VIRGINIA REGISTER OF REGULATIONS

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VIRGINIA REGISTER INFORMATION PAGE

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

ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS

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

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

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

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

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

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

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

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

FAST-TRACK RULEMAKING PROCESS

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

EMERGENCY REGULATIONS

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

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

STATEMENT

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

CITATION TO THE *VIRGINIA REGISTER*

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

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

PUBLICATION SCHEDULE AND DEADLINES

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

December 2015 through December 2016

Volume: Issue	Material Submitted By Noon*	Will Be Published On
32:8	November 24, 2015 **(Tuesday)**	December 14, 2015
32:9	December 9, 2015	December 28, 2015
32:10	December 21, 2015 **(Monday)**	January 11, 2016
32:11	January 6, 2016	January 25, 2016
32:12	January 20, 2016	February 8, 2016
32:13	February 3, 2016	February 22, 2016
32:14	February 17, 2016	March 7, 2016
32:15	March 2, 2016	March 21, 2016
32:16	March 16, 2016	April 4, 2016
32:17	March 30, 2016	April 18, 2016
32:18	April 13, 2016	May 2, 2016
32:19	April 27, 2016	May 16, 2016
32:20	May 11, 2016	May 30, 2016
32:21	May 25, 2016	June 13, 2016
32:22	June 8, 2016	June 27, 2016
32:23	June 22, 2016	July 11, 2016
32:24	July 6, 2016	July 25, 2016
32:25	July 20, 2016	August 8, 2016
32:26	August 3, 2016	August 22, 2016
33:1	August 17, 2016	September 5, 2016
33:2	August 31, 2016	September 19, 2016
33:3	September 14, 2016	October 3, 2016
33:4	September 28, 2016	October 17, 2016
33:5	October 12, 2016	October 31, 2016
33:6	October 26, 2016	November 14, 2016
33:7	November 9, 2016	November 28, 2016
33:8	November 22, 2016 **(Tuesday)**	December 12, 2016
33:9	December 7, 2016	December 26, 2016

*Filing deadlines are Wednesdays unless otherwise specified.

TITLE 12. HEALTH

STATE BOARD OF HEALTH

Initial Agency Notice

Title of Regulation: **12VAC5-550. Board of Health Regulations Governing Vital Records.**

Statutory Authority: §§ 32.1-12 and 32.1-249 through 32.1-276 of the Code of Virginia.

Name of Petitioner: James Parrish, Equality Virginia; and Arli Christian, National Center for Transgender Equality

Nature of Petitioner's Request: The petitioner requests that the vital records regulations be amended as follows: Virginia's birth certificate gender change regulation should not require surgery, based on a modern understanding of appropriate treatment for transgender people. Virginia's birth certificate gender change regulation should not require a court order, as courts are a costly and complicated barrier to many transgender people, and medical providers, rather than judges, have the professional expertise to request the appropriate gender marker on a birth certificate.

Agency Plan for Disposition of Request: In accordance with Virginia law, the petition has been filed with the Registrar of Regulations and will be published on December 14, 2014, and posted to the Virginia Regulatory Town Hall at www.townhall.virginia.gov. Comment on the petition will be accepted until January 4, 2016, and may be posted on the Townhall or sent to the board. Following receipt of all comment on the petition, and within 90 days of January 4, 2016, the matter will be considered by the State Health Commissioner, acting on behalf of the Board, in order to decide whether to grant the petition.

Public Comment Deadline: January 4, 2016.

Agency Contact: Janet Rainey, Director, Department of Health, Division of Vital Records, 2001 Maywill Street, Suite 268, Richmond, VA 23230, telephone (804) 662-5245, or email janet.rainey@vdh.virginia.gov.

VA.R. Doc. No. R16-07; Filed November 13, 2015, 12:45 p.m.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF SOCIAL WORK

Initial Agency Notice

Title of Regulation: **18VAC140-20. Regulations Governing the Practice of Social Work.**

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

Name of Petitioner: Anjaulyeke Bryant-Covert.

Nature of Petitioner's Request: To amend 18VAC140-20-70 to allow persons who have failed the licensing examination to count their supervision hours beyond the two years currently prescribed. The amendment would grandfather those applicants who do not meet current requirements for registration of supervision.

Agency Plan for Disposition of Request: In accordance with Virginia law, the petition was filed with the Registrar of Regulations and will be published on December 14, 2015, with a request for comment to be received until January 13, 2016. The petition will also be posted for comment on the Virginia Regulatory Townhall at www.townhall.virginia.gov. At the next meeting held after the close of the comment period, scheduled for February 5, 2016, the board will consider the petition and any comment received to decide whether or not to initiate the rulemaking process.

Public Comment Deadline: January 13, 2016.

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

VA.R. Doc. No. R16-08; Filed November 12, 2015, 10:50 a.m.

TITLE 1. ADMINISTRATION

DEPARTMENT OF GENERAL SERVICES

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Department of General Services intends to consider adopting **1VAC30-105, Regulations Banning Concealed Firearms in Offices Owned or Occupied by Executive Branch Agencies**. The purpose of this proposed action is to implement Executive Order 50 (McAuliffe 2015), which bans firearms in executive branch agency offices. The proposed regulation will prohibit concealed firearms in offices and workplace facilities under the ownership, lease, or control of an executive branch agency and includes a requirement for posting signs to this effect.

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

Statutory Authority: § 2.2-1102 of the Code of Virginia.

Public Comment Deadline: January 27, 2016.

Agency Contact: Rhonda Bishton, Regulatory Coordinator, Department of General Services, 1100 Bank Street, Suite 420, Richmond, VA 23219, telephone (804) 786-3311, FAX (804) 371-8305, or email rhonda.bishton@dgs.virginia.gov.

VA.R. Doc. No. R16-4572; Filed December 3, 2015, 3:48 p.m.

TITLE 6. CRIMINAL JUSTICE AND CORRECTIONS

STATE BOARD OF CORRECTIONS

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Corrections intends to consider repealing **6VAC15-80, Standards for Planning, Design, Construction and Reimbursement of Local Correctional Facilities** and adopting **6VAC15-81, Standards for Planning, Design, Construction, and Reimbursement of Local Correctional Facilities**. The purpose of the proposed action is to repeal the existing regulation, 6VAC15-80, and replace it with a new regulation, 6VAC15-81. The new regulation will update the regulations to current Code of Virginia requirements and current fire code, building code, and audit standards for the construction of local correctional facilities.

In addition, this regulation will undergo a periodic review pursuant to Executive Order 17 (2014) and a small business impact review pursuant to § 2.2-4007.1 of the Code of Virginia to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

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

Statutory Authority: §§ 53.1-5, 53.1-80, 53.1-81, and 53.1-82 of the Code of Virginia.

Public Comment Deadline: January 14, 2016.

Agency Contact: Jim Bruce, Agency Regulatory Coordinator, Department of Corrections, P.O. Box 26963, Richmond, VA 23261-6963, telephone (804) 887-8215, or email james.bruce@vadoc.virginia.gov.

VA.R. Doc. No. R16-4552; Filed November 13, 2015, 4:10 p.m.

BOARD OF JUVENILE JUSTICE

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Juvenile Justice intends to consider amending **6VAC35-160, Regulations Governing Juvenile Record Information and the Virginia Juvenile Justice Information System**. The purpose of the proposed action is to remove antiquated terms and requirements, provide clarifying language for processes that were previously vague, and ensure that the Commonwealth Information Technology Resource Management Standards are met.

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

Statutory Authority: §§ 16.1-223 and 66-10 of the Code of Virginia.

Public Comment Deadline: January 29, 2016.

Agency Contact: Janet P. Van Cuyk, Legislative and Research Manager, Department of Juvenile Justice, 600 East Main Street, 20th Floor, Richmond, VA 23219, telephone (804) 588-3879, FAX (804) 371-6490, or email janet.vancuyk@djj.virginia.gov.

VA.R. Doc. No. R16-4311; Filed November 20, 2015, 10:03 a.m.

TITLE 8. EDUCATION

STATE BOARD OF EDUCATION

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 State Board of Education has

WITHDRAWN the Notice of Intended Regulatory Action for **8VAC20-22, Licensure Regulations for School Personnel**, which was published in 29:6 VA.R. 1196 November 19, 2012. The local eligibility license was eliminated through a separate regulatory action, and the requirements for teachers who teach online only are included in the board's comprehensive revision of the Licensure Regulations for School Personnel; therefore, this regulatory action is unnecessary.

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

VA.R. Doc. No. R13-3427; Filed November 20, 2015, 2:21 p.m.

TITLE 11. GAMING

CHARITABLE GAMING BOARD

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 intends to consider amending **11VAC15-40, Charitable Gaming Regulations.** The Charitable Gaming Regulations currently include provisions prescribing the number of standalone electronic pull-tab devices and handheld electronic pull-tab devices that may be used at qualifying sites. The planned regulatory action seeks to examine the limit on the number of electronic pull-tab devices that may be used at various qualified sites with the goal of increasing the number of devices allowed. These sites include (i) premises at which charitable gaming is conducted and (ii) private social quarters. Premises at which charitable gaming is conducted are open to the public during charitable gaming sessions. Private social quarters also conduct charitable gaming and are operated by qualified nonprofit organizations, but entrance to these premises is limited to members of the organization operating the social quarters and the members' guests.

The type of premises determines the number of electronic pull-tab devices that may be present at the premises. Limits on the number of permitted devices are prescribed in 11VAC15-40-300. Currently, this regulation allows a maximum of 10 standalone electronic pull-tab devices and 50 handheld electronic pull-tab devices in premises that are open to the public, while private social quarters are limited to a total of five electronic pull-tab devices, regardless of type. These limits were based on an agreement reached between stakeholders during the drafting of the final text of the regulation, which became effective in 2012.

This proposed regulatory action was initiated in response to a Petition for Rulemaking from a licensed manufacturer of electronic pull-tab systems requesting an increase in the number of electronic pull-tab devices allowed in private social quarters.

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

Statutory Authority: § 18.2-340.15 of the Code of Virginia.

Public Comment Deadline: January 13, 2016.

Agency Contact: Michael Menefee, Program Manager, Charitable and Regulatory Programs, Department of Agriculture and Consumer Services, 102 Governor Street, Richmond, VA 23219, telephone (804) 786-3983, FAX (804) 371-7479, or email michael.menefee@vdacs.virginia.gov.

VA.R. Doc. No. R15-32; Filed November 13, 2015, 1:09 p.m.

TITLE 12. HEALTH

DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Medical Assistance Services intends to consider amending **12VAC30-40, Eligibility Conditions and Requirements**. The purpose of the proposed action is to comply with Item 307 T of Chapter 665 of the 2015 Acts of the Assembly, which directed that payments made to compensate individuals who were involuntarily sterilized pursuant to the Virginia Eugenical Sterilization Act and who are living as of February 1, 2015, are disregarded for the purpose of Medicaid eligibility determinations.

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

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

Public Comment Deadline: January 13, 2016.

Agency Contact: Emily McClellan, Regulatory Supervisor, Policy Division, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.virginia.gov.

VA.R. Doc. No. R16-4351; Filed November 23, 2015, 10:36 a.m.

STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Behavioral Health and Developmental Services intends to consider promulgating **12VAC35-240, Victims of Sterilization Fund Program**. The purpose of the proposed action is to

implement Item 307 T of Chapter 665 of the 2015 Acts of Assembly, which establishes compensation for individuals who were involuntarily sterilized pursuant to the 1924 Virginia Eugenical Sterilization Act and who are living as of February 1, 2015. The act enacts requirements for the compensation program, including funding limits on claims and a requirement that disbursements be based on the date at which sufficient documentation is provided, and authorizes the Department of Behavioral Health and Developmental Services to pay claims.

The proposed regulation establishes (i) eligibility criteria, (ii) submission of claims, (iii) appropriate documentation for verification, (iv) compensation, and (v) an administrative process for handling claims

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

Statutory Authority: § 37.2-203 of the Code of Virginia.

Public Comment Deadline: January 13, 2016.

Agency Contact: Ruth Anne Walker, Regulatory Coordinator, Department of Behavioral Health and Developmental Services, Jefferson Building, 1220 Bank Street, 11th Floor, Richmond, VA 23219, telephone (804) 225-2252, FAX (804) 786-8623, or email ruthanne.walker@dbhds.virginia.gov.

VA.R. Doc. No. R16-4471; Filed November 21, 2015, 8:54 p.m.

TITLE 22. SOCIAL SERVICES

STATE BOARD OF SOCIAL SERVICES

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Social Services intends to consider repealing **22VAC40-60, Standards and Regulations for Licensed Adult Day Care Centers,** and adopting **22VAC40-61, Regulations for Licensed Adult Day Care Centers**. The purpose of the proposed action is to repeal the existing regulation for licensed adult day care centers, 22VAC40-60, and adopt a new regulation, 22VAC40-61, to replace it. A comprehensive revision is needed to provide greater protection for adults in care, improve the organization of the regulation, increase clarity and consistency, incorporate changed practices and procedures, and eliminate unnecessarily burdensome or intrusive requirements. The revision will allow for changes based on improved practices, the latest research and improved technology, as well as meeting the increased needs of a population of elderly, infirm, or disabled persons that has become more vulnerable over the years. Current technology and medical practice have allowed individuals to stay in their own homes, or to live with family members longer, and as a result, there is an increased need for this level of care and socialization.

As part of this comprehensive review, this regulation will undergo a periodic review pursuant to Executive Order 17 (2014) and a small business impact review pursuant to § 2.2-4007.1 of the Code of Virginia to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

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

Statutory Authority: § 63.2-1733 of the Code of Virginia.

Public Comment Deadline: January 13, 2016.

Agency Contact: Annette Kelley, Licensing Consultant, Department of Social Services, 801 East Main Street, Room 1507, Richmond, VA 23219, telephone (804) 726-7632, FAX (804) 726-7132, or email annette.kelley@dss.virginia.gov.

VA.R. Doc. No. R16-4545; Filed November 16, 2015, 12:05 p.m.

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Social Services intends to consider repealing **22VAC40-185, Standards for Licensed Child Day Centers**, and adopting **22VAC40-186, Standards for Licensed Child Day Centers**. This proposed regulatory action is a joint action to repeal the existing regulation, 22VAC40-185, and establish a new regulation, 22VAC 40-186, for licensed child day centers to address health and safety issues. The action is essential to enhance the health, safety, and welfare of children in care. The purpose of the adoption of a new regulation is to support the agency's effort to expand and clarify health and safety requirements; to improve understanding and interpretation leading to enhanced compliance and enforcement by adjusting structure and format and simplifying language; and to incorporate updates to address ever-changing national health and safety guidelines and practices. In addition, it is the goal of the agency to ensure that parents have sufficient information to make informed decisions about placing their children in licensed child day centers while ensuring the safety of children receiving care in licensed child day centers.

The current regulation has been amended seven times since its adoption in 1993 and its current terminology and format is burdensome and confusing for providers, parents, and Division of Licensing Programs (DOLP) staff to navigate. In fact, the current regulations are supplemented by a 67-page guidance document to assist providers, parents, and DOLP staff in interpreting and enforcing the current regulation. The goal of this proposed action is to present a clearly written

regulation that will eliminate or substantially decrease the need for such an elaborate technical assistance document.

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

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

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

Public Comment Deadline: January 13, 2016.

Agency Contact: Tatanishia Armstrong, Licensing Consultant, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7152 ext. 7, FAX (804) 726-7132, or email tatanishia.armstrong@dss.virginia.gov.

VA.R. Doc. No. R16-3376; Filed November 10, 2015, 4:23 p.m.

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Social Services intends to consider adopting **22VAC40-920, Appeals of Financial Sanctions for Local Departments of Social Services**. The purpose of the proposed action is to provide local departments of social services (LDSS) with an appeals process for enforcement actions taken against the LDSS by the state Department of Social Services.

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

Statutory Authority: § 63.2-217 of the Code of Virginia; 45 CFR 92.43(a).

Public Comment Deadline: January 13, 2016.

Agency Contact: David Morrison, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7266, or email david.morrison@dss.virginia.gov.

VA.R. Doc. No. R16-4569; Filed November 10, 2015, 3:04 p.m.

TITLE 1. ADMINISTRATION

DEPARTMENT OF GENERAL SERVICES

Emergency Regulation

Title of Regulation: **1VAC30-105. Regulations Banning Concealed Firearms in Offices Owned or Occupied by Executive Branch Agencies (adding 1VAC30-105-10 through 1VAC30-105-80).**

Statutory Authority: § 2.2-1102 of the Code of Virginia.

Effective Dates: December 3, 2015, through June 3, 2017.

Agency Contact: Rhonda Bishton, Regulatory Coordinator, Department of General Services, 1100 Bank Street, Suite 420, Richmond, VA 23219, telephone (804) 786-3311, FAX (804) 371-8305, or email rhonda.bishton@dgs.virginia.gov.

Preamble:

This regulation implements Executive Order 50 (McAuliffe 2015), which bans firearms in executive branch agency offices. This regulation prohibits concealed firearms in offices and workplace facilities under the ownership, lease, or control of an executive branch agency, and includes a requirement for posting signs to this effect. The executive order (EO) directs the Department of General Services to propose regulations within 30 days of the EO.

As stated in the EO, it is the Governor's desire to protect citizens and state employees from gun violence. The purpose of this regulation is to ban concealed firearms from offices owned, leased, or controlled by executive branch agencies. While state employees are already prohibited from carrying firearms through state personnel directives, this regulation will extend that prohibition to members of the public and other nonemployee individuals who may enter the premises.

As stated in the EO, the Governor has determined there is a need to take every precaution to protect citizens and state employees from gun violence. Every day, over 60,000 Virginians report to work in state government buildings across the Commonwealth to provide services to their fellow Virginians. Citizens rely on open access to these facilities to allow citizens to access government representatives and address personal and professional needs. Allowing the carrying of firearms exposes state employees and citizens to unnecessary risk.

CHAPTER 105
REGULATIONS BANNING CONCEALED FIREARMS IN OFFICES OWNED OR OCCUPIED BY EXECUTIVE BRANCH AGENCIES

1VAC30-105-10. Purpose.

The purpose of these regulations is to ban the carrying of concealed firearms in offices occupied by executive branch agencies, with certain exceptions as set forth herein.

1VAC30-105-20. Applicability.

A. This chapter applies to all buildings and workplace facilities owned, leased, or controlled in whole or in part, by or for an executive branch agency. These regulations are intended to be consistent with the Virginia Department of Human Resource Management Policy 1.80 – Workplace Violence, which prohibits state employees from possessing, brandishing, or using a weapon that is not required by the employee's position while on state premises or engaged in state business.

B. This chapter applies to the concealed carrying of firearms; the Department of General Services has issued a guidance document elsewhere prohibiting the open carrying of firearms.

C. The prohibition against carrying a concealed firearm does not apply to law-enforcement officers, authorized security personnel, or military personnel, when such individuals are authorized to carry a firearm in accordance with their duties, and when they are carrying the firearm within that authority. It also does not apply to state employees where the employee's position requires carrying a concealed firearm.

D. These regulations do not apply to individuals who are on public hunting lands, are engaged in lawful hunting, and are in compliance with the Department of Game and Inland Fisheries' Hunting and Trapping regulations found in 4VAC15, regarding allowable firearms and hunting license requirements.

1VAC30-105-30. Definitions.

"Authorized security personnel" means a natural person who performs the functions of observation, detection, reporting, or notification of appropriate authorities or designated agents regarding persons or property on the premises he or she is contracted to protect.

"Concealed firearm" means a firearm hidden from common observation, including a firearm hidden when it is observable but is of such deceptive appearance as to disguise the firearm's true nature.

"Executive branch agency" means any administrative unit of state government in the executive branch, including any department, institution, commission, board, council, authority or other body, however designated.

"Firearm" means any handgun, pistol, revolver, or other weapon designed or intended to propel a missile of any kind by action of an explosion of any combustible material.

"Law-enforcement officer" shall have the same definition as in § 18.2-307.1 of the Code of Virginia.

"State office" means any building or workplace facility owned, leased, or controlled by or for an executive branch agency, including buildings that support the workplace facility. This includes that portion of premises open to others and then used exclusively for functions or activities sponsored by an executive branch agency's tenant(s) while such functions are taking place.

1VAC30-105-40. Possession of firearms prohibited.

Possession or carrying of any concealed firearm by any person is prohibited in and on state offices. Entry upon a state office in violation of this prohibition is expressly forbidden. This prohibition does not apply to law-enforcement officers, authorized security personnel, or military personnel, when such individuals are authorized to carry a firearm in accordance with their duties, and when they are carrying the firearm within that authority. It also does not apply to state employees where the employee's position requires carrying a concealed firearm.

1VAC30-105-50. Required lease terms for state offices.

All leases entered into where an executive branch agency is the lessor shall contain a prohibition on concealed firearms so as to be binding upon all tenants. All leases entered into for the benefit of an executive branch agency shall contain this prohibition to indicate the lessor's acknowledgment. Exceptions may be allowed where approved in writing by the Governor or his designee.

1VAC30-105-60. Posting of signs.

A. Posting location. Signs shall be posted at all state offices indicating the prohibition against carrying concealed firearms. Where the entire premises are owned or occupied by an executive branch agency, signs shall be displayed at every entrance. Where only a portion of the premises are leased for an executive branch agency, the signs shall be displayed within the state office. If an executive branch agency is using an office open to others, temporary signs shall be displayed at or near the entry to the office during the time the office is being used exclusively for Commonwealth-sponsored functions or activities while such functions are taking place.

B. Size and design. Signs shall be of a size and design approved by the Department of General Services. The occupying agency shall be responsible for obtaining signage from the department and for posting of the signs.

1VAC30-105-70. Enforcement.

The occupying agency shall be responsible for enforcing this regulation.

1VAC30-105-80. Exemptions.

A. A state institution of higher education is exempt from this regulation if the institution has implemented its own policies or regulations governing firearms.

B. The Governor or his designee may otherwise grant exemptions from the requirements of this chapter. To qualify for an exemption, the applying executive branch agency must show that an alternative policy, consistent with the Commonwealth's policy against firearms in state offices, is appropriate.

VA.R. Doc. No. R16-4572; Filed December 3, 2015, 3:48 p.m.

OFFICE OF THE STATE INSPECTOR GENERAL

Fast-Track Regulation

Title of Regulation: **1VAC42-5. Public Partipation Guidelines (adding 1VAC42-5-10 through 1VAC42-5-110).**

Statutory Authority: § 2.2-4007.02 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 14, 2016.

Effective Date: January 29, 2016.

Agency Contact: Julie C. Grimes, Communications Coordinator, Office of the State Inspector General, 101 North 14th Street, 7th Floor, Richmond, VA 23219, telephone (804) 625-3276, FAX (804) 371-0165, or email julie.grimes@osig.virginia.gov.

Basis: The legal basis for the Office of the State Inspector General (OSIG) to promulgate its initial public participation guidelines is § 2.2-4007.02 of the Code of Virginia. OSIG is required to promulgate regulations under § 2.2-3014 of the Code of Virginia for the proper administration of the Fraud and Abuse Whistle Blower Reward Fund. OSIG is also authorized to adopt, promulgate, amend, and rescind regulations related to carrying out its statutory duties by §§ 2.2-307 through 2.2-322 of the Code of Virginia.

Purpose: The purpose of adopting and promulgating the initial public participation guidelines is to ensure the regulatory review process used by OSIG with regard to the regulations it adopts, promulgates, amends, or rescinds is generally consistent with the rulemaking process used by other Virginia rulemaking bodies.

Rationale for Using Fast-Track Process: The promulgation of this regulation should be noncontroversial because OSIG is merely adopting the model public participation guidelines developed by the Virginia Department of Planning and Budget.

Substance: OSIG is adopting its initial public participation guidelines because it is responsible for promulgating regulations for the administration of the Fraud and Abuse Whistle Blower Reward Fund. The regulations may be subject to periodic regulatory review, thus necessitating the need to adopt initial public participation guidelines, which are based upon the model public participation guidelines issued by the Virginia Department of Planning and Budget. The public participation guidelines exist to promote public involvement in the development, amendment, or repeal of an agency's regulations. Under § 2.2-4007.02 of the Code of Virginia, rulemaking bodies are required to adopt public participation guidelines and to use these guidelines in the development of their regulations. Adoption of public participation guidelines will ensure OSIG's rulemaking process is consistent with the process used by other Virginia rulemaking bodies. There are no substantive provisions or changes to the model public participation guidelines offered to executive agencies by the Virginia Department of Planning and Budget.

Issues: The primary advantage of this regulation is that OSIG will have in place public participation guidelines consistent with the Governor's executive agencies that will guide future regulatory action by OSIG. There are no disadvantages to taking this action.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Office of the State Inspector General (OSIG) proposes to adopt model public participation guidelines as mandated in Chapter 321 of the 2008 Acts of Assembly.

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

Estimated Economic Impact. Pursuant to Chapter 321 of the 2008 Acts of Assembly, the Department of Planning and Budget, in consultation with the Office of the Attorney General, (i) developed model public participation guidelines (PPGs) and (ii) provided these model PPGs to each agency that has the authority to promulgate regulations. Chapter 321 required that, by December 1, 2008, state agencies either (a) adopt these model public participation guidelines as an exempt action or (b) if significant additions or changes are proposed, promulgate the model public participation guidelines with the proposed changes as fast-track regulations pursuant to Code of Virginia section § 2.2-4012.1. Pursuant to Chapter 321, model PPGs promulgated by agencies after January 1, 2009, are subject to the normal requirements of the Administrative Process Act.

Pursuant to 2011 Acts of Assembly, Chapter 871, effective July 1, 2012, OSIG is authorized to promulgate regulations regarding the performance of its statutory duties regarding the proper administration of the Fraud and Abuse Whistle Blower Reward Fund including eligibility requirements and procedures for filing a claim. Thus, OSIG now proposes to promulgate the model PPGs as a fast-track action for development of its future regulations.

The purposes of the model PPG legislation are threefold: first, to ensure that each agency or board has a current set of PPGs in place.[1] Second, to ensure that each agency's or board's PPGs incorporate the use of technology such as the Virginia Regulatory Town Hall, email to the extent possible, and the use of electronic mailing lists. Last, but perhaps most importantly, to have uniform guidelines in place to facilitate citizen participation in rulemaking and to make those guidelines consistent, to the extent possible, among all executive branch boards and agencies. For all of these reasons, citizens who are interested in participating in the OSIG's rulemaking process will benefit from the promulgation of these PPGs.

Businesses and Entities Affected. While OSIG has a broad client base, these PPGs are proposed for development of Fraud and Abuse Whistle Blower Reward Fund regulations, the only regulations OSIG foresees at this time it will develop. Thus, citizens who are interested in participating in the OSIG's rulemaking process for the fund may be affected. Although there is no information on who may be interested in OSIG's rulemaking process, between July 1, 2012, and September 30, 2015, OSIG received 4,386 hotline calls, of which 1,971 were assigned for investigation.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments do not directly affect employment.

Effects on the Use and Value of Private Property. The proposed amendments do not directly affect the use and value of private property.

Real Estate Development Costs. The proposed amendments do not directly affect real estate development costs.

Small Businesses:

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

Costs and Other Effects. The proposed amendments do not directly affect small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendments do not adversely affect small businesses.

Adverse Impacts:

Businesses: The proposed amendments do not adversely affect non-small businesses.

Localities: The proposed amendments do not adversely affect localities.

Other Entities: The proposed amendments do not adversely affect other entities.

[1]Some agencies and boards have not updated their PPGs since the mid-late 1980's.

Agency's Response to Economic Impact Analysis: The Office of the State Inspector General concurs with the findings of the Department of Planning and Budget's economic impact analysis.

Summary:

The regulations are based on model public participation guidelines issued by the Department of Planning and Budget pursuant to Chapter 321 of the 2008 Acts of Assembly. Public participation guidelines exist to promote public involvement in the development, amendment, or repeal of an agency's regulations. The public participation guidelines include (i) providing for the establishment and maintenance of notification lists of interested persons and specifying the information to be sent to such persons; (ii) providing for public comments on regulatory actions; (iii) establishing the time period during which public comments shall be accepted; (iv) providing that the plan to hold a public meeting shall be indicated in any notice of intended regulatory action; (v) providing for the appointment, when necessary, of regulatory advisory panels to provide professional specialization or technical assistance and negotiated rulemaking panels if a regulatory action is expected to be controversial; and (vi) providing for the periodic review of regulations.

CHAPTER 5
PUBLIC PARTIPATION GUIDELINES

Part I
Purpose and Definitions

1VAC42-5-10. Purpose.

The purpose of this chapter is to promote public involvement in the development, amendment, or repeal of the regulations of the Office of the State Inspector General. This chapter does not apply to regulations, guidelines, or other documents exempted or excluded from the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

1VAC42-5-20. Definitions.

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

"Administrative Process Act" means Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2 of the Code of Virginia.

"Agency" means the Office of the State Inspector General, which is the unit of state government empowered by the agency's basic law to make regulations or decide cases. Actions specified in this chapter may be fulfilled by state employees as delegated by the agency.

"Basic law" means provisions in the Code of Virginia that delineate the basic authority and responsibilities of an agency.

"Commonwealth Calendar" means the electronic calendar for official government meetings open to the public as required by § 2.2-3707 C of the Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

"Negotiated rulemaking panel" or "NRP" means an ad hoc advisory panel of interested parties established by an agency to consider issues that are controversial with the assistance of a facilitator or mediator, for the purpose of reaching a consensus in the development of a proposed regulatory action.

"Notification list" means a list used to notify persons pursuant to this chapter. Such a list may include an electronic list maintained through the Virginia Regulatory Town Hall or other list maintained by the agency.

"Open meeting" means any scheduled gathering of a unit of state government empowered by an agency's basic law to make regulations or decide cases, which is related to promulgating, amending, or repealing a regulation.

"Person" means any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.

"Public hearing" means a scheduled time at which members or staff of the agency will meet for the purpose of receiving public comment on a regulatory action.

"Regulation" means any statement of general application having the force of law, affecting the rights or conduct of any person, adopted by the agency in accordance with the authority conferred on it by applicable laws.

"Regulatory action" means the promulgation, amendment, or repeal of a regulation by the agency.

"Regulatory advisory panel" or "RAP" means a standing or ad hoc advisory panel of interested parties established by the agency for the purpose of assisting in regulatory actions.

"Town Hall" means the Virginia Regulatory Town Hall, the website operated by the Virginia Department of Planning and Budget at www.townhall.virginia.gov that has online public comment forums and displays information about regulatory meetings and regulatory actions under consideration in Virginia and sends this information to registered public users.

"Virginia Register" means the Virginia Register of Regulations, the publication that provides official legal notice of new, amended, and repealed regulations of state agencies, which is published under the provisions of Article 6 (§ 2.2-4031 et seq.) of the Administrative Process Act.

Part II
Notification of Interested Persons

1VAC42-5-30. Notification list.

A. The agency shall maintain a list of persons who have requested to be notified of regulatory actions being pursued by the agency.

B. Any person may request to be placed on a notification list by registering as a public user on the Town Hall or by making a request to the agency. Any person who requests to be placed on a notification list shall elect to be notified either by electronic means or through a postal carrier.

C. The agency may maintain additional lists for persons who have requested to be informed of specific regulatory issues, proposals, or actions.

D. When electronic mail is returned as undeliverable on multiple occasions at least 24 hours apart, that person may be deleted from the list. A single undeliverable message is insufficient cause to delete the person from the list.

E. When mail delivered by a postal carrier is returned as undeliverable on multiple occasions, that person may be deleted from the list.

F. The agency may periodically request those persons on the notification list to indicate their desire to either continue to be notified electronically, receive documents through a postal carrier, or be deleted from the list.

1VAC42-5-40. Information to be sent to persons on the notification list.

A. To persons electing to receive electronic notification or notification through a postal carrier as described in 1VAC42-5-30, the agency shall send the following information:

1. A notice of intended regulatory action (NOIRA).

2. A notice of the comment period on a proposed or a reproposed regulation and hyperlinks to, or instructions on how to obtain, a copy of the regulation and any supporting documents.

3. A notice soliciting comment on a final regulation when the regulatory process has been extended pursuant to § 2.2-4007.06 or 2.2-4013 C of the Code of Virginia.

B. The failure of any person to receive any notice or copies of any documents shall not affect the validity of any regulation or regulatory action.

Part III
Public Participation Procedures

1VAC42-5-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency, and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a reproposed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

1VAC42-5-60. Petition for rulemaking.

A. As provided in § 2.2-4007 of the Code of Virginia, any person may petition the agency to consider a regulatory action.

B. A petition shall include but is not limited to the following information:

1. The petitioner's name and contact information;

2. The substance and purpose of the rulemaking that is requested, including reference to any applicable Virginia Administrative Code sections; and

3. Reference to the legal authority of the agency to take the action requested.

C. The agency shall receive, consider and respond to a petition pursuant to § 2.2-4007 and shall have the sole authority to dispose of the petition.

D. The petition shall be posted on the Town Hall and published in the Virginia Register.

E. Nothing in this chapter shall prohibit the agency from receiving information or from proceeding on its own motion for rulemaking.

1VAC42-5-70. Appointment of regulatory advisory panel.

A. The agency may appoint a RAP to provide professional specialization or technical assistance when the agency determines that such expertise is necessary to address a specific regulatory issue or action or when individuals indicate an interest in working with the agency on a specific regulatory issue or action.

B. Any person may request the appointment of a RAP and request to participate in its activities. The agency shall determine when a RAP shall be appointed and the composition of the RAP.

C. A RAP may be dissolved by the agency if:

1. The proposed text of the regulation is posted on the Town Hall, published in the Virginia Register, or such other time as the agency determines is appropriate; or

2. The agency determines that the regulatory action is either exempt or excluded from the requirements of the Administrative Process Act.

1VAC42-5-80. Appointment of negotiated rulemaking panel.

A. The agency may appoint an NRP if a regulatory action is expected to be controversial.

B. An NRP that has been appointed by the agency may be dissolved by the agency when:

1. There is no longer controversy associated with the development of the regulation;

2. The agency determines that the regulatory action is either exempt or excluded from the requirements of the Administrative Process Act; or

3. The agency determines that resolution of a controversy is unlikely.

1VAC42-5-90. Meetings.

Notice of any open meeting, including meetings of a RAP or an NRP, shall be posted on the Virginia Regulatory Town Hall and Commonwealth Calendar at least seven working days prior to the date of the meeting. The exception to this requirement is any meeting held in accordance with § 2.2-3707 D of the Code of Virginia allowing for contemporaneous notice to be provided to participants and the public.

1VAC42-5-100. Public hearings on regulations.

A. The agency shall indicate in its notice of intended regulatory action whether it plans to hold a public hearing following the publication of the proposed stage of the regulatory action.

B. The agency may conduct one or more public hearings during the comment period following the publication of a proposed regulatory action.

C. An agency is required to hold a public hearing following the publication of the proposed regulatory action when:

1. The agency's basic law requires the agency to hold a public hearing;

2. The Governor directs the agency to hold a public hearing; or

3. The agency receives requests for a public hearing from at least 25 persons during the public comment period following the publication of the notice of intended regulatory action.

D. Notice of any public hearing shall be posted on the Town Hall and Commonwealth Calendar at least seven working days prior to the date of the hearing. The agency shall also notify those persons who requested a hearing under subdivision C 3 of this section.

1VAC42-5-110. Periodic review of regulations.

A. The agency shall conduct a periodic review of its regulations consistent with the following:

1. An executive order issued by the Governor pursuant to § 2.2-4017 of the Administrative Process Act to receive comment on all existing regulations as to their effectiveness, efficiency, necessity, clarity, and cost of compliance; and

2. The requirements in § 2.2-4007.1 of the Administrative Process Act regarding regulatory flexibility for small businesses.

B. A periodic review may be conducted separately or in conjunction with other regulatory actions.

C. Notice of a periodic review shall be posted on the Town Hall and published in the Virginia Register.

VA.R. Doc. No. R16-4535; Filed November 13, 2015, 5:07 p.m.

TITLE 6. CRIMINAL JUSTICE AND CORRECTIONS

BOARD OF JUVENILE JUSTICE

Fast-Track Regulation

Title of Regulation: **6VAC35-71. Regulation Governing Juvenile Correctional Centers (amending 6VAC35-71-350).**

Statutory Authority: §§ 66-10 and 66-13 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 13, 2016.

Effective Date: January 30, 2016.

Agency Contact: Janet Van Cuyk, Regulatory Coordinator, Department of Juvenile Justice, 600 East Main Street, 20th

Floor, Richmond, VA 23219, telephone (804) 588-3879, FAX (804) 371-6490, or email janet.vancuyk@djj.virginia.gov.

Basis: Section 66-4 of the Code of Virginia creates the board, while § 66-10 of the Code of Virginia provides that the board shall have the power and duty to promulgate such regulations as may be necessary to carry out the provisions of Title 66 of the Code of Virginia and the other laws of the Commonwealth. Per § 66-24 D of the Code of Virginia, the board is required to promulgate regulations for licensure or certification of community group homes or other residential facilities that contract with or are rented for the care of juveniles in direct state care. The board's regulations shall address the services required to be provided in such facilities as it may deem appropriate to ensure the welfare and safety of the juveniles. In addition, the board's regulations "shall include, but need not be limited to, (i) specifications for the structure and accommodations of such facilities according to the needs of the juveniles to be placed in the home or facility; (ii) rules concerning allowable activities, local government- and group home- or residential care facility-imposed curfews, and study, recreational, and bedtime hours; and (iii) a requirement that each home or facility have a community liaison who shall be responsible for facilitating cooperative relationships with the neighbors, the school system, local law enforcement, local government officials, and the community at large."

Purpose: During the drafting of Regulation Governing Juvenile Correctional Centers (6VAC35-71), an exemption for secure facilities was erroneously deleted that had been provided for in the previous regulation, Standards for Interim Regulation of Children's Residential Facilities (6VAC35-51-460 D). This section stated: "There shall be one toilet, one hand basin, and one shower or tub for every four residents in any building constructed or structurally modified after July 1, 1981, except secure custody facilities. Facilities licensed after December 28, 2007, shall comply with the one-to-four ratio." The previous regulations granted secure custody facilities built prior to December 28, 2007, an exception to the one-to-four ratio because these facilities were built when the construction standard was one toilet, one hand basin, and one shower or tub for every eight residents. The Standards for Interim Regulation of Children's Residential Facilities 6VAC35-51 were effective September 17, 2008, through December 31, 2013.

The current regulation governing juvenile correctional centers became effective January 1, 2014, and does not include the exemption for secure facilities built prior to 2007. Without this exemption, secure custody facilities constructed after July 1, 1981, are required to conform to the one-to-four ratio. However, the majority of secure facilities across the Commonwealth cannot meet this regulatory requirement since they were constructed using a one-to-eight ratio that was required by construction speculations in effect from July 1, 1981, through December 27, 2007. It will be cost prohibitive for facilities to meet the requirements set forth in the current regulations.

The fast-track rulemaking process is requested to amend the language in 6VAC35-71-350 to include the exemption language. The amended language, if approved, will be substantially similar to the original language drafted in 6VAC35-51-460 that grandfathers in those facilities certified prior to December 28, 2007, that were constructed to conform to the one-to-eight ratio. All of other sections of the regulation remain unchanged.

The amendments have no known no impact on the public health, safety, or welfare.

Rationale for Using Fast-Track Process: It is anticipated that the amendment to 6VAC35-71-350 will be noncontroversial as the proposed change reinserts language that was erroneously deleted in the regulatory action that superseded the regulatory provision with the exemption. The department and the board are of the understanding that this action is correcting a scrivener's error. There was no public comment in opposition to the proposed amendment. The juvenile correctional center facility administrators, the department's certification unit, the department's administration, and the board support the proposed amendment as noncontroversial. Concurrently, on January 7, 2014, the board granted all juvenile correctional centers built prior to December 28, 2007, a variance to the one-to-four ratio required in 6VAC35-71-350 until such time as the regulations were amended with the understanding that a similar regulatory action be pursued to reincorporate the exemption for juvenile correctional centers.

Substance: The proposed amendment changes the date for which juvenile correctional centers are required to comply with the requirement to have one toilet, one hand basin, and one shower or tub for every four residents (one-to-four ratio) in any building constructed or structurally modified after July 1, 1981, to require only those buildings constructed or structurally modified after December 28, 2007, to meet the aforementioned one-to-four ratio.

Issues: The primary advantage of the proposed amendment is to correct a drafting error and to avoid a substantial financial burden and, thus, achieve a financial saving to the Commonwealth for the cost of labor and materials required to construct additional bathroom facilities in the four state-operated juvenile correctional centers to meet the current regulatory requirements. In addition to the capital costs, there would likely be additional administrative costs associated with overtime hours for staff that would be required to monitor construction staff to comply with the regulatory requirement that staff monitor all situations in which outside personnel perform any kind of work in the immediate presence of residents. The bathroom facilities are located in the juvenile facility living area and construction in this space would be disruptive to the juvenile facility daily routines for the duration of the construction. There are no advantages or

disadvantages to the public and no disadvantages in adopting the proposed change to the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Juvenile Justice proposes to amend building standards in its regulation that governs juvenile correctional centers to insert an exemption to newer bathing facility standards. This exemption was in the regulation that was in effect until December 2013 and was unintentionally left out of the current superseding regulation.

Result of Analysis. Benefits likely outweigh costs for this proposed regulatory change.

Estimated Economic Impact. The former regulation for juvenile correctional centers contained an exemption for secure detention facilities to a general building rule that specified that all juvenile justice facilities built or modified after July 1, 1981, contain at least one full bathroom (containing a toilet, wash basin and tub or shower) for every four residents. The exemption only applied the 4/1 ratio standard to secure facilities built or modified after December 28, 2007; facilities built or modified before December 28, 2007, were subject to a standard that specified one full bathroom for every eight residents. This exemption was inadvertently left out when a superseding regulation was promulgated in 2013. The Board now proposes to insert the exemption back into regulation so that secure detention facilities are not required to conform to the more stringent and costly standard.

There are currently 553 individuals housed in four state-run juvenile correctional centers. Any of these facilities that were built or modified between July 1, 1981, (when the new, more stringent standard went into general effect) and December 28, 2007, (when the new, more stringent standard applied under the exemption) will save the cost that would be incurred if they had to approximately double the number of full bathrooms in their facilities. Total cost per facility absent this proposed regulatory change would likely be more than $10,000[1] times the number of bathrooms that would need to be added. Given this estimate, the state's cost avoidance on account of reinserting the exemption into regulation will be considerable.

Businesses and Entities Affected. There are currently four secure juvenile correctional centers in the Commonwealth. To the extent that any of these facilities were built or modified between July 1, 1981, and December 28, 2007, they will be affected by this proposed regulatory action.

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

Projected Impact on Employment. This proposed regulation is unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. This proposed regulation affects only public secure juvenile correctional centers.

Small Businesses: Costs and Other Effects. This proposed regulation affects only public secure juvenile correctional centers.

Small Businesses: Alternative Method that Minimizes Adverse Impact. This proposed regulation affects only public secure juvenile correctional centers.

Real Estate Development Costs. This proposed regulatory action will allow the state to avoid likely large costs for having to modify existing secure juvenile correctional centers.

[1]The Department of Professional and Occupational Regulation recently estimated that retrofitting a bathroom with just a toilet and a wash basin to a cosmetology establishment would cost approximately $10,000. It is likely safe to assume that it would cost much more than $10,000 to add a full bathroom to a facility where security during construction would be an issue.

Agency's Response to Economic Impact Analysis: The responsible Virginia Board of Juvenile Justice agency representatives have reviewed the Department of Planning and Budget (DPB) economic impact analysis. The agency is in agreement with DPB's analysis.

Summary:

The amendment changes which juvenile correctional centers are required to comply with the requirement to have one toilet, one hand basin, and one shower or tub for every four residents from any building constructed or structurally modified after July 1, 1981, to only those buildings constructed or structurally modified after December 28, 2007.

6VAC35-71-350. Toilet facilities.

A. There shall be toilet facilities available for resident use in all sleeping areas for each JCC constructed after January 1, 1998.

B. There shall be at least one toilet, one hand basin, and one shower or tub for every eight residents for facilities certified ~~before July 1, 1981~~ on or before December 27, 2007. There shall be one toilet, one hand basin, and one shower or tub for every four residents in any building constructed or structurally modified ~~after July 1, 1981~~ on or after December 28, 2007.

C. There shall be at least one bathtub in each facility.

D. The maximum number of employees on duty in the living unit shall be counted in determining the required number of toilets and hand basins when a separate bathroom is not provided for staff.

VA.R. Doc. No. R16-4034; Filed November 20, 2015, 1:26 p.m.

Fast-Track Regulation

Title of Regulation: **6VAC35-101. Regulation Governing Juvenile Secure Detention Centers (amending 6VAC35-101-420).**

Statutory Authority: §§ 16.1-322.7 and 66-10 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 13, 2016.

Effective Date: January 30, 2016.

Agency Contact: Janet Van Cuyk, Regulatory Coordinator, Department of Juvenile Justice, 600 East Main Street, 20th Floor, Richmond, VA 23219, telephone (804) 588-3879, FAX (804) 371-6490, or email janet.vancuyk@djj.virginia.gov.

Basis: Section 66-4 of the Code of Virginia creates the board, while § 66-10 of the Code of Virginia provides that the board shall have the power and duty to promulgate such regulations as may be necessary to carry out the provisions of Title 66 of the Code of Virginia and the other laws of the Commonwealth. Per § 66-24 D of the Code of Virginia, the board is required to promulgate regulations for licensure or certification of community group homes or other residential facilities that contract with or are rented for the care of juveniles in direct state care. The board's regulations shall address the services required to be provided in such facilities as it may deem appropriate to ensure the welfare and safety of the juveniles. In addition, the board's regulations "shall include, but need not be limited to (i) specifications for the structure and accommodations of such facilities according to the needs of the juveniles to be placed in the home or facility; (ii) rules concerning allowable activities, local government- and group home- or residential care facility-imposed curfews, and study, recreational, and bedtime hours; and (iii) a requirement that each home or facility have a community liaison who shall be responsible for facilitating cooperative relationships with the neighbors, the school system, local law enforcement, local government officials, and the community at large."

Purpose: During the drafting of Regulation Governing Juvenile Secure Detention Centers (6VAC35-101) an exemption for secure facilities was erroneously deleted in the regulation that had been provided in the previous regulation Standards for Interim Regulation of Children's Residential Facilities (6VAC35-51-460 D). This section stated: "There shall be one toilet, one hand basin, and one shower or tub for every four residents in any building constructed or structurally modified after July 1, 1981, except secure custody facilities. Facilities licensed after December 28, 2007, shall comply with the one-to-four ratio." The previous regulations granted secure custody facilities built prior to December 28, 2007, an exception to the one-to-four ratio because these facilities were built when the construction standard was one toilet, one hand basin, and one shower or tub for every eight residents. The Standards for Interim Regulation of Children's Residential Facilities 6VAC35-51 were effective September 17, 2008, through December 31, 2013.

The current regulation governing juvenile secure detention centers became effective January 1, 2014, and does not include the exemption for secure facilities built prior to 2007. Without this exemption, secure custody facilities constructed after July 1, 1981, are required to conform to the one-to-four ratio. However, the majority of secure facilities across the Commonwealth cannot meet this regulatory requirement since they were constructed using a one-to-eight ratio that was required by construction speculations in effect from July 1, 1981, through December 27, 2007. It will be cost prohibitive for facilities to meet the requirements set forth in the current regulations.

The fast-track rulemaking process is requested to amend the language in 6VAC35-101-420 to include the exemption language. The amended language, if approved, will be substantially similar to the original language drafted in 6VAC35-51-460 that grandfathers in those facilities certified prior to December 28, 2007, that were constructed to conform to the one-to-eight ratio. All of other sections of the regulation will remain unchanged.

The amendments have no known no impact on the public health, safety, or welfare.

Rationale for Using Fast-Track Process: It is anticipated that the amendment to 6VAC35-101-420 will be noncontroversial as the proposed change reinserts language that was erroneously deleted in this regulatory action that superseded the regulatory provision with the exemption. The department and the board are of the understanding that this action is correcting a scrivener's error. There was no public comment in opposition to the proposed amendment. The juvenile secure detention center administrators, the department's certification unit, the department's administration, and the board support the proposed amendment as noncontroversial. Additionally, on January 7, 2014, the board granted all juvenile secure detention centers built prior to December 28, 2007, a variance to the one-to-four ratio required in 6VAC35-101-420 until such time as the regulations were amended, with the understanding that a similar regulatory action be pursued to reincorporate the exemption for juvenile secure detention centers.

Substance: The proposed amendment changes the date for which juvenile secure detention centers are required to comply with the requirement to have one toilet, one hand basin, and one shower or tub for every four residents (one-to-four ratio) in any building constructed or structurally modified after July 1, 1981, to require only those buildings constructed or structurally modified after December 28, 2007, to meet the aforementioned one-to-four ratio.

Issues: The primary advantage of the proposed amendment is to correct a drafting error and to avoid a substantial financial burden and, thus, achieve a financial saving to the local governments operating secure juvenile detention centers. The localities will not have to fund the cost of labor and materials required to construct additional bathroom facilities in the 24 juvenile secure detention centers to meet the current regulatory requirements. In addition to the capital costs, there would likely be additional administrative costs associated with overtime hours for staff that would be required to monitor construction staff to comply with the regulatory requirement that staff monitor all situations in which outside personnel perform any kind of work in the immediate presence of residents. The bathroom facilities are located in the juvenile facility living area and construction in this space would be disruptive to the juvenile facility daily routines for the duration of the construction. There are no advantages or disadvantages to the public and no disadvantages in adopting the proposed change to the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Juvenile Justice proposes to amend building standards in its regulation that governs juvenile secure detention centers to insert an exemption to newer bathing facility standards. This exemption was in the regulation that was in effect until December 2013 and was unintentionally left out of the current superseding regulation.

Result of Analysis. Benefits likely outweigh costs for this proposed regulatory change.

Estimated Economic Impact. The former regulation for juvenile secure detention centers contained an exemption for secure detention facilities to a general building rule that specified that all juvenile justice facilities built or modified after July 1, 1981, contain at least one full bathroom (containing a toilet, wash basin and tub or shower) for every four residents. The exemption only applied the 4/1 ratio standard to secure facilities built or modified after December 28, 2007; facilities built or modified before December 28, 2007, were subject to a standard that specified one full bathroom for every eight residents. This exemption was inadvertently left out when a superseding regulation was promulgated in 2013. The Board now proposes to insert the exemption back into regulation so that secure detention facilities are not required to conform to the more stringent and costly standard.

There are currently 778 individuals housed in 24 locality-run juvenile secure detention centers. Any of these facilities that were built or modified between July 1, 1981, (when the new, more stringent standard went into general effect) and December 28, 2007, (when the new, more stringent standard applied under the exemption) will save the cost that would be incurred if they had to approximately double the number of full bathrooms in their facilities. Total cost per facility absent this proposed regulatory change would likely be more than $10,000[1] times the number of bathrooms that would need to be added. Given this estimate, affected localities' cost avoidance on account of reinserting the exemption into regulation will be considerable.

Businesses and Entities Affected. There are currently 24 locality-run juvenile secure detention centers in the Commonwealth. To the extent that any of these facilities were built or modified between July 1, 1981, and December 28, 2007, they will be affected by this proposed regulatory action.

Localities Particularly Affected. Localities that have juvenile secure detention facilities will be particularly affected by this proposed regulatory action.

Projected Impact on Employment. This proposed regulation is unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. This proposed regulation affects only public juvenile secure detention centers.

Small Businesses: Costs and Other Effects. This proposed regulation affects only public juvenile secure detention centers.

Small Businesses: Alternative Method that Minimizes Adverse Impact. This proposed regulation affects only public juvenile secure detention centers.

Real Estate Development Costs. This proposed regulatory action will allow affected Virginia localities to avoid likely large costs for having to modify existing juvenile secure detention centers.

[1]The Department of Professional and Occupational Regulation recently estimated that retrofitting a bathroom with just a toilet and a wash basin to a cosmetology establishment would cost approximately $10,000. It is likely safe to assume that it would cost much more than $10,000 to add a full bathroom to a facility where security during construction would be an issue.

Agency's Response to Economic Impact Analysis: The responsible Virginia Board of Juvenile Justice agency representatives have reviewed the Department of Planning and Budget (DPB) economic impact analysis. The agency is in agreement with DPB's analysis.

Summary:

The amendment changes which juvenile secure detention centers are required to comply with the requirement to have one toilet, one hand basin, and one shower or tub for every four residents from any building constructed or structurally modified after July 1, 1981, to only those buildings constructed or structurally modified after December 28, 2007.

6VAC35-101-420. Toilet facilities.

A. There shall be toilet facilities available for resident use in all sleeping rooms for each detention center constructed after January 1, 1998.

B. There shall be at least one toilet, one hand basin, and one shower or bathtub for every eight residents for detention

centers constructed ~~before July 1, 1981~~ on or before December 27, 2007. There shall be one toilet, one hand basin, and one shower or tub for every four residents in any building constructed or structurally modified ~~after July 1, 1981~~ on or after December 28, 2007.

C. There shall be at least one bathtub in each facility.

D. The maximum number of staff members on duty in the living unit shall be counted in determining the required number of toilets and hand basins when a separate bathroom is not provided for staff.

VA.R. Doc. No. R16-4035; Filed November 20, 2015, 1:23 p.m.

TITLE 8. EDUCATION

STATE BOARD OF EDUCATION

Final Regulation

Titles of Regulations: **8VAC20-60. Regulations Governing the Approval of Correspondence Courses for Home Instruction (repealing 8VAC20-60-10 through 8VAC20-60-100).**

8VAC20-340. Regulations Governing Driver Education (adding 8VAC20-340-5, 8VAC20-340-40).

Statutory Authority: §§ 22.1-16 and 22.1-205 of the Code of Virginia.

Effective Date: January 13, 2016.

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

Summary:

The regulatory action repeals 8VAC20-60, Regulations Governing the Approval of Correspondence Courses for Home Instruction, and amends 8VAC20-340, Regulations Governing Driver Education. The amendments (i) incorporate the definition section from 8VAC20-60, with minor revisions, and add a definition for the term "parent"; (ii) require the applicant to submit as part of the application process an affidavit, a schedule of tuition and fees, a description of its refund policy, and copies of all application forms and enrollment agreements used by the applicant; (iii) expand the approval criteria by requiring that the content of each course meets the requirements of the Driver Education Standards of Learning and the Curriculum and Administrative Guide for Driver Education in Virginia, 2010 edition; (iv) address approval and denial of an application, and revocation of an approved application; and (v) permit reconsideration by the board when an application is denied or when approval is revoked.

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

8VAC20-340-5. Definitions.

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

"Board" means the Virginia Board of Education.

"Correspondence school" means a school, organization, or other entity, no matter how titled, that teaches students by mailing them lessons and exercises that upon completion are returned to the school for grading. Such lessons or exercises also may be transmitted and graded by electronic means.

"Course" means the presentation of an orderly sequence of material dealing with an individual subject area, such as driver education.

"Department" means the Virginia Department of Education.

"Home instruction" means the teaching of a child or children by a teaching parent in the home as an alternative to meeting the requirements of compulsory attendance as defined in § 22.1-254 of the Code of Virginia and as a means of complying with § 22.1-254.1 of the Code of Virginia.

"Parent" means any parent, guardian, legal guardian, or other person having control or charge of a child as specified in § 22.1-1 of the Code of Virginia.

"School" means a correspondence school for driver education programs.

8VAC20-340-40. Approval of correspondence courses for driver education.

A. Required submissions. Schools seeking approval to offer the classroom portion of a driver education program to school-age children through a correspondence program or course in Virginia shall submit the following:

1. A signed and completed copy of the department's affidavit form.

2. A catalog or other documents containing the following information:

a. A statement of ownership or control of the institution;

b. Descriptions of the driver education courses offered by the institution;

c. A description of the method used to evaluate the students' work;

d. A schedule of tuition and fees, including the school's refund policies; and

e. Copies of all application forms and enrollment agreements used by the school.

3. Verification of approval or exemption from regular oversight from the appropriate state or local government agency in the school's state of domicile.

4. Information regarding the school's accreditation status.

5. The name and publisher of the textbook required.

6. An estimate of the minimum amount of time (in hours) required to complete the course.

7. Such additional information as the board or department may deem necessary.

B. All schools must evaluate the students' work at regular intervals specified by the department and maintain a permanent record of the work.

C. Each school meeting the criteria listed in this section is required to submit the required materials for review every year concurrent with the renewal affidavit.

D. Approval criteria. Driver education courses offered by schools submitting the materials required by this section shall be approved [~~if~~ when] the following criteria have been met:

1. The school is, in fact, a correspondence school as defined in 8VAC20-340-5;

2. The courses offered are consistent with state or federal laws or regulations;

3. The school evaluates the students' progress at regular intervals specified by the department and maintains a permanent record of that work; and

4. The content of each course is accurate [~~,~~ and] rigorous [~~,~~] and meets the requirements of the Curriculum and Administrative Guide for Driver Education in Virginia, 2010 edition, which includes the Driver Education Standards of Learning.

The school must provide evidence that at least two subject matter experts have reviewed and validated the accuracy of online content and textbook materials.

E. [~~The department will consider an application complete when it determines that~~ An application shall be complete when] all required information has been submitted in the form required by the department. If the department [~~finds~~, on behalf of the board, determines] the application [to be] incomplete, [the department shall notify] the applicant [~~will be notified~~ of the insufficiencies] in writing within 45 days of receipt of the incomplete application. [~~If the~~ The] applicant [~~does not resubmit a complete application~~ must submit the required items to complete the application, to be received by the department] within 45 days from the notification [~~,~~. If the application is not completed within the 45-day period,] the case file for the request for approval as a provider will be closed. [~~Prior~~ At any time prior] to closure, the applicant may withdraw the request for approval. The applicant may [~~resubmit a complete~~ submit a new] application at [~~a later~~ any] time.

[~~F. Approval process. After a review of the complete application, the department will notify the applicant of its decision regarding approval. If the application is approved, the department will issue a letter of approval with terms of the approval. If the department denies or revokes the approval for good cause, the department will issue a letter stating the reasons for revocation and denial, including information regarding the applicant's right to appeal this decision.~~

~~G. Appeal process for denial or revocation.~~

~~1. Fact finding conference: notification, appearance, and conduct.~~

~~a. Unless emergency circumstances exist that require immediate action, no application shall be denied, suspended, or revoked except upon notice stating the proposed basis for such action and the time and place for a fact finding conference.~~

~~b. If a basis exists for a refusal to approve or a suspension or a revocation of the department's approval, the department shall notify, via certified or hand delivered mail, the interested parties at the address of record maintained by the department.~~

~~c. Notification shall include the basis for the proposed action and any information in the possession of the department that can be relied upon in making an adverse decision.~~

~~d. The fact finding conference shall afford the interested party the opportunity to present written and oral information to the department that may have a bearing on the proposed action at a fact finding conference. Such information should include a brief, written statement of errors the party believes were made in the department's decision.~~

~~e. If no withdrawal occurs, a fact finding conference shall be scheduled at the earliest mutually agreeable date, but no later than 60 days from the date of the notification. A school wishing to waive its right to a conference to proceed directly to a formal hearing shall notify the department of such at least 14 days before the scheduled conference.~~

~~f. The department may rely on public data, documents, or information in making its decision if all parties are given advance notice of the department's intent to rely on such data.~~

~~g. If, after consideration of information presented during an informal fact finding conference, a basis for adverse action still exists, the department shall send to the interested parties a report on the fact finding conference within 90 days of the conference, via certified or hand delivered mail, that shall include the decision, a brief and general description of the factual or procedural basis for the decision, and the right to a formal hearing.~~

~~h. Parties may enter into a consent agreement to settle the issues at any time prior to, during, or subsequent to an informal fact finding conference.~~

~~2. Hearing: notification, appearance, and conduct.~~

~~a. If an interested party intends to request a formal hearing, it shall notify the department within 30 days of receipt of a report on the fact finding conference.~~

~~b. Parties shall be given reasonable notice of the (i) time, place, and nature of the hearing; (ii) basic law under~~

~~which the department contemplates its possible exercise of authority; and (iii) matters of fact and law asserted or questioned by the department.~~

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

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

~~e. The burden of proof at such hearings shall be on the party seeking to reverse the decision of the department.~~

~~3. Hearing location. Hearings before a hearing officer shall be held, insofar as practical, in the county or city in which the school is located. Hearing officers may conduct hearings at locations convenient to the greatest number of persons or by telephone conference, videoconference, or similar technology in order to expedite the hearing process. No hearing shall be located outside of the Commonwealth of Virginia unless it is held by electronic means as specified in the Code of Virginia.~~

~~4. Hearing decisions.~~

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

~~b. The Superintendent of Public Instruction shall review the recommendation of the hearing officer and render a decision on the recommendation within 30 days of receipt. The decision shall cite the appropriate rule, relief, or denial thereof as to each issue.~~

~~c. The Superintendent of Public Instruction's decision regarding the school's approval shall be delivered to the concerned parties within five days of the decision and include a brief statement of the conclusions, the basis of the conclusions, the basic law upon which the department relies, and the recommendation of the hearing officer.~~

~~5. Agency representation. The Superintendent of Public Instruction's designee may represent the department in an informal conference or at a hearing.~~

F. Approval, denial, and revocation.

1. The department, on behalf of the board, shall notify applicants in writing when an application is approved.

2. Applications that do not meet the criteria required by subsections A, B, and D of this section shall be denied. The department shall notify applicants in writing of the denial, stating the reasons the application was denied and including the applicant's right to request the board to reconsider the application, pursuant to subsection G of this section.

3. An approved application may be revoked for good cause, which includes, but is not limited to, the conviction of the applicant, or any employee thereof, of (i) any felony or (ii) any offense involving the sexual molestation, physical or sexual abuse, or rape of a child.

G. Reconsideration by the Board of Education when an application is denied or when approval is revoked. A school whose application has been denied or whose approval has been revoked for good cause may request reconsideration by letter to the board. The letter of request shall include the reasons that the school believes the denial or revocation was inappropriate and shall document how it has corrected any insufficiency identified in the letter of denial or revocation. The board's decision on reconsideration shall be final on that application; however, a denial of reconsideration shall not prevent the school from submitting a new application at a later time.]

H. Determination of continued compliance. Approval of the academic courses shall be renewed annually on or before August 1, provided that the school verifies that it continues to meet the requirements of this section. Forms for this purpose shall be provided by the department.

I. Disclaimer. The Board of Education's approval of a correspondence course is not an endorsement of the program as a substitute for public school programs nor is it an endorsement of the educational or operational philosophy of the school. Additionally, the approval of courses is not intended as an endorsement of the quality of the courses nor is it a conclusion that these courses meet the educational needs of the student or the assessment required by § 22.1-254.1 of the Code of Virginia.

Parents who choose to educate their children at home through a driver education correspondence course are directly responsible for the educational progress of their children and the adequacy of instruction. The board assumes no liability for damages or financial loss to parents using any of the approved driver education correspondence courses.

J. Restrictions. No school whose courses are approved as a driver education program shall advertise in any way that the courses have the endorsement, recommendation, accreditation, or recognition, or any other similar term, of the board, the department, or the Commonwealth of Virginia.

K. Transmitting the affidavit, documents, and other materials. The affidavit, related letters, forms, and other required application materials must be submitted to the Division of Instruction at the Virginia Department of Education by email to the Driver Education Specialist, whose contact information may be found at http://www.doe.virginia.gov/directories/index.shtml#vdoe.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name to access a

form. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (8VAC20-340)

Affidavit for Approval to Provide Driver Education Programs for Parents Approved to Home School [~~undated~~ (rev. 5/2013)]

Classroom Driver Education Program Approval/Renewal for Homeschool Students [~~undated~~ (rev. 5/2013)]

DOCUMENTS INCORPORATED BY REFERENCE (8VAC20-340)

[~~Curriculum Guide of Driver Education in Virginia.~~]

Curriculum and Administrative Guide for Driver Education in Virginia, 2010 Edition (includes Driver Education Standards of Learning, revised January 2008), Virginia Department of Education [~~(http://www.doe.virginia.gov/instruction/driver_education/curriculum_admin_guide/index.shtml).~~

Program Administration

Module One – Virginia Driver Responsibilities: Licensing Responsibilities

Module Two – Virginia Driver Responsibilities: Preparing to Operate a Vehicle

Module Three – Basic Maneuvering Tasks: Low Risk Environment

Module Four – Basic Maneuvering Tasks: Moderate Risk Driving Environment

Module Five – Information Processing: Moderate Risk Driving Environment

Module Six – Information Processing: Complex Risk Environments

Module Seven – Driver Performance: Personal Factors

Module Eight – Driver Responsibilities: Adverse Conditions

Module Eight – Driver Responsibilities: Adverse Conditions

Module Nine – Driver Responsibilities: Vehicle Functions

Module Ten – Driver Responsibilities: Making Informed Choices

Module Eleven – Laboratory Instruction – Behind-the-Wheel and In-Car Observation

Resource List]

VA.R. Doc. No. R11-2644; Filed November 10, 2015, 1:04 p.m.

TITLE 9. ENVIRONMENT

STATE WATER CONTROL BOARD

Proposed Regulation

REGISTRAR'S NOTICE: The State Water Control Board is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 8 of the Code of Virginia, which exempts general permits issued by the State Water Control Board pursuant to the State Water Control Law (§ 62.1-44.2 et seq.), Chapter 24 (§ 62.1-242 et seq.) of Title 62.1, and Chapter 25 (§ 62.1-254 et seq.) of Title 62.1 if the board (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of § 2.2-4007.01; (ii) following the passage of 30 days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit; (iii) provides notice and receives oral and written comment as provided in § 2.2-4007.03; and (iv) conducts at least one public hearing on the proposed general permit.

Title of Regulation: **9VAC25-820. General Virginia Pollutant Discharge Elimination System (VPDES) Watershed Permit Regulation for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia (amending 9VAC25-820-10 through 9VAC25-820-80; adding 9VAC25-820-15).**

Statutory Authority: § 62.1-44.15 of the Code of Virginia.

Public Hearing Information:

January 21, 2016 - 2 p.m. - Department of Environmental Quality, Piedmont Regional Office, 4949-A Cox Road, Glen Allen, Virginia 23060

Public Comment Deadline: February 12, 2016.

Agency Contact: Allan Brockenbrough, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4147, FAX (804) 698-4032, or email allan.brockenbrough@deq.virginia.gov.

Announcement of Periodic Review and Small Business Impact Review: Pursuant to Executive Order 17 (2014) and § 2.2-4007.1 of the Code of Virginia, the agency is conducting a periodic review and small business impact review of this regulation to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Summary:

This action amends and reissues the general permit for total nitrogen (TN) and total phosphorus (TP) discharges and nutrient trading in the Chesapeake Bay watershed in Virginia. The regulation provides for the permitting of TN and TP discharges in the Chesapeake Bay watershed and allows for trading of nutrient credits to minimize costs to the regulated facilities and allow for future growth. The proposed amendments to the existing regulation update and clarify definitions, effective dates, monitoring frequencies and sample types, quantification level requirements, trading ratio provisions, and new wasteload allocations for some facilities as required by the December 29, 2010, Chesapeake Bay total maximum daily load (TMDL) with associated compliance schedule requirements and conditions applicable to all Virginia Pollutant Discharge Elimination System permits.

The most significant proposed changes are (i) reduced nutrient wasteload allocations for the significant dischargers to the James River Basin, including reduced TN wasteload allocations for the Hampton Roads Sanitary District facilities and reduced TP wasteload allocations for all but two of the significant James River dischargers along with associated schedules of compliance; (ii) increased monitoring frequencies for facilities with design flows between 5.0 and 19.999 millions of gallons per day (MGD) and between 0.5 and 0.999 MGD; (iii) the addition of maximum quantification level requirements; (iv) the addition of a provision to allow a nonpoint source to point source trading ratio of less than 2:1 with an associated public notice requirement; (v) updated prices of TN and TP credit purchases from the Nutrient Offset Fund based on the cost of projects financed by the fund over the previous permit cycle; and (vi) updated TN and TP delivery factors.

9VAC25-820-10. Definitions.

Except as defined below, the words and terms used in this chapter shall have the meanings defined in the Virginia ~~Pollution~~ Pollutant Discharge Elimination System (VPDES) Permit Regulation (9VAC25-31).

"Annual mass load of total nitrogen" (expressed in pounds per year) means the sum of the total monthly loads for all of the months in one calendar year. See Part I E 4 of the general permit in 9VAC25-820-70 for calculating total monthly load.

"Annual mass load of total phosphorus" (expressed in pounds per year) means the sum of the total monthly loads for all of the months in one calendar year. See Part I E 4 of the general permit in 9VAC25-820-70 for calculating total monthly load.

"Association" means the Virginia Nutrient Credit Exchange Association authorized by § 62.1-44.19:17 of the Code of Virginia.

"Attenuation" means the rate at which nutrients are reduced through natural processes during transport in water.

"Board" means the Virginia State Water Control Board or State Water Control Board.

"Delivered total nitrogen load" means the discharged mass load of total nitrogen from a point source that is adjusted by the delivery factor for that point source.

"Delivered total phosphorus load" means the discharged mass load of total phosphorus from a point source that is adjusted by the delivery factor for that point source.

"Delivery factor" means an estimate of the number of pounds of total nitrogen or total phosphorus delivered to tidal waters for every pound discharged from a ~~permitted~~ facility, as determined by the specific geographic location of the ~~permitted~~ facility, to account for attenuation that occurs during riverine transport between the ~~permitted~~ facility and tidal waters. Delivery factors shall be calculated using the Chesapeake Bay Program watershed model. For the purpose of this regulation, delivery factors with a value greater than 1.00 in the Chesapeake Bay Program watershed model shall be considered to be equal to 1.00.

"Department" or "DEQ" means the Department of Environmental Quality.

"Director" means the director of the Department of Environmental Quality.

"Eastern Shore trading ratio" means the ~~number~~ ratio of pounds of point source credits from another tributary that can be acquired and applied by the owner of a facility in the Eastern ~~Coastal~~ Shore Basin for every pound of point source total nitrogen or total phosphorus discharged from the Eastern Shore Basin facility. Trading ratios are expressed in the form "credits supplied: credits received."

"Equivalent load" means:

2,300 pounds per year of total nitrogen or 300 pounds per year of total phosphorus discharged by an industrial facility are considered equivalent to the load discharged from sewage treatment works with a design capacity of 0.04 million gallons per day,

5,700 pounds per year of total nitrogen or 760 pounds per year of total phosphorus discharged by an industrial facility are considered equivalent to the load discharged from sewage treatment works with a design capacity of 0.1 million gallons per day, and

28,500 pounds per year of total nitrogen or 3,800 pounds per year of total phosphorus discharged by an industrial facility are considered equivalent to the load discharged from sewage treatment works with a design capacity of 0.5 million gallons per day.

"Existing facility" means a facility ~~holding~~ (i) subject to a current individual VPDES permit ~~that~~ from which a discharge has ~~either~~ commenced ~~discharge from,~~ or for which its owner has received a Certificate to Construct (for sewage treatment works, or equivalent DEQ approval for discharges from industrial facilities) for the treatment works used to derive its ~~waste load~~ wasteload allocation on or before July 1, 2005, or

(ii) for which the owner has a ~~waste load~~ wasteload allocation listed in 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation. Existing facility shall also mean and include any facility, ~~without~~ not subject to an individual VPDES permit, for which its owner holds a separate ~~waste load~~ wasteload allocation in 9VAC25-720-120 C of the Water Quality Management Planning Regulation.

"Expansion" or "expands" means (i) initiating construction at an existing treatment works after July 1, 2005, to increase design flow capacity, except that the term does not apply in those cases where a Certificate to Construct (for sewage treatment works, or equivalent DEQ approval for discharges from industrial facilities) was issued on or before July 1, 2005, or (ii) industrial production process changes or the use of new treatment products at industrial facilities that increase the annual mass load of total nitrogen or total phosphorus above the ~~waste load~~ wasteload allocation.

"Facility" means a point source ~~discharging~~ from which a discharge or ~~proposing to~~ proposed discharge of total nitrogen or total phosphorus to the Chesapeake Bay or its tributaries exists. This term does not include confined animal feeding operations, discharges of storm water, return flows from irrigated agriculture, or vessels.

"General permit" means this general permit authorized by § 62.1-44.19:14 of the Code of Virginia.

"Industrial facility" means any facility (as defined above) other than sewage treatment works.

"Local water quality-based limitations" means limitations intended to protect local water quality including applicable total maximum daily load (TMDL) allocations, applicable Virginia Pollution Discharge Elimination System (VPDES) permit limits, applicable limitations set forth in water quality standards established under § 62.1-44.15 (3a) of the Code of Virginia, or other limitations as established by the State Water Control Board.

"New discharge" means any discharge from a facility that did not commence ~~the discharge of pollutants~~ prior to July 1, 2005, except that the term does not apply in those cases where a Certificate to Construct (for sewage treatment works, or equivalent DEQ approval for discharges from industrial facilities) was issued to the facility on or before July 1, 2005.

"Nonsignificant discharger" means (i) a sewage treatment works discharging to the Chesapeake Bay watershed downstream of the fall line with a design capacity of less than 0.1 million gallons per day, or less than an equivalent load discharged from industrial facilities, or (ii) a sewage treatment works discharging to the Chesapeake Bay watershed upstream of the fall line with a design capacity of less than 0.5 million gallons per day, or less than an equivalent load discharged from industrial facilities.

"Offset" means to acquire an annual ~~waste load~~ wasteload allocation of total nitrogen or total phosphorus ~~by~~ for a new or expanding facility to ensure that there is no net increase of nutrients into the affected tributary of the Chesapeake Bay.

"Permitted design capacity" or "permitted capacity" means the allowable load (pounds per year) assigned to an existing facility that is a nonsignificant discharger~~,~~ and that does not have a ~~waste load~~ wasteload allocation listed in 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation. The permitted design capacity is calculated based on the design flow and installed nutrient removal technology (for sewage treatment works, or equivalent discharge from industrial facilities) at a facility that has either commenced discharge, or for which an owner has received a Certificate to Construct (for sewage treatment works, or equivalent DEQ approval for discharges from industrial facilities) prior to July 1, 2005. This mass load is used for (i) determining whether the owner of the expanding facility must offset additional mass loading of nitrogen and phosphorus and (ii) determining whether the owner of the facility must acquire credits at the end of a calendar year. For the purpose of this ~~regulation~~ chapter, owners of facilities that have installed secondary wastewater treatment (intended to achieve BOD and TSS monthly average concentrations equal to or less than 30 milligrams per liter) are assumed to achieve an annual average total nitrogen effluent concentration of 18.7 milligrams per liter and an annual average total phosphorus effluent concentration of 2.5 milligrams per liter. Permitted design capacities for facilities that, before July 1, 2005, were required to comply with more stringent nutrient limits shall be calculated using the more stringent values.

"Permitted facility" means a facility whose owner is authorized by this general permit to discharge total nitrogen or total phosphorus. For the sole purpose of generating point source nitrogen credits or point source phosphorus credits, "permitted facility" shall also mean the Blue Plains wastewater treatment facility operated by the District of Columbia Water and Sewer Authority.

"Permittee" means a person authorized by this general permit to discharge total nitrogen or total phosphorus.

"Point source nitrogen credit" means the difference between (i) the ~~waste load~~ wasteload allocation for a permitted facility specified as an annual mass load of total nitrogen and (ii) the monitored annual mass load of total nitrogen discharged ~~by~~ from that facility, where clause (ii) is less than clause (i), and where the difference is adjusted by the applicable delivery factor and expressed as pounds per year of delivered total nitrogen load.

"Point source phosphorus credit" means the difference between (i) the ~~waste load~~ wasteload allocation for a permitted facility specified as an annual mass load of total phosphorus and (ii) the monitored annual mass load of total phosphorus discharged ~~by~~ from that facility, where clause (ii)

is less than clause (i), and where the difference is adjusted by the applicable delivery factor and expressed as pounds per year of delivered total phosphorus load.

"Quantification level ~~(QL)~~" or "QL" means the minimum levels, concentrations, or quantities of a target variable (e.g., target analyte) that can be reported with a specified degree of confidence in accordance with 1VAC30-45, Certification for Noncommercial Environmental Laboratories, or 1VAC30-46, Accreditation for Commercial Environmental Laboratories.

"Registration list" means a list maintained by the department indicating all facilities that ~~have~~ are registered for coverage under this general permit, by tributary, including their ~~waste load~~ wasteload allocations, permitted design capacities, and delivery factors as appropriate.

"Significant discharger" means the owner of (i) a sewage treatment works discharging to the Chesapeake Bay watershed upstream of the fall line with a design capacity of 0.5 million gallons per day or greater, or an equivalent load discharged from industrial facilities; (ii) a sewage treatment works discharging to the Chesapeake Bay watershed downstream of the fall line with a design capacity of 0.1 million gallons per day or greater, or an equivalent load discharged from industrial facilities; (iii) a planned or newly expanding sewage treatment works discharging to the Chesapeake Bay watershed upstream of the fall line that ~~is~~ was expected to be in operation by December 31, 2010, with a permitted design of 0.5 million gallons per day or greater, or an equivalent load to be discharged from industrial facilities; or (iv) a planned or newly expanding sewage treatment works discharging to the Chesapeake Bay watershed downstream of the fall line that ~~is~~ was expected to be in operation by December 31, 2010, with a design capacity of 0.1 million gallons per day or greater, or an equivalent load to be discharged from industrial facilities.

"State-of-the-art nutrient removal technology" means (i) technology that will achieve an annual average total nitrogen effluent concentration of three milligrams per liter and an annual average total phosphorus effluent concentration of 0.3 milligrams per liter or (ii) equivalent load reductions in total nitrogen and total phosphorus through recycle or reuse of wastewater as determined by the department.

"Tributaries" means those river basins ~~for which separate tributary strategies were prepared pursuant to § 2.2-218 of the Code of Virginia~~ listed in the Chesapeake Bay TMDL and includes the Potomac, Rappahannock, York, and James River Basins~~,~~ and the Eastern ~~Coastal~~ Shore Basin, which encompasses the creeks and rivers of the Eastern Shore of Virginia that are west of Route 13 and drain into the Chesapeake Bay.

"VPDES" means Virginia Pollutant Discharge Elimination System.

~~"Waste load~~ "Wasteload allocation" means the most limiting of (i) the water quality-based annual mass load of total nitrogen or annual mass load of total phosphorus allocated to individual facilities pursuant to 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation or its successor, or permitted capacity in the case of nonsignificant dischargers; (ii) the water quality-based annual mass load of total nitrogen or annual mass load of total phosphorus acquired pursuant to § 62.1-44.19:15 of the Code of Virginia for new or expanded facilities; or (iii) applicable total nitrogen or total phosphorus ~~waste load~~ wasteload allocations under the Chesapeake Bay total maximum daily loads (TMDLs) to restore or protect the water quality and beneficial uses of the Chesapeake Bay or its tidal tributaries.

9VAC25-820-15. Applicability of incorporated references based on the dates that they became effective.

Except as noted, when a regulation of the U.S. Environmental Protection Agency set forth in Title 40 of the Code of Federal Regulations is referenced or adopted in this chapter and incorporated by reference that regulation shall be as it exists and has been published as of July 1, 2014.

9VAC25-820-20. Purpose, applicability, delegation of authority.

A. This regulation fulfills the statutory requirement for the General VPDES Watershed Permit for Total Nitrogen and Total Phosphorus discharges and nutrient trading in the Chesapeake Bay watershed issued by the board pursuant to the Clean Water Act (33 USC § 1251 et seq.) and § 62.1-44.19:14 of the Code of Virginia.

B. This general permit regulation governs owners of facilities holding individual VPDES permits or ~~that~~ otherwise ~~meet~~ meeting the definition of "existing facility" that discharge or propose to discharge total nitrogen or total phosphorus to the Chesapeake Bay or its tributaries.

C. The director may perform any act of the board provided under this regulation, except as limited by § 62.1-44.14 of the Code of Virginia.

9VAC25-820-30. Relation to existing VPDES permits issued in accordance with 9VAC25-31.

A. This general permit shall control in lieu of conflicting or duplicative mass loading effluent limitations, monitoring or reporting requirements for total nitrogen and total phosphorus contained in individual VPDES permits for facilities covered by this general permit~~,~~ where these requirements are based upon standards, criteria, ~~waste load~~ wasteload allocations, policy, or guidance established to restore or protect the water quality and beneficial uses of the Chesapeake Bay or its tidal tributaries.

B. This general permit shall not control in lieu of more stringent water quality-based effluent limitations for total nitrogen or total phosphorus in individual permits where those limitations are necessary to protect local water quality, or more stringent technology-based effluent concentration limitations in the individual permit for any facility that has

installed technology for the control of nitrogen and phosphorus whether by new construction, expansion, or upgrade.

C. The compliance schedule in this general permit shall control in lieu of conflicting or duplicative schedule requirements contained in individual VPDES permits for facilities covered by this general permit~~,~~ where those requirements address mass loading of total nitrogen or total phosphorus and are based upon standards, criteria, ~~waste load~~ wasteload allocations, policy, or guidance established to restore or protect the water quality and beneficial uses of the Chesapeake Bay or its tidal tributaries.

9VAC25-820-40. Compliance plans.

A. By July 1, ~~2012~~ 2017, every owner ~~or operator~~ of a facility ~~subject to reduced individual total nitrogen or total phosphorus waste load allocations in the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment dated December 29, 2010, (as~~ identified in ~~9VAC25-820-80)~~ 9VAC25-820-80 and subject to a limit effective date after January 1, 2017, as defined in Part I C 1 of 9VAC25-820-70 shall either individually or through the Virginia Nutrient Credit Exchange Association submit compliance plans to the department for approval.

1. The compliance plans shall contain any capital projects and implementation schedules needed to achieve total nitrogen and phosphorus reductions sufficient to comply with the individual and combined ~~waste load~~ wasteload allocations of all the permittees in the tributary as soon as possible. Permittees submitting individual plans are not required to account for other facilities' activities.

2. As part of the compliance plan development, permittees shall either:

a. Demonstrate that the additional capital projects ~~in~~ anticipated by subdivision 1 of this subsection are necessary to ensure continued compliance with these allocations ~~through~~ by the applicable deadline for the tributary to which the facility discharges (Part I C of the permit), or

b. Request that their individual ~~waste load~~ wasteload allocations become effective on January 1, ~~2012~~ 2017.

3. The compliance plans may rely on the exchange of point source credits in accordance with this general permit, but not the acquisition of credits through payments into the ~~Water Quality Improvement~~ Nutrient Offset Fund (§ ~~10.1-2128 et seq.~~ 10.1-2128.2 of the Code of Virginia), to achieve compliance with the individual and combined ~~waste load~~ wasteload allocations in each tributary.

B. Every owner or operator of a facility required to submit a registration statement shall either individually or through the Virginia Nutrient Credit Exchange Association submit annual compliance plan updates to the department for approval as required by Part I D of ~~this~~ the general permit.

9VAC25-820-50. Transfer of permit coverage.

A. ~~This~~ Coverage under the general permit shall be transferred by the current permittee to a new owner or operator concurrently with the transfer of the individual ~~permit(s)~~ permit or permits in accordance with 9VAC25-31-380. If the current permittee holds an aggregated waste load allocation for multiple facilities in accordance with Part I B 2 of ~~this~~ the general permit, the current permittee shall submit a revised registration statement for any facilities retained and the new owner shall submit a registration statement for the facilities transferred.

B. All conditions of ~~this~~ the general permit, including, but not limited to, the submittal of a registration statement, annual nutrient allocation compliance and reporting requirements, shall apply to the new owner or operator immediately upon the transfer date.

9VAC25-820-60. Termination of permit coverage.

The owner or operator shall terminate coverage under this general permit concurrently with any request for termination of the individual ~~permit(s)~~ permit or permits in accordance with 9VAC25-31-370.

9VAC25-820-70. General permit.

Any owner whose registration statement is accepted by the board will receive the following general permit and shall comply with the requirements ~~therein~~ of the general permit.

General Permit No.: VAN000000
Effective Date: January 1, ~~2012~~ 2017
~~Amended Effective Date: November 21, 2012~~
Expiration Date: December 31, ~~2016~~ 2021

GENERAL PERMIT FOR TOTAL NITROGEN AND TOTAL PHOSPHORUS DISCHARGES AND NUTRIENT TRADING IN THE CHESAPEAKE WATERSHED IN VIRGINIA
AUTHORIZATION TO DISCHARGE UNDER THE VIRGINIA POLLUTANT DISCHARGE ELIMINATION SYSTEM AND THE VIRGINIA STATE WATER CONTROL LAW

In compliance with the provisions of the Clean Water Act, as amended, and pursuant to the State Water Control Law and regulations adopted pursuant ~~thereto~~ to it, owners of facilities holding a VPDES individual permit or owners of facilities that otherwise meet the definition of an existing facility, with total nitrogen ~~and/or~~ or total phosphorus discharges, or both to the Chesapeake Bay or its tributaries, are authorized to discharge to surface waters and exchange credits for total nitrogen ~~and/or~~ or total phosphorus, or both.

The authorized discharge shall be in accordance with the registration statement filed with DEQ, this cover page, Part I-Special Conditions Applicable to All Facilities, Part II-Special Conditions Applicable to New and Expanded Facilities, and Part III-Conditions Applicable to All VPDES Permits, as set forth herein.

PART I

SPECIAL CONDITIONS APPLICABLE TO ALL FACILITIES

A. Authorized activities.

1. Authorization to discharge for owners of facilities required to register.

a. Every owner or operator of a facility required to submit a registration statement to the department by November 1, ~~2011~~ 2016, and thereafter upon the reissuance of this general permit, shall be authorized to discharge total nitrogen and total phosphorus subject to the requirements of this general permit upon the department's approval of the registration statement.

b. Any owner or operator of a facility required to submit a registration statement with the department at the time he makes application with the department for a new discharge or expansion that is subject to an offset or technology-based requirement in Part II of this general permit, shall be authorized to discharge total nitrogen and total phosphorus subject to the requirements of this general permit upon the department's approval of the registration statement.

c. Upon the department's approval of the registration statement, a facility will be included in the registration list maintained by the department.

2. Authorization to discharge for owners of facilities not required to register. Any owner of a facility authorized by a ~~Virginia Pollutant Discharge Elimination System~~ VPDES permit and not required by this general permit to submit a registration statement shall be deemed to be authorized to discharge total nitrogen and total phosphorus under this general permit at the time it is issued. Owners or operators of facilities that are deemed to be permitted under this subsection shall have no obligation under this general permit prior to submitting a registration statement and securing coverage under this general permit based upon such registration statement.

3. Continuation of permit coverage.

a. Any owner authorized to discharge under this general permit and who submits a complete registration statement for the reissued general permit by November 1, ~~2016~~ 2021, in accordance with Part III ~~A~~ M or who is not required to register in accordance with Part I A 2 is authorized to continue to discharge under the terms of this general permit until such time as the board either:

(1) Issues coverage to the owner under the reissued general permit, or

(2) Notifies the owner that the discharge is not eligible for coverage under ~~the reissued~~ this general permit ~~is denied~~.

b. When the owner that was covered under the expiring or expired general permit has violated or is violating the conditions of that permit, the board may choose to do any or all of the following:

(1) Initiate enforcement action based upon the 2012 general permit ~~that has been continued~~,

(2) Issue a notice of intent to deny coverage under the ~~amended~~ reissued general permit ~~if~~. If the general permit coverage is denied, the owner would then be required to cease the ~~activities~~ discharges authorized by the administratively continued coverage under the terms of the 2012 general permit or be subject to enforcement action for operating without a permit, or

(3) Take other actions authorized by the State Water Control Law.

B. ~~Waste load~~ Wasteload allocations.

1. ~~Waste load~~ Wasteload allocations allocated to permitted facilities pursuant to 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation, or applicable ~~total maximum daily loads~~ TMDLs, or ~~waste load~~ wasteload allocations acquired by owners of new and expanding facilities to offset new or increased delivered total nitrogen and delivered total phosphorus loads from a new discharge or expansion under Part II B of this general permit, and existing loads calculated from the permitted design capacity of expanding facilities not previously covered by this general permit, shall be incorporated into the registration list maintained by the department. The ~~waste load~~ wasteload allocations contained in this list shall be enforceable as annual mass load limits in this general permit. Credits shall not be generated by facilities whose operations were previously authorized by a Virginia Pollution Abatement (VPA) permit that was issued before July 1, 2005.

2. Except as described in subdivisions 2 c and 2 d of this subsection, an owner or operator of two or more facilities covered by this general permit and ~~located in~~ discharging to the same tributary may apply for and receive an aggregated mass load limit for delivered total nitrogen and an aggregated mass load limit for delivered total phosphorus reflecting the total of the water quality-based total nitrogen and total phosphorus ~~waste load~~ wasteload allocations or permitted design capacities established for such facilities individually.

a. The permittee (and all of the individual facilities covered under a single registration) shall be deemed to be in compliance when the aggregate mass load discharged by the facilities is less than the aggregate load limit.

b. The permittee will be eligible to generate credits only if the aggregate mass load discharged by the facilities is less than the total of the ~~waste load~~ wasteload allocations assigned to any of the affected facilities.

c. The aggregation of mass load limits shall not affect any requirement to comply with local water quality-based limitations.

d. Facilities whose operations were previously authorized by a Virginia Pollution Abatement (VPA) permit that was issued before July 1, 2005, cannot be aggregated with other facilities under common ownership or operation.

e. Operation under an aggregated mass load limit in accordance with this section shall not be deemed credit acquisition as described in Part I J 2 of this general permit.

3. An owner ~~who~~ that consolidates two or more facilities ~~located in~~ discharging to the same tributary into a single regional facility may apply for and receive an aggregated mass load limit for delivered total nitrogen and an aggregated mass load limit for delivered total phosphorus, subject to the following conditions:

a. If all of the affected facilities have ~~waste load~~ wasteload allocations in 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation, the aggregate mass load limit shall be calculated by adding the ~~waste load~~ wasteload allocations of the affected facilities. The regional facility shall be eligible to generate credits.

b. If any, but not all, of the affected facilities has a ~~waste load~~ wasteload allocation in 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation, the aggregate mass load limit shall be calculated by adding:

(1) ~~Waste load~~ Wasteload allocations of those facilities that have ~~waste load~~ wasteload allocations in 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation;

(2) Permitted design capacities assigned to affected industrial facilities; and

(3) Loads from affected sewage treatment works that do not have a ~~waste load~~ wasteload allocation in 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation, defined as the lesser of a previously calculated permitted design capacity, or the values calculated by the following formulae:

Nitrogen Load (lbs/day) = flow x 8.0 mg/l x 8.345 x 365 days/year

Phosphorus Load (lbs/day) = flow x 1.0 mg/l x 8.345 x 365 days/year

Flows used in the preceding formulae shall be the design flow of the treatment works from which the affected facility currently discharges.

The regional facility shall be eligible to generate credits.

c. If none of the affected facilities have a ~~waste load~~ wasteload allocation in 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation, the aggregate mass load limit shall be calculated by adding the respective permitted design capacities for the affected facilities. ~~The regional facility shall not be eligible to generate credits.~~

d. Facilities whose operations were previously authorized by a Virginia Pollution Abatement (VPA) permit that was issued before July 1, 2005, may be consolidated with other facilities under common ownership or operation, but their allocations cannot be transferred to the regional facility.

e. Facilities whose operations were previously authorized by a VPA permit that was issued before July 1, 2005, can become regional facilities, but they cannot receive additional allocations beyond those permitted in Part II B 1 d of this general permit.

4. Unless otherwise noted, the nitrogen and phosphorus ~~waste load~~ wasteload allocations assigned to permitted facilities are considered total loads, including nutrients present in the intake water from the river, as applicable. On a case-by-case basis, an industrial discharger may demonstrate to the satisfaction of the board that a portion of the nutrient load originates in its intake water. This demonstration shall be consistent with the assumptions and methods used to derive the allocations through the Chesapeake Bay models. In these cases, the board may limit the permitted discharge to the net nutrient load portion of the assigned ~~waste load~~ wasteload allocation.

5. Bioavailability. Unless otherwise noted, the entire nitrogen and phosphorus ~~waste load~~ wasteload allocations assigned to permitted facilities are considered to be bioavailable to organisms in the receiving stream. On a case-by-case basis, a discharger may demonstrate to the satisfaction of the board that a portion of the nutrient load is not bioavailable; this demonstration shall not be based on the ability of the nutrient to resist degradation at the wastewater treatment plant, but instead, on the ability of the nutrient to resist degradation within a natural environment for the amount of time that it is expected to remain in the bay watershed. This demonstration shall also be consistent with the assumptions and methods used to derive the allocations through the Chesapeake Bay models. In these cases, the board may limit the permitted discharge to the bioavailable portion of the assigned ~~waste load~~ wasteload allocation.

C. Schedule of compliance.

1. The following schedule of compliance pertaining to the load allocations for total nitrogen and total phosphorus applies to the facilities listed in 9VAC25-820-80.

a. Compliance shall be achieved as soon as possible, but no later than the following dates, subject to any compliance plan-based adjustment by the board pursuant to subdivision 1 b of this subsection, for each ~~parameter~~ upgrade phase:

~~Tributary~~	~~Parameter~~	~~Final Effluent Limits Effective Date~~
~~James River~~	~~Nitrogen~~	~~January 1, 2017~~
~~York River~~	~~Phosphorus~~	~~January 1, 2016~~

Upgrade Phase	Limit Effective Date
Phase I Total Nitrogen	January 1, 2017
Phase 2 Total Nitrogen	January 1, 2022
Phase 2 Total Phosphorus	January 1, 2017

b. Following submission of compliance plans and compliance plan updates required by 9VAC25-820-40, the board shall reevaluate the schedule of compliance in subdivision 1 a of this subsection, taking into account the information in the compliance plans and the factors in § 62.1-44.19:14 C 2 of the Code of Virginia. When warranted based on such information and factors, the board shall adjust the schedule in subdivision 1 a of this subsection as appropriate by modification or reissuance of this general permit.

2. The registration list shall contain individual dates for compliance ~~(as defined in Part I J 1 a b of this general permit)~~ with wasteload allocations for dischargers, as follows:

a. ~~Facilities~~ Owners of facilities listed in 9VAC25-820-80 will have individual dates for compliance based on their respective compliance plans~~,~~ that may be earlier than the ~~basin~~ upgrade phase schedule listed in subdivision 1 of this subsection.

b. ~~Facilities~~ Owners of facilities listed in ~~9VAC25-820-70~~ 9VAC25-820-80 that waive their compliance schedules in accordance with 9VAC25-820-40 A 2 b shall have an individual compliance date of January 1, ~~2012~~ 2017.

c. Upon completion of the projects contained in their compliance plans, owners of facilities listed in 9VAC25-820-80 may receive a revised individual compliance date of January 1 for the calendar year immediately following the year in which a Certificate to Operate was issued for the capital projects, but not later than the ~~basin~~ upgrade phase schedule listed in subdivision 1 of this subsection.

d. ~~New~~ Owners of new and expanded facilities will have individual dates for compliance corresponding to the date that coverage under this general permit was extended to discharges from the facility.

3. The ~~39~~ significant dischargers in the James River Basin shall meet aggregate discharged ~~waste load~~ wasteload allocations of 8,968,864 lbs/yr TN and 545,558 lbs/yr TP by January 1, 2023.

D. Annual update of compliance plan. Every owner or operator of a facility required to submit a registration statement shall either individually or through the Virginia Nutrient Credit Exchange Association submit updated compliance plans to the department no later than February 1 of each year. The compliance plans shall contain sufficient information to document a plan ~~for the facility~~ to achieve and maintain compliance with applicable total nitrogen and total phosphorus individual ~~waste load~~ wasteload allocations on the registration list and aggregate ~~waste load~~ wasteload allocations in Part I C 3. Compliance plans for owners of facilities that were required to submit a registration statement with the department under Part I G 1 a may rely on the acquisition of point source credits in accordance with Part I J of this general permit, but not the acquisition of credits through payments into the ~~Water Quality Improvement~~ Nutrient Offset Fund, to achieve compliance with the individual and combined ~~waste load~~ wasteload allocations in each tributary. Compliance plans for expansions or new discharges for owners of facilities that are required to submit a registration statement with the department under Part I G 1 b and c may rely on the acquisition of allocation in accordance with Part II B of this general permit to achieve compliance with the individual and combined ~~waste load~~ wasteload allocations in each tributary.

E. Monitoring requirements.

1. Discharges shall be monitored by the permittee during weekdays as specified below unless the department determines that weekday only sampling results in a non-representative load. Weekend monitoring ~~and/or~~ or alternative monthly load calculations to address production schedules or seasonal flows shall be submitted to the department for review and approval on a case-by-case basis. Facilities that exhibit instantaneous discharge flows that vary from the daily average discharge flow by less than 10% may submit a proposal to the department to use an alternative sample type; such proposals shall be reviewed and approved by the department on a case-by-case basis.

Parameter	Sample Type and Collection Frequency					
STP design flow	≥20.0 MGD	5.0 - 19.999 MGD	~~1.0 19.999~~ 1.0 - 4.999 MGD	0.5 - 0.999 MGD	~~0.040 0.999~~ 0.040 - 0.499 MGD	< 0.040 MGD
Effluent TN load limit for industrial facilities		>350,000 lb/yr	~~>100,000~~ 100,000 - 349,999 lb/yr	50,000 - 99,999 lb/yr	~~487 99,999~~ 487 - 49,999 lb/yr	< 487 lb/yr
Effluent TP load limit for industrial facilities		>35,000 lb/yr	~~>10,000~~ 10,000 - 34,999 lb/yr	5,000 - 9,999 lb/yr	~~37 9,999~~ 37 - 4,999 lb/yr	< 37 lb/yr
Flow	Totalizing, Indicating, and Recording					1/Day, see individual VPDES permit for sample type
Nitrogen Compounds (Total Nitrogen = TKN + NO_2- (as N) + NO_3- (as N))	24 HC 3 Days/Week	24 HC 2/Week*	24 HC 1/Week	8 HC 4/Month**	8 HC 2/Month, > 7 days apart	1/Month Grab
Total Phosphorus	24 HC 3 Days/Week	24 HC 2/Week*	24 HC 1/Week	8 HC 4/Month**	8 HC 2/Month, > 7 days apart	1/Month Grab

*Two 24-hour flow composited samples taken in the same calendar week that are then composited by flow into a single weekly composite sample for analysis shall be considered to be in compliance with this requirement.

**Two sets of two 8-hour flow composited samples taken at least one day apart but in the same calendar week that are then composited by flow into two weekly composite samples per month for analysis shall be considered to be in compliance with this requirement.

2. Monitoring for compliance with effluent limitations shall be performed in a manner identical to that used to determine compliance with effluent limitations established in the individual VPDES permit unless specified otherwise in subdivisions 3, 4, and 5 of Part I E. Monitoring or sampling shall be conducted according to analytical laboratory methods approved under 40 CFR Part 136, unless other test or sample collection procedures have been requested by the permittee and approved by the department in writing. All analysis for compliance with effluent limitations shall be conducted in accordance with 1VAC30-45, Certification for Noncommercial Environmental Laboratories, or 1VAC30-46, Accreditation for Commercial Environmental Laboratories. Monitoring may be performed by the permittee at frequencies more stringent than listed ~~above~~ in subdivision 1 of Part I E; however, the permittee shall report all results of such monitoring.

3. Loading values greater than or equal to 10 pounds reported in accordance with Part I E and F of this general permit shall be calculated and reported to the nearest pound without regard to mathematical rules of precision. Loading values of less than 10 pounds reported in accordance with Part I E and F of this general permit shall be calculated and reported to at least two significant digits with the exception that all complete calendar year annual loads shall be reported to the nearest pound.

4. Data shall be reported on a form provided by the department, by the same date each month as is required by the ~~facility's~~ owner's individual VPDES permit. The total monthly load shall be calculated in accordance with the following formula:

$$ML = \left(\frac{\sum DL}{s} \right) \times d$$

where:

ML = total monthly load (lb/mo) = average daily load for the calendar month multiplied by the number of days of the calendar month on which a discharge occurred

DL = daily load = daily concentration (expressed as mg/l to the nearest 0.01 mg/l) multiplied by the flow volume of effluent discharged during the 24-hour period (expressed as MGD to at least the nearest 0.01 MGD and in no case less than two significant digits), multiplied by 8.345. Daily loads greater than or equal to 10 pounds may be rounded to the nearest whole number to convert to pounds per day (lbs/day). Daily loads less than or equal to 10 pounds may be rounded to no fewer than two significant fiqures.

s = number of days in the calendar month in which a sample was collected and analyzed

d = number of discharge days in the calendar month

For total phosphorus, all daily concentration data below the quantification level (QL) for the analytical method used ~~should~~ shall be treated as half the QL. All daily concentration data equal to or above the QL for the analytical method used shall be treated as it is reported. If all data are below the QL, then the average shall be reported as half the QL.

For total nitrogen (TN), if none of the daily concentration data for the respective species (i.e., TKN, nitrates/nitrites) are equal to or above the QL for the respective analytical methods used, the daily TN concentration value reported shall equal one half of the largest QL used for the respective species. If one of the data is equal to or above the QL, the daily TN concentration value shall be treated as that data point as reported. If more than one of the data is above the QL, the daily TN concentration value shall equal the sum of the data points as reported.

The quantification levels shall be less than or equal to the following concentrations:

Parameter	Quantification Level
TKN	0.50 mg/l
Nitrite	0.10 mg/l
Nitrate	0.20 mg/l
Nitrite + Nitrate	0.20 mg/l

Higher QLs may be approved on a case-by-case basis where a higher QL routinely results in reportable results of the species in question or is otherwise technically appropriate based on standard lab practices.

The total year-to-date mass load shall be calculated in accordance with the following formula:

$$AL_{YTD} = \sum_{(Jan-present)} ML$$

where:

AL-YTD = calendar year-to-date annual load (lb/yr)

ML = total monthly load (lb/mo)

The total annual mass load shall be calculated in accordance with the following formula:

$$AL = \sum_{(Jan-Dec)} ML$$

where:

AL = calendar year annual load (lb/yr)

ML = total monthly load (lb/mo)

5. The department may authorize a chemical usage evaluation as an alternative means of determining nutrient loading for outfalls where the only source of nutrients is ~~those~~ that found in the surface water intake and chemical additives used by the facility. Such an evaluation shall be submitted to the department for review and approval on a case-by-case basis. Implementation of approved chemical usage evaluations shall satisfy the requirements specified under Part I E 1 and 2.

F. Annual reporting.

On or before February 1, annually, each permittee shall file a discharge monitoring report with the department identifying the annual mass load of total nitrogen and the annual mass load of total phosphorus discharged by the permitted facility during the previous calendar year.

G. Requirement to register; exclusions.

1. The following owners or operators are required to register for coverage under this general permit:

a. Every owner or operator of an existing facility authorized by a ~~Virginia Pollutant Discharge Elimination System~~ VPDES permit to discharge 100,000 gallons or more per day from a sewage treatment work, or an equivalent load from an industrial facility, directly into tidal waters, or 500,000 gallons or more per day from a sewage treatment ~~work~~ works, or an equivalent load from an industrial facility, directly into nontidal waters, shall submit a registration statement to the department by November 1, ~~2011~~ 2016, and thereafter upon the reissuance of this general permit in accordance with Part III ~~B~~ M. The conditions of this general permit will apply to such owner and operator upon approval of a registration statement.

b. Any owner or operator of a facility authorized by a Virginia Pollutant Discharge Elimination System permit to discharge 40,000 gallons or more per day from a sewage treatment ~~work~~ works, or an equivalent load from an industrial facility, directly into tidal or nontidal waters shall submit a registration statement with the department at the time he makes application for an individual permit with the department for a new discharge or expansion that is subject to an offset requirement in Part II of this general permit or to a technology-based requirement in 9VAC25-40-70, and thereafter upon the reissuance of this general permit in accordance with Part III ~~B~~ M. The conditions of this general permit will apply to such

owner or operator beginning ~~on the start~~ January 1 of the calendar year immediately following approval of a registration statement and issuance or modification of the individual permit.

c. Any owner or operator of a facility treating domestic sewage authorized by a ~~Virginia Pollutant Discharge Elimination System~~ VPDES permit with a discharge greater than 1,000 gallons per day up to and including 39,999 gallons per day that ~~has~~ did not ~~commenced~~ commence the discharge of pollutants prior to January 1, 2011, shall submit a registration statement with the department at the time he makes application for an individual permit with the department or prior to commencing a discharge, ~~which ever~~ whichever occurs first, and thereafter upon the reissuance of this general permit in accordance with Part III ~~B~~ M.

2. All other categories of discharges are excluded from registration under this general permit.

H. Registration statement.

1. The registration statement shall contain the following information:

a. Name, mailing address and telephone number, ~~e-mail~~ email address and fax number of the owner (and facility operator, if different from the owner) applying for permit coverage;

b. Name (or other identifier), address, city or county, contact name, phone number, ~~e-mail~~ email address and fax number for the facility for which the registration statement is submitted;

c. VPDES permit numbers for all permits assigned to the facility, or pursuant to which the discharge is authorized;

d. If applying for an aggregated ~~waste load~~ wasteload allocation in accordance with Part I B 2 of this permit, a list of all affected facilities and the VPDES permit numbers assigned to these facilities;

e. For new and expanded facilities, a plan to offset new or increased delivered total nitrogen and delivered total phosphorus loads, including the amount of ~~waste load~~ wasteload allocation acquired. ~~Waste load~~ Wasteload allocations or credits sufficient to offset projected nutrient loads must be provided for period of at least five years; and

f. For existing facilities, the amount of a facility's ~~waste load~~ wasteload allocation transferred to or from another facility to offset new or increased delivered total nitrogen and delivered total phosphorus loads from a new discharge or expansion.

2. The registration statement shall be submitted to the DEQ Central Office, Office of ~~Water~~ VPDES Permits ~~and Compliance Assistance~~.

3. An amended registration statement shall be submitted to DEQ immediately upon the acquisition or transfer of a facility's ~~waste load~~ wasteload allocation to offset new or increased delivered total nitrogen and delivered total phosphorus loads from a new discharge or expansion.

I. Public notice for registration statements proposing modifications or incorporations of new waste load allocations or delivery factors.

1. All public notices issued pursuant to a proposed modification or incorporation of a (i) new ~~waste load~~ wasteload allocation to offset new or increased delivered total nitrogen and delivered total phosphorus loads from a new discharge or expansion~~,~~ or (ii) delivery factor~~,~~ shall be published once a week for two consecutive weeks in a ~~major~~ local newspaper of general circulation serving the locality where the facility is located informing the public that the owner of the facility intends to apply for coverage under this general permit. At a minimum, the notice shall include:

a. A statement of the ~~owner~~ owner's or operator's intent to register for coverage under this general permit;

b. A brief description of the facility and its location;

c. The amount of ~~waste load~~ wasteload allocation that will be acquired or transferred if applicable;

d. The delivery factor for a new discharge or expansion;

e. If applicable, any proposed nonpoint source to point source trading ratio less than 2:1 proposed under Part II B 1 b (1).

~~e.~~ f. A statement that the purpose of the public participation is to acquaint the public with the technical aspects of the facility and how the standards and the requirements of this chapter will be met, to identify issues of concern, to facilitate communication, and to establish a dialogue between the owner or operator and persons who may be affected by the discharge from the facility;

~~f.~~ g. An announcement of a 30-day comment period and the name, telephone number, and address of the owner's or operator's representative who can be contacted by the interested persons to answer questions;

~~g.~~ h. The name, telephone number, and address of the DEQ representative who can be contacted by the interested persons to answer questions, or where comments shall be sent; and

~~h.~~ i. The location where copies of the documentation to be submitted to the department in support of this general permit notification and any supporting documents can be viewed and copied.

2. The owner or operator shall place a copy of the documentation and support documents in a location accessible to the public in the vicinity of the proposed facility.

3. The public shall be provided 30 days to comment on the technical and the regulatory aspects of the proposal. The

comment period will begin on the date the notice is published in the local newspaper.

J. Compliance with ~~waste load~~ wasteload allocations.

1. Methods of compliance. The owner of the permitted facility shall comply with its ~~waste load~~ wasteload allocation contained in the registration list maintained by the department. The owner of the permitted facility shall be in compliance with its ~~waste load~~ wasteload allocation if:

a. The annual mass load is less than or equal to the applicable ~~waste load~~ wasteload allocation assigned to the facility in this general permit (or permitted design capacity for expanded facilities without allocations);

b. The owner of the permitted facility acquires sufficient point source nitrogen or phosphorus credits in accordance with subdivision 2 of this subsection; provided, however, that the acquisition of nitrogen or phosphorus credits pursuant to this section shall not alter or otherwise affect the individual ~~waste load~~ wasteload allocations for each permitted facility; or

c. In the event ~~it~~ he is unable to meet the individual ~~waste load~~ wasteload allocation pursuant to subdivision 1 a or 1 b of this subsection, the owner of the permitted facility acquires sufficient nitrogen or phosphorus credits through payments made into the ~~Water Quality Improvement~~ Nutrient Offset Fund pursuant to subdivision 3 of this subsection; provided, however, that the acquisition of nitrogen or phosphorus credits pursuant to this section shall not alter or otherwise affect the individual ~~waste load~~ wasteload allocations for each permitted facility.

2. Credit acquisition from owners of permitted facilities. A permittee may acquire point source nitrogen credits or point source phosphorus credits from one or more owners of permitted facilities only if:

a. The credits are generated and applied to a compliance obligation in the same calendar year;

b. The credits are generated by one or more permitted facilities in the same tributary, except that owners of permitted facilities in the Eastern ~~Coastal~~ Shore Basin may also acquire credits from owners of permitted facilities in the Potomac and Rappahannock tributaries. Owners of Eastern ~~Coastal~~ Shore Basin facilities may acquire credits from the owners of Potomac tributary facilities at a trading ratio of 1:1. A trading ratio of 1.3:1 shall apply to the acquisition of credits from the owners of a Rappahannock tributary facility by the owner of an Eastern ~~Coastal~~ Shore Basin facility;

c. The exchange or acquisition of credits does not affect any requirement to comply with local water quality-based limitations as determined by the board;

d. The credits are acquired no later than June 1 immediately following the calendar year in which the credits are applied;

e. The credits are generated by a facility that has been constructed, and has discharged from treatment works whose design flow or equivalent industrial activity is the basis for the facility's ~~waste load~~ wasteload allocations (until a facility is constructed and has commenced operation, such credits are held, and may be sold, by the ~~Water Quality Improvement~~ Nutrient Offset Fund; and

f. No later than June 1 immediately following the calendar year in which the credits are applied, the permittee certifies on a credit exchange notification form supplied by the department that he has acquired sufficient credits to satisfy his compliance obligations. The permittee shall comply with the terms and conditions contained in the credit exchange notification form submitted to the department.

3. Credit acquisitions from the ~~Water Quality Improvement~~ Nutrient Offset Fund. Until such time as the board finds that no allocations are reasonably available in an individual tributary, permittees that cannot meet their total nitrogen or total phosphorus effluent limit may acquire nitrogen or phosphorus credits through payments made into the ~~Virginia Water Quality Improvement~~ Nutrient Offset Fund established in § ~~10.1-2128~~ 10.1-2128.2 of the Code of Virginia only if, no later than June 1 immediately following the calendar year in which the credits are to be applied, the permittee certifies on a form supplied by the department that he has diligently sought, but has been unable to acquire, sufficient credits to satisfy his compliance obligations through the acquisition of point source nitrogen or phosphorus credits with other permitted facilities, and that he has acquired sufficient credits to satisfy his compliance obligations through one or more payments made in accordance with the terms of this general permit. Such certification may include, but not be limited to, providing a record of solicitation or demonstration that point source allocations are not available for sale in the tributary in which the ~~permittee~~ permittee's facility is located. Payments to the ~~Water Quality Improvement~~ Nutrient Offset Fund shall be in the amount of ~~$6.04~~ $4.60 for each pound of nitrogen and ~~$15.08~~ $10.10 for each pound of phosphorus and shall be subject to the following requirements:

a. The credits are generated and applied to a compliance obligation in the same calendar year.

b. The credits are generated in the same tributary, except that owners of permitted facilities in the Eastern ~~Coastal~~ Shore Basin may also acquire credits from the owners of facilities that discharge to the Potomac and Rappahannock tributaries. Owners of Eastern ~~Coastal~~ Shore Basin facilities may acquire credits from the owners of facilities that discharge to a Potomac tributary at a trading ratio of 1:1. A trading ratio of 1.3:1 shall apply to the acquisition of credits from ~~the~~ owners of

facilities that discharge to a Rappahannock tributary by the owners of an Eastern ~~Coastal~~ Shore Basin facility.

c. The acquisition of credits does not affect any requirement to comply with local water quality-based limitations, as determined by the board.

4. This general permit neither requires, nor prohibits a municipality or regional sewerage authority's development and implementation of trading programs among industrial users, which are consistent with the pretreatment regulatory requirements at 40 CFR Part 403 and the municipality's or authority's individual VPDES permit.

PART II

SPECIAL CONDITIONS APPLICABLE TO NEW AND EXPANDED FACILITIES

A. Offsetting mass loads discharged by new and expanded facilities.

1. An owner or operator of a new or expanded facility shall comply with the applicable requirements of this section as a condition of the facility's coverage under this general permit.

a. An owner or operator of a facility authorized by a ~~Virginia Pollutant Discharge Elimination System~~ VPDES permit first issued before July 1, 2005, that expands ~~his~~ the facility to discharge 40,000 gallons or more per day, or an equivalent load, shall demonstrate to the department that he has acquired ~~waste load~~ wasteload allocations sufficient to offset any increase in his delivered total nitrogen and delivered total phosphorus loads resulting from any expansion beyond his permitted capacity as of July 1, 2005.

b. An owner or operator of a facility authorized by a ~~Virginia Pollutant Discharge Elimination System~~ VPDES permit first issued on or after July 1, 2005, to discharge 40,000 gallons or more per day, or an equivalent load, shall demonstrate to the department that he has acquired ~~waste load~~ wasteload allocations sufficient to offset his delivered total nitrogen and delivered total phosphorus loads.

c. An owner or operator of a facility treating domestic sewage authorized by a ~~Virginia Pollutant Discharge Elimination System~~ VPDES permit with a discharge greater than 1,000 gallons per day up to and including 39,999 gallons per day that ~~has~~ did not ~~commenced~~ commence the discharge of pollutants prior to January 1, 2011, shall demonstrate to the department that he has acquired ~~waste load~~ wasteload allocations sufficient to offset his delivered total nitrogen and delivered phosphorus loads prior to commencing the discharge, except when the facility is for short-term temporary use only as determined by the department or when treatment of domestic sewage is not the primary purpose of the facility.

2. Offset calculations shall address the proposed discharge that exceeds:

a. The applicable ~~waste load~~ wasteload allocation assigned to discharges from the facility in this general permit, for expanding significant dischargers with a ~~waste load~~ wasteload allocation listed in 9VAC25-720-50 C, 9VAC25-720-60 C, 9VAC25-720-70 C, 9VAC25-720-110 C, and 9VAC25-720-120 C of the Water Quality Management Planning Regulation;

b. The permitted design capacity, for all other expanding dischargers; and

c. Zero, for facilities with a new discharge.

3. An owner or operator of multiple facilities ~~located in~~ that discharge into the same tributary, and assigned an aggregate mass load limit in accordance with Part I B 2 of this general permit, that undertakes construction of new or expanded facilities, shall be required to acquire ~~waste load~~ wasteload allocations sufficient to offset any increase in delivered total nitrogen and delivered total phosphorus loads resulting from any expansion beyond the aggregate mass load limit assigned these facilities.

B. Acquisition of ~~waste load~~ wasteload allocations. ~~Waste load~~ wasteload allocations required by this section to offset new or increased delivered total nitrogen and delivered total phosphorus loads shall be acquired in accordance with this section.

1. Such allocations may be acquired from one or a combination of the following:

a. Acquisition of all or a portion of the ~~waste load~~ wasteload allocations or point source nitrogen or point source phosphorus credits from the owners of one or more permitted facilities, based on delivered pounds by the respective trading parties as listed by the department;

b. Acquisition of credits certified by the board pursuant to § 62.1-44.19:20 of the Code of Virginia ~~or certified by the Soil and Water Conservation Board pursuant to § 10.1-603.15:2 of the Code of Virginia~~. Credits used to offset new or increased nutrient loads under this subdivision shall be:

(1) Subject to a trading ratio of two pounds reduced for every pound to be discharged if certified as a nonpoint source credit by the ~~Soil and Water Conservation Board~~ board pursuant to § ~~10.1-603.15:2~~ 62.1-44.19:20 of the Code of Virginia~~;~~. On a case-by-case basis the board may approve nonpoint source to source trading ratios of less than 2:1 (but not less than 1:1) when the applicant demonstrates factors that ameliorate the presumed 2:1 uncertainty ratio for credits generation by nonpoint sources such as:

(a) When direct and representative monitoring of the pollutant loadings from a nonpoint source is performed in a manner and at a frequency similar to that performed at VPDES point sources and there is consistency in the

effectiveness of the operation of the nonpoint source best management practice (BMP) approaching that of a conventional point source.

(b) When nonpoint source credits are generated from land conservation that ensures permanent protection through a conservation easement or other instrument attached to the deed and when load reductions can be reliably determined.

(2) Calculated using best management practices efficiency rates and attenuation rates, as established by the latest science and relevant technical information, and approved by the board;

(3) Based on appropriate delivery factors, as established by the latest science and relevant technical information, and approved by the board;

(4) Demonstrated to have achieved reductions beyond those already required by or funded under federal or state law, or by Virginia's Chesapeake Bay TMDL Watershed Implementation Plan;

(5) ~~Included as~~ Generated in accordance with conditions of the facility's individual ~~Virginia Pollutant Discharge Elimination System~~ VPDES permit; and

(6) In the case of ~~allocations~~ credits generated by land use conversions and urban source reduction controls (BMPs), the credits shall represent nutrient reductions beyond those in place as of July 1, 2005;

c. Until such time as the board finds that no allocations are reasonably available in an individual tributary, acquisition of allocations through payments made into the ~~Virginia Water Quality Improvement~~ Nutrient Offset Fund established in § ~~10.1-2128~~ 10.1-2128.2 of the Code of Virginia; or

d. Acquisition of allocations through such other means as may be approved by the department on a case-by-case basis. This includes allocations granted by the board to an owner or operator of a facility that is authorized by a VPA permit to land apply domestic sewage if:

(1) The VPA permit was issued before July 1, 2005;

(2) The allocation does not exceed the facility's permitted design capacity as of July 1, 2005;

(3) The waste treated by the facility that is covered under the VPA permit will be treated and discharged pursuant to a VPDES permit for a new discharge; and

(4) The owner or operator installs state-of-the-art nutrient removal technology at such a facility.

2. Acquisition of allocations or point source nitrogen or point source phosphorus credits is subject to the following conditions:

a. The allocations or credits shall be generated and applied to an offset obligation in the same calendar year in which the credit is generated;

b. The allocations or credits shall be generated in the same tributary;

c. Such acquisition does not affect any requirement to comply with local water quality-based limitations, as determined by the board;

d. The allocations are authenticated (i.e., verified to have been generated) by the permittee as required by the facility's individual ~~Virginia Pollutant Discharge Elimination~~ VPDES permit, utilizing procedures approved by the board, no later than February 1 immediately following the calendar year in which the allocations are applied; and

e. If obtained from the owner of a permitted point source, the allocations shall be generated by a facility that has been constructed, and has discharged from treatment works whose design flow or equivalent industrial activity is the basis for the facility's ~~waste load~~ wasteload allocations.

f. Such allocations or credits shall be ~~provided~~ secured for a period of five years with each registration under the general permit.

3. Priority of options. The board shall give priority to allocations or credits acquired in accordance with subdivisions 1 a, b, and d of this subsection. The board shall approve allocations acquired in accordance with subdivision 1 c of this subsection only after the owner or operator has demonstrated that he has made a good faith effort to acquire sufficient allocations in accordance with subdivisions 1 a and 1 b of this subsection, and that such allocations are not reasonably available taking into account timing, cost and other relevant factors. Such demonstration may include, but not be limited to, providing a record of solicitation, or other demonstration that point source allocations or nonpoint source allocations are not available for sale in the tributary in which the ~~permittee~~ permittee's facility discharge is located.

4. Annual allocation acquisitions from the ~~Water Quality Improvement~~ Nutrient Offset Fund. The cost for each pound of nitrogen and each pound of phosphorus shall be determined at the time payment is made to the ~~WQIF~~ Nutrient Offset Fund, based on the higher of (i) the estimated cost of achieving a reduction of one pound of nitrogen or phosphorus at the facility that is securing the allocation, or comparable facility, for each pound of allocation acquired; or (ii) the average cost, as determined by the ~~Department of Conservation and Recreation~~ department on an annual basis, of reducing two pounds of nitrogen or phosphorus from nonpoint sources in the same tributary for each pound of allocation acquired.

PART III

CONDITIONS APPLICABLE TO ALL VPDES PERMITS

~~A. Duty to comply. The permittee must comply with all conditions of the permit. Any permit noncompliance~~

constitutes a violation of the law and the Clean Water Act, except that noncompliance with certain provisions of the permit may constitute a violation of the law but not the Clean Water Act. Permit noncompliance is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

B. Duty to register for reissued general permit. If the permittee wishes to continue an activity regulated by the general permit after its expiration date, the permittee must register for coverage under the new general permit, when it is reissued by the department.

C. Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

D. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of the permit that has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used by the permittee to achieve compliance with the conditions of the permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems that are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

F. Permit actions. Permits may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

G. Property rights. Permits do not convey any property rights of any sort, or any exclusive privilege.

H. Duty to provide information. The permittee shall furnish to the department, within a reasonable time, any information that the board may request to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. The board may require the permittee to furnish, upon request, such plans, specifications, and other pertinent information as may be necessary to determine the effect of the wastes from his discharge on the quality of state waters, or such other information as may be necessary to accomplish the purposes of the law. The permittee shall also furnish to the department upon request, copies of records required to be kept by the permit, pertaining to activities related to the permitted facility.

I. Inspection and entry. The permittee shall allow the director, or an authorized representative (including an authorized contractor acting as a representative of the administrator), upon presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of the permit;

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under the permit; and

4. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act and the law, any substances or parameters at any location.

J. Monitoring and records.

1. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

2. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit, for a period of at least three years from the date of the sample, measurement, report or application. This period of retention shall be extended automatically during the course of any unresolved litigation regarding the regulated activity or regarding control standards applicable to the permittee, or as requested by the board.

3. Records of monitoring information shall include:

a. The date, exact place, and time of sampling or measurements;

b. The individual(s) who performed the sampling or measurements;

c. The date(s) analyses were performed;

d. The individual(s) who performed the analyses;

e. The analytical techniques or methods used; and

f. The results of such analyses.

4. Monitoring results must be conducted according to test procedures approved under 40 CFR Part 136 or alternative EPA approved methods, unless other test procedures have been specified in the permit.

K. Signatory requirements. All applications, reports, or information submitted to the department shall be signed and certified as required by 9VAC25-31-110.

L. Reporting requirements.

1. The permittee shall give notice to the department as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

a. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in 9VAC25-31-180 A; or

b. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are subject neither to effluent limitations in the permit, nor to notification requirements under 9VAC25-31-200 A 1.

2. The permittee shall give advance notice to the department of any planned changes in the permitted facility or activity that may result in noncompliance with permit requirements.

3. Permits are not transferable to any person except after notice to the department. The board may require modification or revocation and reissuance of permits to change the name of the permittee and incorporate such other requirements as may be necessary under the law or the Clean Water Act.

4. Monitoring results shall be reported at the intervals specified in the permit.

a. Monitoring results must be reported on a Discharge Monitoring Report (DMR).

b. If the permittee monitors any pollutant specifically addressed by the permit more frequently than required by the permit using test procedures approved under 40 CFR Part 136, or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR specified by the department.

c. Calculations for all limitations that require averaging of measurements shall utilize an arithmetic mean unless otherwise specified in the permit.

5. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of the permit shall be submitted no later than 14 days following each schedule date.

6. If any unusual or extraordinary discharge including a bypass or upset should occur from a facility and such discharge enters or could be expected to enter state waters, the owner shall promptly notify, in no case later than 24 hours, the department by telephone after the discovery of such discharge. This notification shall provide all available details of the incident, including any adverse affects on aquatic life and the known number of fish killed. The permittee shall reduce the report to writing and shall submit it to the department within five days of discovery of the discharge in accordance with subdivision 7 a of this subsection. Unusual and extraordinary discharges include but are not limited to any discharge resulting from:

a. Unusual spillage of materials resulting directly or indirectly from processing operations;

b. Breakdown of processing or accessory equipment;

c. Failure or taking out of service of the treatment work or auxiliary facilities (such as sewer lines or wastewater pump stations); and

d. Flooding or other acts of nature.

7. Twenty-four-hour reporting.

a. The permittee shall report any noncompliance that may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

b. The following shall be included as information that must be reported within 24 hours under this subdivision.

(1) Any unanticipated bypass that exceeds any effluent limitation in the permit.

(2) Any upset that exceeds any effluent limitation in the permit.

(3) Violation of a maximum daily discharge limitation for any of the pollutants listed in the permit to be reported within 24 hours.

c. The board may waive the written report on a case-by-case basis for reports under this subdivision if the oral report has been received within 24 hours.

8. The permittee shall report all instances of noncompliance not reported under subdivisions 4, 5, 6, and 7 of this subsection, in writing at the time the next monitoring reports are submitted. The reports shall contain the information listed in subdivision 7 of this subsection.

9. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the department, it shall promptly submit such facts or information.

M. Bypass.

1. The permittee may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of subdivisions 2 and 3 of this subsection.

~~2. Notice.~~

~~a. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least 10 days before the date of the bypass.~~

~~b. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in subdivision L 7 of this section (24 hour notice).~~

~~3. Prohibition of bypass.~~

~~a. Bypass is prohibited, and the board may take enforcement action against a permittee for bypass, unless:~~

~~(1) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;~~

~~(2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and~~

~~(3) The permittee submitted notices as required under subdivision 2 of this subsection.~~

~~b. The board may approve an anticipated bypass, after considering its adverse effects, if the board determines that it will meet the three conditions listed above in subdivision 3 a of this subsection.~~

~~N. Upset.~~

~~1. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of subdivision 2 of this subsection are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.~~

~~2. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~a. An upset occurred and that the permittee can identify the cause(s) of the upset;~~

~~b. The permitted facility was at the time being properly operated;~~

~~c. The permittee submitted notice of the upset as required in subdivision L 7 b (2) of this section (24 hour notice); and~~

~~d. The permittee complied with any remedial measures required under subsection D of this section.~~

~~3. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.~~

A. Monitoring.

1. Samples and measurements taken as required by this permit shall be representative of the monitored activity.

2. Monitoring shall be conducted according to procedures approved under 40 CFR Part 136 or alternative methods approved by the U.S. Environmental Protection Agency, unless other procedures have been specified in this permit.

3. The permittee shall periodically calibrate and perform maintenance procedures on all monitoring and analytical instrumentation at intervals that will ensure accuracy of measurements.

4. Samples taken as required by this permit shall be analyzed in accordance with 1VAC30-45 (Certification for Noncommercial Environmental Laboratories) or 1VAC30-46 (Accreditation for Commercial Environmental Laboratories).

B. Records.

1. Records of monitoring information shall include:

a. The date, exact place, and time of sampling or measurements;

b. The individuals who performed the sampling or measurements;

c. The dates and times analyses were performed;

d. The individuals who performed the analyses;

e. The analytical techniques or methods used; and

f. The results of such analyses.

2. Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years, the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the registration statement for this permit, for a period of at least three years from the date of the sample, measurement, report, or request for coverage. This period of retention shall be extended automatically during the course of any unresolved litigation regarding the regulated activity or regarding control standards applicable to the permittee or as requested by the board.

C. Reporting monitoring results. Monitoring results under this permit are not required to be submitted to the department. However, should the board request that the permittee submit monitoring results, the following subdivisions apply:

1. The permittee shall submit the results of the monitoring required by this permit not later than the 10th day of the month after monitoring takes place, unless another

reporting schedule is specified elsewhere in this permit. Monitoring results shall be submitted to the department's regional office.

2. Monitoring results shall be reported on a Discharge Monitoring Report (DMR) or on forms provided, approved, or specified by the department.

3. If the permittee monitors any pollutant specifically addressed by this permit more frequently than required by this permit using test procedures approved under 40 CFR Part 136 or using other test procedures approved by the U.S. Environmental Protection Agency or using procedures specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted on the DMR or reporting form specified by the department.

4. Calculations for all limitations that require averaging of measurements shall utilize an arithmetic mean unless otherwise specified in this permit.

D. Duty to provide information. The permittee shall furnish to the department, within a reasonable time, any information that the board may request to determine whether cause exists for modifying, revoking and reissuing, or terminating coverage under this permit or to determine compliance with this permit. The board may require the permittee to furnish, upon request, such plans, specifications, and other pertinent information as may be necessary to determine the effect of the wastes from the discharge on the quality of state waters or such other information as may be necessary to accomplish the purposes of the State Water Control Law. The permittee shall also furnish to the department, upon request, copies of records required to be kept by this permit.

E. Compliance schedule reports. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

F. Unauthorized discharges. Except in compliance with this permit or another permit issued by the board, it shall be unlawful for any person to:

1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; or

2. Otherwise alter the physical, chemical, or biological properties of such state waters and make them detrimental to the public health, to animal or aquatic life, or to the use of such waters for domestic or industrial consumption, for recreation, or for other uses.

G. Reports of unauthorized discharges. Any permittee that discharges or causes or allows a discharge of sewage, industrial waste, other wastes, or any noxious or deleterious substance into or upon state waters in violation of Part III F, or that discharges or causes or allows a discharge that may reasonably be expected to enter state waters in violation of Part III F, shall notify the department of the discharge immediately upon discovery of the discharge, but in no case later than 24 hours after said discovery. A written report of the unauthorized discharge shall be submitted to the department within five days of discovery of the discharge. The written report shall contain:

1. A description of the nature and location of the discharge;

2. The cause of the discharge;

3. The date on which the discharge occurred;

4. The length of time that the discharge continued;

5. The volume of the discharge;

6. If the discharge is continuing, how long it is expected to continue;

7. If the discharge is continuing, what the expected total volume of the discharge will be; and

8. Any steps planned or taken to reduce, eliminate, and prevent a recurrence of the present discharge or any future discharge not authorized by this permit.

Discharges reportable to the department under the immediate reporting requirements of other regulations are exempted from this requirement.

H. Reports of unusual or extraordinary discharges. If any unusual or extraordinary discharge including a bypass or upset should occur from a treatment works and the discharge enters or could be expected to enter state waters, the permittee shall promptly notify, in no case later than 24 hours, the department by telephone after the discovery of the discharge. This notification shall provide all available details of the incident, including any adverse effects on aquatic life and the known number of fish killed. The permittee shall reduce the report to writing and shall submit it to the department within five days of discovery of the discharge in accordance with Part III I 2. Unusual and extraordinary discharges include, but are not limited to, any discharge resulting from:

1. Unusual spillage of materials resulting directly or indirectly from processing operations;

2. Breakdown of processing or accessory equipment;

3. Failure or taking out of service some or all of the treatment works; and

4. Flooding or other acts of nature.

I. Reports of noncompliance. The permittee shall report any noncompliance that may adversely affect state waters or may endanger public health.

1. An oral report shall be provided within 24 hours from the time the permittee becomes aware of the circumstances. The following shall be included as information that shall be reported within 24 hours under this paragraph:

a. Any unanticipated bypass; and

b. Any upset that causes a discharge to surface waters.

2. A written report shall be submitted within five days and shall contain:

a. A description of the noncompliance and its cause;

b. The period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and

c. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

The board may waive the written report on a case-by-case basis for reports of noncompliance under Part III I if the oral report has been received within 24 hours and no adverse impact on state waters has been reported.

3. The permittee shall report all instances of noncompliance not reported under Part III I 1 or 2, in writing, at the time the next monitoring reports are submitted. The reports shall contain the information listed in Part III I 2.

NOTE: The immediate (within 24 hours) reports required in Part III G, H, and I may be made to the department's regional office. Reports may be made by telephone, FAX, or online at http://www.deq.virginia.gov/Programs/PollutionResponsePreparedness/MakingaReport.aspx. For reports outside normal working hours, a message may be left and this shall fulfill the immediate reporting requirement. For emergencies, the Virginia Department of Emergency Management maintains a 24-hour telephone service at 1-800-468-8892.

J. Notice of planned changes.

1. The permittee shall give notice to the department as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

a. The permittee plans alteration or addition to any building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced:

(1) After promulgation of standards of performance under § 306 of the Clean Water Act (33 USC § 1251 et seq.) that are applicable to such source; or

(2) After proposal of standards of performance in accordance with § 306 of the Clean Water Act that are applicable to such source, but only if the standards are promulgated in accordance with § 306 within 120 days of their proposal;

b. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are subject neither to effluent limitations nor to notification requirements specified elsewhere in this permit; or

c. The alteration or addition results in a significant change in the permittee's sludge use or of disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or of disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan.

2. The permittee shall give advance notice to the department of any planned changes in the permitted facility or activity that may result in noncompliance with permit requirements.

K. Signatory requirements.

1. Registration statement. All registration statements shall be signed as follows:

a. For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means (i) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy-making or decision-making functions for the corporation or (ii) the manager of one or more manufacturing, production, or operating facilities, provided the manager is authorized to make management decisions that govern the operation of the regulated facility including having the explicit or implicit duty of making major capital investment recommendations and initiating and directing other comprehensive measures to assure long term environmental compliance with environmental laws and regulations; the manager can ensure that the necessary systems are established or other actions taken to gather complete and accurate information for permit registration requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures;

b. For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or

c. For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official. For purposes of this section, a principal executive officer of a public agency includes (i) the chief executive officer of the agency or (ii) a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency.

2. Reports, etc. All reports required by permits and other information requested by the board shall be signed by a person described in Part III K 1 or by a duly authorized representative of that person. A person is a duly authorized representative only if:

a. The authorization is made in writing by a person described in Part III K 1;

b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, operator of a well or a well field,

superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either a named individual or any individual occupying a named position; and

c. The written authorization is submitted to the department.

3. Changes to authorization. If an authorization under Part III K 2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part III K 2 shall be submitted to the department prior to or together with any reports, or information to be signed by an authorized representative.

4. Certification. Any person signing a document under Part III K 1 or 2 shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

L. Duty to comply. The permittee shall comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the State Water Control Law and the Clean Water Act, except that noncompliance with certain provisions of this permit may constitute a violation of the State Water Control Law but not the Clean Water Act. Permit noncompliance is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit coverage renewal application.

The permittee shall comply with effluent standards or prohibitions established under § 307(a) of the Clean Water Act for toxic pollutants and with standards for sewage sludge use or disposal established under § 405(d) of the Clean Water Act within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if this permit has not yet been modified to incorporate the requirement.

M. Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee shall submit a new registration statement at least 60 days before the expiration date of the existing permit, unless permission for a later date has been granted by the board. The board shall not grant permission for registration statements to be submitted later than the expiration date of the existing permit.

N. Effect of a permit. This permit does not convey any property rights in either real or personal property or any exclusive privileges, nor does it authorize any injury to private property or invasion of personal rights or any infringement of federal, state, or local law or regulations.

O. State law. Nothing in this permit shall be construed to preclude the institution of any legal action under, or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to, any other state law or regulation or under authority preserved by § 510 of the Clean Water Act. Except as provided in permit conditions on "bypassing" (Part III U) and "upset" (Part III V), nothing in this permit shall be construed to relieve the permittee from civil and criminal penalties for noncompliance.

P. Oil and hazardous substance liability. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from responsibilities, liabilities, or penalties to which the permittee is or may be subject under §§ 62.1-44.34:14 through 62.1-44.34:23 of the State Water Control Law.

Q. Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also include effective plant performance, adequate funding, adequate staffing, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems that are installed by the permittee only when the operation is necessary to achieve compliance with the conditions of this permit.

R. Disposal of solids or sludges. Solids, sludges, or other pollutants removed in the course of treatment or management of pollutants shall be disposed of in a manner so as to prevent any pollutant from such materials from entering state waters.

S. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.

T. Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

U. Bypass.

1. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. The permittee may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to ensure efficient operation.

These bypasses are not subject to the provisions of Part III U 2 and 3.

2. Notice.

a. Anticipated bypass. If the permittee knows in advance of the need for a bypass, prior notice shall be submitted, if possible, at least 10 days before the date of the bypass.

b. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in Part III I.

3. Prohibition of bypass.

a. Bypass is prohibited, and the board may take enforcement action against a permittee for bypass, unless:

(1) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and

(3) The permittee submitted notices as required under Part III U 2.

b. The board may approve an anticipated bypass after considering its adverse effects if the board determines that it will meet the three conditions listed in Part III U 3 a.

V. Upset.

1. An upset, defined in 9VAC25-31-10, constitutes an affirmative defense to an action brought for noncompliance with technology-based permit effluent limitations if the requirements of Part III V 2 are met. A determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is not a final administrative action subject to judicial review.

2. A permittee who wishes to establish the affirmative defense of upset shall demonstrate through properly signed, contemporaneous operating logs, or other relevant evidence that:

a. An upset occurred and that the permittee can identify the cause or causes of the upset;

b. The permitted facility was at the time being properly operated;

c. The permittee submitted notice of the upset as required in Part III I; and

d. The permittee complied with remedial measures required under Part III S.

3. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

W. Inspection and entry. The permittee shall allow the director, or an authorized representative, upon presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act and the State Water Control Law, substances or parameters at any location.

For purposes of this section, the time for inspection shall be deemed reasonable during regular business hours and whenever the facility is discharging. Nothing contained herein shall make an inspection unreasonable during an emergency.

X. Permit actions. Permits may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, termination, or notification of planned changes or anticipated noncompliance does not stay any permit condition.

Y. Transfer of permits. Permits are not transferable to any person except after notice to the department. Coverage under this permit may be automatically transferred to a new permittee if:

1. The current permittee notifies the department within 30 days of the transfer of the title to the facility or property, unless permission for a later date has been granted by the board;

2. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

3. The board does not notify the existing permittee and the proposed new permittee of its intent to deny the new permittee coverage under the permit. If this notice is not received, the transfer is effective on the date specified in the agreement described in Part III Y 2.

Z. Severability. The provisions of this permit are severable, and if any provision of this permit or the application of any provision of this permit to any circumstance is held invalid,

the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

9VAC25-820-80. Facilities subject to reduced individual total nitrogen and total phosphorus ~~waste load~~ wasteload allocations.

The facilities identified in this section are subject to reduced individual total nitrogen and total phosphorus ~~waste load~~ wasteload allocations as indicated.

~~Facility~~	~~Registration No.~~	~~Basin~~	~~Reduced Waste Load Allocation~~
~~Caroline Co. Regional STP~~	~~VAN030045~~	~~York~~	~~609 lbs/yr TP~~
~~Gordonsville STP~~	~~VAN030046~~	~~York~~	~~1,145 lbs/yr TP~~
~~Hanover County Aggregate[1]~~	~~VAN030051~~	~~York~~	~~11,390 lbs/yr TP (delivered)~~
~~White Birch Paper - Bear Island LLC Division~~	~~VAN030133~~	~~York~~	~~10,233 lbs/yr TP~~
~~Western Refinery - Yorktown~~	~~VAN030047~~	~~York~~	~~17,689 lbs/yr TP~~
~~HRSD York River Aggregate[2]~~	~~VAN030052~~	~~York~~	~~19,315 lbs/yr TP (delivered)~~
~~Parham Landing WWTP~~	~~VAN030048~~	~~York~~	~~2,436 lbs/yr TP~~
~~RockTenn CP LLC - West Point~~	~~VAN030049~~	~~York~~	~~56,038 lbs/yr TP~~
~~HRSD James River Aggregate[3]~~	~~VAN040090~~	~~James~~	~~4,400,000 lbs/yr TN (delivered)~~

~~[1]Hanover County Aggregate includes Ashland STP (VA0024899), Doswell WWTP (VA0029521), and Totopotomoy WWTP (VA0089915)~~

~~[2]HRSD York River Aggregate includes York River STP (VA0081311), West Point STP (VA0075434), and King William STP (VA0028819).~~

Facility	VPDES No.	Phase 1 Total Nitrogen (lbs/yr)	Phase 2 Total Nitrogen (lbs/yr)	Phase 2 Total Phosphorus (lbs/yr)
Buena Vista STP	VA0020991	N/A	N/A	2,778
Covington STP	VA0025542	N/A	N/A	3,705
GP Big Island LLC	VA0003026	N/A	N/A	40,273
Mohawk Industries, Inc.	VA0004677	N/A	N/A	9,880
Lexington - Rockbridge Regional WQCF	VA0088161	N/A	N/A	3,705
Alleghany County - Low Moor STP	VA0027979	N/A	N/A	617
Lower Jackson River STP	VA0090671	N/A	N/A	1,852
Clifton Forge STP	VA0022772	N/A	N/A	2,470
MeadWestvaco	VA0003646	N/A	N/A	96,771
Amherst - Rutledge Creek WWTP	VA0031321	N/A	N/A	741
BWX Technologies Inc.	VA0003697	N/A	N/A	1,235
Greif Inc.	VA0006408	N/A	N/A	24,082
Lake Monticello STP	VA0024945	N/A	N/A	1,229
Lynchburg STP (DWF only)	VA0024970	N/A	N/A	27,169

RWSA - Moores Creek Regional STP	VA0025518	N/A	N/A	18,525
Powhatan CC STP	VA0020699	N/A	N/A	581
Crewe WWTP	VA0020303	N/A	N/A	617
Farmville WWTP	VA0083135	N/A	N/A	2,964
Richmond WWTP (DWF only)	VA0063177	N/A	N/A	55,574
E. I. DuPont - Spruance	VA0004669	N/A	N/A	6,339
Chesterfield County - Falling Creek WWTP	VA0024996	N/A	N/A	12,473
Chesterfield County - Proctors Creek WWTP	VA0060194	N/A	N/A	33,344
Dominion - Chesterfield (Net)	VA0004146	N/A	N/A	170
Henrico County WWTP	VA0063690	N/A	N/A	92,623
The Sustainability Park LLC	VA0002780	N/A	N/A	1,556
Philip Morris USA - Park 500	VA0026557	N/A	N/A	2,149
Honeywell - Hopewell	VA0005291	N/A	N/A	41,841
Hopewell Regional WTF	VA0066630	N/A	N/A	61,749
South Central WW Authority WWTF	VA0025437	N/A	N/A	28,404
Tyson Foods - Glen Allen	VA0004031	N/A	N/A	409
Chickahominy WWTP	VA0088480	N/A	N/A	123
HRSD - Boat Harbor STP	VA0081256	N/A	N/A	43,177
HRSD - James River STP	VA0081272	N/A	N/A	34,541
HRSD - Williamsburg STP	VA0081302	N/A	N/A	38,859
HRSD - Nansemond STP	VA0081299	N/A	N/A	51,812
HRSD - Army Base STP	VA0081230	N/A	N/A	31,087
HRSD - Virginia Initiative Plant WWTP	VA0081281	N/A	N/A	69,083
HRSD - Chesapeake - Elizabeth STP	VA0081264	N/A	N/A	41,450
HRSD Aggregate Nutrient Discharge*	N/A	4,400,000	3,400,000	310,010
JH Miles and Company	VA0003263	N/A	N/A	17,437

~~3~~* HRSD James River Aggregate includes Boat Harbor STP (VA0081256), James River STP (VA0081272), Williamsburg STP (VA0081302), Nansemond STP (VA0081299), Army Base STP (VA0081230), Virginia Initiative STP (VA0081281), and Chesapeake - Elizabeth STP (VA0081264).

VA.R. Doc. No. R15-4273; Filed November 17, 2015, 1:11 p.m.

TITLE 12. HEALTH

STATE BOARD OF HEALTH

Final Regulation

Title of Regulation: **12VAC5-20. Regulations for the Conduct of Human Research (amending 12VAC5-20-10, 12VAC5-20-30 through 12VAC5-20-130).**

Statutory Authority: §§ 32.1-12 and 32.1-12.1 of the Code of Virginia.

Effective Date: January 14, 2016.

Agency Contact: Dev Nair, Director, Division of Policy and Evaluation, Office of Family Health, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7662, or email dev.nair@vdh.virginia.gov.

Summary:

The amendments (i) revise the definitions of "human research," "informed consent," and "legally authorized representative" to be consistent with § 32.1-162.16 of the Code of Virginia and 45 CFR Part 46; (ii) provide additional clarity on committee review procedures; (iii) require that the research review committee ensure compliance with the Health Insurance Portability and Accountability Act and federal and state regulations regarding disclosure of personal health information and change committee membership from seven to five; (iv) clarify the informed consent requirements; and (v) revise the required reporting dates for the research review committee to report yearly activities and for the commissioner to report the listing of institutions that are subject to federal regulations regarding human subject research and are exempt from 12VAC5-20.

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

12VAC5-20-10. Definitions.

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

"Affiliated with the institution" means employed by or contracting with the institution or directly or indirectly involved in the management thereof.

"Commissioner" means the Commissioner of the Department of Health.

"Committee" means human research committee assembled pursuant to 12VAC5-20-70 of this chapter by any institution defined herein.

"Department" means the Department of Health.

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

"Informed consent" means the knowing and voluntary agreement, without undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion, of a person who is capable of exercising free power of choice. ~~For the purposes of human research, the basic elements of information necessary to such consent shall include:~~

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

~~2. A disclosure of any appropriate alternative procedures or therapies that might be advantageous for the individual;~~

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

~~4. An explanation of any costs or compensation which may accrue to the person and, if applicable, the availability of third-party reimbursement for the proposed procedures or protocols; and~~

~~5. An offer to answer any inquiries by any individual concerning the procedures and protocols.~~

~~In addition to the required elements, the information provided to the individual should also include the following:~~

~~1. A statement that the study involves research, and an explanation that includes identification of any procedures which are experimental; the expected duration of the individual's participation; and a statement describing the extent, if any, to which confidentiality of records identifying the participant will be maintained; and if any data from this study are published, the individual will not be identified without his written permission;~~

~~2. A statement that there may be other risks not yet identified;~~

~~3. A disclosure of any appropriate alternative procedures or therapies that might be advantageous for the individual;~~

~~4. A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the individual is otherwise entitled, and the individual may discontinue participation at any time without penalty or loss of benefits to which he is otherwise entitled;~~

~~5. An explanation of whom to contact for answers to pertinent questions about the research and research participants' rights, and whom to contact in the event of a research-related injury; and~~

~~6. For research involving more than minimal risk, an explanation as to whether any compensation or medical care is available if injury occurs and, if so, what is included or where further information may be obtained.~~

~~Information should be provided in a manner that is understandable to the individual with regard to his educational level and language of greatest fluency.~~

"Institution" or "agency" means any facility, program, or organization owned or operated by the Commonwealth, by any political subdivision, or by any person, firm, corporation, association, or other legal entity.

"Legally authorized representative" means, in the following specified order of priority, (i) the parent or parents having custody of a prospective ~~participant~~ subject of human research who is a minor; (ii) the agent appointed under an advance directive as defined in § 54.1-2982 of the Code of Virginia, executed by the person who is the prospective subject of human research, provided the advance directive authorizes the agent to make decisions regarding the person's participation in human research; (iii) the legal guardian of a prospective ~~participant~~ subject of human research; (iv) the spouse of a prospective subject of human research, except where a suit for divorce has been filed and the divorce decree is not yet final; (v) an adult child of a prospective subject of human research; (vi) a parent of a prospective subject of human research when the individual is an adult; (vii) an adult brother or sister of a prospective subject of human research; or (viii) any person or judicial or other body authorized by law or regulation to consent on behalf of a prospective ~~participant~~ subject of human research to such person's participation in the particular human research. For the purposes of this chapter, any person authorized by law or regulation to consent on behalf of a prospective ~~participant~~ subject to ~~his~~ such subject's participation in the particular human research shall include an attorney-in-fact appointed under a durable power of attorney, to the extent the power grants the authority to make such a decision. The attorney-in-fact shall not be employed by the person, institution or agency conducting the human research. No official or employee of the institution or agency conducting or authorizing the research shall be qualified to act as a legally authorized representative.

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

["Minor increase over minimal risk" means there is only slightly more than minimal risk; potential harms are transient and reversible with respect to any harm; and there is an extremely small probability that the subject will experience severe pain, discomfort, stress, or harm.]

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

"Protected health information" or "PHI" means individually identifiable health information that is created or received by or on behalf of the institution or agency that is maintained or transmitted in any medium, including electronic media. PHI excludes individually identifiable health information in:

1. Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 USC § 1232g;

2. Records described at 20 USC § 1232g(a)(4)(B)(iv) (educational records not otherwise covered under the Family Educational Rights and Privacy Act in subdivision 1 of this definition); or

3. Employment records held by a covered entity in its role as an employer.

"Subject" or "human subject" means a living person about whom an investigator (whether professional or student) conducting research obtains (i) data through intervention or interaction with the person or (ii) identifiable private information.

12VAC5-20-30. Applicability.

This chapter shall apply to the department, including any local health department and to any facility operated, funded or licensed by the department ~~which~~ that conducts or ~~which~~ proposes to conduct or authorize research ~~which uses~~ using human ~~participants~~ subjects.

12VAC5-20-40. Policy.

A. No human research ~~may~~ shall be conducted without informing the ~~participant~~ subject or his legally authorized representative of the procedures, risks, and discomforts of the research. The consent of the ~~participant~~ subject or his legally authorized representative to participate in the research shall be subscribed to in writing by the ~~participant~~ subject or his legally authorized representative and supported by the signature of a witness not involved in the conduct of the research, except as provided for in 12VAC5-20-100 ~~F and H of this chapter~~. Special arrangements shall be made for those who need assistance in understanding the consequences of participating in the research.

B. Each human research activity shall be reviewed and approved by a committee as set forth in 12VAC5-20-70 ~~of this chapter~~ composed of representatives of varied backgrounds who shall assure the competent, complete, and professional review of human research activities.

C. Every person engaged in the conduct of human research or proposing to conduct human research shall associate himself with an institution or agency having a research review committee, and the human research which he conducts or

proposes to conduct shall be subject to review and approval by such committee in the manner set forth in ~~these regulations~~ this chapter.

D. Nontherapeutic research using patients or residents within an institution as defined herein is forbidden unless it is determined by the research review committee that such nontherapeutic research ~~will~~ shall not present greater than minimal risk.

E. The ~~individual~~ person, institution, or agency conducting the human research shall ~~be required to~~ notify all ~~participants~~ subjects of human research of the risks caused by the research ~~which~~ that are discovered after the research has concluded. If consent has been obtained by the signature of the legally authorized representative, the legally authorized representative shall also be notified.

F. No official or employee of the institution or agency conducting or authorizing the human research shall be qualified to act as a legally authorized representative for a subject of the particular human research.

12VAC5-20-50. Review process for department.

A. Prior to the initiation of a human research project by any component of the department, a description of the proposed human research project shall be submitted to a research review committee established by the department for review and approval. The description shall include a statement of the purpose of the proposed project and justification thereof, the criteria for inclusion ~~of a participant~~ as a subject in the research project, a description of what will be done to the ~~participants~~ subjects, and a copy of the informed consent statement.

B. The committee shall report by ~~January~~ March 31 of each year to the commissioner on activities of the committee during the previous calendar year. Such reports shall include:

1. A description of each human research project reviewed and whether it was approved or disapproved;

2. Any significant deviations from proposals as approved;

3. A list of committee members, their qualifications for service on the committee, and their institutional affiliation; and

4. A copy of the minutes of any committee meetings conducted.

C. The ~~chairman~~ chair of the committee shall report as soon as possible to the commissioner any violation of the research protocol ~~which~~ that led the committee to either suspend or terminate the research.

D. The commissioner may inspect the records of the committee.

E. The commissioner shall report at least annually to the Governor and General Assembly on the human research projects conducted by any component of the department as annually reported to the commissioner by the committee.

12VAC5-20-60. Review process for institutions or agencies funded or licensed by the department.

A. Prior to the initiation of a human research project by any institution or agency funded or licensed by the department, a description of the proposed human research project shall be submitted to a research review committee for review and approval. The description shall include a statement of the purpose of the proposed project and justification thereof, the criteria for inclusion of a ~~participant~~ subject in the research project, a description of what will be done to the ~~participants~~ subjects, and a copy of the informed consent statement.

B. When more than one such institution or agency is involved in a research project, the cooperating entities may enter into joint review.

C. Such institutions or agencies having a committee shall report by ~~January~~ March 31 of each year to the commissioner on activities of the committee during the previous calendar year. Such reports shall include:

1. A description of each human research project reviewed and whether it was approved or disapproved;

2. Any significant deviations from proposals as approved;

3. A list of committee members, their qualifications for service on the committee, and their institutional affiliation; and

4. A copy of the minutes of any committee meetings conducted.

D. The ~~chairman~~ chair of the committee shall report as soon as possible to the head of such institution or agency and to the commissioner any violation of the research protocol which led the committee to ~~either~~ suspend or terminate the research.

E. The commissioner may inspect the records of the committee.

F. The commissioner shall report at least annually to the Governor and General Assembly on the human research projects conducted by such institutions or agencies as annually reported to the commissioner by the relevant research review committees.

12VAC5-20-70. Composition of research review committee.

A. Each committee shall have at least ~~seven~~ five members, appointed by the head of the institution, with varying backgrounds to provide complete and adequate review of activities commonly conducted by the institution. The committee shall be sufficiently qualified through the maturity, experience, and diversity of its members, including consideration of race, gender and cultural background, to promote respect for its advice and counsel in safeguarding the rights and welfare of ~~participants~~ subjects in human research. In addition to possessing the professional competence necessary to review specific activities, the committee shall be able to ascertain the acceptability of applications and proposals in terms of institutional commitments and

regulations, applicable law, standards of professional conduct and practice, and community attitudes. If a committee regularly reviews research that has an impact on patients or residents within an institution as defined herein or other vulnerable category of ~~participants~~ subjects, [~~the committee shall have in its membership one or more individuals who are primarily concerned with the welfare of these participants~~] ~~subjects~~ [~~and who have appropriate experience to serve in that capacity~~ such as children, prisoners, pregnant women, or handicapped or mentally disabled persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these subjects].

B. No committee shall consist entirely of members of one profession, and at least one member ~~must~~ shall be an individual whose primary concerns are in nonscientific areas (e.g., lawyers, ethicists, members of the clergy).

C. Each committee shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

D. No member of a committee shall participate in the committee's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the committee. The committee has responsibility for determining whether a member has a conflicting interest. The committee size shall be maintained at no fewer than ~~seven~~ five persons by appointment of a substitute representative for each member with a conflicting interest.

E. A committee may, at its discretion, invite individuals with competence in special areas to assist in the review of complex issues which require expertise beyond or in addition to that available on the committee. These individuals ~~may~~ shall not vote with the committee.

F. A quorum of the committee shall consist of a majority of its members including at least one member whose primary concerns are in nonscientific areas.

G. The committee and the institution shall establish procedures and rules of operation necessary to fulfill the requirements of this chapter.

12VAC5-20-80. Elements of committee review process.

A. No human research shall be conducted or authorized by a person, institution, or agency unless a research review committee has reviewed and approved the proposed human research project giving consideration to:

1. The adequacy of the description of the potential benefits and risks involved and the adequacy of the methodology of the human research;

2. The degree of the risk and, if the human research is nontherapeutic, whether it presents greater than minimal risk;

3. Whether the rights and welfare of the human subjects involved are adequately protected;

4. Whether the risks to the human subjects are outweighed by the potential benefits to them;

5. Whether the risks to subjects are minimized (i) by using procedures that are consistent with sound human research design and that do not unnecessarily expose subjects to risk and (ii) whenever appropriate, by using currently accepted procedures for diagnostic or treatment purposes;

6. Whether additional safeguards have been included in the study to protect the rights and welfare of the subjects when some or all of the subjects are likely to be incapable of providing informed consent or are otherwise vulnerable to coercion or undue [~~influence~~ inducement], such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons;

7. Whether the informed consent is to be obtained by methods that are adequate and appropriate and whether the written consent form is adequate and appropriate in both content and language for the particular human research and for the particular subjects of the human research;

8. Whether the persons proposing to supervise or conduct the particular human research are appropriately competent and qualified;

9. Whether criteria for selection of subjects are equitable; and

10. Whether the human research conforms with other requirements of the department, where applicable.

~~A.~~ B. The committee shall consider a research ~~proposals~~ proposal within 45 days after its submission to the committee. In order for the research proposal to be approved, it shall receive the approval of a majority of ~~those~~ the committee members present at a meeting ~~in~~ for which a quorum exists. A committee shall notify investigators and the institution in writing of its decision to approve or disapprove the ~~proposed~~ research ~~activity,~~ proposal or of modifications required to secure committee approval.

~~B.~~ C. During the committee review of research ~~projects~~ proposals, no personal identifiers of present or potential subjects shall be stated.

~~C.~~ D. The committee shall ~~approve or~~ develop a written description of the procedure to be followed when a subject has a complaint about a research project in which he is participating or has participated.

~~D.~~ E. Any subject who has a complaint about a research project in which he is participating or has participated shall be referred to the committee to determine if there has been a violation of the protocol.

F. The committee shall have the authority to suspend or terminate approval of research that is not being conducted in accordance with the committee requirements or that has been

associated with unexpected serious harm to the subjects. Any suspension or termination of approval shall include a statement of the reasons for the committee's action and shall be reported promptly to the investigator, appropriate institutional officials, the department or agency head, and the commissioner.

G. The chair of the committee shall provide a written report to the head of the institution of any violation of the human research protocol that led the committee to suspend or terminate the human research.

~~E.~~ H. The committee shall require reports from approved research projects at least annually to ensure conformity with the approved proposal. The frequency of such reports shall be consistent with the nature and degree of risk of each research project. The committee shall also require a report ~~from the research project~~ at the conclusion of the research project.

I. The committee shall ensure compliance with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d et seq.), if applicable, and federal and state regulations regarding the use and disclosure of PHI created for human research. In particular, authorization shall be obtained for the use and disclosure of PHI created for the purpose of human research, except as otherwise permitted by 45 CFR 164.512(i).

J. When cooperating institutions conduct some or all of the human research involving some or all of the subjects of the human research, each cooperating institution shall be responsible for safeguarding the rights and welfare of the subjects and for complying with this chapter, provided however, in complying with this chapter, institutions may enter into joint review, rely upon the review of another qualified committee, or come to similar agreements aimed at avoiding duplication of effort. Any such agreement shall be in writing and designate a lead institution, which shall be the institution responsible for reporting and handling any possible misconduct in the human research. Such agreements shall be entered into by the committee chair with the approval of a majority of the committee members. If an institution or agency does not have a research review committee, such agreements shall be approved and entered into by the chief executive officer of the institution or his designee.

12VAC5-20-90. Expedited review of human research projects.

A. The committee is authorized to conduct an expedited review of a human research project ~~which~~ that involves no more than minimal risk to the subjects ~~if:~~ and involves only research procedures listed in one or more categories established by the Secretary of Health and Human Services and published in the Federal Register pursuant to 45 CFR 46.110.

B. The committee also is authorized to conduct an expedited review of a human research project that involves no more than minimal risk to the subjects if:

1. Another institution's or agency's human research review committee has reviewed and approved the project; or

2. The review involves only minor changes in previously approved research and the changes occur during the approved project period.

C. An expedited review may be carried out by the chair of the committee or by one or more experienced reviewers designated by the chair from among the committee members. In reviewing the research project, the reviewers may exercise all of the authorities of the committee except that the reviewers may not disapprove the research project. A research project may be disapproved only after review by the full committee in accordance to the procedures set forth in 12VAC5-20-80.

~~B.~~ D. Each committee ~~which~~ that uses an expedited review procedure shall adopt a method for keeping all members advised of research ~~proposals which~~ projects that have been approved under the procedure.

12VAC5-20-100. Informed consent.

A. "Informed consent" means the knowing and voluntary agreement, without undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion, of a person who is capable of exercising free power of choice. For the purposes of human research, the basic elements of information necessary to determine the existence of such consent shall include the following:

1. A reasonable and comprehensible explanation to the person of the proposed procedures or protocols to be followed, their purposes, including descriptions of any attendant discomforts, and risks and benefits reasonably to be expected, how the results of the human research are disseminated, and how the identity of the person is protected;

2. A disclosure of any appropriate alternative procedures or therapies that might be advantageous for the ~~individual~~ person, together with their side effects, risks, and benefits;

3. A description of any adverse consequences and risks to be expected and an indication of whether there may be other significant risks not yet identified;

~~3.~~ 4. An instruction that the person may withdraw his consent and discontinue participation in the human research at any time without prejudice to him or fear of reprisal;

~~4.~~ 5. An explanation of any costs or compensation that may accrue to the person and, if applicable, the availability of third party reimbursement for the proposed procedures or protocols or any medical care that may be available if an injury occurs;

~~5.~~ 6. An offer to answer any inquiries by ~~any individual~~ the person or, if applicable, his legally authorized representative concerning the procedures and protocols and a description of the ways in which concerns may be raised or questions asked;

~~6.~~ 7. A statement that the study involves research, and an explanation that includes identification of any procedures that are experimental; the expected duration of the ~~individual's~~ person's participation; a statement describing the extent, if any, to which confidentiality of records identifying the participant will be maintained; and if any data from this study are published, the ~~individual~~ person will not be identified without his written permission;

~~7.~~ [~~8. A statement that there may be other risks not yet identified;~~]

[8. ~~9.~~] A disclosure of any appropriate alternative procedures or therapies that might be advantageous for the ~~individual~~ person;

[9. ~~10.~~] A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the ~~individual~~ person is otherwise entitled, and the ~~individual~~ person may discontinue participation at any time without penalty or loss of benefits to which he is otherwise entitled;

[10. ~~11.~~] An explanation of whom to contact for answers to pertinent questions about the research and research participants' rights, and whom to contact in the event of a research-related injury; and

[11. ~~12.~~] For research involving more than minimal risk, an explanation as to whether any compensation or medical care is available if injury occurs and, if so, what is included or where further information may be obtained.

Information shall be provided in a manner that is understandable to the ~~individual~~ person with regard to his educational level and language of greatest fluency.

B. No human research shall be conducted in the absence of informed consent subscribed to in writing by the person or by the person's authorized representative except as provided for in subsection E of this section. If the person is capable of providing informed consent, written consent shall be provided by the person and witnessed. If the person is incapable of making an informed decision as defined in § 54.1-2982 of the Code of Virginia, at the time consent is required, written consent shall be provided by the person's legally authorized representative and witnessed. If the person is a minor otherwise capable of rendering informed consent, the consent shall be provided by both the minor and his legally authorized representative. An investigator shall seek such consent only under circumstances that provide the person who is the prospective subject or the representative sufficient opportunity to consider whether to participate and that minimize the possibility of coercion or undue influence. The information that is given to the person or, if applicable, the person's legally authorized representative shall be in language understandable to the person or representative.

C. No person shall participate in human research unless the informed consent requirement in this section is met. No informed consent shall include any language through which the person waives or appears to waive any of his legal rights, including any release of any person, institution, or agency or any agents therof from liability for negligence. No person shall be forced to participate in any human research if the investigator conducting the human research knows that participation in the human research is protested by the person.

D. No legally authorized representative shall consent to nontherapeutic human research unless it is determined by the research review committee that such nontherapeutic research will present no more than a minor increase over minimal risk to the subject [and (i) the intervention or procedure presents experiences to subjects that are reasonably commensurate with those inherent in their actual or expected medical, dental, psychological, social, or educational situations; and (ii) the intervention or procedure is likely to yield generalizable knowledge about the subject's disorder or condition, which is of vital importance for the understanding or amelioration of the subject's disorder or condition]. A legally authorized representative may not consent to participation in human research on behalf of a subject if the legally authorized representative knows, or upon reasonable inquiry ought to know, that any aspect of the human research protocol is contrary to the religious beliefs or basic values of the subject, whether expressed orally or in writing.

E. The research review committee may approve a consent procedure that does not include or that alters some or all of the elements of informed consent set forth in this section, or that waives the requirements to obtain informed consent provided the committee finds and documents that:

1. The human research involves no more than minimal risk to the subjects;

2. The omission, waiver, or alteration will not adversely affect the rights and welfare of the subjects;

3. The human research could not practicably be performed without the omission, waiver, or alterations; and

4. After participation, the subjects shall be provided with additional pertinent information, whenever appropriate.

~~B.~~ F. Consent may take the form of either of the following:

1. A written consent document that embodies the elements of informed consent required by this section. This form may be read to the subject or the subject's legally authorized representative, but, in any event, the investigator shall give either the subject or the representative adequate opportunity to read it before it is signed and witnessed; or

2. A short form written consent document stating that the elements of informed consent required by this section have been presented orally to the subject or the subject's legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Also, the committee shall approve a written summary of what is to be said to the subject or the representative. Only the short form ~~itself~~ written consent is ~~to be~~ signed by the subject or

the representative. However, the witness shall sign both the short form written consent and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary and a copy of the short form written consent shall be given to the subject or the representative.

G. The research review committee may waive the requirement in subsection B of this section for the investigator to obtain a written informed consent form for some or all subjects if it finds that the only record linking the subject and the human research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject shall be asked whether the subject wants documentation linking the subject with the human research, and the subject's wishes shall govern. In cases where the documentation requirement is waived, the committee may require the investigator to provide subjects with a written statement explaining the human research.

12VAC5-20-110. Categories of human research exempt from regulation.

Research activities in which the only involvement of human ~~participants will be~~ subjects is in one or more of the following categories are exempt from this chapter:

1. The surveillance and investigation by the department into all preventable diseases and epidemics in the Commonwealth and into the means for the prevention of such diseases and epidemics conducted pursuant to § 32.1-39 of the Code of Virginia.

2. Research designed to study on a large scale anonymous vital records and registry data collected pursuant to the Code of Virginia, Chapter 7 (§ 32.1-249 et seq.) of Title 32.1 (Vital Records), § 32.1-64.1 (Virginia Hearing Impairment Identification and Monitoring System), § 32.1-69.1 ~~(Viginia~~ (Virginia Congenital Anomalies Reporting and Education System), § 32.1-70 (Statewide Cancer Registry), ~~§ 32.1-71.1 (Statewide Alzheimer's Disease and Related Disorders Registry),~~ § 32.1-46.01 (Virginia Immunization Information System), and ~~§§~~ § 32.116.1 ~~and 32.116.1:2~~ (Emergency Medical Services Patient Care Information System).

3. Research or student learning outcomes assessment conducted in educational settings such as research involving:

a. Regular or special education instructional strategies; [~~or~~]

b. The effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods; or

c. The use of educational tests, whether cognitive, diagnostic, aptitude, or achievement, if the data from such tests are recorded in a manner so that ~~participants~~ subjects cannot be identified, directly or through identifiers linked to the ~~participants~~ subjects.

4. Research involving survey or interview procedures unless responses are recorded in such a manner that the ~~participants~~ subjects can be identified, directly or through identifiers linked to the ~~participants~~ subjects, and either:

a. The ~~participant's~~ subject's responses, if they became known outside the research, could reasonably place the participant at risk of criminal or civil liability or be damaging to his financial standing, employability, or reputation; or

b. The research deals with sensitive aspects of the ~~participant's~~ subject's own behavior such as sexual behavior, drug or alcohol use, or illegal conduct.

5. Research involving survey or interview procedures, when the respondents are elected or appointed public officials or candidates for public office.

6. Research involving solely the observation of public behavior, including observation by participants, unless observations are recorded in such a manner that the ~~participants~~ subjects can be identified, directly or through identifiers linked to the ~~participants~~ subjects, and either:

a. The observations recorded about the ~~individual~~ subject, if they became known outside the research, could reasonably place the ~~participant~~ subject at risk of criminal or civil liability or be damaging to his financial standing, employability, or reputation; or

b. The research deals with sensitive aspects of the ~~participant's~~ subject's own behavior, such as sexual behavior, drug or alcohol use, or illegal conduct.

7. Research involving the collection or study of existing data, documents, records, or pathological specimens, if these sources are publicly available or if the information is recorded by the investigator in a manner so that ~~participants~~ subjects cannot be identified, directly or through identifiers linked to the ~~participants~~ subjects.

12VAC5-20-120. Committee records.

A. Documentation of committee activities shall be prepared and maintained by each such committee and shall include the following:

1. Copies of all research proposals reviewed, scientific evaluations that may accompany the proposals, approved sample consent documents, progress reports submitted by investigators, and reports of injuries to ~~participants~~ subjects;

2. Minutes of committee meetings ~~which shall be~~ in sufficient detail to show attendance at the meetings; actions taken by the committee; the vote on ~~these actions~~ each action, including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controversial issues and their resolution;

3. Records of continuing review activities;

4. Copies of all correspondence between the committee and the investigators;

5. A list of committee members;

6. Written procedures for the committee; and

7. Statements of significant new findings provided to ~~participants~~ subjects.

B. The records required by this chapter shall be retained for at least three years, and records relating to research ~~which~~ that is conducted shall be retained for at least three years after completion of the research. All records shall be accessible for inspection and copying by authorized employees or agents of the department at reasonable times and in a reasonable manner.

C. ~~An~~ Each research review committee of a state institution or agency shall ensure that an overview of approved human research projects and the results of such projects ~~will be~~ are made public on ~~the department's~~ such institution's or agency's website unless otherwise exempt from disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

12VAC5-20-130. Applicability of federal policies.

Human research ~~at institutions which are~~ that is subject to policies and regulations for the protection of human ~~participants~~ subjects promulgated by any agency of the federal government shall be exempt from this chapter. ~~Such institutions~~ Institutions where research is performed that is subject to federal policies and regulation shall notify the commissioner annually, by ~~January~~ March 31, of their compliance with the policies and regulations of federal agencies. The commissioner shall identify institutions exempt from this chapter as reported in accordance with this section in the annual report to the Governor and the General Assembly provided in accordance with 12VAC5-20-60 F.

VA.R. Doc. No. R13-3401; Filed November 13, 2015, 1:04 p.m.

Proposed Regulation

Titles of Regulations: **12VAC5-71. Regulations Governing Virginia Newborn Screening Services (amending 12VAC5-71-10, 12VAC5-71-30, 12VAC5-71-150; adding 12VAC5-71-210 through 12VAC5-71-260).**

12VAC5-191. State Plan for the Children with Special Health Care Needs Program (amending 12VAC5-191-260).

Statutory Authority: §§ 32.1-12 and 32.1-67 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: February 12, 2016.

Agency Contact: Dev Nair, Director, Division of Policy and Evaluation, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7662, FAX (804) 864-7647, or email dev.nair@vdh.virginia.gov.

Basis: Section 32.1-12 of the Code of Virginia authorizes the State Board of Health to make, adopt, promulgate, and enforce regulations.

Section 32.1-65.1 of the Code of Virginia states that the Board of Health shall require every hospital in Virginia having a newborn nursery to screen infants for critical congenital heart disease.

Section 32.1-67 of the Code of Virginia requires the Board of Health to promulgate regulations as may be necessaryto implement Newborn Screening Services and the Children with Special Health Care Needs Program.

Chapters 4 and 175 of the 2014 Acts of Assembly required the Board of Health to promulgate emergency regulations for critical congenital heart disease (CCHD) screening. This regulatory action seeks to make those changes permanent.

Purpose: Congenital heart defects are the most common birth defects in the United States, affecting about one in every 110 babies. A few babies born with congenital heart defects have more serious forms of heart disease, which are referred to as critical congenital heart disease (CCHD), affecting approximately two of every 1,000 births. CCHDs are heart defects that result in abnormal blood flow and oxygen deprivation. These defects require intervention within the first year of life and delayed diagnosis can result in death. Screening newborns for CCHD using pulse oximetry has been recommended through the U.S. Department of Health and Human Services Recommended Uniform Screening Panel. The screening is simple, quick, and painless. A sensor wrapped around the baby's right hand or either foot measures the amount of oxygen in the baby's blood.

The purpose of the proposed regulatory action is to ensure that all Virginia hospitals with newborn nurseries implement CCHD screening, and to ensure that newborns diagnosed with CCHD are reported to VDH so that they may be linked to care coordination services through the "Care Connections for Children" program.

Substance: These proposed amendments to the newborn screening regulations require all hospitals with a newborn nursery to screen newborns for CCHD within 24 to 48 hours of birth. Specifically they add the following elements to the existing regulations:

1. Hospitals are required to develop protocols for screening, timely evaluation, and timely referral of newborns with abnormal screening results.

2. Requirements that a licensed practitioner perform the screening and setting forth when the screening is to occur. If screening is not indicated, documentation requirements are set forth for the medical record. Hospitals are required to develop screening protocols for specialty and subspecialty nurseries.

3. Requirements that all screening results must be entered into the medical record and the electronic birth certificate system. This section also requires health care providers to report abnormal screening results immediately and to evaluate the newborn in a timely manner. Newborns shall not be discharged unless a cause for the abnormal screening result has been determined or CCHD has been ruled out. Parents or guardians and the infant's primary care provider after discharge from the hospital shall be notified of any abnormal results and any diagnoses.

4. Hospitals must report individuals diagnosed with CCHD to the Virginia Department of Health (VDH) so that the newborn's parent or guardian may be referred to care coordination services through the Care Connection for Children.

5. A section specifying what documents shall be provided when requested by the VaCARES system at VDH, and specifying the confidentiality rules for these documents.

6. A section that permits parents to refuse CCHD screening based upon religious practices or tenets, and to specify that the hospital must report the refusal to VDH.

Issues: These proposed amendments will permanently add CCHD screening requirements to the regulations for newborn screening. The primary advantage to VDH, the public, and the Commonwealth is that the regulations will ensure that every infant born in a hospital with a newborn nursery will be screened for CCHD and that those who screen positive will have further evaluation and follow up as needed. The majority of hospitals that would be affected by these regulations already provide screening for CCHD voluntarily. These proposed amendments set minimum standards for this screening. 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. Pursuant to Chapter 4 of the 2014 Acts of Assembly, the proposed regulations permanently require hospitals with a newborn nursery to screen all infants born in Virginia for critical congenital heart disease within 24 to 48 hours after birth using pulse-oximetry.

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

Estimated Economic Impact. Pursuant to Chapter 4 of the 2014 Acts of Assembly, the proposed regulations permanently require hospitals with a newborn nursery to screen all infants born in Virginia for critical congenital heart disease (CCHD) within 24 to 48 hours after birth using pulse-oximetry.

More specifically, the proposed changes require that hospitals develop protocols for the screening of all newborns for CCHD, and that they have protocols for the follow-up and referral for any infants that have positive screens. Newborns that have an abnormal screen will not be discharged from the hospital until the cause of the abnormal screen has been evaluated and an appropriate plan for care is in place. Any diagnosis resulting from an abnormal screen will be entered in the electronic birth certificate, and the attending physician will notify the parent and the primary care provider of the diagnosis. Infants who are diagnosed with CCHD will be referred to the Care Connections for Children program for care coordination services. A parent may refuse to have their child screened on the basis of religious practices or tenets. Such refusal must be documented in writing. These requirements were already implemented on December 24, 2014 under emergency regulations.

CCHD is a serious health condition affecting newborns that can result in death if not diagnosed and treated early. According to the Virginia Department of Health (VDH), congenital heart defects are the most common birth defects in the United States, affecting about one in every 110 babies. A few babies born with congenital heart defects have more serious forms of heart disease, which are referred to as critical congenital heart disease (affecting approximately 2 of every 1,000 births). CCHDs are heart defects that result in abnormal blood flow and oxygen deprivation. These defects require intervention within the first year of life and delayed diagnosis can result in death. Screening newborns for CCHD using pulse oximetry has been recommended through the U.S. Department of Health and Human Services Recommended Uniform Screening Panel. The screening is simple, quick, and painless. A sensor wrapped around the baby's right hand or either foot measures the amount of oxygen in the baby’s blood.

The purpose of the proposed regulatory action is to ensure that all Virginia hospitals with newborn nurseries implement CCHD screening, and to ensure that newborns diagnosed with CCHD are reported to VDH so that they may be linked to care coordination services through the Care Connections for Children program. Increased CCHD detection at birth hospitals through screening may lead to decreased hospital costs and avoid some deaths during infancy.[1] Initial actions to educate hospitals and develop a tracking and recording system for CCHD were supported by a $299,000 federal grant.

Additional reporting of screening results and confirmed cases that are required by these regulations occurs through existing systems (electronic birth certificate and VaCARES); therefore additional costs to implement these regulations are projected to be minimal. Based on a recent study in New Jersey, the estimated screening time per newborn was just over nine minutes and the associated labor and equipment costs per newborn screened were $6.68 and $6.82, respectively, yielding a total estimate of $13.50 per newborn.[2] Similarly, initial VDH estimates suggest CCHD screening time is 9 minutes and 45 seconds on average and the average cost of CCHD screening is $13.28 in Virginia.[3]

Screening infants for CCHD is considered a best practice and was already adopted by 51 of the 55 hospitals prior to the requirements enacted by the 2014 General Assembly. Thus, most hospitals in Virginia are already voluntarily performing this screening. The proposed amendments would require the four additional hospitals to implement the screening.

The administrative costs to VDH for referral to the Care Connections for Children program to obtain care coordination services are considered small and will be absorbed by agency's existing resources.

Businesses and Entities Affected. These regulations apply to 55 hospitals in Virginia of which 51 were already performing required screening voluntarily prior to emergency regulations. There were approximately 101,700 infants born in Virginia and approximately 142 newborns were diagnosed with CCHD in 2014.

Localities Particularly Affected. The proposed changes apply throughout the Commonwealth.

Projected Impact on Employment. The proposed amendments are unlikely to significantly affect employment as most hospitals were already voluntarily performing the proposed screening.

Effects on the Use and Value of Private Property. The proposed amendments are unlikely to significantly affect the use and value of private property as most hospitals were already voluntarily performing the proposed screening.

Real Estate Development Costs. The proposed amendments are unlikely to affect real estate development costs.

Small Businesses:

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

Costs and Other Effects. Only a few of the 55 hospitals in Virginia may be considered as small businesses. None of the four hospitals that had not been voluntarily performing the CCHD screening is believed to be a small business. Thus, no significant effect on small businesses is expected.

Alternative Method that Minimizes Adverse Impact. The proposed screening is not expected to have an adverse impact on small businesses.

Adverse Impacts:

Businesses: Since all but four hospitals were already performing required screening, the prosed regulations impose some additional compliance costs on only four hospitals.

Localities: The proposed amendments will not adversely affect localities.

Other Entities: No significant impact on other entities is expected. Additional administrative costs of the required screening will be absorbed by VDH's existing resources.

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[1] Peterson et al., Hospitalizations, Costs, and Mortality among Infants with Critical Congenital Heart Disease: How Important Is Timely Detection? Birth Defects Research, 2013, Oct, 97(10):664-72.

[2] Peterson et al., A public health economic assessment of hospitals' cost to screen newborns for critical congenital heart disease. Public Health Reports, 2014, Jan-Feb, 129 (1):86-93.

[3] These estimates are preliminary and subject to change.

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

Summary:

The proposed amendments require hospitals with a newborn nursery to screen all infants born in Virginia for critical congenital heart disease (CCHD) within 24 to 48 hours after birth using pulse oximetry. The proposed amendments (i) require that hospitals develop protocols for screening, timely evaluation, and timely referral of newborns with abnormal screening results; (ii) require that a licensed practitioner perform the screening; (iii) establish when the screening is to occur, and if screening is not indicated, documentation requirements for the medical record; (iv) require hospitals to develop screening protocols for specialty and subspecialty nurseries; (v) require that all screening results are entered into the medical record and the electronic birth certificate system, and that health care providers report abnormal screening results immediately; (vi) prohibit the discharge of a newborn with an abnormal screen until the cause of the abnormal screen has been evaluated and an appropriate plan for care is in place; (vii) require that hospitals report individuals diagnosed with CCHD to the department for referral to care coordination services through the Care Connection for Children; (viii) specify documents that must be provided in response to a request by the department's VaCARES system and the confidentiality rules for these documents; and (ix) permit parents to refuse CCHD screening based upon religious practices or tenets, and specify that the hospital must report the refusal to the department.

This regulatory action also includes proposed amendments to the State Plan for the Children with Special Health Care Needs Program (12VAC5-191), so that those regulations remain consistent with 12VAC5-71.

12VAC5-71-10. Definitions.

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

"Abnormal screening results" means, in 12VAC5-71-210 through 12VAC5-71-250 only, all results that indicate the newborn has not passed the screening test.

"Attending physician" means the physician in charge of the infant's care.

"Board" means the State Board of Health.

"Business days" means Monday through Friday from 9 a.m. to 5 p.m., excluding federal and state holidays.

"Care Connection for Children" means a statewide network of centers of excellence for children with special health care needs (CSHCN) that provides leadership in the enhancement of specialty medical services, care coordination, medical insurance benefits evaluation and coordination, management of the CSHCN pool of funds, information and referral to CSHCN resources, family-to-family support, and training and consultation with community providers on CSHCN issues.

"Care coordination" means a process that links individuals and their families to services and resources in a coordinated effort to maximize their potential and provide them with optimal health care.

"Certified nurse midwife" means a person licensed to practice as a nurse practitioner in the Commonwealth pursuant to § 54.1-2957 of the Code of Virginia and in accordance with Part II (18VAC90-30-60 et seq.) of 18VAC90-30 and 18VAC90-30-121, subject to 18VAC90-30-160.

"Chief executive officer" means a job descriptive term used to identify the individual appointed by the governing body to act in its behalf in the overall management of the hospital. Job titles may include administrator, superintendent, director, executive director, president, vice-president, and executive vice-president.

"Child" means a person less than 18 years of age and includes a biological or an adopted child, as well as a child placed for adoption or foster care unless otherwise treated as a separate unit for the purposes of determining eligibility and charges under these regulations.

"Commissioner" means the State Health Commissioner, his duly designated officer, or agent.

"Confirmatory testing" means a test or a panel of tests performed following a screened-abnormal result to verify a diagnosis.

"Core panel conditions" means those heritable disorders and genetic diseases considered appropriate for newborn screening. The conditions in the core panel are similar in that they have (i) specific and sensitive screening tests, (iii) a sufficiently well understood natural history, and (iii) available and efficacious treatments.

"Critical congenital heart disease" or "CCHD" means a congenital heart disease that places a newborn at significant risk of disability or death if not diagnosed and treated soon after birth. The disease may include, but is not limited to, hypoplastic left heart syndrome, pulmonary atresia (with intact septum), tetralogy of fallot, total anomalous pulmonary venous return, transposition of the great arteries, tricuspid atresia, and truncus arteriosus.

"CCHD screening" means the application of screening technology to detect CCHD.

"Department" means the state Department of Health.

"Dried-blood-spot specimen" means a clinical blood sample collected from an infant by heel stick method and placed directly onto specially manufactured absorbent specimen collection (filter) paper.

"Echocardiogram" means a test that uses an ultrasound to provide an image of the heart.

"Guardian" means a parent-appointed, court-appointed, or clerk-appointed guardian of the person.

"Healthcare provider" means a person who is licensed to provide health care as part of his job responsibilities and who has the authority to order newborn dried-blood-spot screening tests.

"Heritable disorders and genetic diseases" means pathological conditions (i.e., interruption, cessation or disorder of body functions, systems, or organs) that are caused by an absent or defective gene or gene product, or by a chromosomal aberration.

"Hospital" means any facility as defined in § 32.1-123 of the Code of Virginia.

"Infant" means a child less than 12 months of age.

"Licensed practitioner" means a licensed health care provider who is permitted, within the scope of his practice pursuant to Chapter 29 (§ 54.1-2900 et seq.) or Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia, to provide care to a newborn.

"Low protein modified foods" means foods that are (i) specially formulated to have less than one gram of protein per serving, (ii) intended to be used under the direction of a physician for the dietary treatment of an inherited metabolic disease, (iii) not natural foods that are naturally low in protein, and (iv) prescribed as medically necessary for the therapeutic treatment of inherited metabolic diseases.

"Metabolic formula" means nutritional substances that are (i) prescribed by a health professional with appropriate prescriptive authority; (ii) specifically designed and formulated to be consumed or administered internally under the supervision of such health professional; (iii) specifically designed, processed, or formulated to be distinct in one or more nutrients that are present in natural food; and (iv) intended for the medical and nutritional management of patients with limited capacity to metabolize ordinary foodstuffs or limited capacity to metabolize certain nutrients contained in ordinary foodstuffs.

"Metabolic supplements" means certain dietary or nutritional substances intended to be used under the direction of a physician for the nutritional management of inherited metabolic diseases.

"Midwife" means a person licensed as a nurse practitioner in the category of certified nurse midwife by the Boards of Nursing and Medicine or licensed as a midwife by the Board of Medicine.

"Newborn" means an infant who is 28 days old or less who was born in Virginia.

"Newborn nursery" means a general level, intermediate level, or specialty level newborn service as defined in 12VAC5-410-443 B 1, B 2, and B 3.

"Nurse" means a person holding a current license as a registered nurse or licensed practical nurse by the Virginia Board of Nursing or a current multistate licensure privilege to practice in Virginia as a registered nurse or licensed practical nurse.

"Parent" means a biological parent, adoptive parent, or stepparent.

"Pediatric Comprehensive Sickle Cell Clinic Network" means a statewide network of clinics that are located in major medical centers and provide comprehensive medical and support services for newborns and children living with sickle cell disease and other genetically related hemoglobinopathies.

"Physician" means a person licensed to practice medicine or osteopathic medicine in the Commonwealth pursuant to Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1 of the Code of Virginia and in accordance with applicable regulations.

"Pool of funds" means funds designated for payment of direct health care services. Access to the pool is not an entitlement and is subject to availability of funds and guidelines that govern its eligibility and coverage of services. Pool of funds is a mix of federal Title V funds and state matching funds.

"Population-based" means preventive interventions and personal health services developed and available for the entire infant and child health population of the Commonwealth rather than for individuals in a one-on-one situation.

"Preterm infant" means an infant whose birth occurs by the end of the last day of the 36th week following the onset of the last menstrual period.

"Repeat specimen" means an additional newborn dried-blood-spot screening specimen submitted to the testing laboratory voluntarily or by request.

"Resident" means an individual who resides within the geographical boundaries of the Commonwealth.

"Satisfactory specimen" means a newborn dried-blood-spot screening specimen that has been determined to be acceptable for laboratory analyses by the testing laboratory.

"Screened-abnormal" means a newborn dried-blood-spot screening test result that is outside the established normal range or normal value for that test method.

"Screening technology" means pulse oximetry testing in the right hand and either foot. Screening technology shall also include alternate medically accepted tests that measure the percentage of blood oxygen saturation, follow medical guideline consensus and recommendations issued by the American Academy of Pediatrics, and are approved by the State Board of Health.

"Specialty level nursery" means the same as defined in 12VAC5-410-443 B 3 and as further defined as Level III by the Levels of Neonatal Care, written by the American Academy of Pediatrics Committee on Fetus and Newborn.

"Subspecialty level nursery" means the same as defined in 12VAC5-410-443 B 4.

"Testing laboratory" means the laboratory that has been selected by the department to perform newborn dried-blood-spot screening tests services.

"Total parenteral nutrition" or "TPN" means giving nutrients through a vein for babies who cannot be fed by mouth.

"Treatment" means appropriate management including genetic counseling, medical consultation, and pharmacological and dietary management for infants diagnosed with a disease listed in 12VAC5-71-30 D.

"Unsatisfactory specimen" means a newborn dried-blood-spot screening specimen that is inadequate for performing an accurate analysis.

"Virginia Genetics Advisory Committee" means a formal group that advises the department on issues pertaining to access to clinical genetics services across the Commonwealth and the provision of genetic awareness, quality services, and education for consumers and providers.

"Virginia Newborn Screening System" means a coordinated and comprehensive group of services, including education, screening, follow up, diagnosis, treatment and management, and program evaluation, managed by the department's Virginia Newborn Screening Program and Virginia Early Hearing Detection and Intervention Program for safeguarding the health of children born in Virginia.

"Virginia Sickle Cell Awareness Program" means a statewide program for the education and screening of individuals for the disease of sickle cell anemia or the sickle cell trait and for such other genetically related hemoglobinopathies.

12VAC5-71-30. Core panel of heritable disorders and genetic diseases.

A. The Virginia Newborn Screening System, which includes the Virginia Newborn Screening Program ~~and,~~ the Virginia Early Hearing Detection and Intervention Program, and Virginia critical congenital heart disease screening, shall ensure that the core panel of heritable disorders and genetic diseases for which newborn screening is conducted is consistent with but not necessarily identical to the U.S. Department of Health and Human Services Secretary's Recommended Uniform Screening Panel.

B. The department shall review, at least biennially, national recommendations and guidelines and may propose changes to the core panel of heritable disorders and genetic diseases for which newborn dried-blood-spot screening tests are conducted.

C. The Virginia Genetics Advisory Committee may be consulted and provide advice to the commissioner on proposed changes to the core panel of heritable disorders and genetic diseases for which newborn dried-blood-spot screening tests are conducted.

D. Infants under six months of age who are born in Virginia shall be screened in accordance with the provisions set forth in this chapter for the following heritable disorders and genetic diseases, which are identified through newborn dried-blood-spot screening tests:

1. Argininosuccinic aciduria (ASA);

2. Beta-Ketothiolase deficiency (BKT);

3. Biotinidase deficiency (BIOT);

4. Carnitine uptake defect (CUD);

5. Classical galactosemia (galactose-1-phosphate uridyltransferase deficiency) (GALT);

6. Citrullinemia type I (CIT-I);

7. Congenital adrenal hyperplasia (CAH);

8. Cystic fibrosis (CF);

9. Glutaric acidemia type I (GA I);

10. Hb S beta-thalassemia (Hb F,S,A);

11. Hb SC-disease (Hb F,S,C);

12. Hb SS-disease (sickle cell anemia) (Hb F, S);

13. Homocystinuria (HCY);

14. Isovaleric acidemia (IVA);

15. Long chain L-3-Hydroxy acyl-CoA dehydrogenase deficiency (LCHAD);

16. Maple syrup urine disease (MSUD);

17. Medium-chain acyl-CoA dehydrogenase deficiency (MCAD);

18. Methylmalonic acidemia (Methylmalonyl-CoA mutase deficiency) (MUT);

19. Methylmalonic acidemia (Adenosylcobalamin synthesis deficiency) (CBL A, CBL B);

20. Multiple carboxylase deficiency (MCD);

21. Phenylketonuria (PKU);

22. Primary congenital hypothyroidism (CH);

23. Propionic acidemia (PROP);

24. Severe combined immunodeficiency (SCID);

25. Tyrosinemia type I (TYR I);

26. Trifunctional protein deficiency (TFP);

27. Very long-chain acyl-CoA dehydrogenase deficiency (VLCAD);

28. 3-hydroxy 3-methyl glutaric aciduria (HMG); and

29. 3-Methylcrotonyl-CoA carboxylase deficiency (3-MCC).

E. Infants born in Virginia shall be screened for hearing loss in accordance with provisions set forth in §§ 32.1-64.1 and 32.1-64.2 of the Code of Virginia and as governed by 12VAC5-80.

F. Newborns born in Virginia shall be screened for critical congenital heart disease in accordance with provisions set forth in §§ 32.1-65.1 and 32.1-67 of the Code of Virginia and as governed by 12VAC5-71-210 through 12VAC5-71-260.

12VAC5-71-150. Responsibilities of the Care Connection for Children network.

A. The Care Connection for Children network shall provide the following services:

1. Care coordination services for residents of the Commonwealth who are diagnosed with selected heritable disorders ~~or,~~ genetic diseases, or critical congenital heart disease and are referred to the network by the Virginia Newborn Screening Program.

2. Other network services for eligible individuals in accordance with ~~the~~ § 32.1-77 of the Code of Virginia and applicable regulations.

B. The Care Connection for Children network shall provide data as needed by the department's newborn screening program.

12VAC5-71-210. Critical congenital heart disease screening protocols.

A. Hospitals shall develop protocols for critical congenital heart disease screening in accordance with this section, 12VAC5-71-220 through 12VAC5-71-260, and national recommendations from the American Academy of Pediatrics.

B. Hospitals shall develop protocols for the physical evaluation by licensed practitioners of newborns with abnormal screening results.

C. Hospitals shall develop protocols for the referral of newborns with abnormal screening results, if needed, after evaluation.

12VAC5-71-220. Critical congenital heart disease screening.

A. A licensed practitioner shall perform the CCHD screening.

B. Except as specified in subsection C of this section and 12VAC5-71-260, CCHD screening shall be performed on every newborn in the birth hospital between 24 and 48 hours of life, or if the newborn is discharged from the hospital before reaching 24 hours of life, the CCHD screening shall be performed as late as practical before discharge.

C. If CCHD screening is not indicated, the reason shall be documented in the newborn's medical record. The reasons include but are not limited to:

1. The newborn's current clinical evaluation has included an echocardiogram that ruled out CCHD;

2. The newborn has confirmed CCHD; or

3. The newborn is under the care of a specialty level or subspecialty level nursery.

D. Hospitals shall develop protocols for screening newborns in specialty level nurseries and subspecialty level nurseries.

12VAC5-71-230. Critical congenital heart disease screening results.

A. Recording results.

1. All CCHD screening results shall be recorded in the newborn's medical record.

2. All CCHD screening results shall be entered into the electronic birth certificate system with the following information:

a. CCHD screening completed, CCHD pass or fail, and pulse oximetry values; or

b. Not screened pursuant to 12VAC5-71-220 C.

B. Abnormal screening results.

1. Abnormal screening results shall be reported by the authorized health care provider who conducted the screening to the attending physician or his designee.

2. A newborn shall be evaluated by an attending physician or his designee according to the timeframes within the hospital protocol developed in accordance with 12VAC5-71-210.

3. A newborn shall not be discharged from care until:

a. A cause for the abnormal screening result has been determined and a plan is in place for immediate evaluation at another medical facility; or

b. An echocardiogram has been performed and read, and an appropriate clinical plan has been developed.

4. Any diagnosis arising from abnormal screening results shall be entered into the electronic birth certificate system.

5. The attending physician or his designee shall provide notification of abnormal results and any diagnoses to the newborn's parent or guardian and to the primary care provider in charge of the newborn's care after the newborn leaves the hospital.

12VAC5-71-240. Referral for care coordination.

A. For any person diagnosed under 12VAC5-71-210 through 12VAC5-71-250, the chief administrative officer of every hospital, as defined in § 32.1-123 of the Code of Virginia, shall make or cause to be made a report to the commissioner in accordance with § 32.1-69.1 of the Code of Virginia.

B. Upon receiving the notification described in subsection A of this section, the Newborn Screening Program at the Virginia Department of Health shall refer the newborn's parent or guardian to the Care Connection for Children network for care coordination services.

12VAC5-71-250. Congenital heart disease screening records.

A. The screening of newborns pursuant to this chapter is a population-based public health surveillance program as defined by the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191; 110 Stat. 2033).

B. Upon request, a hospital shall make available to the Virginia Congenital Anomalies Reporting and Education System (VaCARES):

1. Medical records;

2. Records of laboratory tests; and

3. Any other information that VaCARES considers necessary to:

a. Determine final outcomes of abnormal CCHD screening results; or

b. Evaluate CCHD screening activities in the Commonwealth, including performance of follow-up evaluations and diagnostic tests, initiation of treatment when necessary, and surveillance of the accuracy and efficacy of the screening.

C. Information that the Virginia Department of Health receives under this section is confidential and may only be used or disclosed:

1. For research and collective statistical purposes pursuant to § 32.1-67.1 of the Code of Virginia;

2. For state or federally mandated statistical reports;

3. To ensure that the information received by the Virginia Department of Health is accurate and reliable; or

4. For reporting to the Virginia Congenital Anomalies Reporting and Education System pursuant to § 32.1-69.1 of the Code of Virginia and 12VAC5-191-280. The Newborn Screening Program shall refer the newborn's parent or guardian to the Care Connection for Children network for care coordination services.

D. The hospital administrator shall ensure that CCHD screening is included in the perinatal quality assurance program and provide the results of the quality improvement program to the Virginia Department of Health upon request.

12VAC5-71-260. Parent or guardian refusal for screening.

A. In the instance of parent or guardian refusal of the CCHD screening based on religious practices or tenets, the parent or guardian refusal shall be documented on a refusal form provided by the Virginia Department of Health and made a part of the newborn's medical record.

B. The administrator of the hospital shall ensure that the Newborn Screening Program at the Virginia Department of Health is notified in writing of the parent or guardian refusal within five days of the newborn's birth.

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

FORMS (12VAC5-71)

Notification of Parental Refusal of Dried-Blood-Spot and Critical Congenital Heart Disease Screening (undated)

DOCUMENTS INCORPORATED BY REFERENCE (12VAC5-71)

Levels of Neonatal Care, Policy Statement from Committee on Fetus and Newborn, American Academy of Pediatrics, August 27, 2012

12VAC5-191-260. Scope and content of the Virginia Newborn Screening System.

A. The Virginia Newborn Screening System consists of ~~two~~ three components: (i) Virginia Newborn Screening Services ~~and~~, (ii) Virginia Early Hearing Detection and Intervention Program, and (iii) Virginia critical congenital heart disease screening.

B. Virginia Newborn Screening Services.

1. Mission. The Virginia Newborn Screening Services prevents ~~mental retardation~~ intellectual disability, permanent disability, or death through early identification and treatment of infants who are affected by selected inherited disorders.

2. Scope of services. The Virginia Newborn Screening Services provides a coordinated and comprehensive system of services to assure that all infants receive a screening test after birth for selected inherited metabolic, endocrine, and hematological disorders as defined in Regulations Governing ~~the~~ Virginia Newborn Screening ~~and Treatment Program~~ Services, ~~12VAC5-70~~ 12VAC5-71.

These population-based, direct, and enabling services are provided through:

a. Biochemical dried bloodspot screening tests.

b. Follow up of abnormal results.

c. Diagnosis.

d. Education to health professionals and families.

e. Expert consultation on abnormal results, diagnostic testing, and medical and dietary management for health professionals.

Medical and dietary management is provided for the diagnosed cases and includes assistance in accessing specialty medical services and referral to Care Connection for Children.

The screening and management for specified diseases are governed by Regulations Governing ~~the~~ Virginia Newborn Screening ~~and Treatment Program~~ Services, ~~12VAC5-70~~ 12VAC5-71.

3. Criteria to receive Virginia Newborn Screening Services. All infants born in the Commonwealth are eligible for the screening test for selected inherited disorders.

4. Goal. The Title V national performance measures, as required by the federal Government Performance and Results Act ~~(GPRA Pub. L.~~ (Public Law 103-62), are used to establish the program goals. The following goal shall change as needed to be consistent with the Title V national performance measures:

All infants will receive appropriate newborn bloodspot screening, follow up testing, and referral to services.

C. Virginia Early Hearing Detection and Intervention Program.

1. Mission. The Virginia Early Hearing Detection and Intervention Program promotes early detection of and intervention for infants with congenital hearing loss to maximize linguistic and communicative competence and literacy development.

2. Scope of services. The Virginia Early Hearing Detection and Intervention Program provides services to assure that all infants receive a hearing screening after birth, that infants needing further testing are referred to appropriate facilities, that families have the information that they need to make decisions for their children, and that infants and young children diagnosed with a hearing loss receive appropriate and timely intervention services. These population-based and enabling services are provided through:

a. Technical assistance and education to new parents.

b. Collaboration with physicians and primary care providers.

c. Technical assistance and education to birthing facilities and those persons performing home births.

d. Collaboration with audiologists.

e. Education to health professionals and general public.

Once diagnosed, the infants are referred to early intervention services. The screening and management for hearing loss are governed by the regulation, Regulations for Administration of the Virginia Hearing Impairment Identification and Monitoring System, 12VAC5-80.

3. Criteria to receive services from the Virginia Early Hearing Detection and Intervention Program.

a. All infants born in the Commonwealth are eligible for the hearing screening.

b. All infants who are residents of the Commonwealth and their families are eligible for the Virginia Early Hearing Detection and Intervention Program.

4. Goals. The Title V national performance measures, as required by the federal Government Performance and Results Act ~~(GPRA Pub. L.~~ (Public Law 103-62), are used to establish the program goals. The following goals shall change as needed to be consistent with the Title V national performance measures:

All infants will receive screening for hearing loss no later than one month of age, achieve identification of congenital hearing loss by three months of age, and enroll in appropriate intervention by six months of age.

D. Virginia critical congenital heart disease screening.

1. Mission. Virginia critical congenital heart disease screening promotes early detection of and intervention for newborns with critical congenital heart disease to maximize positive health outcomes and help prevent disability and death early in life.

2. Scope of services. Newborns receive a critical congenital heart disease screening 24 to 48 hours after birth in a hospital with a newborn nursery, as provided in §§ 32.1-67 and 32.1-69.1 of the Code of Virginia and the regulations governing critical congenital heart disease screening (12VAC5-71-210 through 12VAC5-71-260). These population-based, direct, and enabling services are provided through:

a. Critical congenital heart disease screening tests using pulse oximetry or other screening technology as defined in 12VAC5-71-10;

b. Hospital reporting of test results pursuant to § 32.1-69.1 of the Code of Virginia and 12VAC5-191-280; and

c. Follow-up, referral processes, and services, as appropriate, through Care Connection for Children.

3. The screening and management for newborn critical congenital heart disease are governed by the regulations governing critical congenital heart disease screening (12VAC5-71-210 through 12VAC5-71-260).

4. Criteria to receive critical congenital heart disease screening. Except as specified in 12VAC5-71-220 C and 12VAC5-71-260, all newborns born in the Commonwealth in a hospital with a newborn nursery shall receive the screening test for critical congenital heart disease 24 to 48 hours after birth using pulse oximetry or other screening technology.

5. Goal. Except as specified in 12VAC5-71-220 C and 12VAC5-71-260, all newborns born in the Commonwealth in a hospital with a newborn nursery shall receive appropriate critical congenital heart disease screening 24 to 48 hours after birth.

VA.R. Doc. No. R15-4176; Filed November 13, 2015, 2:11 p.m.

Fast-Track Regulation

Title of Regulation: **12VAC5-217. Regulations of the Patient Level Data System (amending 12VAC5-217-10, 12VAC5-217-20, 12VAC5-217-70; adding 12VAC5-217-15; repealing 12VAC5-217-30, 12VAC5-217-80, 12VAC5-217-90).**

Statutory Authority: §§ 32.1-12 and 32.1-276.6 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 13, 2016.

Effective Date: February 1, 2016.

Agency Contact: Debbie Condrey, Chief Information Officer, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7118, or email debbie.condrey@vdh.virginia.gov.

Basis: The regulation is promulgated under the authority of § 32.1-12 and Chapter 7.2 (§ 32.1-276.2 et seq.) of Title 32.1 of the Code of Virginia. Section 32.1-12 grants the board the legal authority "to make, adopt, promulgate, and enforce such regulations necessary to carry out the provisions" of Title 32.1. Section 32.1-276.2 requires the board to administer the health care data reporting initiatives established by Chapter 7.2 of Title 32.1.

Purpose: To fulfill the statutory mandate to review regulations and to protect the citizens of the Commonwealth, the department conducted a periodic review of 12VAC5-217, Regulations of the Patient Level Data System, pursuant to Executive Order 14 (2010). As a result of this review, the department determined it was necessary to use the regulatory process to amend these regulations. The amendments are necessary to protect the health, safety, and welfare of citizens because they correct outdated citations and enhance the clarity of the regulations in order to achieve improvements that will be reasonable and prudent, and will not impose an unnecessary burden on the Virginia Department of Health or the public.

Rationale for Using Fast-Track Process: These amendments simply update the regulations to reflect current practice. The department does not expect that this regulatory action will be controversial.

Substance:

12VAC5-217-10. Definitions - Correct three definitions and remove an unnecessary definition.

12VAC5-217-15. Requirements of processed, verified data - Create a new section. The substance of this section comes from the previous definition of "processed verified data." The definition had numerous substantive requirements that were not appropriate to be located in the definitions section.

12VAC5-217-20. Reporting requirements for patient level data elements - Remove outdated citations; add language to ensure the section does not become outdated due to later

publications from the National Uniform Billing Committee; and add language clarifying that reporting requirements require a complete filing submitted in electronic format.

12VAC5-217-30. Options for filing format - Repeal this section.

12VAC5217-70. Establishment of annual fee - Amend this section to reflect current practice.

12VAC5-217-80. Payment of fee to nonprofit organization - Repeal this section.

12VAC5-217-90. Waiver or reduction of fee - Repeal this section.

Issues: The purpose of the proposed regulatory action is to comply with the Code of Virginia and to remove outdated regulations that no longer reflect current practice. There are no known disadvantages to the public, the regulated entities, business entities, or the Commonwealth. The advantage is greater clarity of the regulations.

Small Business Impact Review Report of Findings: This regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Health (Board) proposes to: 1) update definitions for consistency with the Code of Virginia, 2) repeal obsolete language, 3) move text for improved organization, 4) amend language for clarity, and 5) place in the regulation the current policy that inpatient hospitals that submit data pursuant to this regulation are not assessed fees if the data is processed, verified, and timely in accordance with standards established by the Board.

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

Estimated Economic Impact. Updating definitions for consistency with the Code of Virginia, repealing obsolete language, improving organization of text, and amending language to improve clarity are all moderately beneficial in that they may reduce some potential confusion amongst the interested public.

Inpatient hospitals are required to submit specified patient level data for each hospital inpatient, including a separate record for each infant, if applicable. Inpatient hospitals are defined as a hospital providing inpatient care and licensed pursuant to Article 1 (§ 32.1-123 et seq.) of Chapter 5 of Title 32.1 of the Code of Virginia, a hospital licensed pursuant to Article 2 (§ 32.2-403 et seq.) of Chapter 4 of Title 37.2 of the Code of Virginia, a hospital operated by the Department of Behavioral Health and Developmental Services for the care and treatment of individuals with mental illness, or a hospital operated by the University of Virginia or Virginia Commonwealth University Health System Authority.

It is current Board policy to not assess fees to inpatient hospitals who submit data that is processed, verified, and timely in accordance with standards established by the Board. Establishing this policy in regulation does not change what occurs in practice but does provide a modest benefit in that it provides clarity for interested parties.

Businesses and Entities Affected. The proposed amendments concern 105 licensed hospitals in the Commonwealth, as well as the nonprofit organization Virginia Health Information.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments will not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendments will not significantly affect the use and value of private property.

Small Businesses: Costs and Other Effects. The proposed amendments will not significantly affect costs for small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments will not adversely affect small businesses.

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

Agency's Response to Economic Impact Analysis: The Virginia Department of Health concurs with the findings of the Department of Planning and Budget's economic impact analysis.

Summary:

The amendments clarify and simplify the regulation, update definitions, and eliminate three unnecessary sections.

12VAC5-217-10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings:

"Board" means the Virginia Board of Health.

"Complete filing" means that patient level data of at least 99% of a hospital's inpatient discharges for a calendar year quarter are submitted.

"Inpatient hospital" means a hospital providing inpatient care and licensed pursuant to Article 1 (§ 32.1-123 et seq.) of Chapter 5 of Title 32.1 of the Code of Virginia, a hospital licensed pursuant to ~~Chapter 8 (§ 37.1-179 et seq.) of Title 37.1~~ Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2 of the Code of Virginia, a hospital operated by the Department of Behavioral Health and Developmental Services for the care and treatment of individuals with mental illness, or a hospital operated by the University of Virginia or Virginia Commonwealth University Health System Authority.

"Nonprofit organization" means a nonprofit, tax-exempt health data organization with the characteristics, expertise, and capacity to execute the powers and duties set forth for such entity in Chapter 7.2 (§ 32.1-276.2 et seq.) of Title 32.1 of the Code of Virginia and with which the Commissioner of Health has entered into a contract as required by § 32.1-276.4 of the Code of Virginia.

"Processed, verified data" means data on inpatient records ~~which have been subjected to edits~~ that fulfill the requirements specified in 12VAC5-217-15. ~~These edits shall be applied to data elements which are on the UB-92 Billing Form (or a successor Billing Form adopted by the Virginia Uniform Billing Committee for use by inpatient hospitals in Virginia). The edits shall have been agreed to by the board and the nonprofit organization. Inpatient records containing invalid UB-92 codes or all blank fields for any of the data elements subjected to edits shall be designated as error records. To be considered processed and verified, a complete filing of all records which are submitted by an inpatient hospital in aggregate per calendar year quarter and which are subjected to these edits must be free of error at a prescribed minimum rate. The prescribed minimum error rate shall be 95% overall, with patient identifier separately calculated at 95% or a minimum rate recommended by the board of directors of the nonprofit organization and approved by the Virginia Board of Health. The error rate shall be calculated on only those fields designated in 12VAC5-217-20 or as subsequently approved by the board through the process specified in 12VAC5-217-20.~~

~~"System" means the Virginia Patient Level Data System.~~

12VAC5-217-15. Requirements of processed, verified data.

Inpatient hospitals shall submit only processed, verified data from inpatient records. To be considered processed and verified, a complete filing of all records that are submitted by an inpatient hospital in aggregate per calendar year quarter must be free of error at a prescribed minimum rate. The prescribed minimum accuracy rate shall be 95% overall, with patient identifier separately calculated at 95%. The accuracy rate shall be calculated on only those fields designated in 12VAC5-217-20. Inpatient records containing invalid codes or blank fields for any of the data elements shall be designated as error records.

12VAC5-217-20. Reporting requirements for patient level data elements.

Every inpatient hospital shall submit a complete filing of each patient level data element listed ~~below~~ in the table in this section for each hospital inpatient, including a separate record for each infant, if applicable. Most of these data elements are currently collected from a ~~UB-92~~ Uniform Billing Form located in the latest publication of the Uniform Billing Manual prepared by the National Uniform Billing Committee. ~~The column for a "Form Locator" indicates where the data element is located on the UB-92. For elements collected on the UB-92, the column "Page Number" refers to the Uniform Billing Manual (UB-92), revised May, 1993.~~ The Uniform Billing Form and the Uniform Billing Manual are located on the National Uniform Billing Committee's website at www.nubc.org. The Uniform Billing Manual ~~UB-92, prepared for Virginia hospitals by the Virginia Uniform Billing Committee,~~ provides a detailed field description and any special ~~instructions~~ instruction pertaining to that element. An asterisk (*) indicates when the required data element is either not on the ~~UB-92~~ billing form or in the Uniform Billing Manual. The instructions provided under that particular data element should then be followed. ~~If a successor billing form to the UB-92 form is adopted by the Virginia Uniform Billing Committee for use by inpatient hospitals in Virginia, information pertaining to the data elements listed below should be derived from that successor billing form.~~ Inpatient hospitals that submit patient level data directly to the board or the nonprofit organization shall submit it in an electronic data format.

Data Element	~~Form Locator~~	~~Page Number~~
1. Hospital identifier.* Enter the six-digit Medicare provider number or a number assigned by the board or its designee.	~~*~~	~~*~~
2. Attending physician identifier. Enter the nationally assigned physician identification number, either the Uniform Physician Identification Number (UPIN) or National Provider Identifier (NPI) as approved by the board for the physician assigned as the attending physician for an inpatient.	~~82~~	~~82-1 and 82-2~~
3. Other physician identifier. Enter the nationally assigned physician identification number, either the Uniform Physician Identification Number (UPIN) or National Provider Identifier (NPI) as approved by the board for the physician identified as the operating physician for the principal procedure reported.	~~83-A & B~~	~~83-1 and 83-2~~
4. Payor identifier.	~~50-A, B, C~~	~~50-1 through 50-~~

		~~11~~
5. Employer ~~name~~ identifier.	~~65 A~~	~~65 1~~
6. Patient identifier.* Enter the nine-digit social security number of the patient. If a social security number has not been assigned, leave blank. The nine-digit social security number is not required for patients under four years of age.	*	*
7a. Patient sex.	~~15~~	~~15 1~~
7b. Race code.* If an inpatient hospital collects information regarding the choices listed below, the appropriate one-digit code reflecting the race of the patient should be entered. If a hospital only collects information for categories 0, 1, or 2, then the appropriate code should be entered from those three selections. 0 = White 1 = Black 2 = Other 3 = Asian 4 = American Indian 5 = White Hispanic 6 = Black Hispanic	*	*
7c. Date of birth.	~~14~~	~~14 1~~
7d. ~~Zip~~ Street address, city or county, and zip code.	~~13~~	~~13 1~~
~~7e. Patient relationship to insured.~~	~~59 A, B, C~~	~~59 1 through 59 3~~
~~7f.~~ 7e. Employment status code.	~~64 A, B, C~~	~~64 1 and 64 2~~
~~7g.~~ 7f. Patient status (i.e., discharge). Inpatient codes only.	~~22~~	~~22 1 and 22 2~~
~~7h.~~ 7g. Birth weight (for infants)*	*	*
Enter the birth weight of newborns in grams.		
8a. Admission type.	~~19~~	~~19 1 and 19 2~~
8b. Admission source.	~~20~~	~~20 1 through 20 3~~
8c. Admission date.	~~17~~	~~17 1~~
8d. Admission hour.	~~18~~	~~18 1~~
8e. Admission diagnosis code.	~~76~~	~~76 1~~
9a. Discharge date. Only enter date of discharge.	*	*
10. Principal diagnosis code. Enter secondary diagnoses (up to eight). In addition, include diagnoses recorded in the comments section for DX6-DX9.	~~67~~ ~~68 75~~	~~67 1 and 67 2~~ ~~68 1~~
11. External cause of injury code (E-code). Record all external cause of injury codes in secondary diagnoses position after recording all treated secondary diagnoses.	~~77~~	~~77 1~~
12. Co-morbid conditions existing but not treated.		
~~12.~~ 13. Principal procedure code and date. Enter other procedures and dates (up to five). In addition, include procedures recorded in the comments section for PX4-PX6.	~~80~~ ~~81 A E~~	~~80 1~~ ~~81 1~~
~~13.~~ 14. Revenue code (up to 23). Units of service (up to 23). Units of service charges (up to 23).	~~42~~ ~~46~~ ~~47~~	~~42 1 through 42 56~~ ~~46 1~~ ~~47 1~~
~~14.~~ 15. Total charges (by revenue code category or by HCPCS code). (R.C. Code 001 is for total charges. See page 47-1.)	~~47~~	~~47 1~~

12VAC5-217-30. ~~Options for filing format.~~ (Repealed.)

~~Inpatient hospitals of 100 beds or more that submit patient level data directly to the board or the nonprofit organization shall submit it in an electronic data format. Hospitals of less than 100 beds that submit patient level data directly to the board or the nonprofit organization may directly submit it in electronic data format or in hard copy. If hard copy is utilized the hospital shall submit, for each inpatient discharged, a copy of the UB 92 and an addendum sheet for those data elements not collected on the UB 92 or defined in the Uniform Billing Manual. These hospitals must submit all patient level data in electronic data format by January 1, 1995.~~

~~If a hospital submits processed, verified data directly to the nonprofit organization, it shall be in electronic format.~~

12VAC5-217-70. Establishment of annual fee.

The board shall not assess any fee against any health care provider that submits data under this chapter that is processed, verified, and timely in accordance with standards established by the board. The board shall prescribe a reasonable fee not to exceed $1.00 per discharge for each inpatient hospital submitting patient level data pursuant to this chapter that is not processed, verified, or timely to cover the cost of the reasonable expenses in processing and verifying such data. The fee shall be established and reviewed annually by the board. ~~Payment of the fee by a hospital shall be at the time quarterly inpatient data is submitted.~~

12VAC5-217-80. ~~Payment of fee to nonprofit organization.~~ (Repealed.)

~~If an inpatient hospital chooses to submit its patient level data directly to the nonprofit organization, that hospital may pay the fee described in 12VAC5-217-70 to the nonprofit organization at the time it submits its quarterly data. If a hospital pays its fee directly to the nonprofit organization, the requirements of a fee to be paid to the board, as described in 12VAC5-217-70, shall be waived by the board.~~

12VAC5-217-90. ~~Waiver or reduction of fee.~~ (Repealed.)

~~If a hospital submits processed, verified patient level data to the nonprofit organization, the nonprofit organization may, in its discretion, grant a waiver or reduction of the fee if it determines that the hospital has submitted properly processed, verified data.~~

VA.R. Doc. No. R16-3632; Filed November 13, 2015, 2:44 p.m.

Fast-Track Regulation

Title of Regulation: **12VAC5-407. Procedures for the Submission of Health Maintenance Organization Quality of Care Performance Information (amending 12VAC5-407-10, 12VAC5-407-50 through 12VAC5-407-100; repealing 12VAC5-407-30, 12VAC5-407-40, 12VAC5-407-120).**

Statutory Authority: §§ 32.1-12 and 32.1-276.5 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 13, 2016.

Effective Date: February 1, 2016.

Agency Contact: Debbie Condrey, Chief Information Officer, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7118, FAX (804) 864-7156, or email debbie.condrey@vdh.virginia.gov.

Basis: The regulation is promulgated under the authority of §§ 32.1-12 and 32.1-276.5 of the Code of Virginia. Section 32.1-12 grants the board the legal authority "to make, adopt, promulgate, and enforce such regulations necessary to carry out the provisions" of Title 32.1 of the Code of Virginia. Subsection B of § 32.1-276.5 requires health maintenance organizations (HMOs) to submit annually to the Commissioner of Health audited data consistent with the latest version of the Health Employer Data and Information Set (HEDIS) as collected by the National Committee for Quality Assurance (NCQA). Subsection B of § 32.1-276.5 requires that the board promulgate regulations to implement this requirement.

Purpose: To fulfill the statutory mandate to review regulations and to protect the citizens of the Commonwealth, the department conducted a periodic review of 12VAC5-407, "Procedures for the Submission of Health Maintenance Organization Quality of Care Performance Information" pursuant to Executive Order 14 (2010). As a result of this review, the department determined it was necessary to use the regulatory process to amend these regulations. The amendments are essential to protect the health, safety, and welfare of citizens because they enhance the clarity of the regulations in order to achieve improvements that will be reasonable and prudent and will not impose an unnecessary burden on the Virginia Department of Health or the public.

Rationale for Using Fast-Track Process: These amendments simply clarify confusing language, eliminate unnecessary sections within the existing regulations, and correct the statutory authority for the chapter. This regulatory action does not propose any substantive changes. These amendments have also been created with input from stakeholders. Therefore, the department does not expect that this regulatory action will be controversial.

Substance:

12VAC5-407-10. Definitions -- Remove the unnecessary definition of "Code." Correct the definitions of "HEDIS" and "Nonprofit Organization."

12VAC5-407-30 Reporting requirements for HMO -- Remove an unnecessary section.

12VAC5-407-40 Exceptions to HEDIS reporting -- Remove an unnecessary section.

12VAC5-407-50 Reporting methods and exemption from reporting -- Restructure the section for improved clarity.

12VAC5-407-60 Audited data required -- Change the section into active voice and remove unnecessary language from the section.

12VAC5-407-70 Process for data submission -- Clarify language.

12VAC-407-80 Fees -- Clarify language and update terminology.

12VAC5-407-90 Late charge -- Change terminology for consistency across the regulations.

12VAC5-407-100 Duties of the nonprofit organization -- Clarify language.

12VAC5-407-120 Other duties of the board -- Remove an unnecessary section.

Issues: The primary advantage to the agency, the Commonwealth, and the public of the proposed regulatory action will be clearer and less burdensome regulations. There are no known disadvantages to the agency, the Commonwealth, or the public.

Small Business Impact Review Report of Findings: This regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Board of Health (Board) proposes to: 1) update definitions, 2) amend language to improve clarity, and 3) remove obsolete language.

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

Estimated Economic Impact. Code of Virginia § 32.1-276.5 (B) requires health maintenance organizations (HMOs) to annually submit audited data to the State Health Commissioner and the Board to promulgate regulation to implement this requirement. The Regulations for the Submission of Health Maintenance Organization Quality of Care Performance Information are such regulation.

None of the Board's proposed amendments change requirements in practice. Proposed language changes will enable readers of the regulation to more accurately understand requirements in practice. Thus the proposed amendments will likely produce a small net benefit.

Businesses and Entities Affected. The proposed amendments pertain to the 10 HMOs with active licenses to operate in the Commonwealth of Virginia. None of these firms are small businesses.[1]

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments will not affect employment.

Effects on the Use and Value of Private Property. The proposed amendments will not significantly affect the use and value of private property.

Small Businesses: Costs and Other Effects. The proposed amendments will not significantly affect small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments will not significantly affect small businesses.

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

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[1] Data source: Virginia Department of Health

Agency's Response to Economic Impact Analysis: The Virginia Department of Health concurs with the findings of the economic impact analysis.

Summary:

The amendments clarify and simplify the regulation, update definitions and titles, and eliminate three unnecessary sections.

Part I
Definitions and General Information

12VAC5-407-10. Definitions.

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

"Board" means State Board of Health.

~~"Code" means the Code of Virginia.~~

"Commissioner" means the State Health Commissioner.

"Consumer" means any person (i) whose occupation is other than the administration of health activities or the provision of health services~~,~~; (ii) who has no fiduciary obligation to a health care institution or other health agency or to any organization, public or private, whose principal activity is an adjunct to the provision of health services~~,~~; or (iii) who has no material financial interest in the rendering of health services.

"Department" means the ~~State~~ Virginia Department of Health.

"Health maintenance organization" or "HMO" means any person who undertakes to provide or to arrange for one or more health care plans pursuant to Chapter 43 (§ 38.2-4300 et seq.) of Title 38.2 of the Code of Virginia.

"HEDIS" means the Health ~~Plan~~ Employer Data and Information Set, also known as the Healthcare Effectiveness Data and Information Set, a set of standardized performance measures ~~sponsored, supported~~ collected and maintained by the National Committee for Quality Assurance.

"NCQA" means the National Committee for Quality Assurance.

"Nonprofit organization" means a nonprofit, tax-exempt health data organization with the characteristics, expertise,

and capacity to execute the powers and duties set forth for such entity in ~~this chapter~~ Chapter 7.2 (§ 32.1-276.2 et seq.) of Title 32.1 of the Code of Virginia and that enters into a contract for the compilation, storage, analysis, and evaluation of data pursuant to Chapter 7.2 of Title 32.1.

Part II
Quality of Care Data Reporting

12VAC5-407-30. ~~Reporting requirements for HMO data.~~ (Repealed.)

~~A. Every HMO shall make available to the commissioner those HEDIS or any other quality of care or performance information set, or a subset thereof.~~

~~B. The board may contract directly with NCQA to purchase the selected HEDIS measures on behalf of the HMOs.~~

12VAC5-407-40. ~~Exception to HEDIS reporting.~~ (Repealed.)

~~A. The board may approve and require quality of care data other than the HEDIS measures provided that reasonable notice is given to the HMOs in writing.~~

12VAC5-407-50. Reporting methods and exemption from reporting.

A. Every HMO with an active license in the Commonwealth shall be required to submit the HEDIS or any other quality of care or performance information set approved by the board unless granted a written exemption by the commissioner.

B. The following methods shall be used for data submission:

1. If the HMO submits data to NCQA, the commissioner may purchase HEDIS data or any other quality of care or performance information set from NCQA.

2. If the HMO does not submit data to NCQA, or the commissioner elects not to purchase HEDIS data from the NCQA, then the HMO shall submit the performance information sets approved by the board to the nonprofit organization in accordance with the timeframes established in 12VAC5-407-70.

~~B.~~ C. An HMO may, in writing, petition the commissioner for an exemption. The commissioner, at his discretion, may grant a waiver from reporting the HEDIS or any other approved quality of care or performance information set. In considering a petition for waiver, the commissioner may give due consideration to the HMO's (i) sample size; (ii) number of covered lives; (iii) length of operating experience in Virginia; (iv) accreditation status with respect to NCQA or other national accrediting organizations; or (v) any other relevant factors he deems appropriate.

~~C.~~ D. An HMO that can demonstrate that it does not meet NCQA's minimum sample size requirements to collect statistically valid information on at least 50% of the HEDIS effectiveness of care measures or performance information sets approved by the board shall be exempt from reporting the HEDIS quality of care or performance sets during the reporting period. The HMO shall submit documentation to the commissioner each reporting period to demonstrate that it meets the criteria for obtaining an exemption from reporting.

~~D. Options for data submission.~~

~~1. The commissioner may purchase HEDIS data or any other quality of care or performance information set from NCQA that includes all HMOs operating in the Commonwealth that submit HEDIS data to NCQA.~~

~~2. HMOs that do not submit data directly to NCQA must submit the performance information sets approved by the board to the nonprofit organization in accordance with the timeframes established in 12VAC5-407-70.~~

~~3. If the budget pursuant to 12VAC5-407-100 E includes a cost-benefit for direct submission of HEDIS data or any other quality of care or performance information set, the commissioner may thereafter require direct submission.~~

12VAC5-407-60. Audited data required.

~~A. Data submitted by~~ HMOs ~~is required to be~~ shall submit HEDIS or other quality of care or performance information set approved by the board that has been verified by an independent auditing organization with no financial interest in or managerial association with the HMO. The HMO shall submit an audit report with the data.

~~B. HMOs whose performance information set is audited by an NCQA-certified HEDIS compliance auditor will have a notice to that effect published with their HEDIS data.~~

~~C. HMOs whose performance information set is not audited by NCQA-certified auditors will have a notice to that effect published with their HEDIS data.~~

12VAC5-407-70. Process for data submission.

A. Before January 1 of each year, the commissioner shall submit to each HMO in writing the process required for data submission, ~~obtaining a waiver from reporting and the amount of the fee to be paid~~ the fee associated with data submission, and the process for obtaining a waiver. HMOs providing HEDIS or any other quality of care or performance information set directly to the ~~commissioner~~ nonprofit organization shall submit the data by September 15 of each year.

B. The ~~nonprofit organization~~ board shall direct the nonprofit organization to publish annually the quality information data before December 31.

12VAC5-407-80. Fees.

A. For each HMO required to provide information pursuant to this chapter, the board shall prescribe a reasonable fee to cover the cost of collecting and making available such data. The commissioner may purchase HEDIS data or other quality of care or performance information set on behalf of all the actively licensed HMOs in the Commonwealth that are participating in HEDIS and divide the cost among the HMOs. Each HMO shall pay an equal share of the cost to the board for purchase of the HEDIS data directly from NCQA. The remainder of the cost associated with making the data

available shall be divided among the participating HMOs in a tiered format based on the number of enrollees per HMO.

B. Fees described in subsection A of this section shall not exceed $3,000 per HMO per year.

C. The payment of such fees shall be on September 15 of each year or later if determined by an agreement between the board and the nonprofit organization. The nonprofit organization ~~providing services pursuant to an agreement or contract as provided in § 32.1 276.4 of the Code of Virginia~~ shall be authorized to charge and collect the fees prescribed by the board in subsection A of this section when the data are provided directly to the nonprofit organization. Such fees shall not exceed the amount authorized by the board.

D. The nonprofit organization ~~providing services pursuant to an agreement or contract as provided in § 32.1 276.4 of the Code of Virginia~~ shall be authorized to charge and collect reasonable fees approved by the board for making available to any individual or entity who requests the HEDIS data or other approved quality of care data; however, the commissioner, the State Corporation Commission, and the Commissioner of ~~Mental Health, Mental Retardation and Substance Abuse Services~~ Behavioral Health and Developmental Services shall be entitled to receive relevant and appropriate data from the nonprofit organization at no charge.

E. ~~HMOs shall be entitled to receive relevant and appropriate HMO data as defined by and from the nonprofit organization, with input from the HMO industry at no charge.~~ The board shall direct the nonprofit organization to solicit input from the HMO industry to determine relevant and appropriate data that the industry shall receive at no charge.

12VAC5-407-90. Late charge.

A. A late charge of $25 per working day shall be paid to the board by an HMO that has not received an exemption from the commissioner as provided for in 12VAC5-407-50 and that has not paid the assessed fees by September 15 or later if determined by an agreement between the board and the nonprofit. The late ~~fee~~ charge may not be assessed until completion of a 30-day grace period for submitting the data.

B. Late charges may be waived by the board, in its discretion, if an HMO can show that an extenuating circumstance exists. Examples of an extenuating circumstance may include, but are not limited to, the installation of a new computerized system, a bankruptcy proceeding, or change of ownership in the HMO.

Part III

Duties of the Board and the Nonprofit Organization

12VAC5-407-100. ~~Contract with~~ Duties of the nonprofit organization.

The contract entered into by the board and the nonprofit organization pursuant to Chapter 7.2 (§ 32.1-276.2 et seq.) of Title 32.1 of the Code of Virginia shall provide:

~~A. The commissioner shall negotiate and contract with a nonprofit organization pursuant to § 32.1 276.4 of the Code of Virginia for compiling, storing, and making~~ 1. The nonprofit organization shall compile, store, and make available to consumers the data submitted by HMOs ~~pursuant to 12VAC5-407-30 and 12VAC5-407-40~~.

~~B.~~ 2. The nonprofit organization shall assist the board in developing a summary plan and budget to collect and make available HMO HEDIS or any other quality of care performance information set results for consumers. The nonprofit organization shall present the summary plan and budget on a biennial basis to the board for approval. The commissioner, at his discretion, shall also review the summary plan on a periodic basis to determine its effectiveness.

~~C.~~ 3. The nonprofit organization shall collect the HEDIS data in the most cost-effective manner available.

~~D.~~ 4. The nonprofit organization ~~will~~ shall prepare a biennial summary plan in identifying the measures selected for reporting. The summary plan shall include:

~~1.~~ a. The rationale for selecting each measure to be made available to consumers;

~~2.~~ b. The goal of reporting each measure;

~~3.~~ c. The cost and benefit of collecting the measures and making them available to consumers; and

~~4.~~ d. The scope of dissemination of information in paper or electronic format and the target audience.

~~E.~~ 5. The nonprofit organization shall prepare a biennial budget that includes a cost-benefit analysis of purchasing HEDIS data from NCQA or obtaining the information performance sets directly from the HMOs.

~~F.~~ 6. The nonprofit organization ~~will~~ shall present the summary plan and budget to the board for review and approval on a biennial basis.

~~G.~~ 7. The nonprofit organization shall organize, present, and make available to consumers all data required by the board to be reported to the commissioner. This data shall also be available on the nonprofit's website.

12VAC5-407-120. ~~Other duties of the board.~~ (Repealed.)

~~The board shall (i) maintain records of its activities relating to the dissemination of data reported by HMOs and (ii) collect and account for all fees, as described in this chapter, and deposit the moneys so collected into a special fund from which the expenses attributed to this chapter shall be paid.~~

VA.R. Doc. No. R16-3763; Filed November 13, 2015, 2:46 p.m.

DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

Emergency Regulation

Title of Regulation: **12VAC30-40. Eligibility Conditions and Requirements (amending 12VAC30-40-290; adding 12VAC30-40-370).**

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

Effective Dates: November 23, 2015, through May 22, 2017.

Agency Contact: Emily McClellan, Regulatory Supervisor, Policy Division, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.virginia.gov.

Preamble:

Section 2.2-4011 of the Code of Virginia states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of § 2.2-4006 A 4. Item 307 T of Chapter 665 of the 2015 Acts of the Assembly included such an enactment clause and directed the agency to modify its Medicaid eligibility regulations to permit persons who were involuntarily sterilized to retain their compensation without the compensation affecting their eligibility.

This emergency regulation requires that payments made to compensate individuals who were involuntarily sterilized pursuant to the Virginia Eugenical Sterilization Act and who are living as of February 1, 2015, (i) are disregarded for the purpose of Medicaid eligibility determinations and (ii) increase the basic personal needs allowance.

12VAC30-40-290. More liberal methods of treating resources under § 1902(r)(2) of the Act: § 1902(f) states.

A. Resources to meet burial expenses. Resources set aside to meet the burial expenses of an applicant/recipient or that individual's spouse are excluded from countable assets. In determining eligibility for benefits for individuals, disregarded from countable resources is an amount not in excess of $3,500 for the individual and an amount not in excess of $3,500 for his spouse when such resources have been set aside to meet the burial expenses of the individual or his spouse. The amount disregarded shall be reduced by:

1. The face value of life insurance on the life of an individual owned by the individual or his spouse if the cash surrender value of such policies has been excluded from countable resources; and

2. The amount of any other revocable or irrevocable trust, contract, or other arrangement specifically designated for the purpose of meeting the individual's or his spouse's burial expenses.

B. Cemetery plots. Cemetery plots are not counted as resources regardless of the number owned.

C. Life rights. Life rights to real property are not counted as a resource. The purchase of a life right in another individual's home is subject to transfer of asset rules. See 12VAC30-40-300.

D. Reasonable effort to sell.

1. For purposes of this section, "current market value" is defined as the current tax assessed value. If the property is listed by a realtor, then the realtor may list it at an amount higher than the tax assessed value. In no event, however, shall the realtor's list price exceed 150% of the assessed value.

2. A reasonable effort to sell is considered to have been made:

a. As of the date the property becomes subject to a realtor's listing agreement if:

(1) It is listed at a price at current market value; and

(2) The listing realtor verifies that it is unlikely to sell within 90 days of listing given the particular circumstances involved (e.g., owner's fractional interest; zoning restrictions; poor topography; absence of road frontage or access; absence of improvements; clouds on title, right of way or easement; local market conditions); or

b. When at least two realtors refuse to list the property. The reason for refusal must be that the property is unsaleable at current market value. Other reasons for refusal are not sufficient; or

c. When the applicant has personally advertised his property at or below current market value for 90 days by use of a "Sale By Owner" sign located on the property and by other reasonable efforts, such as newspaper advertisements, or reasonable inquiries with all adjoining landowners or other potential interested purchasers.

3. Notwithstanding the fact that the recipient made a reasonable effort to sell the property and failed to sell it, and although the recipient has become eligible, the recipient must make a continuing reasonable effort to sell by:

a. Repeatedly renewing any initial listing agreement until the property is sold. If the list price was initially higher than the tax-assessed value, the listed sales price must be reduced after 12 months to no more than 100% of the tax-assessed value.

b. In the case where at least two realtors have refused to list the property, the recipient must personally try to sell the property by efforts described in subdivision 2 c of this subsection for 12 months.

c. In the case of a recipient who has personally advertised his property for a year without success (the newspaper advertisements and "for sale" sign do not have to be

continuous; these efforts must be done for at least 90 days within a 12-month period), the recipient must then:

(1) Subject his property to a realtor's listing agreement at price or below current market value; or

(2) Meet the requirements of subdivision 2 b of this subsection which are that the recipient must try to list the property and at least two realtors refuse to list it because it is unsaleable at current market value; other reasons for refusal to list are not sufficient.

4. If the recipient has made a continuing effort to sell the property for 12 months, then the recipient may sell the property between 75% and 100% of its tax assessed value and such sale shall not result in disqualification under the transfer of property rules. If the recipient requests to sell his property at less than 75% of assessed value, he must submit documentation from the listing realtor, or knowledgeable source if the property is not listed with a realtor, that the requested sale price is the best price the recipient can expect to receive for the property at this time. Sale at such a documented price shall not result in disqualification under the transfer of property rules. The proceeds of the sale will be counted as a resource in determining continuing eligibility.

5. Once the applicant has demonstrated that his property is unsaleable by following the procedures in subdivision 2 of this subsection, the property is disregarded in determining eligibility starting the first day of the month in which the most recent application was filed, or up to three months prior to this month of application if retroactive coverage is requested and the applicant met all other eligibility requirements in the period. A recipient must continue his reasonable efforts to sell the property as required in subdivision 3 of this subsection.

E. Automobiles. Ownership of one motor vehicle does not affect eligibility. If more than one vehicle is owned, the individual's equity in the least valuable vehicle or vehicles must be counted. The value of the vehicles is the wholesale value listed in the National Automobile Dealers Official Used Car Guide (NADA) Book, Eastern Edition (update monthly). In the event the vehicle is not listed, the value assessed by the locality for tax purposes may be used. The value of the additional motor vehicles is to be counted in relation to the amount of assets that could be liquidated that may be retained.

F. Life, retirement, and other related types of insurance policies. Life, retirement, and other related types of insurance policies with face values totaling $1,500 or less on any one person 21 years old and over are not considered resources. When the face values of such policies of any one person exceeds $1,500, the cash surrender value of the policies is counted as a resource.

G. Long-term care partnership insurance policy (partnership policy). Resources equal to the amount of benefits paid on the insured's behalf by the long-term care insurer through a Virginia issued long-term care partnership insurance policy shall be disregarded. A long-term care partnership insurance policy shall meet the following requirements:

1. The policy is a qualified long-term care partnership insurance policy as defined in § 7702B(b) of the Internal Revenue Code of 1986.

2. The policy meets the requirements of the National Association of Insurance Commissioners (NAIC) Long-Term Care Insurance Model Regulation and Long-Term Care Insurance Model Act as those requirements are set forth in § 1917(b)(5)(A) of the Social Security Act (42 USC § 1396p).

3. The policy was issued no earlier than May 1, 2007.

4. The insured individual was a resident of a partnership state when coverage first became effective under the policy. If the policy is later exchanged for a different long-term care policy, the individual was a resident of a partnership state when coverage under the earliest policy became effective.

5. The policy meets the inflation protection requirements set forth in § 1917(b)(1)(C)(iii)(IV) of the Social Security Act.

6. The Insurance Commissioner requires the issuer of the partnership policy to make regular reports to the federal Secretary of Health and Human Services that include notification of the date benefits provided under the policy were paid and the amount paid, the date the policy terminates, and such other information as the secretary determines may be appropriate to the administration of such partnerships. Such information shall also be made available to the Department of Medical Assistance Services upon request.

7. The state does not impose any requirement affecting the terms or benefits of a partnership policy that the state does not also impose on nonpartnership policies.

8. The policy meets all the requirements of the Bureau of Insurance of the State Corporation Commission described in 14VAC5-200.

H. Reserved.

I. Resource exemption for Aid to Dependent Children categorically and medically needy (the Act §§ 1902(a)(10)(A)(i)(III), (IV), (VI), (VII); §§ 1902(a)(10)(A)(ii)(VIII), (IX); § 1902(a)(10)(C)(i)(III)). For ADC-related cases, both categorically and medically needy, any individual or family applying for or receiving assistance may have or establish one interest-bearing savings or investment account per assistance unit not to exceed $5,000 if the applicant, applicants, recipient or recipients designate that the account is reserved for purposes related to self-sufficiency. Any funds deposited in the account shall be exempt when determining eligibility for medical assistance for so long as the funds and interest remain on deposit in the account. Any amounts withdrawn and used for purposes

related to self-sufficiency shall be exempt. For purposes of this section, purposes related to self-sufficiency shall include, but are not limited to, (i) paying for tuition, books, and incidental expenses at any elementary, secondary, or vocational school, or any college or university; (ii) for making down payment on a primary residence; or (iii) for establishment of a commercial operation that is owned by a member of the medical assistance unit.

J. Disregard of resources. The Commonwealth of Virginia will disregard all resources for qualified children covered under §§ 1902(a)(10)(A)(i)(I), 1902(a)(10)(A)(i)(III), 1902(a)(10)(A)(ii)(VIII), and 1905(n) of the Social Security Act.

K. Household goods and personal effects. The Commonwealth of Virginia will disregard the value of household goods and personal effects. Household goods are items of personal property customarily found in the home and used in connection with the maintenance, use and occupancy of the premises as a home. Examples of household goods are furniture, appliances, televisions, carpets, cooking and eating utensils and dishes. Personal effects are items of personal property that are worn or carried by an individual or that have an intimate relation to the individual. Examples of personal property include clothing, jewelry, personal care items, prosthetic devices and educational or recreational items such as books, musical instruments, or hobby materials.

L. Determining eligibility based on resources. When determining Medicaid eligibility, an individual shall be eligible in a month if his countable resources were at or below the resource standard on any day of such month.

M. Working individuals with disabilities eligible for assistance under § 1902(a)(10)(A)(ii)(XV) of the Act who wish to increase their personal resources while maintaining eligibility for Medicaid shall establish Work Incentive (WIN) accounts. The Commonwealth will disregard up to the current annual SSI (Social Security Act, § 1619(b)) threshold amount (as established for Virginia by the Social Security Administration) held in WIN accounts for workers with disabilities eligible for assistance under § 1902(a)(10)(A)(ii)(XV) of the Act. To be eligible for this resource disregard, WIN accounts are subject to the following provisions:

1. Deposits to this account shall derive solely from the individual's income earned after electing to enroll in the Medicaid Buy-In (MBI) program.

2. The balance of this account shall not exceed the current annual SSI (Social Security Act § 1619(b)) threshold amount (as established for Virginia by the Social Security Administration).

3. This account will be held separate from nonexempt resources in accounts for which prior approval has been obtained from the department, and for which the owner authorizes regular monitoring and reporting including deposits, withdrawals, and other information deemed necessary by the department for the proper administration of this provision.

4. A spouse's resources will not be deemed to the applicant when determining whether or not the individual meets the financial eligibility requirements for eligibility under this section.

5. Resources accumulated in the Work Incentive account shall be disregarded in determining eligibility for aged, blind, and disabled Medicaid-covered groups for one year after the individual leaves the Medicaid Buy-In program.

6. In addition, excluded from the resource and asset limit include amounts deposited in the following types of IRS-approved accounts established as WIN accounts: retirement accounts, medical savings accounts, medical reimbursement accounts, education accounts and independence accounts. Assets retained in these WIN accounts shall be disregarded for all future Medicaid eligibility determinations for aged, blind, or disabled Medicaid-covered groups.

N. For all aged, blind, or disabled individuals, both categorically needy and medically needy, the Commonwealth shall disregard as resources amounts received as payment for involuntary sterilization under the Virginia Eugenical Sterilization Act, beyond the allowable nine-month exclusion by the SSI program's resource methodologies.

12VAC30-40-370. Variations from the basic personal needs allowance.

For victims of Virginia's eugenical program, the Commonwealth shall, in addition to the basic personal needs allowance (PNA), increase the basic PNA by amounts received as payments for involuntary sterilization under the Virginia Eugenical Sterilization Act.

VA.R. Doc. No. R16-4351; Filed November 23, 2015, 10:36 a.m.

Proposed Regulation

Titles of Regulations: **12VAC30-50. Amount, Duration, and Scope of Medical and Remedial Care Services (amending 12VAC30-50-190).**

12VAC30-141. Family Access to Medical Insurance Security Plan (amending 12VAC30-141-820).

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

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: February 12, 2016.

Agency Contact: Victoria Simmons, Regulatory Coordinator, Department of Medical Assistance Services, Policy Division, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-6043, FAX (804) 786-1680, TTY (800) 343-0634, or email victoria.simmons@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance.

Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the Plan for Medical Assistance according to the board's requirements. The Medicaid authority as established by § 1902(a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services.

In addition, Item 301 LLLL 2 of Chapter 665 of the 2015 Acts of Assembly provides that "The Department of Medical Assistance Services is authorized to amend the State Plan under Title XIX of the Social Security Act to add coverage for comprehensive dental services to pregnant women receiving services under the Medicaid program to include: (i) diagnostic, (ii) preventive, (iii) restorative, (iv) endodontics, (v) periodontics, (vi) prosthodontics both removable and fixed, (vii) oral surgery, and (viii) adjunctive general services." An emergency regulation for this purpose is currently in effect. This proposed regulation would replace the emergency regulation.

Purpose: Prior to this action, only those individuals covered through the Family Access to Medical Insurance Security Plan (FAMIS) or those younger than the age of 21 years who were covered through Medicaid were provided dental services. Dental emergency coverage for adults was also provided. Services are provided to individuals younger than 21 years of age as long as they are routine diagnostic, preventive, or restorative procedures necessary for oral health provided by or under the direct supervision of a dentist in accordance with the State Dental Practice Act.

Due to the need of pregnant women to receive dental care, the Governor approved emergency regulations to provide dental care for about 45,000 adult pregnant women enrolled in Medicaid and FAMIS MOMS who already receive publicly funded Medicaid/FAMIS MOMS health care services. This action seeks to utilize the authority granted by the Governor to make permanent the dental services regulation to allow the department to continue to carry out the Governor's directive.

Substance: In the past, DMAS covered routine dental services through the Smiles for Children (SFC) program only for individuals younger than 21 years of age. Dental services are required by the FAMIS program (12VAC30-141-500 and 12VAC30-141-830) and by the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program (42 CFR 440.40(b) and 12VAC30-50-40 B). The covered services are diagnostic x-rays and exams; preventive cleanings; restorative fillings; endodontics (root canals); periodontics (gum-related treatments); prosthodontics, both removable and fixed (crowns, bridges, partials, and dentures); orthodontia; oral surgery (extractions and other oral surgeries); and adjunctive general services (all covered services that do not fall into specific professional categories). DMAS also covers emergency dental care, with the associated diagnostic tests, for adults.

Control of dental disease during pregnancy has been shown to have positive effect on a pregnancy's outcome. Both the American Congress of Obstetricians and Gynecologists (ACOG) and the American Dental Association (ADA) have published position papers supporting the need for and safety of oral health care during pregnancy.

In furtherance of the Governor's Healthy Virginia Plan, DMAS is working in concert with its dental benefits administrator, DentaQuest, to design an oral health program for adult pregnant women who are enrolled in Medicaid and FAMIS MOMS. The service categories are inclusive of those provided in Virginia's Smiles for Children (SFC) program and, in comparison, are similar in scope to dental services available through the Virginia Department of Human Resources dental benefits for state employees, with the exception of orthodontia services, which will not be covered.

Services for adult pregnant women will include the following when deemed medically appropriate: diagnostic x-rays and exams; preventive cleanings; restorative fillings; endodontics (root canals); periodontics (gum-related treatment); prosthodontics, both removable and fixed (crowns, bridges, partials, and dentures); oral surgery (extractions and other oral surgeries); and adjunctive general services (all covered services that do not fall into specific professional categories). The appropriateness of particular services for an individual pregnant woman will be determined by the dental provider based on the term of the woman's pregnancy.

DMAS estimates that approximately 45,000 adult pregnant women will be eligible for this service. Based on the average per individual expenditure for dental services, DMAS estimates that this new coverage may cost approximately $600,000 in state fiscal year (SFY) 2015 (beginning March 1, 2015) and $3.2 million in SFY 2016. The funds for this service derive from the state general fund and federal matching funds claimed by DMAS.

Issues: Control of dental disease during and after pregnancies may have a positive effect on the overall health of mothers and infants. The advantages to indigent pregnant women will be the availability of dental services. The advantage to the Commonwealth and citizens will be the improved health outcomes with the related cost savings. The disadvantage is a slight increase in Commonwealth expenditures. However, this cost is partially offset by the matching funds received from the Centers for Medicare and Medicaid Services.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to the 2015 Acts of Assembly, Chapter 665[1], Item 301 LLLL(2), the Board of Medical Assistance Services (Board) proposes to add adult pregnant women to the individuals eligible to receive full dental services (excluding orthodontia) through Medicaid and FAMIS MOMS. An emergency regulation for this purpose is currently in effect.

This proposed regulation would replace the emergency regulation.

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

Estimated Economic Impact. Prior to the legislation and emergency regulation, the Department of Medical Assistance Services (DMAS) only covered comprehensive dental services including orthodontia (12VAC30-50-190 and 42 CFR 440.100) for individuals under the age of 19 who were covered through the Family Access to Medical Insurance Security (FAMIS) plan and for individuals up to the age of 21 as a required element of the Early and Periodic Screening, Diagnosis, and Treatment program (12VAC30-50-130(B) and 42 CFR 440.40(b)). Only emergency dental care with the associated diagnostic tests was covered for adults (ages 21 and older). The Board proposes to cover dental care, excluding orthodontia, for adult pregnant women enrolled in Medicaid and FAMIS MOMS.

Peer-reviewed studies have found that improved oral health during pregnancy decreases transmission of potentially cariogenic bacteria to infants.[2] Both the American Congress of Obstetricians and Gynecologists[3] and the American Dental Association[4] have published position papers supporting the need for and safety of oral health care during pregnancy. Thus, providing dental services through Medicaid for adult pregnant women will provide significant health benefits for both the women and their babies.

DMAS calculates that approximately 45,000 adult women are pregnant and enrolled in Medicaid and FAMIS MOMS at any point within a year. The agency also estimates that the state share of the costs of this program would be approximately $1.6 million for fiscal year 2016.

Businesses and Entities Affected. The proposed amendment affects dental practices, the dental benefits administrator DentaQuest, and the approximate 45,000 women who are pregnant and enrolled in Medicaid and FAMIS MOMS at any point within a year.

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

Projected Impact on Employment. The proposed amendment may moderately increase staffing needs for dental practices.

Effects on the Use and Value of Private Property. The proposed amendment will create additional business for dental practices.

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

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

Costs and Other Effects. The proposed amendment is unlikely to increase costs for small businesses.

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

Adverse Impacts: Businesses: The proposed amendment will not adversely affect businesses.

Localities: The proposed amendment will not adversely affect localities.

Other Entities: The proposed amendment will cost the Commonwealth (taxpayers) approximately $1.6 million annually.

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[1]This is the 2015 Appropriation Act.

[2]Meyer K, Geurtsen W, Gunay H. "An early oral health care program starting during pregnancy: results of a prospective clinical long-term study." Clin Oral Investig 2010;14:257–64.

Gomez SS,Weber AA. "Effectiveness of a caries preventive program in pregnant women and new mothers on their offspring." Int J Paediatr Dent 2001;11:117–22.

Kohler B, Andreen I, Jonsson B. "The effect of caries-preventive measures in mothers on dental caries and the oral presence of the bacteria Streptococcus mutans and lactobacilli in their children." Arch Oral Biol 1984;29:879–83.

[3]"Oral health care during pregnancy and through the lifespan." Committee Opinion No. 569. American College of Obstetricians and Gynecologists. Obstet Gynecol 2013;122:417–22.

[4]"Pregnant dental patients: Health groups spread word that dental care is safe, necessary." American Dental Association. ADA News May 20, 2013.

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget regarding the regulations concerning Dental Services for Pregnant Women. The agency raises no issues with this analysis.

Summary:

Pursuant to Item 301 LLLL 2 of Chapter 665 of the 2015 Acts of Assembly, the proposed amendments add adult pregnant women to the individuals eligible to receive full dental services, excluding orthodontia, through Medicaid and FAMIS MOMS.

12VAC30-50-190. Dental services.

A. Dental services ~~are limited to recipients under~~ shall be covered for individuals younger than 21 years of age in fulfillment of the treatment requirements under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program and defined as routine diagnostic, preventive, or restorative procedures necessary for oral health provided by or under the direct supervision of a dentist in accordance with the State Dental Practice Act.

1. The state agency will provide any medically necessary dental service to individuals younger than 21 years of age.

~~B.~~ 2. Certain dental services, as described in the agency's Office Reference Manual (Smiles for Children, ~~copyright 2005)~~ March 13, 2014), prepared by DMAS' dental benefits administrator, require preauthorization or prepayment review by the state agency or its designee.

3. Dental services for individuals younger than the age of 21 years that do not require preauthorization or prepayment review are initial, periodic, and emergency examinations; required radiography necessary to develop a treatment plan; patient education; dental prophylaxis; fluoride treatments; routine amalgam and composite restorations; stainless steel crowns, prefabricated steel post and temporary (polycarbonate crowns) and stainless steel bands; crown recementation; pulpotomies; emergency endodontics for temporary relief of pain; pulp capping; sedative fillings; therapeutic apical closure; topical palliative treatment for dental pain; removal of foreign body; simple extractions; root recovery; incision and drainage of abscess; surgical exposure of the tooth to aid eruption; sequestrectomy for osteomyelitis; and oral antral fistula closure.

~~C.~~ B. Dental services determined by the dental provider to be medically appropriate for an adult woman during the term of her pregnancy and through the end of the month following the 60th day postpartum shall be provided to a Medicaid-enrolled pregnant woman. The dental services that shall be covered are (i) diagnostic x-rays and exams; (ii) preventive cleanings; (iii) restorative fillings; (iv) endodontics (root canals); (v) periodontics (gum-related treatments); (vi) prosthodontics, both removable and fixed (crowns, bridges, partial plates, and dentures); (vii) oral surgery (tooth extractions and other oral surgeries); and (viii) adjunctive general services (all covered services that do not fall into specific professional categories). These services require prepayment review by the state agency or its designee.

C. ~~The~~ For the dental services covered for Medicaid-enrolled adult pregnant women, the state agency may place appropriate limits on a service based on medical necessity, for utilization control, or both. Examples of service limitations are: examinations, prophylaxis, fluoride treatment (once/six months); space maintenance appliances; bitewing x-ray—two films (once/12 months); routine amalgam and composite restorations (once/three years); dentures (once/five years); extractions, ~~orthodontics,~~ tooth guidance appliances, permanent crowns and bridges, endodontics, patient education and sealants (once).

D. Limited oral surgery procedures, as defined and covered under Title XVIII (Medicare), are covered for all recipients, and require preauthorization or prepayment review by the state agency or its designee as described in the agency's Office Reference Manual located on the DMAS website at: ~~(http://www.dmas.virginia.gov/downloads/pdfs/dental-office_reference_manual_06-09-05.pdf)~~ http://www.dmas.virginia.gov/Content_atchs/dnt/VA_SFC_ORM_140313.pdf.

DOCUMENTS INCORPORATED BY REFERENCE (12VAC30-50)

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition DSM-IV-TR, copyright 2000, American Psychiatric Association

Length of Stay by Diagnosis and Operation, Southern Region, 1996, HCIA, Inc.

Guidelines for Perinatal Care, 4th Edition, August 1997, American Academy of Pediatrics and the American College of Obstetricians and Gynecologists

Virginia Supplemental Drug Rebate Agreement Contract and Addenda

~~Office Reference Manual (Smiles for Children), prepared by DMAS' Dental Benefits Administrator, copyright 2005 (www.dmas.virginia.gov/downloads/pdfs/dental-office_reference_manual_06-09-05.pdf).~~

Office Reference Manual (Smiles for Children), prepared by DMAS' Dental Benefits Administrator, copyright 2010, dated March 13, 2014 (http://www.dmas.virginia.gov/Content_atchs/dnt/VA_SFC_ORM_140313.pdf)

Patient Placement Criteria for the Treatment of Substance-Related Disorders ASAM PPC-2R, Second Edition, copyright 2001, American Society of Addiction Medicine

Virginia Medicaid Durable Medical Equipment and Supplies Provider Manual, Appendix B (rev. 1/11), Department of Medical Assistance Services

Human Services and Related Fields Approved Degrees/Experience, Department of Behavioral Health and Developmental Services (rev. 5/13)

12VAC30-141-820. Benefit packages.

Pregnant women covered through FAMIS MOMS may receive the same medical and dental services and are subject to the same limitations on services as pregnant women (see 12VAC30-50-190) covered by the Medicaid program as defined in 12VAC30-10-140 and 12VAC30-50-10.

VA.R. Doc. No. R15-4215; Filed November 13, 2015, 12:28 p.m.

Fast-Track Regulation

Title of Regulation: **12VAC30-80. Methods and Standards for Establishing Payment Rates; Other Types of Care (amending 12VAC30-80-30, 12VAC30-80-300).**

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

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 13, 2016.

Effective Date: January 29, 2016.

Agency Contact: Emily McClellan, Regulatory Supervisor, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804)

371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants the Board of Medical Assistance Services the authority to administer and amend the State Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the State Plan for Medical Assistance according to the board's requirements. The Medicaid authority as established by § 1902(a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services.

In addition, Item 301 B 4 of Chapter 665 of the 2015 Acts of Assembly states that "the department shall have the authority to amend the State Plan for Medical Assistance to increase physician supplemental payments for physician practice plans affiliated with Type One hospitals up to the average commercial rates as demonstrated by University of Virginia Health System and Virginia Commonwealth University Health System..."

Purpose: The purpose of this action is to revise the maximum reimbursement to 201% of the Medicare rate for Type I physicians, based on updated information on the average commercial rate furnished by state academic health systems. This regulatory action is essential to protect the health, safety, and welfare of citizens by maintaining funding for Medicaid and indigent care costs at state academic health centers, and thereby helping to ensure that these facilities remain open and continue to provide this care.

Rationale for Using Fast-Track Process: This proposed regulatory change is being promulgated through the fast-track rulemaking process because it is expected to be noncontroversial. DMAS consulted with the affected providers, who are satisfied with supplemental payment calculation and methodology. Therefore, no opposition is expected as a result of this fast-track regulatory action.

Substance: Supplemental payments to Type I physicians are calculated as the difference between the maximum payment allowed, the average commercial rate (ACR), and the payment otherwise made for physician services. The ACR has increased over time, and regulatory language did not reflect such increases.

The amendments state that effective April 8, 2014, the supplemental payment amount for Type I physicians shall be the difference between the Medicaid payments otherwise made for physician services and 201% of Medicare rates.

Issues: There are no disadvantages to the public in this action. The advantage of these supplemental payments to these affected institutions is that such payments help fund Medicaid and indigent care costs at the state academic health centers. The advantage to the Commonwealth is that these supplemental payments may facilitate these affected institutions remaining in business across the state.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The proposed regulation revises the maximum reimbursement for Type One physicians to 201% of the Medicare rate.

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

Estimated Economic Impact. Federal regulations allow Virginia Medicaid to make supplemental payments for Type One physicians. A Type One physician is a member of a practice group organized by or under the control of a state academic health system or an academic health system that operates under state authority. Type One physicians affected by this change are the physicians affiliated with the University of Virginia (UVA) and the Virginia Commonwealth University (VCU).

Supplemental payments are calculated as the difference between the maximum payment allowed and regular payments. The maximum payment allowed by the Centers for Medicare and Medicaid (CMS) is the average commercial rate (ACR). As the payments made by commercial providers change over time so does the ACR. The ACR has increased from 143% of the Medicare rate in 2002, to 181% in 2012, and to 197% of the Medicare rate in 2013. The current regulation reflects 181% of the Medicare rate. However, the ACR went up to 201% of the Medicare rate in 2014 and CMS approved the change to the 201% rate on January 27, 2015. Pursuant to the 2015 Acts of Assembly, Chapter 665, Item 301 B 4, the new ACR has been retroactively applied to payments since April 8, 2014. The proposed change will incorporate the new ACR in the regulations.

The proposed ACR equates to a $3.4 million increase that affected funds hospitals receive for Type One physicians. Since one-half of Virginia Medicaid is funded by federal matching funds, the state's share of this amount is $1.7 million. However, the increase in the supplemental payments to Type One physicians is offset by an equivalent reduction in the need for the Disproportionate Share Hospital (DSH) payments Medicaid makes to the teaching hospitals. In other words, while the composition of the payments made to the Type One hospitals changes because of the new ACR, the overall total payment received by them from Medicaid remains the same absent any other changes. Thus, the proposed ACR does not cause an increase in overall payments to the teaching hospitals.

Even though the new ACR does not increase the total payment to the teaching hospitals, the proposed regulation is beneficial in the sense that it more accurately reflects the components of the total payment Type One hospitals receive from Medicaid.

Businesses and Entities Affected. The proposed new ACR applies to two physician practice plans: one for UVA and one for VCU.

Localities Particularly Affected. The proposed changes apply to two teaching hospitals which are located in the City of Richmond and the City of Charlottesville.

Projected Impact on Employment. The proposed amendments do not affect employment.

Effects on the Use and Value of Private Property. No impact on the use and value of private property is expected.

Real Estate Development Costs. No impact on real estate development costs is expected.

Small Businesses:

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

Costs and Other Effects. The proposed regulation does not impose costs or other effects on small businesses.

Alternative Method that Minimizes Adverse Impact. No adverse impact on small businesses is expected.

Adverse Impacts:

Businesses: The proposed regulation does not have an impact on non-small businesses.

Localities: The proposed regulation does not adversely affect localities.

Other Entities: The proposed regulation does not adversely affect other entities.

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget. The agency raises no issues with this analysis.

Summary:

Pursuant to Item 301 B 4 of Chapter 665 of the 2015 Acts of Assembly, the amendments revise the maximum reimbursement rate for Type I physicians to 201% of the Medicare rate.

12VAC30-80-30. Fee-for-service providers.

A. Payment for the following services, except for physician services, shall be the lower of the state agency fee schedule (12VAC30-80-190 has information about the state agency fee schedule) or actual charge (charge to the general public):

1. Physicians' services. Payment for physician services shall be the lower of the state agency fee schedule or actual charge (charge to the general public). The following limitations shall apply to emergency physician services.

a. Definitions. The following words and terms, when used in this subdivision 1 shall have the following meanings when applied to emergency services unless the context clearly indicates otherwise:

"All-inclusive" means all emergency service and ancillary service charges claimed in association with the emergency department visit, with the exception of laboratory services.

"DMAS" means the Department of Medical Assistance Services consistent with Chapter 10 (§ 32.1-323 et seq.) of Title 32.1 of the Code of Virginia.

"Emergency physician services" means services that are necessary to prevent the death or serious impairment of the health of the recipient. The threat to the life or health of the recipient necessitates the use of the most accessible hospital available that is equipped to furnish the services.

"Recent injury" means an injury that has occurred less than 72 hours prior to the emergency department visit.

b. Scope. DMAS shall differentiate, as determined by the attending physician's diagnosis, the kinds of care routinely rendered in emergency departments and reimburse physicians for nonemergency care rendered in emergency departments at a reduced rate.

(1) DMAS shall reimburse at a reduced and all-inclusive reimbursement rate for all physician services rendered in emergency departments that DMAS determines are nonemergency care.

(2) Services determined by the attending physician to be emergencies shall be reimbursed under the existing methodologies and at the existing rates.

(3) Services determined by the attending physician that may be emergencies shall be manually reviewed. If such services meet certain criteria, they shall be paid under the methodology in subdivision 1 b (2) of this subsection. Services not meeting certain criteria shall be paid under the methodology in subdivision 1 b (1) of this subsection. Such criteria shall include, but not be limited to:

(a) The initial treatment following a recent obvious injury.

(b) Treatment related to an injury sustained more than 72 hours prior to the visit with the deterioration of the symptoms to the point of requiring medical treatment for stabilization.

(c) The initial treatment for medical emergencies including indications of severe chest pain, dyspnea, gastrointestinal hemorrhage, spontaneous abortion, loss of consciousness, status epilepticus, or other conditions considered life threatening.

(d) A visit in which the recipient's condition requires immediate hospital admission or the transfer to another facility for further treatment or a visit in which the recipient dies.

(e) Services provided for acute vital sign changes as specified in the provider manual.

(f) Services provided for severe pain when combined with one or more of the other guidelines.

(4) Payment shall be determined based on ICD diagnosis codes and necessary supporting documentation. As used here, the term "ICD" is defined in 12VAC30-95-5.

(5) DMAS shall review on an ongoing basis the effectiveness of this program in achieving its objectives and for its effect on recipients, physicians, and hospitals. Program components may be revised subject to achieving program intent objectives, the accuracy and effectiveness of the ICD code designations, and the impact on recipients and providers. As used here, the term "ICD" is defined in 12VAC30-95-5.

2. Dentists' services.

3. Mental health services including: (i) community mental health services, (ii) services of a licensed clinical psychologist, or (iii) mental health services provided by a physician.

a. Services provided by licensed clinical psychologists shall be reimbursed at 90% of the reimbursement rate for psychiatrists.

b. Services provided by independently enrolled licensed clinical social workers, licensed professional counselors or licensed clinical nurse specialists-psychiatric shall be reimbursed at 75% of the reimbursement rate for licensed clinical psychologists.

4. Podiatry.

5. Nurse-midwife services.

6. Durable medical equipment (DME) and supplies.

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

"DMERC" means the Durable Medical Equipment Regional Carrier rate as published by the Centers for Medicare and Medicaid Services at http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/DMEPOSFeeSched/DMEPOS-Fee-Schedule.html.

"HCPCS" means the Healthcare Common Procedure Coding System, Medicare's National Level II Codes, HCPCS 2006 (Eighteenth edition), as published by Ingenix, as may be periodically updated.

a. Obtaining prior authorization shall not guarantee Medicaid reimbursement for DME.

b. The following shall be the reimbursement method used for DME services:

(1) If the DME item has a DMERC rate, the reimbursement rate shall be the DMERC rate minus 10%. For dates of service on or after July 1, 2014, DME items subject to the Medicare competitive bidding program shall be reimbursed the lower of:

(a) The current DMERC rate minus 10% or

(b) The average of the Medicare competitive bid rates in Virginia markets.

(2) For DME items with no DMERC rate, the agency shall use the agency fee schedule amount. The reimbursement rates for DME and supplies shall be listed in the DMAS Medicaid Durable Medical Equipment (DME) and Supplies Listing and updated periodically. The agency fee schedule shall be available on the agency website at www.dmas.virginia.gov.

(3) If a DME item has no DMERC rate or agency fee schedule rate, the reimbursement rate shall be the manufacturer's net charge to the provider, less shipping and handling, plus 30%. The manufacturer's net charge to the provider shall be the cost to the provider minus all available discounts to the provider. Additional information specific to how DME providers, including manufacturers who are enrolled as providers, establish and document their cost or costs for DME codes that do not have established rates can be found in the relevant agency guidance document.

c. DMAS shall have the authority to amend the agency fee schedule as it deems appropriate and with notice to providers. DMAS shall have the authority to determine alternate pricing, based on agency research, for any code that does not have a rate.

d. The reimbursement for incontinence supplies shall be by selective contract. Pursuant to § 1915(a)(1)(B) of the Social Security Act and 42 CFR 431.54(d), the Commonwealth assures that adequate services/devices shall be available under such arrangements.

e. Certain durable medical equipment used for intravenous therapy and oxygen therapy shall be bundled under specified procedure codes and reimbursed as determined by the agency. Certain services/durable medical equipment such as service maintenance agreements shall be bundled under specified procedure codes and reimbursed as determined by the agency.

(1) Intravenous therapies. The DME for a single therapy, administered in one day, shall be reimbursed at the established service day rate for the bundled durable medical equipment and the standard pharmacy payment, consistent with the ingredient cost as described in 12VAC30-80-40, plus the pharmacy service day and dispensing fee. Multiple applications of the same therapy shall be included in one service day rate of reimbursement. Multiple applications of different therapies administered in one day shall be reimbursed for the bundled durable medical equipment service day rate as follows: the most expensive therapy shall be reimbursed at 100% of cost; the second and all subsequent most expensive therapies shall be reimbursed at 50% of cost. Multiple therapies administered in one day shall be reimbursed at the pharmacy service day rate plus 100% of every active therapeutic ingredient in the

compound (at the lowest ingredient cost methodology) plus the appropriate pharmacy dispensing fee.

(2) Respiratory therapies. The DME for oxygen therapy shall have supplies or components bundled under a service day rate based on oxygen liter flow rate or blood gas levels. Equipment associated with respiratory therapy may have ancillary components bundled with the main component for reimbursement. The reimbursement shall be a service day per diem rate for rental of equipment or a total amount of purchase for the purchase of equipment. Such respiratory equipment shall include, but not be limited to, oxygen tanks and tubing, ventilators, noncontinuous ventilators, and suction machines. Ventilators, noncontinuous ventilators, and suction machines may be purchased based on the individual patient's medical necessity and length of need.

(3) Service maintenance agreements. Provision shall be made for a combination of services, routine maintenance, and supplies, to be known as agreements, under a single reimbursement code only for equipment that is recipient owned. Such bundled agreements shall be reimbursed either monthly or in units per year based on the individual agreement between the DME provider and DMAS. Such bundled agreements may apply to, but not necessarily be limited to, either respiratory equipment or apnea monitors.

7. Local health services.

8. Laboratory services (other than inpatient hospital). The agency's rates for clinical laboratory services were set as of July 1, 2014, and are effective for services on or after that date.

9. Payments to physicians who handle laboratory specimens, but do not perform laboratory analysis (limited to payment for handling).

10. X-ray services.

11. Optometry services.

12. Medical supplies and equipment.

13. Home health services. Effective June 30, 1991, cost reimbursement for home health services is eliminated. A rate per visit by discipline shall be established as set forth by 12VAC30-80-180.

14. Physical therapy; occupational therapy; and speech, hearing, language disorders services when rendered to noninstitutionalized recipients.

15. Clinic services, as defined under 42 CFR 440.90.

16. Supplemental payments for services provided by Type I physicians.

a. In addition to payments for physician services specified elsewhere in this State Plan, DMAS provides supplemental payments to Type I physicians for furnished services provided on or after July 2, 2002. A Type I physician is a member of a practice group, organized by or under the control of a state academic health system or an academic health system that operates under a state authority and includes a hospital, who has entered into contractual agreements for the assignment of payments in accordance with 42 CFR 447.10.

b. Effective July 2, 2002, the supplemental payment amount for Type I physician services shall be the difference between the Medicaid payments otherwise made for Type I physician services and Medicare rates. Effective August 13, 2002, the supplemental payment amount for Type I physician services shall be the difference between the Medicaid payments otherwise made for physician services and 143% of Medicare rates. Effective January 3, 2012, the supplemental payment amount for Type I physician services shall be the difference between the Medicaid payments otherwise made for physician services and 181% of Medicare rates. Effective January 1, 2013, the supplemental payment amount for Type I physician services shall be the difference between the Medicaid payments otherwise made for physician services and 197% of Medicare rates. Effective April 8, 2014, the supplemental payment amount for Type I physician services shall be the difference between the Medicaid payments otherwise made for physician services and 201% of Medicare rates.

c. The methodology for determining the Medicare equivalent of the average commercial rate is described in 12VAC30-80-300.

~~c.~~ d. Supplemental payments shall be made quarterly no later than 90 days after the end of the quarter.

17. Supplemental payments for services provided by physicians at Virginia freestanding children's hospitals.

a. In addition to payments for physician services specified elsewhere in this State Plan, DMAS provides supplemental payments to Virginia freestanding children's hospital physicians providing services at freestanding children's hospitals with greater than 50% Medicaid inpatient utilization in state fiscal year 2009 for furnished services provided on or after July 1, 2011. A freestanding children's hospital physician is a member of a practice group (i) organized by or under control of a qualifying Virginia freestanding children's hospital, or (ii) who has entered into contractual agreements for provision of physician services at the qualifying Virginia freestanding children's hospital and that is designated in writing by the Virginia freestanding children's hospital as a practice plan for the quarter for which the supplemental payment is made subject to DMAS approval. The freestanding children's hospital physicians also must have entered into contractual agreements with the practice plan for the assignment of payments in accordance with 42 CFR 447.10.

b. Effective July 1, 2011, the supplemental payment amount for freestanding children's hospital physician

services shall be the difference between the Medicaid payments otherwise made for freestanding children's hospital physician services and 143% of Medicare rates as defined in the supplemental payment calculation for Type I physician services subject to the following reduction. Final payments shall be reduced on a prorated basis so that total payments for freestanding children's hospital physician services are $400,000 less annually than would be calculated based on the formula in the previous sentence. Payments shall be made on the same schedule as Type I physicians.

18. Supplemental payments to nonstate government-owned or operated clinics.

a. In addition to payments for clinic services specified elsewhere in the regulations, DMAS provides supplemental payments to qualifying nonstate government-owned or operated clinics for outpatient services provided to Medicaid patients on or after July 2, 2002. Clinic means a facility that is not part of a hospital but is organized and operated to provide medical care to outpatients. Outpatient services include those furnished by or under the direction of a physician, dentist or other medical professional acting within the scope of his license to an eligible individual. Effective July 1, 2005, a qualifying clinic is a clinic operated by a community services board. The state share for supplemental clinic payments will be funded by general fund appropriations.

b. The amount of the supplemental payment made to each qualifying nonstate government-owned or operated clinic is determined by:

(1) Calculating for each clinic the annual difference between the upper payment limit attributed to each clinic according to subdivision 18 d of this subsection and the amount otherwise actually paid for the services by the Medicaid program;

(2) Dividing the difference determined in subdivision 18 b (1) of this subsection for each qualifying clinic by the aggregate difference for all such qualifying clinics; and

(3) Multiplying the proportion determined in subdivision 18 b (2) of this subsection by the aggregate upper payment limit amount for all such clinics as determined in accordance with 42 CFR 447.321 less all payments made to such clinics other than under this section.

c. Payments for furnished services made under this section may be made in one or more installments at such times, within the fiscal year or thereafter, as is determined by DMAS.

d. To determine the aggregate upper payment limit referred to in subdivision 18 b (3) of this subsection, Medicaid payments to nonstate government-owned or operated clinics will be divided by the "additional factor" whose calculation is described in Attachment 4.19-B, Supplement 4 (12VAC30-80-190 B 2) in regard to the state agency fee schedule for ~~RBRVS~~ Resource Based Relative Value Scale. Medicaid payments will be estimated using payments for dates of service from the prior fiscal year adjusted for expected claim payments. Additional adjustments will be made for any program changes in Medicare or Medicaid payments.

19. Personal assistance services (PAS) for individuals enrolled in the Medicaid Buy-In program described in 12VAC30-60-200. These services are reimbursed in accordance with the state agency fee schedule described in 12VAC30-80-190. The state agency fee schedule is published on the DMAS website at http://www.dmas.virginia.gov.

B. Hospice services payments must be no lower than the amounts using the same methodology used under Part A of Title XVIII, and take into account the room and board furnished by the facility, equal to at least 95% of the rate that would have been paid by the state under the plan for facility services in that facility for that individual. Hospice services shall be paid according to the location of the service delivery and not the location of the agency's home office.

12VAC30-80-300. Medicare equivalent of average commercial rate.

Physician supplemental payment amounts shall be calculated using the Medicare equivalent of the average commercial rate (ACR) methodology prescribed by CMS. The following methodology describes the calculation of the supplemental payment. To compute the ACR by commercial payers, calculate the average amount reimbursed for each procedure code (e.g., CPT or HCPCS) by the top five commercial payers for a specified base period. Data from Medicare, Workers' Compensation, and other noncommercial payers and codes not reimbursed by Medicaid are excluded.

(Payer 1 + Payer 2 + Payer 3 + Payer 4 + Payer 5) / (5) = Average Commercial Reimbursement

To compute the reimbursement ceiling, multiply the average reimbursement rate as determined by the number of claims recorded in Medicaid Management Information System (MMIS) for each procedure code that was rendered to Medicaid members by eligible physicians during the base period. Add the product for all procedure codes. This total represents the total reimbursement ceiling.

(Average Commercial Reimbursement) X (Medicaid Count) = Total Reimbursement Ceiling for each Procedure Code

Sum of Total Reimbursement Ceiling for each Procedure Code = Total Reimbursement Ceiling

To determine the Medicare equivalent to the reimbursement ceiling, for each of the billing codes used to determine the reimbursement ceiling, multiply the Medicare rate by the number of claims recorded in MMIS for each procedure code that was rendered to Medicaid members during the base period. Add the product for all procedure codes. This sum

represents the total Medicare reimbursement that would have been received. Divide the reimbursement ceiling (commercial payment) by Medicare reimbursement. This ratio expresses the ACR as a percentage of Medicare.

(Medicare Rate) X (Medicaid Count) = Total Medicare Reimbursement for each Procedure Code

Sum of Total Medicare Reimbursement for each Procedure Code = Total Medicare Reimbursement

(Total Reimbursement Ceiling) / (Total Medicare Reimbursement) = Medicare equivalent of the ACR

This single ratio is applied to the Medicare rates for reimbursable Medicaid practitioner services to determine the total allowable Medicaid payment, including both the regular base payment and supplemental payment.

(Medicare equivalent of the ACR) X (Medicare rate per CPT Code for all applicable CPT Codes) = Total Allowable Medicaid Payment

Total Allowable Medicaid Payment – Medicaid Base Payment = Maximum Supplemental Payment

The Medicare equivalent of the ACR demonstration shall be updated every three years. Only the professional component of radiology services and clinical laboratory services is included in the ACR calculation. Claims with a technical component are excluded from the demonstration.

VA.R. Doc. No. R16-4376; Filed November 13, 2015, 12:43 p.m.

Proposed Regulation

Title of Regulation: **12VAC30-120. Waivered Services (amending 12VAC30-120-360 through 12VAC30-120-395, 12VAC30-120-400, 12VAC30-120-410, 12VAC30-120-420).**

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

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: February 12, 2016.

Agency Contact: Victoria Simmons, Regulatory Coordinator, Department of Medical Assistance Services, Division of Policy and Research, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-6043, FAX (804) 786-1680, or email victoria.simmons@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the Plan for Medical Assistance according to the board's requirements. The Medicaid authority as established by § 1902(a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services.

DMAS operates its managed care program under the authority of § 1915(b) of the Social Security Act, which permits the waiving of Medicaid individuals' freedom of choice of providers of health care to enable mandatory enrollment in managed care. DMAS sought federal approval of these changes to § 1915(b) of the Social Security Act waiver and received Centers for Medicare and Medicaid Services approval dated July 14, 2014. This action amends the regulations to conform to the federally approved waiver changes.

DMAS operates its home and community-based care waivers (such as the Elderly or Disabled with Consumer Direction waiver) under the authority of § 1915(c) of the Act that permits the waiving of the comparability rule (42 CFR 440. 240), which requires that services covered for any eligible individual in a covered group must be covered for all individuals in that group. These waivers enable the coverage of specific services, such as personal care, respite care, adult day health care, etc., to enable individuals to avoid institutionalization and remain in their homes and communities.

Purpose: The purpose of this regulation is to implement several mandates from various legislative actions to (i) require qualifying individuals in the Elderly or Disabled with Consumer Direction Waiver to also be enrolled in Medicaid contracted managed care organizations and (ii) require expedited enrollment for Medicaid individuals into Medicaid contracted managed care organizations, especially for pregnant women. These regulatory changes will improve the health and welfare of the affected Medicaid individuals by providing care coordination and well-person preventive services in addition to routine acute care.

These regulations apply to managed care organizations (MCOs). Small business requirements do not apply to managed care organizations because managed care organizations do not meet the definition of small businesses.

Substance: Medallion II, a mandatory managed care organization program, expanded throughout the Commonwealth the use of managed care for the delivery of health care to Medicaid recipients. Medallion II was created for the purposes of further improving access to care, promoting disease prevention, ensuring quality care, and reducing Medicaid expenditures. The program requires mandatory enrollment into a contracted MCO for certain specified groups of Medicaid individuals (12VAC30-120-370 A). Also, certain specified groups of individuals are excluded from managed care enrollment (12VAC30-120-370 B). MCOs provide the Commonwealth with the most value per taxpayer dollar for the provision of high quality health care and provide an integrated, comprehensive delivery system to individuals enrolled in Medicaid.

In 2007, the managed care health plans began providing acute care coverage for approximately 4,600 home and community-based (HCB) waiver participants through the Acute and Long

Term Care (ALTC) Phase 1 program. This included individuals enrolled in the Elderly or Disabled with Consumer Direction (EDCD) Waiver, the Intellectual Disability (ID) Waiver, the Individuals and Family Developmental Disabilities Support (IFDDS) Waiver, the Day Support (DS) Waiver, and the Alzheimer's Assisted Living (AAL) Waiver. Under the Phase 1 program, if an MCO-enrolled Medicaid member subsequently becomes eligible for and enrolled into one of five HCB waivers, then he remains enrolled with the MCO for primary and acute care services while all long-term care waiver services, such as personal care, respite care, personal emergency response systems, and environmental modifications, are covered under the fee-for-service reimbursement system.

Item 297 MMMM 1 of the 2011 appropriation act directed DMAS to seek federal authority through amendments to the State Plan under Title XIX of the Social Security Act, and any necessary waivers, to allow individuals enrolled in home and community-based care waivers to also be enrolled in contracted Medallion II managed care organizations for the purposes of receiving acute and medical care services

On December 1, 2014, DMAS launched the Health and Acute Care Program (HAP). This initiative allows eligible EDCD Waiver individuals to receive their acute and primary medical care through one of the managed care health plans, and, concurrently, the individual's HCB care waiver services, including transportation to the waivered services, are paid for through the Medicaid fee-for-service system as a "carved out" service. These individuals participate concurrently in § 1915(b) and § 1915(c) waivers. As part of the HAP initiative, approximately 2,700 individuals enrolled in the EDCD Waiver, who received acute medical services in the fee-for-service program and who were eligible for managed care (i.e., do not have any managed care exclusions), were transitioned into managed care in December 2014. The ALTC program was rebranded as HAP for approximately 7,300 individuals enrolled in both the § 1915(b) and § 1915(c) waivers.

Item 307 FFF of the 2012 appropriation act authorized DMAS to seek federal authority through amendments to the State Plans under Title XIX and Title XXI of the Social Security Act, and appropriate waivers to such, to develop and implement programmatic and system changes that allow expedited enrollment of Medicaid eligible recipients into Medicaid managed care, most importantly for pregnant women.

In an effort to ensure that newly eligible Medicaid individuals, especially pregnant women, have quicker access to the managed care delivery system, DMAS shortened the period of time between an individual being identified as Medicaid eligible and that individual's enrollment into a managed care organization. This new process reduces disruptions to continuity of care by minimizing the movement of individuals between the fee-for-service and the managed care delivery systems.

Issues: The primary advantage of this regulatory action is that the expedited enrollment component of this regulation will ensure that Medicaid individuals who are eligible for managed care get placed into an MCO sooner than the previous "pre-assignment" methodology allowed, resulting in less time waiting to enroll in an MCO. Both expedited enrollment and the additional population becoming eligible for managed care ensure access to care coordination and additional services offered by the MCOs that are not available under Medicaid fee-for-service. Another advantage is that this regulation is projected to create savings for DMAS and the Commonwealth.

DMAS does not anticipate any disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Medical Assistance Services (Board) proposes to amend its regulation for mandatory capitated managed care to make several clarifying changes and two substantive changes. The Board proposes substantive changes to shorten the time it takes to move people from fee-for-service Medicaid to managed care and to require individuals with Elderly or Disabled with Consumer Direction (EDCD) waivers who are not exempt to receive their acute and primary health care through managed care.

Result of Analysis. Benefits likely outweigh costs for these proposed changes.

Estimated Economic Impact. Current regulation contains many references to the Medallion II program of managed care, which has been replaced by Medallion III. The Board proposes to remove references to Medallion II, as they are now obsolete, and to add more generic language that references mandatory managed care. At the same time, the Board proposes to harmonize language that refers to individuals who receive health care under this program by referring to them as "members" in all instances. No entity is likely to incur costs on account of clarifying changes such as these. Interested parties are, however, likely to benefit as these changes are likely to make regulatory text easier to understand.

Current regulation has rules for individuals who newly sign up for Medicaid that establish how they will be pre-assigned a mandatory managed care plan and how they can go about selecting a different plan. Board staff reports that the pre-assignment process, and subsequent movement from fee-for-service Medicaid to a managed care plan, currently takes approximately 45-60 days. The Department of Medical Assistance Services (DMAS) has received federal approval to shorten this process (by about 15 days) and the Board now proposes to amend this regulation to facilitate this change. Board staff reports that this change may lead to long term

costs saving for taxpayers but also reports that any savings are currently unquantifiable. Budget forecasts from DMAS completed in fiscal year 2015 did, however, include projected savings of $1,589,635 in fiscal year 2015 and $3,180,949 in fiscal year 2016. Board staff reports that pregnant women who are eligible for Medicaid will likely see a more immediate benefit from this change as it will allow them to have quicker access to DMAS's managed care delivery system, which may reduce disruptions to the continuity of their care.

Currently, managed care eligible individuals who receive long-term care waivers from the Commonwealth, except for the subset of individuals who have EDCD waivers, are mandated to receive their primary and acute care through a managed care plan unless they fall into a group that is excluded from participating in mandatory managed care[1]. The Board proposes to extend this mandate in regulation to also cover individuals with EDCD waivers (who were actually transitioned into managed care programs in December of 2014). Since these individuals are already covered by Medicaid, it is unlikely that moving them into managed care plans for their primary and acute care caused taxpayers to incur any additional costs. To the extent that costs savings may be expected for individuals who receive care from a managed care plan when compared to the cost of fee-for-service plans, taxpayers may see some long term but as yet not quantifiable cost savings.

Businesses and Entities Affected. Board staff reports that these changes will affect any individuals who are newly enrolled in Medicaid, as they will be able to move more quickly into a managed care program, and all 2,700 individuals who have an EDCD waiver.

Localities Particularly Affected. No locality in the Commonwealth will be particularly affected by these proposed changes.

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

Effects on the Use and Value of Private Property. These proposed changes will likely have no impact on the use or value of private property.

Real Estate Development Costs. These proposed changes will likely not affect real estate development costs.

Small Businesses:

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

Costs and Other Effects. No small businesses will incur costs on account of these regulatory changes.

Alternative Method that Minimizes Adverse Impact. No small businesses will incur costs on account of these regulatory changes.

Adverse Impacts:

Businesses: No businesses will incur costs on account of these regulatory changes.

Localities: These proposed changes are unlikely to adversely impact localities.

Other Entities: These proposed changes are unlikely to adversely impact any other entity in the Commonwealth.

[1]Individuals are excluded from participating in mandatory managed care if 1) they are receiving inpatient care in a state mental hospital; 2) they are approved by DMAS for receiving inpatient care in a long-term hospital, nursing facility or intermediate care facility for individuals with intellectual disabilities; 3) they are placed on spend-down; 4) they are participating in the family planning waiver or are in a federal waiver program for home-based and community-based Medicaid coverage prior to managed care enrollment; 5) they are under age 21 and are approved for DMAS residential facility Level C programs as defined in 12VAC30-130-860; 6) they are pregnant women in the third trimester of pregnancy who request exclusion because their current obstetrical providers do not participate in the managed care organization to which the pregnant woman would be assigned; 7) they are individuals other than students who permanently live outside their area of residence for more than 60 consecutive days except individuals placed outside their area of residence for medically necessary services funded by the managed care plan to which they are assigned; 8) they are receiving hospice services in accordance with DMAS criteria; 9) they have other comprehensive group or individual health insurance coverage; 10) they request exclusion and are inpatient at a hospital (other than a state mental hospital, long-term care hospital, nursing facility or intermediate care facility for individuals with intellectual disabilities) at the scheduled time of managed care enrollment or they are scheduled for an inpatient hospital stay or surgery within 30 calendar days of the effective date of their managed care enrollment; 11) they request exclusion because they have been diagnosed with a terminal condition and have a life expectancy of six months of less; 12) they are between the ages of birth and three years old, are certified by the Department of Behavioral Health and Developmental Services as eligible for services under the Disabilities Education Act and are granted an exception by DMAS; 13) they have an eligibility period of less than three months; 14) they are enrolled in the Commonwealth's Title XXI SCHIP program; 15) they have an eligibility period that is only retroactive or 16) they are children enrolled in the Virginia Birth-Related Neurological Injury Compensation Program.

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget regarding the regulations concerning Mandatory Capitated Managed Care. The agency raises no issues with this analysis.

Summary:

The proposed amendments (i) require individuals who are enrolled in the Elderly or Disabled with Consumer Direction Waiver and who are excluded from participating in mandatory managed care to be enrolled in Medicaid contracted managed care organizations and to receive all acute care services through the mandatory managed care delivery system and (ii) provide for expedited enrollment for Medicaid individuals into Medicaid contracted managed care organizations, especially for pregnant women.

Part VI
~~Medallion II~~ Mandatory Managed Care

12VAC30-120-360. Definitions.

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

"Action" means the denial or limited authorization of a requested service, including the type or level of service; the reduction, suspension, or termination of a previously authorized service; the denial, in whole or in part, of payment for a service; the failure to provide services in a timely manner, as defined by the state; or the failure of an MCO to act within the timeframes provided in 42 CFR 438.408(b).

"Appeal" means a request for review of an action, as "action" is defined in this section.

"Area of residence" means the ~~individual's~~ member's address in the Medicaid eligibility file.

~~"Capitation payment" means a payment the department makes periodically to a contractor on behalf of each individual enrolled under a contract for the provision of medical services under the State Plan, regardless of whether the particular individual receives services during the period covered by the payment.~~

"Covered services" means Medicaid services as defined in the State Plan for Medical Assistance.

"Disenrollment" means the process of changing enrollment from one ~~Medallion II~~ Managed Care Organization (MCO) plan to another MCO, if applicable.

"DMAS" means the Department of Medical Assistance Services.

~~"Enrollee" or "enrollees" means people having current Medicaid eligibility who shall be in the process of being authorized by DMAS to be enrolled in Medallion II.~~

"Early Intervention" means EPSDT Early Intervention services provided pursuant to Part C of the Individuals with Disabilities Education Act (IDEA) of 2004 as set forth in 12VAC30-50-131.

"Eligible person" means any person eligible for Virginia Medicaid in accordance with the State Plan for Medical Assistance under Title XIX of the Social Security Act.

"Emergency medical condition" means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in the following:

1. Placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

2. Serious impairment to bodily functions, or

3. Serious dysfunction of any bodily organ or part.

"Emergency services" means covered inpatient and outpatient services that are furnished by a provider that is qualified to furnish these services and that are needed to evaluate or stabilize an emergency medical condition.

"Enrollment broker" means an independent contractor that enrolls individuals in the contractor's plan and is responsible for the operation and documentation of a toll-free individual service helpline. The responsibilities of the enrollment broker include, but shall not be limited to, individual education and MCO enrollment, assistance with and tracking of individuals' complaints resolutions, and may include individual marketing and outreach.

~~"Exclusion from Medallion II"~~ "Exclude" means the removal of ~~an enrollee~~ a member from the ~~Medallion II~~ mandatory managed care program on a temporary or permanent basis.

"External quality review organization" or "EQRO" means an organization that meets the competence and independence requirements set forth in 42 CFR 438.354 and performs external quality reviews, other external quality review related activities as set forth in 42 CFR 438.358, or both.

"Grievance" means an expression of dissatisfaction about any matter other than an action, as "action" is defined in this section.

~~"Health care plan" means any arrangement in which any managed care organization undertakes to provide, arrange for, pay for, or reimburse any part of the cost of any health care services.~~

"Health care professional" means a provider as defined in 42 CFR 438.2.

"Individual" or "individuals" means ~~people~~ a person or persons who are eligible for Medicaid ~~but,~~ who are not yet undergoing enrollment ~~nor~~ for mandatory managed care, and who are not enrolled in a mandatory managed care organization.

"Managed care organization" or "MCO" means an entity that meets the participation and solvency criteria defined in 42 CFR Part 438 and has an executed contractual agreement with DMAS to provide services covered under the ~~Medallion II~~ mandatory managed care program. Covered services for ~~Medallion II~~ mandatory managed care program individuals ~~must~~ shall be as accessible (in terms of timeliness, amount, duration, and scope) as compared to other Medicaid individuals served within the geographic area.

"Member" or "members" means people who have current Medicaid eligibility who are also enrolled in ~~Medallion II~~ mandatory managed care.

"Network" means doctors, hospitals or other health care providers who participate or contract with an MCO contractor and, as a result, agree to accept a ~~mutually agreed~~ mutually agreed upon sum or fee schedule as payment in full for covered services that are rendered to eligible participants.

"Newborn enrollment period" means the period from the child's date of birth plus the next two calendar months.

~~"Nonparticipating provider" means a health care entity or health care professional not in the contractor's participating provider network.~~

~~"Participant" or "participants" means an individual or individuals having current Medicaid eligibility who shall be authorized by DMAS to be a member or members of Medallion II.~~

"PCP of record" means a primary care physician of record with whom the recipient has an established history and such history is documented in the individual's records.

~~"Post stabilization care services" means covered services related to an emergency medical condition that are provided after an enrollee is stabilized in order to maintain the stabilized condition or to improve or resolve the enrollee's condition.~~

~~"Potential enrollee" means a Medicaid individual who is subject to mandatory enrollment or may voluntarily elect to enroll in a given managed care program, but is not yet an enrollee of a specific MCO.~~

"Retractions" means the departure of an enrolled managed care organization from any one or more localities as provided for in 12VAC30-120-370.

"Rural exception" means a rural area designated in the § 1915(b) managed care waiver, pursuant to § 1932(a)(3)(B) of the Social Security Act and 42 CFR § 438.52(b) and recognized by the Centers for Medicare and Medicaid Services, wherein qualifying ~~Medallion II~~ mandatory managed care members are mandated to enroll in the one available contracted MCO.

~~"School health services" means those physical therapy, occupational therapy, speech therapy, nursing, psychiatric and psychological services rendered to children who qualify for these services under the federal Individuals with Disabilities Education Act (20 USC § 1471 et seq.) by (i) employees of the school divisions or (ii) providers that subcontract with school divisions, as described in 12VAC30-50-130.~~

"Spend-down" means the process of reducing countable income by deducting incurred medical expenses for medically needy individuals, as determined in the State Plan for Medical Assistance.

12VAC30-120-370. ~~Medallion II enrollees~~ Mandatory managed care members.

A. DMAS shall determine enrollment in ~~Medallion II~~ mandatory managed care. Medicaid eligible persons not meeting the exclusion criteria set out in this section ~~must~~ shall participate in the ~~Medallion II~~ mandatory managed care program. Enrollment in ~~Medallion II is~~ mandatory managed care shall not be a guarantee of continuing eligibility for services and benefits under the Virginia Medical Assistance Services Program.

1. DMAS reserves the right to exclude from participation in the ~~Medallion II~~ mandatory managed care program any member who has been consistently noncompliant with the policies and procedures of managed care or who is threatening to providers, MCOs, or DMAS. There must be sufficient documentation from various providers, the MCO, and DMAS of these noncompliance issues and any attempts at resolution. Members excluded from ~~Medallion II~~ mandatory managed care through this provision may appeal the decision to DMAS.

2. Qualifying individuals enrolled in the Elderly or Disabled with Consumer Direction (EDCD) Waiver pursuant to Part IX (12VAC30-120-900 et seq.) of this chapter who do not meet any exclusions in subsection B of this section shall be required to enroll in managed care and shall receive all acute care services through the mandatory managed care delivery system. For these individuals, services provided under 12VAC30-120-380 A 2 shall continue to be provided through the DMAS fee-for-service system.

B. The following individuals shall be excluded (as defined in 12VAC30-120-360) from participating in ~~Medallion II~~ mandatory managed care as defined in the § 1915(b) managed care waiver. Individuals excluded from ~~Medallion II~~ mandatory managed care shall include the following:

1. Individuals who are inpatients in state mental hospitals;

2. Individuals who are approved by DMAS as inpatients in long-stay hospitals, nursing facilities, or intermediate care facilities for individuals with intellectual disabilities;

3. Individuals who are placed on spend-down;

4. Individuals who are participating in the family planning waiver, or in federal waiver programs for home-based and community-based Medicaid coverage prior to managed care enrollment (except eligible EDCD members);

5. Individuals under age 21 who are approved for DMAS residential facility Level C programs as defined in 12VAC30-130-860;

6. Newly eligible individuals who are in the third trimester of pregnancy and who request exclusion within a department-specified timeframe of the effective date of their MCO enrollment. Exclusion may be granted only if the member's obstetrical provider ~~(e.g.~~ (i.e., physician, hospital, or midwife) does not participate with the ~~enrollee's~~ member's assigned MCO. Exclusion requests made during the third trimester may be made by the member, MCO, or provider. DMAS shall determine if the request meets the criteria for exclusion. Following the end of the pregnancy, these individuals shall be required to enroll to the extent they remain eligible for Medicaid;

7. Individuals, other than students, who permanently live outside their area of residence for greater than 60 consecutive days except those individuals placed there for medically necessary services funded by the MCO;

8. Individuals who receive hospice services in accordance with DMAS criteria;

9. Individuals with other comprehensive group or individual health insurance coverage, including Medicare, insurance provided to military dependents, and any other insurance purchased through the Health Insurance Premium Payment Program (HIPP);

10. Individuals requesting exclusion who are inpatients in hospitals, other than those listed in subdivisions 1 and 2 of this subsection, at the scheduled time of MCO enrollment or who are scheduled for inpatient hospital stay or surgery within 30 calendar days of the MCO enrollment effective date. The exclusion shall remain effective until the first day of the month following discharge. This exclusion reason shall not apply to members admitted to the hospital while already enrolled in a department-contracted MCO;

11. Individuals who request exclusion during ~~preassignment~~ assignment to an MCO or within a time set by DMAS from the effective date of their MCO enrollment, who have been diagnosed with a terminal condition and who have a life expectancy of six months or less. The ~~client's~~ individual's physician must certify the life expectancy;

12. Certain individuals between birth and age three certified by the Department of Behavioral Health and Developmental Services as eligible for services pursuant to Part C of the Individuals with Disabilities Education Act (20 USC § 1471 et seq.) who are granted an exception by DMAS to the mandatory ~~Medallion II~~ managed care enrollment;

13. Individuals who have an eligibility period that is less than three months;

14. Individuals who are enrolled in the Commonwealth's Title XXI SCHIP program;

15. Individuals who have an eligibility period that is only retroactive; and

16. Children enrolled in the Virginia Birth-Related Neurological Injury Compensation Program established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 of the Code of Virginia.

C. Members enrolled with a MCO who subsequently meet one or more of the criteria of ~~subsections A and~~ subsection B of this section during MCO enrollment shall be excluded from MCO participation as determined by DMAS, with the exception of those who subsequently become participants in the federal long-term care waiver programs, as otherwise defined elsewhere in this chapter, for home-based and community-based Medicaid coverage ~~(AIDS,~~ (IFDDS, ~~MR/ID~~ ID, EDCD, Day Support, or Alzheimer's, or as may be amended from time to time). These ~~individuals~~ members shall receive acute and primary medical services via the MCO and shall receive waiver services and related transportation to waiver services via the fee-for-service program.

Individuals excluded from mandatory managed care enrollment shall receive Medicaid services under the current fee-for-service system. When individuals no longer meet the criteria for exclusion, they shall be required to enroll in the appropriate managed care program.

D. Individuals who are enrolled in localities that qualify for the rural exception may meet exclusion criteria if their PCP of record, as defined in 12VAC30-120-360, cannot or will not participate with the one MCO in the locality. Individual requests to be excluded from MCO participation in localities meeting the qualification for the rural exception must be made to DMAS for consideration on a case-by-case basis. ~~Recipients~~ Members enrolled in MCO rural exception areas shall not have open enrollment periods and shall not be afforded the 90-day window after initial enrollment during which they may make a health plan or program change.

Individuals excluded from mandatory managed care enrollment shall receive Medicaid services under the current fee-for-service system. When individuals no longer meet the criteria for exclusion, they shall be required to enroll in the appropriate managed care program.

E. ~~Medallion II~~ Mandatory managed care plans shall be offered to individuals, and individuals shall be enrolled in those plans, exclusively through an independent enrollment broker under contract to DMAS.

F. ~~Clients~~ Members shall be enrolled as follows:

1. All eligible individuals, except those meeting one of the exclusions of subsection B of this section, shall be enrolled in ~~Medallion II~~ mandatory managed care.

2. Individuals shall receive a Medicaid card from DMAS~~,~~ and shall be provided authorized medical care in accordance with DMAS' procedures after Medicaid eligibility has been determined to exist.

3. Once individuals are enrolled in Medicaid, they will receive a letter indicating that they may select one of the contracted MCOs. These letters shall indicate ~~a preassigned~~ an assigned MCO, determined as provided in subsection F of this section, in which the ~~individual~~ member will be enrolled if he does not make a selection within a period specified by DMAS of not less than 30 days. Members who are enrolled in one mandatory MCO program who immediately become eligible for another mandatory MCO program are able to maintain consistent enrollment with their currently assigned MCO, if available. These members will receive a notification letter including information regarding their ability to change health plans under the new program.

4. Any newborn whose mother is enrolled with an MCO at the time of birth shall be considered a member of that same MCO for the newborn enrollment period.

a. This requirement does not preclude the member, once he is assigned a Medicaid identification number, from

disenrolling from one MCO to enrolling with another in accordance with subdivision H 1 of this section.

b. The newborn's continued enrollment with the MCO is not contingent upon the mother's enrollment. Additionally, if the MCO's contract is terminated in whole or in part, the MCO shall continue newborn coverage if the child is born while the contract is active, until the newborn receives a Medicaid number or for the newborn enrollment period, whichever timeframe is earlier. ~~Children who do not receive a Medicaid identification number prior to the end of the newborn enrollment period will be disenrolled.~~ Newborns who remain eligible for participation in ~~Medallion II~~ mandatory managed care will be reenrolled in an MCO through the ~~preassignment~~ assignment process upon receiving a Medicaid identification number.

c. Any newborn whose mother is enrolled in an MCO at the time of birth shall receive a Medicaid identification number prior to the end of the newborn enrollment period in order to maintain the newborn's enrollment in an MCO.

5. Individuals who lose then regain eligibility for ~~Medallion II~~ mandatory managed care within 60 days will be reenrolled into their previous MCO without going through ~~preassignment~~ assignment and selection.

G. Individuals who do not select an MCO as described in subdivision F 3 of this section shall be assigned to an MCO as follows:

1. Individuals are assigned through a system algorithm based upon the ~~client's~~ member's history with a contracted MCO.

2. Individuals not assigned pursuant to subdivision 1 of this subsection shall be assigned to the MCO of another family member, if applicable.

3. Individuals who live in rural exception areas as defined in 12VAC30-120-360 ~~must~~ shall enroll with the one available MCO. These ~~persons~~ individuals shall receive ~~a preassignment~~ an assignment notification for enrollment into the MCO. Individuals in rural exception areas who are assigned to the one MCO may request exclusion from MCO participation if their PCP of record, as defined in 12VAC30-120-360, cannot or will not participate with the one MCO in the locality. Individual requests to be excluded from MCO participation in rural exception localities must be made to DMAS for consideration on a case-by-case basis.

4. All other individuals shall be assigned to an MCO on a basis of approximately equal number by MCO in each locality.

5. All eligible members are automatically assigned to a contracted MCO in their localities. Members are allowed 90 days after the effective date of new or initial enrollment to change to another MCO that participates in the geographic area where the member lives. ~~Recipients~~ Members residing in localities qualifying for a rural exception shall not be afforded the 90-day window after initial enrollment during which they may make a health plan or program change.

6. DMAS shall have the discretion to utilize an alternate strategy for enrollment or transition of enrollment from the method described in this section for expansions, retractions, or changes to ~~client~~ member populations, geographical areas, procurements, or any or all of these; such alternate strategy shall comply with federal waiver requirements.

H. Following their initial enrollment into an MCO, members shall be restricted to the MCO until the next open enrollment period, unless appropriately disenrolled or excluded by the department (as defined in 12VAC30-120-360).

1. During the first 90 calendar days of enrollment in a new or initial MCO, a member may disenroll from that MCO to enroll into another MCO for any reason. Such disenrollment shall be effective no later than the first day of the second month after the month in which the member requests disenrollment.

2. During the remainder of the enrollment period, the member may only disenroll from one MCO into another MCO upon determination by DMAS that good cause exists as determined under subsection ~~I~~ J of this section.

I. The department shall conduct an annual open enrollment for all ~~Medallion II~~ mandatory managed care members with the exception of those ~~clients~~ members who live in a designated rural exception area. The open enrollment period shall be the 60 calendar days before the end of the enrollment period. Prior to the open enrollment period, DMAS will inform the member of the opportunity to remain with the current MCO or change to another MCO, without cause, for the following year. Enrollment selections will be effective on the first day of the next month following the open enrollment period. Members who do not make a choice during the open enrollment period will remain with their current MCO selection.

J. Disenrollment for cause may be requested at any time.

1. After the first 90 days of enrollment in an MCO, members ~~must~~ may request disenrollment from DMAS based on cause. The request may be made orally or in writing to DMAS and ~~must~~ shall cite the reason or reasons why the member wishes to disenroll. Cause for disenrollment shall include the following:

a. A member's desire to seek services from a federally qualified health center that is not under contract with the member's current MCO, and the member requests a change to another MCO that subcontracts with the desired federally qualified health center;

b. Performance or nonperformance of service to the member by an MCO or one or more of its providers that

is deemed by the department's external quality review organizations to be below the generally accepted community practice of health care. This may include poor quality care;

c. Lack of access to a PCP or necessary specialty services covered under the State Plan or lack of access to providers experienced in dealing with the member's health care needs;

d. A member has a combination of complex medical factors that, in the sole discretion of DMAS, would be better served under another contracted MCO;

e. The member moves out of the MCO's service area;

f. The MCO does not, because of moral or religious objections, cover the service the member seeks;

g. The member needs related services to be performed at the same time; not all related services are available within the network, and the member's primary care provider or another provider determines that receiving the services separately would subject the member to unnecessary risk; or

h. Other reasons as determined by DMAS through written policy directives.

2. DMAS shall determine whether cause exists for disenrollment. Written responses shall be provided within a timeframe set by department policy; however, the effective date of an approved disenrollment shall be no later than the first day of the second month following the month in which the member files the request, in compliance with 42 CFR 438.56.

3. Cause for disenrollment shall be deemed to exist and the disenrollment shall be granted if DMAS fails to take final action on a valid request prior to the first day of the second month after the request.

4. The DMAS determination concerning cause for disenrollment may be appealed by the member in accordance with the department's client appeals process at 12VAC30-110-10 through ~~12VAC30-110-380~~ 12VAC30-110-370.

5. The current MCO shall provide, within two working days of a request from DMAS, information necessary to determine cause.

6. Members enrolled with a MCO who subsequently meet one or more of the exclusions in subsection B of this section during MCO enrollment shall be excluded as appropriate by DMAS, with the exception of those who subsequently become individuals participating in the IFDDS, ID, ~~EDCD,~~ Day Support, or Alzheimer's federal waiver programs for home-based and community-based Medicaid coverage. These members shall receive acute and primary medical services via the MCO and shall receive waiver services and related transportation to waiver services via the fee-for-service program.

12VAC30-120-380. ~~Medallion II~~ MCO responsibilities.

A. The MCO shall provide, at a minimum, all medically necessary covered services provided under the State Plan for Medical Assistance and further defined by written DMAS regulations, policies and instructions, except as otherwise modified or excluded in this part.

1. Nonemergency services provided by hospital emergency departments shall be covered by MCOs in accordance with rates negotiated between the MCOs and the hospital emergency departments.

2. Services that shall be provided outside the MCO network shall include, but are not limited to, those services identified and defined by the contract between DMAS and the MCO. Services reimbursed by DMAS include, but shall not be limited to, dental and orthodontic services for children up to age 21; for all others, dental services ~~(~~as described in 12VAC30-50-190~~)~~, school health services ~~(as defined in 12VAC30-120-360)~~, community mental health services (rehabilitative, targeted case management and the following substance abuse treatment services: emergency services (crisis); intensive outpatient services; day treatment services; substance abuse case management services; and opioid treatment services)~~,~~ as defined in 12VAC30-50-228 and 12VAC30-50-491, ~~EPSDT~~ Early Intervention services provided pursuant to Part C of the Individuals with Disabilities Education Act (IDEA) of 2004 ~~(~~as defined in 12VAC30-50-131 and 12VAC30-50-415~~)~~, and long-term care services provided under the § 1915(c) home-based and community-based waivers including related transportation to such authorized waiver services.

3. The MCOs shall pay for emergency services and family planning services and supplies whether ~~they~~ such services are provided inside or outside the MCO network.

B. EPSDT services shall be covered by the MCO and defined by the contract between DMAS and the MCO. The MCO shall have the authority to determine the provider of service for EPSDT screenings.

C. The MCOs shall report data to DMAS under the contract requirements, which may include data reports, report cards for ~~clients~~ members, and ad hoc quality studies performed by the MCO or third parties.

D. Documentation requirements.

1. The MCO shall maintain records as required by federal and state law and regulation and by DMAS policy. The MCO shall furnish such required information to DMAS, the Attorney General of Virginia or his authorized representatives, or the State Medicaid Fraud Control Unit on request and in the form requested.

2. Each MCO shall have written policies regarding ~~enrollee~~ member rights and shall comply with any applicable federal and state laws that pertain to ~~enrollee~~ member rights and shall ensure that its staff and affiliated providers

take those rights into account when furnishing services to ~~enrollees~~ members in accordance with 42 CFR 438.100.

E. The MCO shall ensure that the health care provided to its ~~clients~~ members meets all applicable federal and state mandates, community standards for quality, and standards developed pursuant to the DMAS managed care quality program.

F. The MCOs shall promptly provide or arrange for the provision of all required services as specified in the contract between the ~~state~~ Commonwealth and the ~~contractor~~ MCO. Medical evaluations shall be available within 48 hours for urgent care and within 30 calendar days for routine care. On-call clinicians shall be available 24 hours per day, seven days per week.

G. The MCOs ~~must~~ shall meet standards specified by DMAS for sufficiency of provider networks as specified in the contract between the ~~state~~ Commonwealth and the ~~contractor~~ MCO.

H. Each MCO and its subcontractors shall have in place, and follow, written policies and procedures for processing requests for initial and continuing authorizations of service. Each MCO and its subcontractors shall ensure that any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the ~~enrollee's~~ member's condition or disease. Each MCO and its subcontractors shall have in effect mechanisms to ensure consistent application of review criteria for authorization decisions and shall consult with the requesting provider when appropriate.

I. In accordance with 42 CFR 447.50 through 42 CFR 447.60, MCOs shall not impose any cost sharing obligations on ~~enrollees~~ members except as set forth in 12VAC30-20-150 and 12VAC30-20-160.

J. An MCO may not prohibit, or otherwise restrict, a health care professional acting within the lawful scope of practice, from advising or advocating on behalf of ~~an enrollee~~ a member who is his patient in accordance with 42 CFR 438.102.

K. An MCO that would otherwise be required to reimburse for or provide coverage of a counseling or referral service is not required to do so if the MCO objects to the service on moral or religious grounds and furnishes information about the service it does not cover in accordance with 42 CFR 438.102.

12VAC30-120-390. Payment rate for ~~Medallion II~~ MCOs.

The payment rate to MCOs that participate in the mandatory managed care program shall be set by negotiated contracts and in accordance with 42 CFR 438.6 and other pertinent federal regulations.

12VAC30-120-395. Payment rate for preauthorized or emergency care provided by out-of-network providers.

The MCOs shall pay for preauthorized or emergency services when provided outside the MCO network. Preauthorized or emergency services provided to a ~~Medallion II client~~ managed care member by a provider or facility not participating in the MCO's network will be reimbursed according to the current Medicaid fee schedule. This reimbursement shall be considered payment in full to the provider or facility of emergency services.

12VAC30-120-400. Quality control and utilization review.

A. DMAS shall rigorously monitor the quality of care provided by the MCOs. DMAS may contract with one or more external quality review organizations to perform focused studies on the quality of care provided by the MCOs. The external organizations may utilize data or other tools to ensure contract compliance and quality improvement activities. Specifically, DMAS shall monitor to determine if the MCO:

1. Fails substantially to provide the medically necessary items and services required under law or under the contract to be provided to an enrolled recipient and the failure has adversely affected (or has substantial likelihood of adversely affecting) the individual.

2. Engages in any practice that discriminates against individuals on the basis of their health status or requirements for health care services, including expulsion or refusal to reenroll an individual, or any practice that could reasonably be expected to have the effect of denying or discouraging enrollment (except as permitted by § 1903(m) of the Social Security Act (42 USC § 1396b(m))) by eligible individuals whose medical conditions or histories indicate a need for substantial future medical services.

3. Misrepresents or falsifies information that it furnishes, under § 1903(m) of the Social Security Act (42 USC § 1396b(m)) to CMS, DMAS, an individual, or any other entity.

4. Fails to comply with the requirements of 42 CFR 417.479(d) through (g) relating to physician incentive plans, or fails to submit to DMAS its physician incentive plans as required or requested in 42 CFR 434.70.

5. Imposes on ~~enrollees~~ members premiums or charges that are in excess of the premiums or charges permitted under the Medicaid program.

B. DMAS shall ensure that data on performance and patient results are collected.

C. DMAS shall ensure that quality outcomes information is provided to MCOs. DMAS shall ensure that changes which are determined to be needed as a result of quality control or utilization review are made.

12VAC30-120-410. Sanctions.

A. If DMAS determines that an MCO is not in compliance with applicable state or federal laws, regulations (including but not limited to the requirements of or pursuant to 12VAC30-120-380 E~~,~~ or 42 CFR 438, Subpart I), or ~~their Medallion II~~ the MCO contract, DMAS may impose sanctions on the MCO. The sanctions may include, but are not limited to:

1. Limiting enrollments in the MCO by freezing voluntary ~~recipient~~ member enrollments;

2. Freezing DMAS assignment of ~~recipients~~ members to the MCO;

3. Limiting MCO enrollment to specific areas;

4. Denying, withholding, or retracting payments to the MCO;

5. Terminating the MCO's ~~Medallion II~~ contract;

6. Intermediate sanctions including, but not limited to, the maximum civil money penalties specified in 42 CFR Part 438, Subpart I, for the violations set forth therein, or in accordance therewith; and

7. Civil monetary penalties as specified in 42 CFR 438.704.

B. In the case of an MCO that has repeatedly failed to meet the requirements of §§ 1903(m) and 1932 of the Social Security Act, DMAS shall, regardless of what other sanctions are imposed, impose the following sanctions:

1. Appoint a temporary manager to:

a. Oversee the operation of the Medicaid managed care organization upon a finding by DMAS that there is continued egregious behavior by the organization or there is a substantial risk to the health of ~~enrollees~~ members; or

b. Assure the health of the organization's ~~enrollees~~ members if there is a need for temporary management while (i) there is an orderly termination or reorganization of the organization or (ii) improvements are made to remedy the violations found under subsection A of this section. Temporary management under this subdivision may not be terminated until DMAS has determined that the MCO has the capability to ensure that the violations shall not recur.

2. Permit ~~individuals~~ members who are enrolled with the MCO to disenroll without cause. If this sanction is imposed, DMAS shall be responsible for notifying such ~~individuals~~ members of the right to disenroll.

C. Prior to terminating a contract as permitted under subdivision A 5 of this section, DMAS shall provide the MCO with a hearing. DMAS ~~may~~ shall not provide an MCO with a pretermination hearing before the appointment of a temporary manager under subdivision B 1 of this section.

D. Prior to imposing any sanction other than termination of the MCO's contract, DMAS shall provide the MCO with notice, develop procedures with which the MCO must comply to eliminate specific sanctions, and provide such other due process protections as the Commonwealth may provide.

E. In accordance with the terms of the contract, MCOs shall have the right to appeal any adverse action taken by DMAS. For appeal procedures not addressed by the contract, the MCO shall proceed in accordance with the appeals provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia). Pursuant to §§ 2.2-4364 and 2.2-4365 of the Code of Virginia, DMAS shall establish an administrative appeals procedure through which the MCO may elect to appeal decisions on disputes arising during the performance of its contract. Pursuant to § 2.2-4365 of the Code of Virginia, such appeal shall be heard by a hearing officer; however, in no event shall the hearing officer be an employee of DMAS. In conducting the administrative appeal, the hearing officer shall follow the hearing procedure used in § 2.2-4020 of the Code of Virginia.

F. When DMAS determines that an MCO committed one of the violations specified in 12VAC30-120-400 A, DMAS shall implement the provisions of 42 CFR 434.67.

1. Any sanction imposed pursuant to this subsection shall be binding upon the MCO.

2. The MCO shall have the appeals rights for any sanction imposed pursuant to this subsection as specified in 42 CFR 434.67.

12VAC30-120-420. ~~Client~~ Member grievances and appeals.

A. The MCOs shall, whenever ~~an enrolled client's~~ a member's request for covered services is reduced, denied or terminated, or payment for services is denied, provide a written notice in accordance with the notice provisions specified in 42 CFR 438.404 and 42 CFR 438.210(c), as defined by the contract between DMAS and the MCO, and any other statutory or regulatory requirements.

B. MCOs shall, at the initiation of either new ~~client~~ member enrollment or new provider/subcontractor contracts, or at the request of the ~~enrollee~~ member, provide to every ~~enrollee~~ member the information described in 42 CFR 438.10(g) concerning grievance/appeal rights and procedures.

C. Disputes between the MCO and the ~~client~~ member concerning any aspect of service delivery, including medical necessity and specialist referral, shall be resolved through a verbal or written grievance/appeals process operated by the MCO or through the DMAS appeals process. A provider who has the ~~enrollee's~~ member's written consent may act on behalf of ~~an enrollee~~ a member in the MCO grievance/appeals or the DMAS appeals process.

1. The ~~enrollee~~ member, provider, or representative acting on behalf of the ~~enrollee~~ member with the ~~enrollee's~~ member's written consent may file an oral or written grievance or appeal with the MCO. The MCO must accept

grievances or appeals submitted within 30 days from the date of the notice of adverse action. Oral requests for appeals must be followed up in writing within 10 business days by the ~~enrollee~~ member, provider, or the representative acting on behalf of the ~~enrollee~~ member with the ~~enrollee's~~ member's consent, unless the request is for an expedited appeal. The ~~enrollee~~ member may also file a written request for a standard or expedited appeal with the DMAS Appeals Division within 30 days of the ~~client's~~ member's receipt of the notice of adverse action, in accordance with 42 CFR 431, Subpart E~~;~~; 42 CFR Part 438, Subpart F~~;~~; and ~~12VAC30-110~~ 12VAC30-110-10 through 12VAC30-110-370.

2. As specified in 12VAC30-110-100, pending the resolution of a grievance or appeal filed by a ~~client~~ member or his representative (including a provider acting on behalf of the ~~client)~~ member), coverage shall not be terminated or reduced for the ~~client~~ member for any reason which is the subject of the grievance or appeal.

3. The MCO shall ensure that the ~~individuals~~ employees or agents who make decisions on MCO grievances and appeals were not involved in any previous level of review or decision making, and where the reason for the grievance or appeal involves clinical issues, relates to a denial or a request for an expedited appeal, or where the appeal is based on a lack of medical necessity, shall ensure that the decision makers are health care professionals with the appropriate clinical expertise in treating the ~~enrollee's~~ member's condition or disease.

D. The MCO shall develop written materials describing the grievance/appeals system and its procedures and operation.

E. The MCO shall maintain a recordkeeping and tracking system for complaints, grievances, and appeals that includes a copy of the original complaint, grievance, or appeal; the decision; and the nature of the decision. This system shall distinguish Medicaid from commercial ~~enrollees~~ members, if the MCO does not have a separate system for Medicaid ~~enrollees~~ members.

F. At the time of enrollment and at the time of any adverse actions, the MCO shall notify the ~~client~~ member, in writing, that:

1. Medical necessity, specialist referral or other service delivery issues may be resolved through a system of grievances and appeals, within the MCO or through the DMAS client appeals process;

2. ~~Clients~~ Members have the right to appeal directly to DMAS; and

3. The MCO shall promptly provide grievance or appeal forms, reasonable assistance and written procedures to ~~clients~~ members who wish to register written grievances or appeals.

G. The MCO shall issue grievance/appeal decisions as defined by the contract between DMAS and the MCO. Oral grievance decisions are not required to be in writing.

H. The MCO shall issue standard appeal decisions within 30 days from the date of initial receipt of the appeal in accordance with 42 CFR 438.408 and as defined by the contract between DMAS and the MCO. The appeal decision shall be in writing and shall include, but shall not be limited to, the following:

1. The decision reached, the results and the date of the decision reached by the MCO;

2. The reasons for the decision;

3. The policies or procedures that provide the basis for the decision;

4. A clear explanation of further appeal rights and a timeframe for filing an appeal; and

5. For appeals that involve the termination, suspension, or reduction of a previously authorized course of treatment, the right to continue to receive benefits in accordance with 42 CFR 438.420 pending a hearing, and how to request continuation of benefits.

I. An expedited appeal decision shall be issued as expeditiously as the ~~enrollee's~~ member's condition requires and within three business days in cases of medical emergencies in which delay could result in death or serious injury to a ~~client~~ member. Extensions to these timeframes shall be allowed in accordance with 42 CFR 438.408 and as defined by the contract between DMAS and the MCO. Written confirmation of the decision shall promptly follow the verbal notice of the expedited decision.

J. Any appeal decision issued by the MCO may be appealed by the ~~client~~ member to DMAS in accordance with the department's Client Appeals regulations at 12VAC30-110-10 through ~~12VAC30-110-380~~ 12VAC30-110-370. DMAS shall conduct an evidentiary hearing in accordance with the Client Appeals regulations at 12VAC30-110-10 through ~~12VAC30-110-380~~ 12VAC30-110-370 and shall not base any appealed decision on the record established by any appeal decision of the MCO. The MCO shall comply with the DMAS appeal decision. The DMAS decision in these matters shall be final and shall not be subject to appeal by the MCO.

K. The MCO shall provide information necessary for any DMAS appeal within timeframes established by DMAS.

VA.R. Doc. No. R15-4135; Filed November 13, 2015, 1:01 p.m.

STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

Proposed Regulation

Title of Regulation: **12VAC35-115. Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded, or Operated by the Department of Behavioral Health and Developmental Services (amending 12VAC35-115-10, 12VAC35-115-30, 12VAC35-115-50, 12VAC35-115-60, 12VAC35-115-90, 12VAC35-115-100, 12VAC35-115-110, 12VAC35-115-130, 12VAC35-115-145, 12VAC35-115-150, 12VAC35-115-180, 12VAC35-115-190, 12VAC35-115-200, 12VAC35-115-210, 12VAC35-115-230; adding 12VAC35-115-105, 12VAC35-115-175, 12VAC35-115-260, 12VAC35-115-270; repealing 12VAC35-115-140, 12VAC35-115-170, 12VAC35-115-250).**

Statutory Authority: §§ 37.2-203 and 37.2-400 of the Code of Virginia.

Public Hearing Information:

December 16, 2015 - 9 a.m. - Department of Behavioral Health and Developmental Services, 13th Floor, Large Conference Room, Jefferson Building, 1220 Bank Street, Richmond, VA 23219

Public Comment Deadline: February 12, 2016.

Agency Contact: Deb Lochart, Director, Office of Human Rights, Department of Behavioral Health and Developmental Services, Jefferson Building, 1220 Bank Street, 13th Floor, Richmond, VA 23219, telephone (804) 786-0032, FAX (804) 371-2308, or email deb.lochart@dbhds.virginia.gov.

Basis: The State Board of Behavioral Health and Developmental Services has the authority to promulgate the amendments pursuant to §§ 37.2-203 and 37.2-400 of the Code of Virginia. Section 37.2-203 of the Code of Virginia authorizes the board to adopt regulations that may be necessary to carry out the provisions of Title 37.2 of the Code of Virginia and other laws of the Commonwealth administered by the commissioner or the department. Section 37.2-400 of the Code of Virginia provides the board with authority to adopt regulations pertaining to rights of individuals receiving services in a hospital, training center, other facility, or program operated, funded or licensed by the department.

Purpose: The purpose of the revisions to the human rights regulations is to streamline the human rights system from the current administrative model to a more efficient model, thus improving the ability of the Office of Human Rights to perform its mandated responsibilities of oversight and advocacy and maximize resources, in a manner that promotes the vision for individuals receiving services of recovery, self-determination, empowerment, and community integration while protecting their health, safety, and welfare.

The regulatory changes will reduce the number of local human rights committees (LHRCs) and fundamentally modify their role and function by shifting from a focus on provider administrative and support activities to review and approval of planned restrictions to the rights of individuals receiving services. The regulatory changes also reorganize and simplify the information regarding the complaint process to clarify expectations and underscore the individuals' due process rights.

The proposed amendments are intended to:

1. Increase the availability and flexibility of human rights advocates for direct involvement with individuals receiving services and other critical functions by clarifying (i) the administrative responsibilities of the Department of Behavioral Health and Developmental Services with regards to the operation of the human rights system, (ii) the role of the human rights advocate, (iii) the role of the local human rights committee (LHRC), and (iv) the role of the State Human Rights Committee (SHRC).

2. Simplify the administrative processes regarding the dispute resolution process, the behavior treatment plan review, and substitute decision-making and eliminate redundant or duplicative activities.

3. Enhance the user friendliness of the regulations by reorganizing and reducing the size of the regulation and simplifying the language of the regulation.

Substance: The substantive proposed amendments include:

1. Operational functions of the system have been removed from LHRCs, providers, and the SHRC and placed with the department.

2. The department has an increased responsibility for the overall functioning of the human rights system by supporting LHRCs with resources, training, and consultation.

3. The department, in consultation with the SHRC, will set the number of local human rights committees.

4. LHRC duties will now focus on individual rights (e.g., complaints, behavior plans, and variances), and the LHRC duties will not include monitoring providers (e.g., review of policies, reporting requirements, attendance requirements, etc.).

5. Expanded LHRC review of all restrictions lasting longer than seven days and any plans that proposed to restrict an individual's rights.

6. Human rights advocates will have increased responsibilities to train all stakeholders on regulatory protections.

7. Providers will no longer affiliate with an LHRC, rather providers will access the committee in their locality if there is an issue that requires review. Providers will no longer be required to attend LHRC meetings.

8. Complaint processes are consolidated into one section.

9. The use of prone restraints is prohibited.

Issues: The primary advantage to the public is a streamlined, more efficient human rights system that shifts from the

current administrative model to one that more directly promotes and supports the individual receiving services. There are more than 70 local human rights committees (LHRCs) across the Commonwealth. The regulatory changes will reduce the number of LHRCs and fundamentally modify their role and function by shifting from a focus on provider administrative and support activities to review and approval of planned restrictions to the rights of individuals receiving services. The proposed amendments also reorganize and simplify the information regarding the complaint process to clarify expectations and underscore the individuals' due process rights. There is no known disadvantage to the public, the department, or the Commonwealth.

Small Business Impact Review Report of Findings: This regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Board of Behavioral Health and Developmental Services (Board) proposes to amend its regulation that governs procedures for protecting the human rights of individuals who are receiving mental health services, developmental services or substance abuse services through providers that are licensed or operated by the Department of Behavioral Health and Developmental Services (DBHDS). The Board specifically proposes to update obsolete language in this regulation and consolidate all processes for human rights complaints into one place in the regulation. The Board also proposes to change the regulatory responsibilities of local human rights committees (LHRCs) so that they will no longer handle administrative tasks but will instead have more authority to oversee treatment plans that contain restrictions on human rights as defined by this regulation.

Result of Analysis. Benefits likely outweigh costs for most of the Board's proposed regulatory changes. For at least one proposed change, there is insufficient information to ascertain whether benefits will likely outweigh costs.

Estimated Economic Impact. Currently this regulation contains many obsolete references to terms no longer commonly used by DBHDS and has various rules for the rights and responsibilities of care providers and clients as well as complaint procedures scattered throughout various regulatory sections. The Board now proposes to update obsolete regulatory language and to gather all rules for the human right complaint process into one section of this regulation. No entity is likely to incur any costs on account of these changes. These changes will, however, benefit interested parties in that the regulatory language now reflects currently used terminology and all rules for the human rights complaint process will be more easily found because they will all be in one place.

The current regulation also contains rules for providers and the 80 LHRCs in the Commonwealth to interact and cooperate. Included in these rules are the requirements that providers supply all monetary support needed by the LHRCs, attend LHRC meetings and get LHRC approval for any treatment plans that include physical restraint of clients. Board staff reports that, while all LHRCs receive support from their provider assignees, only about half of LHRCs (about 40) actually have an explicit dollar cost attached that providers had to pay. These costs range between $25 and $450 annually. Board staff reports that LHRCs currently handle many administrative and operational tasks that the Board believes could better be handled by DBHDS which would leave LHRCs more time to expand their oversight of more client treatment plans and to provide more client support during the complaint process.

Accordingly, the Board proposes to reorganize and amend these regulations so that DBHDS is responsible for administrative and training tasks currently provided through provider funding. Board staff reports that the Board anticipates reducing the number of LHRCs from the current 80 to fewer than 10. Under this proposed regulation, LHRCs will be responsible for approving treatment plans where human rights as defined by this regulation may be impacted in addition to approving any treatment plans that include plans for physical restraint. Providers that currently pay an explicit amount per year to support their affiliate LHRCs will see savings of between $25 and $450 per year. Providers that do not currently pay explicit dollar amounts but instead volunteer staff to provide administrative help and pay for other support like gas cards for LHRC members on an ad hoc basis will save the value of their staff's paid time spent on LHRC administration plus the costs of any other ad hoc support currently provided. These cost savings may be partially or completely offset by increased travel costs for providers to attend meetings with a drastically reduced number of LHRCs that presumably would be housed farther from at least some assigned providers. Provider savings may also be offset by increased travel and staff costs associated with gaining approval for treatment plans that may impact clients human rights to freedom of movement, freedom to communicate, associate and meet privately with anyone the client chooses, freedom to have and spend personal money or any of the other human rights listed in 12VAC35-115-100.

Businesses and Entities Affected. This proposed regulation will affect all service providers licensed or operated by the Board as well as the clients they serve. Board staff estimates that approximately 900 providers will be affected and that all of these providers would qualify as small businesses. Additionally, Board staff reports that there are approximately 55 public facilities that will be affected.

Localities Particularly Affected. No localities will be particularly affected by this proposed regulatory change.

Projected Impact on Employment. This regulatory action will likely have little impact on employment in the Commonwealth.

Effects on the Use and Value of Private Property. This regulatory action will likely have no impact on the use or value of private property.

Small Businesses: Costs and Other Effects. Small business service providers may see some cost savings as they will no longer be responsible for fully funding the operations of the LHRCs to which they are assigned. However, any savings may be partially or completely offset by increased time and travel costs incurred if they have to travel greater distances to attend LHRC meetings that would likely be farther away once the number of LHRCs is drastically cut.

Small Businesses: Alternative Method that Minimizes Adverse Impact. There are likely no alternative methods that would both satisfy the Board's aims and further reduce travel and time costs that either service providers or members of LHRCs will likely have to incur.

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

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

Summary:

The proposed amendments (i) increase the availability and flexibility of human rights advocates for direct involvement with individuals receiving services and other critical functions by clarifying the administrative responsibilities of the department with regards to the operation of the human rights system and clarifying the roles of the human rights advocate, the local human rights committee (LHRC), and the State Human Rights Committee (SHRC); (ii) modify the regulatory responsibilities of LHRCs, which will no longer handle administrative tasks but will have more authority to oversee treatment plans that contain restrictions on human rights; (iii) simplify the administrative processes regarding the dispute resolution process, the behavior treatment plan review, and substitute decision-making and eliminate redundant or duplicative activities; (iv) consolidate complaint processes into one section of the regulation; (v) prohibit the use of prone restraints; and (vi) update and simplify language.

Part I
General Provisions

12VAC35-115-10. Authority and applicability.

A. The Code of Virginia authorizes these regulations to further define and protect the rights of individuals receiving services from providers of mental health, ~~mental retardation~~ developmental, or substance abuse services in Virginia. ~~The regulations require~~ This chapter requires providers of services to take specific actions to protect the rights of each individual. ~~The regulations establish~~ This chapter establishes remedies when rights are violated or are in dispute~~,~~ and ~~provide~~ provides a structure for support of these rights.

B. Providers subject to ~~these regulations~~ this chapter include:

1. Facilities operated by the department under Chapters 3 (§ 37.2-300 et seq.) and 7 (§ 37.2-700 et seq.) of Title 37.2 of the Code of Virginia;

2. Sexually violent predator programs established under § 37.2-909 of the Code of Virginia;

3. Community services boards that provide services under Chapter 5 (§ 37.2-500 et seq.) of Title 37.2 of the Code of Virginia;

4. Behavioral health authorities that provide services under Chapter 6 (§ 37.2-600 et seq.) of Title 37.2 of the Code of Virginia;

5. Public or private providers that operate programs or facilities licensed by the department under Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2 of the Code of Virginia except those operated by the Department of Corrections; and

6. Any other providers receiving funding from the department. Providers of services under Part C of the Individuals with Disabilities Education Act (IDEA), 20 USC §§ 1431-1444, that are subject to ~~these regulations~~ this chapter solely by receipt of Part C funds from or through the department shall comply with all applicable IDEA regulations found in 34 CFR Part 303 in lieu of ~~these regulations~~ this chapter.

C. Unless ~~another law takes precedence~~ otherwise provided by law, ~~these regulations apply~~ this chapter applies to all individuals who are receiving services from a public or private provider of services operated, licensed, or funded by the Department of Behavioral Health and Developmental Services, except those operated by the Department of Corrections.

D. ~~These regulations apply~~ This chapter applies to individuals under forensic status and individuals committed to the custody of the department as sexually violent predators, except to the extent that the commissioner may determine ~~these regulations are~~ this chapter is not applicable to them. The exemption ~~must~~ shall be in writing and based solely on the need to protect individuals receiving services, employees, or the general public. The commissioner shall give the State Human Rights Committee (SHRC) chairperson prior notice of all exemptions and provide the written exemption to the SHRC for its information. These exemptions shall be time limited and services shall not be compromised.

12VAC35-115-30. Definitions.

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

"Abuse" means any act or failure to act by an employee or other person responsible for the care of an individual in a facility or program operated, licensed, or funded by the department, excluding those operated by the Department of Corrections, that was performed or was failed to be performed knowingly, recklessly, or intentionally, and that caused or might have caused physical or psychological harm, injury, or death to a person receiving care or treatment for mental illness, ~~mental retardation~~ intellectual disability, or substance abuse. Examples of abuse include acts such as:

1. Rape, sexual assault, or other criminal sexual behavior;

2. Assault or battery;

3. Use of language that demeans, threatens, intimidates, or humiliates the person;

4. Misuse or misappropriation of the person's assets, goods, or property;

5. Use of excessive force when placing a person in physical or mechanical restraint;

6. Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies~~,~~; professionally accepted standards of practice~~,~~; or the person's individualized services plan; and

7. Use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan. See § 37.2-100 of the Code of Virginia.

"Advance directive" means a document voluntarily executed in accordance with § 54.1-2983 of the Code of Virginia or the laws of another state where executed (§ 54.1-2993 of the Code of Virginia). This may include a wellness recovery action plan (WRAP) or similar document as long as it is executed in accordance with § 54.1-2983 of the Code of Virginia or the laws of another state. A WRAP or similar document may identify the health care agent who is authorized to act as the individual's substitute decision maker.

"Authorization" means a document signed by the individual receiving services or that individual's authorized representative that authorizes the provider to disclose identifying information about the individual. An authorization ~~must~~ shall be voluntary. To be voluntary, the authorization ~~must~~ shall be given by the individual receiving services or his authorized representative freely and without undue inducement~~,~~; any element of force, fraud, deceit, or duress~~,~~; or any form of constraint or coercion.

"Authorized representative" means a person permitted by law or ~~these regulations~~ this chapter to authorize the disclosure of information or to consent to treatment and services or participation in human research. The decision-making authority of an authorized representative recognized or designated under ~~these regulations~~ this chapter is limited to decisions pertaining to the designating provider. Legal guardians, attorneys-in-fact, or health care agents appointed pursuant to § 54.1-2983 of the Code of Virginia may have decision-making authority beyond such provider.

"Behavior intervention" means those principles and methods employed by a provider to help an individual to achieve a positive outcome and to address challenging behavior in a constructive and safe manner. Behavior management principles and methods must be employed in accordance with the individualized services plan and written policies and procedures governing service expectations, treatment goals, safety, and security.

"Behavioral treatment plan," "functional plan," or "behavioral support plan" means any set of documented procedures that are an integral part of the individualized services plan and are developed on the basis of a systematic data collection, such as a functional assessment, for the purpose of assisting an individual to achieve the following:

1. Improved behavioral functioning and effectiveness;

2. Alleviation of symptoms of psychopathology; or

3. Reduction of challenging behaviors.

"Board" means the Board of Behavioral Health and Developmental Services.

"Caregiver" means an employee or contractor who provides care and support services; medical services; or other treatment, rehabilitation, or habilitation services.

"Commissioner" means the Commissioner of the Department of Behavioral Health and Developmental Services.

"Community services board" or "CSB" means the public body established pursuant to § 37.2-501 of the Code of Virginia that provides mental health, ~~mental retardation~~ developmental, and substance abuse services to individuals within each city and county that established it. For the purpose of these regulations, community services board also includes a behavioral health authority established pursuant to § 37.2-602 of the Code of Virginia.

"Complaint" means an allegation of a violation of ~~these regulations~~ this chapter or a provider's policies and procedures related to ~~these regulations~~ this chapter.

"Consent" means the voluntary agreement of an individual or that individual's authorized representative to specific services.

Consent ~~must~~ shall be given freely and without undue inducement~~,~~; any element of force, fraud, deceit, or duress~~,~~; or any form of constraint or coercion. Consent may be expressed through any means appropriate for the individual, including verbally, through physical gestures or behaviors, in Braille or American Sign Language, in writing, or through other methods.

"Department" means the Department of Behavioral Health and Developmental Services.

"Director" means the chief executive officer of any provider delivering services. In organizations that also include services

not covered by ~~these regulations~~ this chapter, the director is the chief executive officer of the services or services licensed, funded, or operated by the department.

"Discharge plan" means the written plan that establishes the criteria for an individual's discharge from a service and identifies and coordinates delivery of any services needed after discharge.

"Disclosure" means the release by a provider of information identifying an individual.

"Emergency" means a situation that requires a person to take immediate action to avoid harm, injury, or death to an individual or to others.

"Exploitation" means the misuse or misappropriation of the individual's assets, goods, or property. Exploitation is a type of abuse. (See § 37.2-100 of the Code of Virginia.) Exploitation also includes the use of a position of authority to extract personal gain from an individual. Exploitation includes violations of 12VAC35-115-120 ~~(Work)~~ and 12VAC35-115-130 ~~(Research)~~. Exploitation does not include the billing of an individual's third party payer for services. Exploitation also does not include instances of use or appropriation of an individual's assets, goods or property when permission is given by the individual or his authorized representative:

1. With full knowledge of the consequences;

2. With no inducements; and

3. Without force, misrepresentation, fraud, deceit, duress of any form, constraint, or coercion.

"Governing body of the provider" means the person or group of persons with final authority to establish policy. ~~For the purpose of these regulations, the governing body of a CSB means the public body established according to Chapter 5 (§ 37.2-500 et seq.) or Chapter 6 (§ 37.2-600 et seq.) of Title 37.2 of the Code of Virginia, and shall include administrative policy community services boards, operating community services boards, local government departments with policy advisory boards, and the board of a behavioral health authority.~~

"Habilitation" means the provision of individualized services conforming to current acceptable professional practice that enhance the strengths of, teach functional skills to, or reduce or eliminate challenging behaviors of an individual. These services occur in an environment that suits the individual's needs, responds to his preferences, and promotes social interaction and adaptive behaviors.

"Health care operations" means any activities of the provider to the extent that the activities are related to its provision of health care services. Examples include:

1. Conducting quality assessment and improvement activities, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives, and related functions that do not include treatment;

2. Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, and training, licensing or credentialing activities;

3. Conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs; and

4. Other activities contained within the definition of health care operations in ~~the Standards for Privacy of Individually Identifiable Health Information,~~ 45 CFR 164.501.

"Health plan" means an individual or group plan that provides or pays the cost of medical care, including any entity that meets the definition of "health plan" in ~~the Standards for Privacy of Individually Identifiable Health Information,~~ 45 CFR 160.103.

"Historical research" means the review of information that identifies individuals receiving services for the purpose of evaluating or otherwise collecting data of general historical significance. See 12VAC35-115-80 B ~~(Confidentiality)~~.

"Human research" means any systematic investigation, including research development, testing, and evaluation, utilizing human subjects, that is designed to develop or contribute to generalized knowledge. Human research shall not include research exempt from federal research regulations pursuant to 45 CFR 46.101(b).

"Human rights advocate" means a person employed by the commissioner upon recommendation of the State Human Rights Director to help individuals receiving services exercise their rights under this chapter. See 12VAC35-115-250 C.

"Independent review committee" means a committee appointed or accessed by a provider to review and approve the clinical efficacy of the provider's behavioral treatment plans and associated data collection procedures. An independent review committee shall be composed of professionals with training and experience in applied behavioral analysis who are not involved in the development of the plan or directly providing services to the individual.

"Individual" means a person who is receiving services. This term includes the terms "consumer," "patient," "resident," "recipient," and "client."

"Individualized services plan" or "ISP" means a comprehensive and regularly updated written plan that describes the individual's needs, the measurable goals and objectives to address those needs, and strategies to reach the individual's goals. An ISP is person-centered, empowers the individual, and is designed to meet the needs and preferences of the individual. The ISP is developed through a partnership between the individual and the provider and includes an individual's treatment plan, habilitation plan, person-centered plan, or plan of care.

"Informed consent" means the voluntary written agreement of an individual, or that individual's authorized representative to surgery, electroconvulsive treatment, use of psychotropic

medications, or any other treatment or service that poses a risk of harm greater than that ordinarily encountered in daily life or for participation in human research. To be voluntary, informed consent must be given freely and without undue inducement~~,~~; any element of force, fraud, deceit, or duress~~,~~; or any form of constraint or coercion.

~~"Inspector general" means a person appointed by the Governor to provide oversight by inspecting, monitoring, and reviewing the quality of services that providers deliver.~~

"Investigating authority" means any person or entity that is approved by the provider to conduct investigations of abuse and neglect.

"Licensed professional" means a physician, licensed clinical psychologist, licensed professional counselor, licensed clinical social worker, licensed or certified substance abuse treatment practitioner, or ~~certified~~ psychiatric nurse ~~specialist~~ practitioner.

"Local ~~Human Rights Committee~~ human rights committee" or "LHRC" means a group of at least five people appointed by the State Human Rights Committee. See 12VAC35-115-250 D for membership and duties.

"Neglect" means failure by a person, program, or facility operated, licensed, or funded by the department, excluding those operated by the Department of Corrections, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of ~~a person~~ an individual receiving care or treatment for mental illness, ~~mental retardation~~ intellectual disability, or substance abuse. See § 37.2-100 of the Code of Virginia.

"Next friend" means a person designated in accordance with 12VAC35-115-146 B to serve as the authorized representative of an individual who has been determined to lack capacity to consent or authorize the disclosure of identifying information, when required under ~~these regulations~~ this chapter.

"Peer-on-peer aggression" means a physical act, verbal threat, or demeaning expression by an individual against or to another individual that causes physical or emotional harm to that individual. Examples include hitting, kicking, scratching, and other threatening behavior. Such instances may constitute potential neglect.

"Person centered" means focusing on the needs and preferences of the individual, empowering and supporting the individual in defining the direction for his life, and promoting self-determination, community involvement, and recovery.

"Program rules" means the operational rules and expectations that providers establish to promote the general safety and well-being of all individuals in the program and to set standards for how individuals will interact with one another in the program. Program rules include any expectation that produces a consequence for the individual within the program. Program rules may be included in a handbook or policies and shall be available to the individual.

"Protection and advocacy agency" means the state agency designated under the federal Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) ~~Act~~ and the Developmental Disabilities Assistance and Bill of Rights Act (DD) ~~Act~~. The protection and advocacy agency is the ~~Virginia Office for Protection and Advocacy~~ disAbility Law Center of Virginia (dLCV).

"Provider" means any person, entity, or organization offering services that is licensed, funded, or operated by the department.

"Psychotherapy notes" means comments, recorded in any medium by a health care provider who is a mental health professional, documenting and analyzing the contents of conversation during a private counseling session with an individual or a group, joint, or family counseling session that are separated from the rest of the individual's health record. "Psychotherapy notes" shall not include annotations relating to medication and prescription monitoring, counseling session start and stop times, treatment modalities and frequencies, clinical test results, or any summary of any symptoms, diagnosis, prognosis, functional status, treatment plan, or the individual's progress to date.

"Research review committee" or "institutional review board" means a committee of professionals that provides complete and adequate review of research activities. The committee shall be sufficiently qualified through maturity, experience, and diversity of its members, including consideration of race, gender, and cultural background, to promote respect for its advice and counsel in safeguarding the rights and welfare of participants in human research. (See § 37.2-402 of the Code of Virginia and 12VAC35-180.)

"Restraint" means the use of a mechanical device, medication, physical intervention, or hands-on hold to prevent an individual from moving his body to engage in a behavior that places him or others at imminent risk. There are three kinds of restraints:

1. Mechanical restraint means the use of a mechanical device that cannot be removed by the individual to restrict the freedom of movement or functioning of a limb or a portion of an individual's body when that behavior places him or others at imminent risk.

2. Pharmacological restraint means the use of a medication that is administered involuntarily for the emergency control of an individual's behavior when that individual's behavior places him or others at imminent risk and the administered medication is not a standard treatment for the individual's medical or psychiatric condition.

3. Physical restraint, also referred to as manual hold, means the use of a physical intervention or hands-on hold to prevent an individual from moving his body when that individual's behavior places him or others at imminent risk.

"Restraints for behavioral purposes" means using a physical hold, medication, or a mechanical device to control behavior or involuntarily restrict the freedom of movement of an individual in an instance when all of the following conditions are met: (i) there is an emergency, (ii) nonphysical interventions are not viable, and (iii) safety issues require an immediate response.

"Restraints for medical purposes" means using a physical hold, medication, or mechanical device to limit the mobility of an individual for medical, diagnostic, or surgical purposes, such as routine dental care or radiological procedures and related postprocedure care processes, when use of the restraint is not the accepted clinical practice for treating the individual's condition.

"Restraints for protective purposes" means using a mechanical device to compensate for a physical or cognitive deficit when the individual does not have the option to remove the device. The device may limit an individual's movement, for example, bed rails or a gerichair, and prevent possible harm to the individual or it may create a passive barrier, such as a helmet to protect the individual.

"Restriction" means anything that limits or prevents an individual from freely exercising his rights and privileges.

"SCC" means a specially constituted committee serving an intermediate care facility as described in the Centers for Medicare and Medicaid Services (CMS) Conditions of Participation (42 CFR 483.440(f)(3)).

"Seclusion" means the involuntary placement of an individual alone in an area secured by a door that is locked or held shut by a staff person, by physically blocking the door, or by any other physical or verbal means, so that the individual cannot leave it.

"Serious injury" means any injury resulting in bodily hurt, damage, harm, or loss that requires medical attention by a licensed physician.

"Services" means care, treatment, training, habilitation, interventions, or other supports, including medical care, delivered by a provider licensed, operated or funded by the department.

"Services record" means all written and electronic information that a provider keeps about an individual who receives services.

"State Human Rights Committee" or "SHRC" means a committee of nine members appointed by the board that is accountable for the duties prescribed in ~~12VAC35-115-250 E~~ 12VAC35-115-270. See ~~12VAC35-115-250 E~~ 12VAC35-115-270 C 8 for membership and duties.

"State ~~Human Rights Director~~ human rights director" means the person employed by and reporting to the commissioner who is responsible for carrying out the functions prescribed in ~~12VAC35-115-250 F~~ 12VAC35-115-260 D .

"Time out" means the involuntary removal of an individual by a staff person from a source of reinforcement to a different, open location for a specified period of time or until the problem behavior has subsided to discontinue or reduce the frequency of problematic behavior.

"Treatment" means the individually planned, sound, and therapeutic interventions that are intended to improve or maintain functioning of an individual receiving services delivered by providers licensed, funded, or operated by the department. In order to be considered sound and therapeutic, the treatment ~~must~~ shall conform to current acceptable professional practice.

Part III

Explanation of Individual Rights and Provider Duties

12VAC35-115-50. Dignity.

A. Each individual has a right to exercise his legal, civil, and human rights, including constitutional rights, statutory rights, and the rights contained in ~~these regulations~~ this chapter, except as specifically limited ~~herein~~ in this chapter or otherwise by law. Each individual has a right to have services that he receives respond to his needs and preferences and be person-centered. Each individual also has the right to be protected, respected, and supported in exercising these rights. Providers shall not partially or totally take away or limit these rights solely because an individual has a mental ~~illness, mental retardation,~~ health or substance use disorder or an intellectual disability and is receiving services for these conditions or has any physical or sensory condition that may pose a barrier to communication or mobility.

B. In receiving all services, each individual has the right to:

1. Use his preferred or legal name. The use of an individual's preferred name may be limited when a licensed professional makes the determination that the use of the name will result in demonstrable harm or have significant negative impact on the program itself or the individual's treatment, progress, and recovery. The director or his designee shall discuss the issue with the individual and inform the human rights advocate of the reasons for any restriction prior to implementation and the reasons for the restriction shall be documented in the individual's services record. The need for the restriction shall be reviewed by the team every month and documented in the services record.

2. Be protected from harm including abuse, neglect, and exploitation.

3. Have help in learning about, applying for, and fully using any public service or benefit to which he may be entitled. These services and benefits include educational or vocational services, housing assistance, services or benefits under Titles II, XVI, XVIII, and XIX of the Social Security Act, United States Veterans Benefits, and services from legal and advocacy agencies.

4. Have opportunities to communicate in private with lawyers, judges, legislators, clergy, licensed health care practitioners, authorized representatives, advocates, the

Office of the State Inspector General (§ 2.2-308 of the Code of Virginia), and employees of the protection and advocacy agency.

5. Be provided with general information about program services, policies, and rules in writing and in the manner, format and language easily understood by the individual.

6. Be afforded the opportunity to have an individual of his choice notified of his general condition, location, and transfer to another facility.

C. In services provided in residential and inpatient settings, each individual has the right to:

1. Have sufficient and suitable clothing for his exclusive use.

2. Receive nutritionally adequate, varied, and appetizing meals that are prepared and served under sanitary conditions, are served at appropriate times and temperatures, and are consistent with any individualized diet program.

3. Live in a humane, safe, sanitary environment that gives each individual, at a minimum:

a. Reasonable privacy and private storage space;

b. An adequate number of private, operating toilets, sinks, showers, and tubs that are designed to accommodate individuals' physical needs;

c. Direct outside air provided by a window that opens or by an air conditioner;

d. Windows or skylights in all major areas used by individuals;

e. Clean air, free of bad odors; and

f. Room temperatures that are comfortable year round and compatible with health requirements.

4. Practice a religion and participate in religious services subject to their availability, provided that such services are not dangerous to the individual or others and do not infringe on the freedom of others.

a. Religious services or practices that present a danger of bodily injury to any individual or interfere with another individual's religious beliefs or practices may be limited. The director or his designee shall discuss the issue with the individual and inform the human rights advocate of the reasons for any restriction prior to implementation. The reasons for the restriction shall be documented in the individual's services record.

b. Participation in religious services or practices may be reasonably limited by the provider in accordance with other general rules limiting privileges or times or places of activities.

5. Have paper, pencil and stamps provided free of charge for at least one letter every day upon request. However, if an individual has funds to buy paper, pencils, and stamps to send a letter every day, the provider does not have to pay for them.

6. Communicate privately with any person by mail and have help in writing or reading mail as needed.

a. An individual's access to mail may be limited only if the provider has reasonable cause to believe that the mail contains illegal material or anything dangerous. If so, the director or his designee may open the mail, but not read it, in the presence of the individual.

b. An individual's ability to communicate by mail may be limited if, in the judgment of a licensed professional, the individual's communication with another person or persons will result in demonstrable harm to the individual's mental health.

c. The director or his designee shall discuss the issue with the individual and inform the human rights advocate of the reasons for any restriction prior to implementation and the reasons for the restriction shall be documented in the individual's services record. The need for the restriction shall be reviewed by the team every month and documented in the services record.

7. Communicate privately with any person by telephone and have help in doing so. Use of the telephone may be limited to certain times and places to make sure that other individuals have equal access to the telephone and that they can eat, sleep, or participate in an activity without being disturbed.

a. An individual's access to the telephone may be limited only if, in the judgment of a licensed professional, communication with another person or persons will result in demonstrable harm to the individual or significantly affect his treatment.

b. The director or his designee shall discuss the issue with the individual and inform the human rights advocate of the reasons for any restriction prior to implementation and the reasons for the restriction shall be documented in the individual's services record. The need for the restriction shall be reviewed by the team every month and documented in the individual's services record.

c. Residential substance abuse services providers that are not inpatient hospital settings or crisis stabilization programs may develop policies and procedures that limit the use of the telephone during the initial phase of treatment when sound therapeutic practice requires restriction, subject to the following conditions:

(1) Prior to implementation and when it proposes any changes or revisions, the provider shall submit policies and procedures, program handbooks, or program rules to the LHRC and the human rights advocate for review and approval.

(2) When an individual applies for admission, the provider shall notify him of these restrictions.

8. Have or refuse visitors.

a. An individual's access to visitors may be limited or supervised only when, in the judgment of a licensed professional, the visits result in demonstrable harm to the individual or significantly affect the individual's treatment or when the visitors are suspected of bringing contraband or threatening harm to the individual in any other way.

b. The director or his designee shall discuss the issue with the individual and inform the human rights advocate of the reasons for any restriction prior to implementation and the restriction shall be documented in the individual's services record. The need for the restriction shall be reviewed by the team every month and documented in the individual's services record.

c. Residential substance abuse service providers that are not inpatient hospital settings or crisis stabilization programs may develop policies and procedures that limit visitors during the initial phase of treatment when sound therapeutic practice requires the restriction, subject to the following conditions:

(1) Prior to implementation and when proposing any changes or revisions, the provider shall submit policies and procedures, program handbooks, or program rules to the LHRC and the human rights advocate for review and approval.

(2) The provider shall notify individuals who apply for admission of these restrictions.

9. Nothing in these provisions shall prohibit a provider from stopping, reporting, or intervening to prevent any criminal act.

D. The provider's duties.

1. Providers shall recognize, respect, support, and protect the dignity rights of each individual at all times. In the case of a minor, providers shall take into consideration the expressed preferences of the minor and the parent or guardian.

2. Providers shall develop, carry out, and regularly monitor policies and procedures that assure the protection of each individual's rights.

3. Providers shall assure the following relative to abuse, neglect, and exploitation:

a. Policies and procedures governing harm, abuse, neglect, and exploitation of individuals receiving their services shall require that, as a condition of employment or volunteering, any employee, volunteer, consultant, or student who knows of or has reason to believe that an individual may have been abused, neglected, or exploited at any location covered by ~~these regulations,~~ this chapter shall immediately report this information directly to the director.

b. The director shall immediately take necessary steps to protect the individual until an investigation is complete. This may include the following actions:

(1) Direct the employee or employees involved to have no further contact with the individual. In the case of incidents of peer-on-peer aggression, protect the individuals from the aggressor in accordance with sound therapeutic practice and ~~these regulations~~ this chapter.

(2) Temporarily reassign or transfer the employee or employees involved to a position that has no direct contact with individuals receiving services.

(3) Temporarily suspend the involved employee or employees pending completion of an investigation.

~~c. The director shall immediately notify the human rights advocate and the individual's authorized representative. In no case shall notification be later than 24 hours after the receipt of the initial allegation of abuse, neglect, or exploitation.~~

~~d. In no case shall the director punish or retaliate against an employee, volunteer, consultant, or student for reporting an allegation of abuse, neglect, or exploitation to an outside entity.~~

~~e. The director shall initiate an impartial investigation within 24 hours of receiving a report of potential abuse or neglect. The investigation shall be conducted by a person trained to do investigations and who is not involved in the issues under investigation.~~

~~(1) The investigator shall make a final report to the director or the investigating authority and to the human rights advocate within 10 working days of appointment. Exceptions to this time frame may be requested and approved by the department if submitted prior to the close of the sixth day.~~

~~(2) The director or investigating authority shall, based on the investigator's report and any other available information, decide whether the abuse, neglect or exploitation occurred. Unless otherwise provided by law, the standard for deciding whether abuse, neglect, or exploitation has occurred is preponderance of the evidence.~~

~~(3) If abuse, neglect or exploitation occurred, the director shall take any action required to protect the individual and other individuals. All actions must be documented and reported as required by 12VAC35-115-230.~~

~~(4) In all cases, the director shall provide his written decision, including actions taken as a result of the investigation, within seven working days following the completion of the investigation to the individual or the individual's authorized representative, the human rights advocate, the investigating authority, and the involved employee or employees. The decision shall be in writing and in the manner, format, and language that is most easily understood by the individual.~~

~~(5) If the individual affected by the alleged abuse, neglect, or exploitation or his authorized representative is not satisfied with the director's actions, he or his~~

~~authorized representative, or anyone acting on his behalf, may file a petition for an LHRC hearing under 12VAC35-115-180.~~

~~f. The director shall cooperate with any external investigation, including those conducted by the Office of the State Inspector General (§ 2.2-308 of the Code of Virginia), the protection and advocacy agency, or other regulatory or enforcement agencies.~~

~~g. If at any time the director has reason to suspect that an individual may have been abused or neglected, the director shall immediately report this information to the appropriate local Department of Social Services (see §§ 63.2-1509 and 63.2-1606 of the Code of Virginia) and cooperate fully with any investigation that results.~~

~~h. If at any time the director has reason to suspect that the abusive, neglectful or exploitive act is a crime, the director or his designee shall immediately contact the appropriate law enforcement authorities and cooperate fully with any investigation that results.~~

4. Providers shall afford the individual the opportunity to have an individual of his choice notified of his general condition, location, and transfer to another facility.

12VAC35-115-60. Services.

A. Each individual receiving services shall receive those services according to law and sound therapeutic practice.

B. The provider's duties.

1. Providers shall develop, carry out, and regularly monitor policies and procedures prohibiting discrimination in the provision of services. Providers shall comply with all state and federal laws, including any applicable provisions of the Americans with Disabilities Act (42 USC § 12101 et seq.), that prohibit discrimination on the basis of race, color, religion, ethnicity, age, sex, disability, or ability to pay. ~~These policies and procedures shall require, at a minimum, the following:~~

~~a. An individual or anyone acting on his behalf may complain to the director if he believes that his services have been limited or denied due to discrimination.~~

~~b. If an individual complains of discrimination, the director shall assure that an appropriate investigation is conducted immediately. The director shall make a decision, take action, and document the action within 10 working days of receipt of the complaint.~~

~~c. A written copy of the decision and the director's action shall be forwarded to the individual and his authorized representative, the human rights advocate, and any employee or employees involved.~~

~~d. If the individual or his authorized representative is not satisfied with the director's decision or action, he may file a petition for an LHRC hearing under 12VAC35-115-180.~~

2. Providers shall ensure that all services, including medical services and treatment, are at all times delivered in accordance with sound therapeutic practice. Providers may deny or limit an individual's access to services if sound therapeutic practice requires limiting the service to individuals of the same sex or similar age, disability, or legal status.

3. Providers shall develop and implement policies and procedures that address emergencies. These policies and procedures shall:

a. Identify what caregivers may do to respond to an emergency;

b. Identify qualified clinical staff who are accountable for assessing emergency conditions and determining the appropriate intervention;

c. Require that the director immediately notify the individual's authorized representative and the advocate if an emergency results in harm or injury to any individual; and

d. Require documentation in the individual's services record of all facts and circumstances surrounding the emergency.

4. Providers shall assign a specific person or group of persons to carry out each of the following activities:

a. Medical, mental health, and behavioral screenings and assessments, as applicable, upon admission and during the provision of services;

b. Preparation, implementation, and ~~appropriate changes~~ modifications to an ~~individual's services plan~~ ISP based on ~~the~~ ongoing review of the medical, mental, and behavioral needs of the individual;

c. Preparation and implementation of an individual's discharge plan; and

d. Review of every use of seclusion or restraint by a qualified professional who is involved in providing services to the individual.

5. Providers shall not deliver any service to an individual without ~~a services plan~~ an ISP that is tailored specifically to the needs and expressed preferences of the individual and, in the case of a minor, the minor and the minor's parent or guardian or other person authorized to consent to treatment pursuant to § 54.1-2969 A of the Code of Virginia. Services provided in response to emergencies or crises shall be deemed part of the ~~services plan~~ ISP and thereafter documented in the ~~individual's services plan~~ ISP.

6. Providers shall write the ~~services plan~~ ISP and discharge plan in clear, understandable language.

7. When preparing or changing an ~~individual's services~~ ISP or discharge plan, providers shall ensure that all services received by the individual are integrated. With the individual's or the individual's authorized representative's authorization, providers may involve family members in

services and discharge planning. When the individual or his authorized representative requests such involvement, the provider shall take all reasonable steps to do so. In the case of services to minors, the parent or guardian or other person authorized to consent to treatment pursuant to § 54.1-2969 A of the Code of Virginia shall be involved in service and discharge planning.

8. Providers shall ensure that the entries in an individual's services record are at all times authentic, accurate, complete, timely, and pertinent.

12VAC35-115-90. Access to and amendment of services records.

A. With respect to his own services record, each individual and his authorized representative has the right to:

1. See, read, and get a copy of his own services record, except information that is privileged pursuant to § 8.01-581.17 of the Code of Virginia, and information compiled by the provider in reasonable anticipation of or for use in a civil, criminal, or administrative action or proceeding;

2. Let certain other people see, read, or get a copy of his own services record if the individual is restricted by law from seeing, reading, or receiving a copy;

3. Challenge, request to amend, or receive an explanation of anything in his services record; and

4. Let anyone who sees his record, regardless of whether amendments to the record have been made, know that the individual has tried to amend the record or explain his position and what happened as a result.

B. ~~Except in the following circumstances,~~ With respect to the services records of minors ~~must have their parent's or guardian's permission before they can access their services record~~:

1. A minor must have the permission of a parent, guardian, or other person standing in loco parentis before he can access his services record. He may access his services record without ~~the~~ this permission ~~of a parent~~ only if the records pertain to treatment for sexually transmitted or reportable contagious diseases, family planning or pregnancy, outpatient care, treatment or rehabilitation for substance use disorders, mental illness or emotional disturbance, or inpatient psychiatric hospitalization when a minor is 14 years of age or older and has consented to the admission.

2. A parent may access his minor child's services record unless prohibited by 42 CFR Part 2, parental rights have been terminated, a court order provides otherwise, or the minor's treating physician or clinical psychologist has determined, in the exercise of professional judgment, that ~~the~~ disclosure to the parent would be reasonably likely to cause substantial harm to the minor or another person.

C. The provider's duties.

1. Providers shall tell each individual and his authorized representative how he can access and request amendment of his own services record.

2. Providers shall permit each individual to see his services record when he requests it and to request amendments if necessary.

a. Access to all or a part of an individual's services record may be denied or limited only if a physician or a clinical psychologist involved in providing services to the individual talks to the individual, examines the services record as a result of the individual's request for access, and signs and puts in the services record permanently a written statement that he thinks access to the services record by the individual at this time would be reasonably likely to endanger the life or physical safety of the individual or another person or that the services record makes reference to a person other than a health care provider and the access requested would be reasonably likely to cause substantial harm to the referenced person. The physician or clinical psychologist ~~must~~ shall also tell the individual as much about his services record as he can without risking harm to the individual.

b. If access is denied in whole or in part, the provider shall give the individual or his authorized representative a written statement that explains the basis for the denial, the individual's review rights, as set forth in the following subdivisions, how he may exercise them, and how the individual may file a complaint with the provider or the ~~United States~~ U.S. Department of Health and Human Services, if applicable. If restrictions ~~or time limits~~ are placed on access, the individual shall be notified of the restrictions ~~and time limits~~ and conditions for their removal. These ~~time limits and~~ conditions also shall be specified in the services record.

(1) If the individual requests a review of denial of access, the provider shall designate a physician or clinical psychologist who was not directly involved in the denial to review the decision to deny access. The physician or clinical psychologist ~~must~~ shall determine within a reasonable period of time whether or not to deny the access requested in accordance with the standard in subdivision 2 a of this subsection. The provider ~~must~~ shall promptly provide the individual notice of the physician's or psychologist's determination and provide or deny access in accordance with that determination.

(2) At the individual's option, the individual may designate at his own expense a reviewing physician or clinical psychologist who was not directly involved in the denial to review the decision to deny access in accordance with the standard in subdivision 2 a of this subsection. If the individual chooses this option, the provider is not required to designate a physician or clinical psychologist to review the decision.

c. If the provider limits or refuses to let an individual see his services record, the provider shall also notify the advocate and tell the individual that he can ask to have a lawyer or authorized insurer of his choice see his record. If the individual makes this request, the provider shall disclose the record to that lawyer or authorized insurer (§ 8.01-413 of the Code of Virginia).

3. Providers shall, without charge, give individuals any help they may need to read and understand their services record and request amendments to it.

4. If an individual asks to challenge, amend, or explain any information contained in his services record, the provider shall investigate and file in the services record a written report concerning the individual's request.

a. If the report finds that the services record is incomplete, inaccurate, not pertinent, not timely, or not necessary, the provider shall:

(1) Either mark that part of the services record clearly to say so, or else remove that part of the services record and file it separately with an appropriate cross reference to indicate that the information was removed;

(2) Not disclose the original services record without separate specific authorization or legal authority (e.g., if compelled by subpoena or other court order);

(3) Obtain the individual's identification of and agreement to have the provider notify the relevant persons of the amendment; and

(4) Promptly notify in writing all persons who have received the incorrect information and all persons identified by the individual that the services record has been corrected.

b. If a request to amend the services record is denied, the provider shall give the individual a written statement containing the basis for the denial and notify the individual of his right to submit a statement of disagreement and how to submit such a statement. The provider shall also give the individual (i) a statement that if a statement of disagreement is not submitted that the individual may request the provider to disclose the request for amendment and the denial with future disclosures of information and (ii) a description of how the individual may complain to the provider or the Secretary of Health and Human Services, if applicable. Upon request, the provider shall file in the services record the individual's statement ~~explaining his position~~ of disagreement. If needed, the provider shall help the individual to write this statement. If a statement is filed, the provider shall:

(1) Give all persons who have copies of the record a copy of the individual's statement.

(2) Clearly note in any later disclosure of the record that it is disputed and include a copy of the statement with the disputed record.

12VAC35-115-100. Restrictions on freedoms of everyday life.

A. From admission until discharge from a service, each individual is entitled to:

1. Enjoy all the freedoms of everyday life that are consistent with his need for services, his protection, and the protection of others, and that do not interfere with his services or the services of others. These freedoms include:

a. Freedom to move within the service setting, its grounds, and the community;

b. Freedom to communicate, associate, and meet privately with anyone the individual chooses;

c. Freedom to have and spend personal money;

d. Freedom to see, hear, or receive television, radio, books, and newspapers, whether privately owned or in a library or public area of the service setting;

e. Freedom to keep and use personal clothing and other personal items;

f. Freedom to use recreational facilities and enjoy the outdoors; and

g. Freedom to make purchases in canteens, vending machines, or stores selling a basic selection of food and clothing.

2. Receive services in that setting and under those conditions that are least restrictive of his freedom.

B. The provider's duties.

1. Providers shall encourage each individual's participation in normal activities and conditions of everyday living and support each individual's freedoms.

2. Providers shall not limit or restrict any individual's freedom more than is needed to achieve a therapeutic benefit, maintain a safe and orderly environment, or intervene in an emergency.

3. Providers shall not impose any restriction on an individual unless the restriction is justified and carried out according to ~~these regulations~~ this chapter or otherwise required by law. If a provider imposes a restriction pursuant to this chapter, except as provided in 12VAC35-115-50, the following conditions shall be met:

a. A qualified professional involved in providing services has, in advance, assessed and documented all possible alternatives to the proposed restriction, taking into account the individual's medical and mental condition, behavior, preferences, nursing and medication needs, and ability to function independently.

b. A qualified professional involved in providing services has, in advance, determined that the proposed restriction is necessary for effective treatment of the individual or to protect him or others from personal harm, injury, or death.

c. A qualified professional involved in providing services has, in advance, documented in the individual's services record the specific reason for the restriction.

d. A qualified professional involved in providing services has explained~~,~~ and provided written notice so that the individual can understand~~,~~ the reason for the restriction, the criteria for removal, and the individual's right to a fair review of whether the restriction is permissible.

e. A qualified professional regularly reviews the restriction and that the restriction is discontinued when the individual has met the criteria for removal.

~~f.~~ 4. If a court has ordered the provider to impose the restriction or if the provider is otherwise required by law to impose the restriction, the restriction shall be documented in the individual's services record.

5. Providers shall obtain approval of the LHRC of any restriction imposed on an individual's rights under this subsection or 12VAC35-115-50 that lasts longer than seven days or is imposed multiple times during a 30-day time period. If the LHRC finds that the restriction is not being implemented in accordance with this chapter, the director shall be notified, and the LHRC shall provide recommendations.

~~4.~~ 6. Providers may develop and enforce written program rules, but only if the rules do not conflict with ~~these regulations~~ this chapter or any ~~individual's services plan~~ ISP and are needed to maintain a safe and orderly environment.

~~5.~~ 7. Providers shall, in the development of these program rules:

a. Get as many suggestions as possible from all individuals who are expected to obey the rules;

b. Apply these rules in the same way to each individual;

c. Give the rules to and review them with each individual and his authorized representative in a way that the individual can understand them, including explaining possible consequences for violating them;

d. Post the rules in summary form in all areas to which individuals and their families have regular access;

e. Submit the rules to the LHRC for review and approval upon request of the advocate or LHRC; and

f. Prohibit individuals from disciplining other individuals, except as part of an organized self-government program conducted according to a written policy approved in advance by the LHRC.

12VAC35-115-105. Behavioral treatment plans.

A. A behavioral treatment plan is used to assist an individual to improve participation in normal activities and conditions of everyday living, reduce challenging behaviors, alleviate symptoms of psychopathology, and maintain a safe and orderly environment.

B. Providers may use individualized restrictions such as restraint or time out in a behavioral treatment plan to address challenging behaviors that present an immediate danger to the individual or others, but only after a licensed professional has conducted a detailed and systematic assessment of the behavior and the situations in which the behavior occurs. Providers shall document in the individual's services record that the lack of success or probable success of less restrictive procedures attempted or considered, and the risks associated with not treating the behavior, are greater than any risks associated with the use of the proposed restrictions.

C. Providers shall develop any behavioral treatment plan according to their policies and procedures, which ensure that:

1. Behavioral treatment plans are initiated, developed, carried out, and monitored by professionals who are qualified by expertise, training, education, or credentials to do so;

2. Behavioral treatment plans include nonrestrictive procedures and environmental modifications that address the targeted behavior; and

3. Behavioral treatment plans are submitted to an independent review committee, prior to implementation, for review and approval of the technical adequacy of the plan and data collection procedures.

D. Providers shall submit any behavioral treatment plan that involves the use of restraint or time out in an intermediate care facility, and its independent review committee approval, to the SCC under 42 CFR 483.440(f)(3) for the SCC's approval prior to implementation.

E. Providers shall submit any behavioral treatment plan that does not require SCC approval, and its independent review committee approval, to the LHRC, which shall determine whether the plan is in accordance with this chapter prior to implementation.

F. If either the LHRC or SCC finds that the behavioral treatment plan violates the rights of the individual or is not being implemented in accordance with this chapter, the LHRC or SCC shall notify the director and provide recommendations regarding the proposed plan.

G. Behavioral treatment plans involving the use of restraint or time out shall be reviewed quarterly by the independent review committee and the LHRC or SCC to determine if the use of restraint has resulted in improvements in functioning of the individual.

H. Providers shall not use seclusion in a behavioral treatment plan.

12VAC35-115-110. Use of seclusion, restraint, and time out.

A. Each individual is entitled to be completely free from any unnecessary use of seclusion, restraint, or time out.

B. The voluntary use of mechanical supports to achieve proper body position, balance, or alignment so as to allow

greater freedom of movement or to improve normal body functioning in a way that would not be possible without the use of such a mechanical support, and the voluntary use of protective equipment are not considered restraints.

C. The provider's duties.

1. Providers shall meet with the individual or his authorized representative upon admission to the service to discuss and document in the individual's services record, his preferred interventions in the event his behaviors or symptoms become a danger to himself or others and under what circumstances, if any, the intervention may include seclusion, restraint, or time out.

2. Providers shall document in the individual's services record all known contraindications to the use of seclusion, time out, or any form of physical or mechanical restraint, including medical contraindications and a history of trauma and shall flag the record to alert and communicate this information to staff.

3. Only residential facilities for children that are licensed under the Regulations for Children's Residential Facilities (12VAC35-46) and inpatient hospitals may use seclusion and only in an emergency.

4. Providers shall not use seclusion, restraint, or time out as a punishment or reprisal or for the convenience of staff.

5. Providers shall not use seclusion or restraint solely because criminal charges are pending against the individual.

6. Providers shall not use a restraint that places the individual's body in a prone (face down) position.

~~6.~~ 7. Providers shall not use seclusion or restraint for any behavioral, medical, or protective purpose unless other less restrictive techniques have been considered and documentation is placed in the ~~individual's services plan~~ ISP that these less restrictive techniques did not or would not succeed in reducing or eliminating behaviors that are self-injurious or dangerous to other people or that no less restrictive measure was possible in the event of a sudden emergency.

~~7.~~ 8. Providers that use seclusion, restraint, or time out shall develop written policies and procedures that comply with applicable federal and state laws and regulations, accreditation~~,~~ and certification standards, third party payer requirements, and sound therapeutic practice. These policies and procedures shall include at least the following requirements:

a. Individuals shall be given the opportunity for motion and exercise, to eat at normal meal times and take fluids, to use the restroom, and to bathe as needed.

b. Trained, qualified staff shall monitor the individual's medical and mental condition continuously while the restriction is being used.

c. Each use of seclusion, restraint, or time out shall end immediately when criteria for removal are met.

d. Incidents of seclusion and restraint, including the rationale for and the type and duration of the restraint, ~~are~~ shall be reported to the department as provided in 12VAC35-115-230 C.

~~8. Providers shall submit all proposed seclusion, restraint, and time out policies and procedures to the LHRC for review and comment before implementing them, when proposing changes, or upon request of the human rights advocate, the LHRC, or the SHRC.~~

9. Providers shall comply with all applicable state and federal laws and regulations, certification and accreditation standards, and third party requirements as they relate to seclusion and restraint.

a. Whenever an inconsistency exists between ~~these regulations~~ this chapter and federal laws or regulations, accreditation or certification standards, or the requirements of third party payers, the provider shall comply with the higher standard.

b. Providers shall notify the department whenever a regulatory, accreditation, or certification agency or third party payer identifies problems in the provider's compliance with any applicable seclusion and restraint standard.

10. Providers shall ensure that only staff who have been trained in the proper and safe use of seclusion, restraint, and time out techniques may initiate, monitor, and discontinue their use.

11. Providers shall ensure that a qualified professional who is involved in providing services to the individual reviews every use of physical restraint as soon as possible after it is carried out and documents the results of his review in the individual's services record.

12. Providers shall ensure that review and approval by a qualified professional for the use or continuation of restraint for medical or protective purposes is documented in the individual's services record. Documentation includes:

a. Justification for any restraint;

b. Time-limited approval for the use or continuation of restraint; and

c. Any physical or psychological conditions that would place the individual at greater risk during restraint.

13. Providers may use seclusion or mechanical restraint for behavioral purposes in an emergency only if a qualified professional involved in providing services to the individual has, within one hour of the initiation of the procedure:

a. Conducted a face-to-face assessment of the individual placed in seclusion or mechanical restraint and documented that alternatives to the proposed use of

seclusion or mechanical restraint have not been successful in changing the behavior or were not attempted, taking into account the individual's medical and mental condition, behavior, preferences, nursing and medication needs, and ability to function independently;

b. Determined that the proposed seclusion or mechanical restraint is necessary to protect the individual or others from harm, injury, or death;

c. Documented in the individual's services record the specific reason for the seclusion or mechanical restraint;

d. Documented in the individual's services record the behavioral criteria that the individual must meet for release from seclusion or mechanical restraint; and

e. Explained to the individual, in a way that he can understand, the reason for using mechanical restraint or seclusion, the criteria for its removal, and the individual's right to a fair review of whether the mechanical restraint or seclusion was permissible.

14. Providers shall limit each approval for restraint for behavioral purposes or seclusion to four hours for individuals age 18 and older, two hours for children and adolescents ages nine through 17, and one hour for children under age nine.

15. Providers shall not issue standing orders for the use of seclusion or restraint for behavioral purposes.

16. Providers shall ensure that no individual is in time out for more than 30 minutes per episode.

17. Providers shall monitor the use of restraint for behavioral purposes or seclusion through continuous face-to-face observation, rather than by an electronic surveillance device.

~~18. Providers may use restraint or time out in a behavioral treatment plan to address behaviors that present an immediate danger to the individual or others, but only after a qualified professional has conducted a detailed and systematic assessment of the behavior and the situations in which the behavior occurs.~~

~~a. Providers shall develop any behavioral treatment plan involving the use of restraint or time out for behavioral purposes according to its policies and procedures, which ensure that:~~

~~(1) Behavioral treatment plans are initiated, developed, carried out, and monitored by professionals who are qualified by expertise, training, education, or credentials to do so.~~

~~(2) Behavioral treatment plans include nonrestrictive procedures and environmental modifications that address the targeted behavior.~~

~~(3) Behavioral treatment plans are submitted to and approved by an independent review committee comprised of professionals with training and experience in applied behavior analysis who have assessed the technical adequacy of the plan and data collection procedures.~~

~~b. Providers shall document in the individual's services record that the lack of success, or probable success, of less restrictive procedures attempted and the risks associated with not treating the behavior are greater than any risks associated with the use of restraint.~~

~~c. Prior to the implementation of any behavioral treatment plan involving the use of restraint or time out, the provider shall obtain approval of the LHRC. If the LHRC finds that the plan violates or has the potential to violate the rights of the individual, the LHRC shall notify and make recommendations to the director.~~

~~d. Behavioral treatment plans involving the use of restraint or time out shall be reviewed quarterly by the independent review committee and by, the LHRC to determine if the use of restraint has resulted in improvements in functioning of the individual.~~

~~19.Providers may not use seclusion in a behavioral treatment plan.~~

12VAC35-115-130. Research.

A. Each individual has a right to choose to participate or not participate in human research.

B. The provider's duties.

1. Providers shall obtain prior, written, informed consent of the individual or his authorized representative before any individual begins to participate in human research unless the research is exempt under § 32.1-162.17 of the Code of Virginia.

2. Providers shall comply with all other applicable state and federal laws and regulations regarding human research, including the provisions under Chapter 5.1 (§ 32.1-162.16 et seq.) of Title 32.1 and § 37.2-402 of the Code of Virginia ~~and the regulations adopted under § 37.2-402 of the Code of Virginia~~.

3. Providers shall obtain review and approval from an institutional review board or research review committee prior to performing or participating in a human research protocol. Documentation of this review and approval shall be maintained and made available on request by the individual or his authorized representative.

4. Prior to participation by individuals in any human research project, the provider shall inform and provide a copy of the institutional review board or research review committee approval to the LHRC. Once the research has been initiated, the provider shall update the LHRC periodically on the status of the individual's participation.

12VAC35-115-140. ~~Complaint and fair hearing.~~ (Repealed.)

~~A. Each individual has a right to:~~

~~1. Complain that the provider has violated any of the rights assured under these regulations;~~

~~2. Have a timely and fair review of any complaint according to the procedures in Part V (12VAC35-115-150 et seq.) of this chapter;~~

~~3. Have someone file a complaint on his behalf;~~

~~4. Use these and other complaint procedures; and~~

~~5. Complain under any other applicable law, including complain to the protection and advocacy agency.~~

~~B. The provider's duties.~~

~~1. If an individual makes a complaint, the provider shall make every attempt to resolve the complaint at the earliest possible step.~~

~~2. Providers shall not take, threaten to take, permit, or condone any action to retaliate against anyone filing a complaint or prevent anyone from filing a complaint or helping an individual to file a complaint.~~

~~3. Providers shall assist the complainant in understanding the full complaint process, the options for resolution including the formal and informal processes, and the confidentiality elements involved.~~

Part IV
Substitute Decision Making

12VAC35-115-145. Determination of capacity to give consent or authorization.

If the capacity of an individual to consent to treatment, services, or research~~,~~ or to authorize the disclosure of information is in doubt, the provider shall obtain an evaluation ~~from~~ conducted by or under the supervision of a licensed professional who is ~~qualified by expertise, training, education, or credentials and~~ not directly involved with the individual to determine whether the individual has capacity to consent or to authorize the disclosure of information.

1. Capacity evaluations shall be obtained for all individuals who may lack capacity, even if they request that an authorized representative be designated or agree to submit to a recommended course of treatment.

2. In conducting this evaluation, the professional may seek comments from representatives accompanying the individual pursuant to 12VAC35-115-70 A 4 about the individual's capacity to consent or to authorize disclosure.

3. Providers shall determine the need for an evaluation of an individual's capacity to consent or authorize disclosure of information and the need for a substitute decision maker whenever the individual's condition warrants, the individual requests such a review, at least every six months, and at discharge, except for individuals receiving acute inpatient services.

a. If the individual's record indicates that the individual is not expected to obtain or regain capacity, the provider shall document annually that it has reviewed the individual's capacity to make decisions and whether there has been any change in that capacity.

b. Providers of acute inpatient services shall determine the need for an evaluation of an individual's capacity to consent or authorize disclosure of information whenever the individual's condition warrants or at least at every treatment team meeting. Results of such reviews shall be documented in the treatment team notes and communicated to the individual and his authorized representative.

4. Capacity evaluations shall be conducted in accordance with accepted standards of professional practice and shall indicate the specific type of decision for which the individual's capacity is being evaluated (e.g., medical) and shall indicate what specific type of decision the individual has or does not have the capacity to make. Capacity evaluations shall address the type of supports that might be used to increase the individual's decision-making capabilities.

5. If the individual or his family objects to the results of the ~~qualified~~ licensed professional's determination, the provider shall immediately inform the human rights advocate.

a. If the individual or family member wishes to obtain an independent evaluation of the individual's capacity, he may do so at his own expense and within reasonable timeframes consistent with his circumstances. If the individual or family member cannot pay for an independent evaluation, the individual may request that the LHRC consider the need for an independent evaluation pursuant to 12VAC35-115-200 B. The provider shall take no action for which consent or authorization is required, except in an emergency, pending the results of the independent evaluation. The provider shall take no steps to designate an authorized representative until the independent evaluation is complete.

b. If the independent evaluation is consistent with the provider's evaluation, the provider's evaluation is binding, and the provider shall implement it accordingly.

c. If the independent evaluation is not consistent with the provider's evaluation, the matter shall be referred to the LHRC for review and decision under 12VAC35-115-200 ~~through 12VAC35-115-250~~ and 12VAC35-115-210.

Part V
Complaint Resolution, Hearing, and Appeal Procedures

12VAC35-115-150. General provisions.

A. Any action taken by the judicial system or administrative hearing bodies is not subject to review under the human rights complaint resolution process.

~~A.~~ B. The parties to any complaint are the individual and the director. Each party can also have anyone else represent him during resolution of the complaint. The director shall make every effort to resolve the complaint at the earliest possible stage.

~~B.~~ C. ~~Meetings, reviews,~~ Reviews and hearings will generally be closed to other people unless the individual making the complaint requests that other people attend or if an open meeting is required by the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

~~1.~~ The LHRC and SHRC may conduct a closed hearing to protect the confidentiality of persons who are not a party to the complaint, but only if a closed meeting is otherwise allowed under the Virginia Freedom of Information Act (see § 2.2-3711 of the Code of Virginia).

~~2. If any person alleges that implementation of an LHRC recommendation would violate the individual's rights or those of other individuals, the person may file a petition for a hearing with the SHRC, according to 12VAC35-115-210.~~

~~C.~~ D. In no event shall a pending hearing, review, or appeal prevent a director from taking corrective action based on the advice of the provider's legal counsel that such action is required by law or ~~he otherwise~~ if the director thinks such action is correct and justified.

~~D.~~ E. The LHRC or SHRC, on the motion of any party or on its own motion, may, for good cause, extend any time periods before or after the expiration of that time period. No director may extend any time periods for any actions he is required to take under these procedures without prior approval of the LHRC or SHRC.

~~E.~~ F. Except in the case of emergency proceedings, if a time period in which action must be taken under this part is not extended by the LHRC or SHRC, the failure of a party to act within that time period shall waive that party's further rights under these procedures.

~~F.~~ G. In making ~~their~~ recommendations regarding complaint resolution, the LHRC and the SHRC shall identify any rights or regulations that the provider violated and any policies, practices, or conditions that contributed to the violations. They shall also recommend appropriate corrective actions, including changes in policies, practices, or conditions, to prevent further violations of the rights assured under ~~these regulations~~ this chapter.

~~G.~~ H. If it is impossible to carry out the recommendations of the LHRC or the SHRC within a specified time, the LHRC or the SHRC, as appropriate, shall recommend any necessary interim action that gives appropriate and possible immediate remedies.

~~H.~~ I. Any action plan submitted by the director or commissioner in the course of these proceedings shall fully address final and interim recommendations made by the LHRC or the SHRC and identify financial or other constraints, if any, that prevent efforts to fully remedy the violation.

~~I.~~ J. All communication with the individual during the complaint resolution process shall be in the manner, format, and language most easily understood by the individual.

12VAC35-115-170. ~~Complaint resolution process.~~ (Repealed.)

~~A. Anyone who believes that a provider has violated an individual's rights under these regulations may report it to the director or the human rights advocate for resolution.~~

~~1. If the report is made only to the director, the director or his designee shall immediately notify the human rights advocate. If the report is made on a weekend or holiday, then the director or his designee shall notify the human rights advocate on the next business day.~~

~~2. If the report is made only to the human rights advocate, the human rights advocate shall immediately notify the director. If the report is made on a weekend or holiday, then the human rights advocate shall notify the director on the next business day.~~

~~3. The human rights advocate or the director or his designee shall discuss the report with the individual and notify the individual of his right to pursue a complaint through the process established in these regulations. The steps in the informal and formal complaint process established in these regulations shall be thoroughly explained to the individual. The human rights advocate or the director or his designee shall ask the individual if he understands the complaint process and the choice that he has before asking the individual how he wishes to pursue the complaint. The individual shall then be given the choice of pursuing the complaint through the informal or formal complaint process. If the individual does not make a choice, the complaint shall be managed through the informal process.~~

~~4. The following steps apply if the complaint is pursued through the informal process:~~

~~Step 1: The director or his designee shall attempt to resolve the complaint immediately. If the complaint is resolved, no further action is required.~~

~~Step 2: If the complaint is not resolved within five working days, the director or his designee shall refer it for resolution under the formal process. The individual may extend the informal process five day time frame for good cause. All such extensions shall be reported to the human rights advocate by the director or his designee.~~

~~5. The following steps apply if the complaint is pursued through the formal process:~~

~~Step 1: The director or his designee shall try to resolve the complaint by meeting with the individual, any representative the individual chooses, the human rights advocate, and others as appropriate within 24 hours of receipt of the complaint or the next business day if that day is a weekend or holiday. The director or his designee shall conduct an investigation of the complaint, if necessary.~~

~~Step 2: The director or his designee shall give the individual and his chosen representative a written~~

~~preliminary decision and, where appropriate, an action plan for resolving the complaint within 10 working days of receiving the complaint. Along with the action plan, the director shall provide written notice to the individual about the time frame for the individual's response pursuant to Step 3 of this subdivision, information on how to contact the human rights advocate for assistance with the process, and a statement the complaint will be closed if the individual does not respond.~~

~~Step 3: If the individual disagrees with the director's preliminary decision or action plan, he can respond to the director in writing within five working days after receiving the preliminary decision and action plan. If the individual has not responded within five working days, the complaint will be closed.~~

~~Step 4: If the individual disagrees with the preliminary decision or action plan and reports his disagreement to the director in writing within five working days after receiving the decision or action plan, the director shall investigate further as appropriate and shall make a final decision regarding the complaint. The director shall forward a written copy of his final decision and action plan to the individual, his chosen representative, and the human rights advocate within five working days after the director receives the individual's written response. Along with the action plan, the director shall provide written notice to the individual about the time frame for the individual's response pursuant to Step 5 of this subdivision, information about how to contact the human rights advocate for assistance with the process, and a statement that if the individual does not respond that the complaint will be closed.~~

~~Step 5: If the individual disagrees with the director's final decision or action plan, he may file a petition for a hearing by the LHRC using the procedures prescribed in 12VAC35-115-180. If the individual has accepted the relief offered by the director, the matter is not subject to further review.~~

~~B. If at any time during the formal complaint process the human rights advocate concludes that there is substantial risk that serious or irreparable harm will result if the complaint is not resolved immediately, the human rights advocate shall inform the director, the provider, the provider's governing body, and the LHRC. Steps 1 through 5 of subdivision A 5 of this section shall not be followed. Instead, the LHRC shall conduct a hearing according to the special procedures for emergency hearings in 12VAC35-115-180.~~

12VAC35-115-175. Human rights complaint process.

A. Each individual has a right to:

1. Make a complaint that the provider has violated any of the rights assured under this chapter;

2. Have a timely and fair review of any complaint in accordance with this chapter and the program's human rights complaint resolution policies and procedures;

3. Have someone file a complaint on his behalf;

4. Use these and other complaint procedures; and

5. Make a complaint under any other applicable law, including to the protection and advocacy agency.

B. The individual shall:

1. Be contacted by the director or the director's designee regarding the complaint within 24 hours;

2. Have access to a human rights advocate for assistance with the complaint;

3. Be protected from retaliation and harm;

4. Have the complaint reviewed, investigated, and resolved as soon as possible;

5. Receive a report with the director's decision and action plan within 10 working days; and

6. Be notified in writing of his right to and the process for appealing the director's decision and action plan to the LHRC.

C. Upon receipt of a complaint, providers shall:

1. Notify the department of the complaint as soon as possible, but no later than the next business day;

2. Initiate an impartial investigation into, or resolution of, the complaint as soon as possible, but no later than the next business day;

3. Take all steps necessary to ensure that individuals involved in the complaint are protected from retaliation and harm;

4. Assist the individual making a complaint in understanding the human rights complaint process, the provider's complaint resolution policies and procedures, and the confidentiality of involved information;

5. Ensure that all communications to the individual are in the manner, format, and language most easily understood by the individual;

6. Adhere to the reporting requirements in 12VAC35-115-230; and

7. Report the director's decision and action plan within 10 working days to the individual, authorized representative, if applicable, and human rights advocate.

D. All providers shall have complaint resolution policies and procedures that address all of the requirements of subsection C of this section.

E. Provider complaint resolution policies and procedures shall be in writing and approved by the department prior to implementation. The policies and procedures shall:

1. Ensure that anyone who believes that a provider has violated an individual's rights under this chapter can report

it to the director or the human rights advocate for resolution;

2. Ensure that employees shall not take, threaten to take, permit, or condone any action (i) to punish or retaliate against anyone filing a complaint or (ii) to prevent anyone from filing or helping an individual file a complaint either under this chapter or with an outside entity;

3. Ensure that every attempt is made to resolve an individual's complaint as quickly as possible;

4. Provide opportunities for timely negotiation and resolution for all complaints, including the additional requirements related to abuse, neglect, or exploitation in subsection F of this section;

5. Establish a process for designating the director's responsibilities to ensure timely complaint reporting and resolution;

6. Detail the program's complaint review or investigation process, including (i) specific actions the program will take to protect the individual and gather and document relevant information and (ii) how and when the individual and his authorized representative, if applicable, will receive updates on the progress of the review;

7. Detail notification requirements and deadlines including procedures for providing:

a. The program's complaint policies and procedures to all individuals and authorized representatives at admission to service;

b. Written notification to the individual regarding his right to and the process to appeal the director's decision and action plan to the LHRC; and

8. Detail staff training requirements regarding the program's complaint resolution process and requirements.

F. Additional requirements for complaints involving abuse, neglect, or exploitation:

1. The program director shall take immediate steps to protect the individual until the investigation is complete, including appropriate personnel actions.

2. Any instance of seclusion or restraint that does not comply with this chapter or an approved variance, or that results in injury to an individual, shall be reported to the authorized representative, as applicable, and the department in accordance with the requirements for reporting allegations of abuse.

3. The program director shall notify the department and authorized representative, if applicable, of an allegation of abuse or neglect within 24 hours of the receipt of the allegation.

4. The program director shall ensure that the investigation is conducted by a person trained to do investigations and who is not involved in the issues under investigation.

5. The investigator shall provide a written report of the results of the investigation of abuse or neglect to the director and to the human rights advocate within 10 working days from the date the investigation began unless an extension has been granted.

6. The program director shall decide, based on the investigator's report and any other available information, whether the abuse, neglect, or exploitation occurred. Unless otherwise provided by law, the standard for deciding whether abuse, neglect, or exploitation has occurred is preponderance of the evidence.

7. The program director shall submit the final decision and action plan, if applicable, to the individual, authorized representative, if applicable, and human rights advocate within 10 working days of its completion.

G. If the human rights advocate concludes that there is substantial risk that serious or irreparable harm will result if the complaint is not resolved immediately, the human rights advocate shall inform the director, the provider's governing body, and the LHRC. The LHRC shall conduct a hearing according to the special procedures for emergency hearings in 12VAC35-115-190.

H. The director shall cooperate fully with any abuse or neglect complaint investigation conducted by a local department of social services.

I. If at any time the director has reason to suspect that the abusive, neglectful, or exploitive act is a crime and that it occurred on the program premises, the director or designee shall immediately contact the appropriate law-enforcement authorities and cooperate fully with any investigation that may result.

12VAC35-115-180. Local ~~Human Rights Committee~~ human rights committee hearing and review procedures.

A. ~~Any individual or his authorized representative who does not accept the relief offered by the director or disagrees with (i) a director's final decision and action plan resulting from the complaint resolution; (ii) a director's final action following a report of abuse, neglect, or exploitation; or (iii) a director's final decision following a complaint of discrimination in the provision of services may request an LHRC hearing by following the steps provided in subsections B through I of this section.~~ Any individual or his authorized representative who disagrees with a director's final decision or action plan resulting from any complaint resolution process under this chapter may request an LHRC hearing by following the process described in this section.

B. ~~Step 1:~~ The individual or his authorized representative ~~must~~ shall file the petition for a hearing with the chairperson of the LHRC within 10 working days ~~of~~ from receipt of the director's action plan or final decision on the complaint.

1. The petition for hearing ~~must~~ shall be in writing. It ~~should~~ shall contain all facts and arguments surrounding the complaint and reference any section of ~~the regulations~~ this chapter that the individual believes the provider violated.

2. The human rights advocate or any person the individual chooses may help the individual in filing the petition. If the individual chooses a person other than the human rights advocate to help him, he and his chosen representative may request the human rights advocate's assistance in filing the petition.

C. ~~Step 2:~~ The LHRC chair shall forward a copy of the petition to the director and the human rights advocate as soon as he receives it. A copy of the petition shall also be forwarded to the provider's governing body.

D. ~~Step 3:~~ Within five working days, the director shall submit to the LHRC:

1. A written response to everything contained in the petition; and

2. A copy of the entire written record of the complaint.

E. ~~Step 4: The~~ LHRC ~~shall hold a hearing within 20 working days of receiving the petition.~~ hearing procedures:

1. The LHRC shall hold a hearing within 20 working days of receiving the petition.

2. The parties shall have at least five working days' notice of the hearing.

~~2.~~ 3. The director or his designee shall attend the hearing.

~~3.~~ 4. The individual or his authorized representative making the complaint shall attend the hearing.

5. The hearing is an informal process and, as such, the rules of legal proceedings are not applicable.

~~4.~~ 6. At the hearing, the parties and chosen representatives and designees have the right to present witnesses and other evidence and the opportunity to be heard.

7. The hearing shall be conducted in a nonadversarial manner.

a. Each party shall be provided the opportunity to present its facts.

b. Each party shall direct questions to the LHRC rather than to the other party.

c. The LHRC shall ask questions, as appropriate, to each party.

F. ~~Step 5:~~ Within 10 working days after the hearing ends, the LHRC shall give its written findings of fact and recommendations to the parties and their representatives. Whenever appropriate, the LHRC shall identify information that it believes the director shall take into account in making decisions concerning discipline or termination of personnel.

G. ~~Step 6:~~ Within five working days of receiving the LHRC's findings and recommendations, the director shall give the individual, the individual's chosen representative, the human rights advocate, the governing body, and the LHRC a written action plan he intends to ~~take~~ implement to respond to the LHRC's findings and recommendations. Along with the action plan, the director shall provide written notice to the individual about the ~~time frame~~ timeframe for the individual's response ~~pursuant to Step 7 (subsection H of this section)~~ and a statement that if the individual does not respond ~~that~~, then the complaint will be closed. The plan shall not be implemented for five working days after it is submitted, unless the individual agrees to its implementation sooner.

H. ~~Step 7:~~ The individual, his chosen representative, the human rights advocate, or the LHRC may object to the action plan within five working days by stating the objection and what the director can do to resolve the objection.

1. If an objection is made, the director may not implement the action plan~~, or~~ until the objection is resolved. The provider may, however, implement ~~only that~~ any portion of the plan ~~that~~ to which the individual making the complaint agrees ~~to, until he resolves the objection as requested or appeals to the SHRC for a decision under 12VAC35-115-210~~.

2. If no one objects to the action plan, the director shall begin to implement the plan on the sixth working day after he submitted it, or as otherwise provided in the plan.

I. ~~Step 8:~~ If an objection to the action plan is made and the director does not resolve the objection to the action plan to the individual's satisfaction within two working days following its receipt by the director, the individual may appeal to the SHRC under 12VAC35-115-210.

12VAC35-115-190. Special procedures for emergency hearings by the LHRC.

A. If the human rights advocate informs the LHRC of a substantial risk that serious and irreparable harm will result if a complaint is not resolved immediately, the LHRC shall hold and conclude a preliminary hearing within 72 hours of receiving this information.

1. The director or his designee and the human rights advocate shall attend the hearing. The individual and his authorized representative may attend the hearing.

2. The hearing shall be conducted according to the procedures in 12VAC35-115-180, but it shall be ~~concluded~~ conducted on an expedited basis.

B. At the end of the hearing, the LHRC shall make preliminary findings and, if a violation is found, shall make preliminary recommendations to the director, the provider, and the provider's governing body.

C. The director shall formulate and carry out an action plan within 24 hours of receiving the LHRC's preliminary recommendations. A copy of the plan shall be sent to the human rights advocate, the individual, his authorized representative, and the governing body.

D. If the individual or the human rights advocate objects within 24 hours to the LHRC findings or recommendations or to the director's action plan, the LHRC shall conduct a full hearing within five working days of the objection, following the procedures outlined in 12VAC35-115-180. This objection shall be made in writing to the LHRC chairperson, with a copy sent to the director.

E. Either party may appeal the LHRC's decision to the SHRC under 12VAC35-115-210.

12VAC35-115-200. Special procedures for LHRC reviews involving consent and authorization.

A. The individual, his authorized representative, or anyone acting on the individual's behalf may request in writing that the LHRC review the following situations and issue a decision:

1. If an individual ~~his authorized representative~~ objects at any time to the appointment of a specific person as his authorized representative or any decision for which consent or authorization is required and has been given by his authorized representative, other than a legal guardian, he may ask the LHRC to decide whether his capacity was properly evaluated, the authorized representative was properly appointed, or his authorized representative's decision was made based on the individual's basic values and any preferences previously expressed by the individual to the extent that they are known, and if unknown or unclear in the individual's best interests.

a. The provider shall take no action for which consent or authorization is required if the individual objects, except in an emergency or as otherwise permitted by law, pending the LHRC review.

b. If the LHRC determines that the individual's capacity was properly evaluated, the authorized representative is properly designated, or the authorized representative's decision was made based on the individual's basic values and any preferences previously expressed by the individual to the extent that they are known, or if unknown or unclear in the individual's best interests, then the provider may proceed according to the decision of the authorized representative.

c. If the LHRC determines that the individual's capacity was not properly evaluated or the authorized representative was not properly designated, then the provider shall take no action for which consent is required except in an emergency or as otherwise required or permitted by law~~,~~ until the capacity review and authorized representative designation ~~is~~ are properly done.

d. If the LHRC determines that the authorized representative's decision was not made based on the individual's basic values and any ~~preferences~~ preference previously expressed by the individual to the extent known, and if unknown or unclear, made in the individual's best interests, then the provider shall take steps to remove the authorized representative pursuant to 12VAC35-115-146.

2. If an individual or his family member has obtained an independent evaluation of the individual's capacity to consent to treatment or services or to participate in human research ~~under 12VAC35-115-70~~, or to authorize the disclosure of information under ~~12VAC35-115-90~~ 12VAC35-115-80, and the opinion of that evaluator conflicts with the opinion of the provider's evaluator, the LHRC may be requested to decide which evaluation will control.

a. If the LHRC agrees that the individual lacks the capacity to consent to treatment or services or authorize disclosure of information, the director may begin or continue treatment or research or disclose information, but only with the appropriate consent or authorization of the authorized representative. The LHRC shall advise the individual of his right to appeal this determination to the SHRC under 12VAC35-115-210.

b. If the LHRC does not agree that the individual lacks the capacity to consent to treatment or services or authorize disclosure of information, the director shall not begin any treatment or research, or disclose information without the individual's consent or authorization, or shall take immediate steps to discontinue any actions begun without the consent or authorization of the individual. The director may appeal to the SHRC under 12VAC35-115-210 but may not take any further action until the SHRC issues its opinion.

3. If a director makes a decision that affects an individual and the individual believes that the decision requires his personal consent or authorization or that of his authorized representative, he may object and ask the LHRC to decide whether consent or authorization is required.

Regardless of the individual's capacity to consent to treatment or services or to authorize disclosure of information, if the LHRC determines that a decision made by a director requires consent or authorization that was not obtained, the director shall immediately ~~rescind the~~ stop such action unless and until such consent or authorization is obtained. The director may appeal to the SHRC under 12VAC35-115-210 but may not take any further action until the SHRC issues its opinion.

B. Before making such a decision, the LHRC shall review the action proposed by the director, any determination of lack of capacity, the opinion of the independent evaluator if applicable, and the individual's or his authorized representative's reasons for objecting to that determination. To facilitate its review, the LHRC may ask that a physician or licensed clinical psychologist not employed by the provider evaluate the individual at the provider's expense and give an opinion about his capacity to consent to treatment or to authorize disclosure of information.

The LHRC shall notify all parties and the human rights advocate of the decision within 10 working days of the initial request.

12VAC35-115-210. State Human Rights Committee appeals procedures.

A. Any party may appeal to the SHRC if he ~~is not satisfied~~ disagrees with any of the following:

1. An LHRC's final findings of fact, conclusions, and recommendations following a hearing;

2. A director's final action plan following an LHRC hearing;

3. An LHRC's final decision regarding the capacity of an individual to consent to treatment, services, or research or to authorize disclosure of information; or

4. An LHRC's final decision concerning whether consent or authorization is needed for the director to take a certain action.

The steps for filing an appeal are provided in subsections B through ~~I~~ D of this section.

B. ~~Step 1:~~ Appeals shall be filed in writing with the SHRC by a party within 10 working days of receipt of the final decision or action plan.

1. The appeal shall explain the reasons for disagreement with the final decision or action ~~is not satisfactory~~ plan.

2. The human rights advocate or any other person may help in filing the appeal. If the individual chooses a person other than the human rights advocate to help him, he and his chosen representative may request the human rights advocate's help in filing the appeal.

3. The party appealing ~~must~~ shall give a copy of the appeal to the other party, the human rights advocate, and the LHRC.

4. If the director is the party appealing, he shall first request and get written permission to appeal from the commissioner or governing body of the provider, as appropriate. If the director does not get this written permission and note the appeal within 10 working days, his right to appeal is waived.

C. ~~Step 2:~~ If the director is appealing, the individual may file a written statement with the SHRC within five working days after receiving a copy of the appeal. If the individual is appealing, the director shall file a written statement with the SHRC within five working days after receiving a copy of the appeal.

D. ~~Step 3:~~ Within five working days of noting or being notified of an appeal, the director shall forward a complete record of the LHRC hearing to the SHRC. The record shall include, at a minimum:

1. The original petition or information filed with the LHRC and any statement filed by the director in response;

2. Parts of the individual's services record that the LHRC considered and any other parts of the services record submitted to, but not considered by, the LHRC that either party considers relevant;

3. All written documents and materials presented to and considered by the LHRC, including any independent evaluations conducted;

4. A tape or transcript of the LHRC proceedings, if available;

5. The LHRC's findings of fact, conclusions, and recommendations;

6. The director's action plan, if any; and

7. Any written objections to the action plan or its implementation.

E. ~~Step 4:~~ The SHRC shall hear the appeal at its next scheduled meeting after the chairperson receives the appeal.

1. The SHRC shall give the parties at least 10 working days' notice of the appeal hearing.

2. The following rules govern appeal hearings:

a. The SHRC shall not hear any new evidence.

b. The SHRC is bound by the LHRC's findings of fact ~~subject to subdivision 3 of this subsection~~ unless it makes a determination that those findings of fact are clearly wrong or that the hearing procedures of the LHRC were inadequate.

c. The SHRC shall limit its review to whether the facts, as found by the LHRC, establish a violation of ~~these regulations~~ this chapter and a determination of whether the LHRC's recommendations or the action plan adequately address the alleged violation.

d. All parties and their representatives shall have the opportunity to appear before the SHRC to present their positions and answer questions the SHRC may have.

e. The SHRC shall notify the Office of the State Inspector General (§ 2.2-308 of the Code of Virginia) of the appeal.

3. If the SHRC decides that the LHRC's findings of fact are clearly wrong or that the hearing procedures employed by the LHRC were inadequate, the SHRC may:

a. Send the case back to the LHRC for another hearing to be completed within a time period specified by the SHRC; or

b. Conduct its own fact-finding hearing. If the SHRC chooses to conduct its own fact-finding hearing, it may appoint a subcommittee of at least three of its members as fact finders. The fact-finding hearing shall be conducted within 30 working days of the SHRC's initial hearing.

In either case, the parties shall have 15 working days' notice of the date of the hearing and the opportunity to be heard and to present witnesses and other evidence.

F. ~~Step 5:~~ Within 20 working days after the SHRC appeal hearing, the SHRC shall submit a ~~report,~~ decision containing its findings of fact, if applicable, and its conclusions and recommendations to the commissioner and to the provider's

governing body, with copies to the parties, the LHRC, and the human rights advocate.

G. ~~Step 6:~~ Within 10 working days after receiving the SHRC's ~~report~~ decision, in the case of appeals involving a state facility, the commissioner shall submit an outline of actions to be taken in response to the SHRC's recommendations. In the case of appeals involving CSBs and private providers, the ~~commissioner and the provider's governing body~~ director shall ~~each~~ outline in writing the action or actions ~~they~~ that will ~~take~~ be taken in response to the recommendations of the SHRC. They shall also explain any reasons for not carrying out any of the recommended actions. Copies of their responses shall be forwarded to the SHRC, the LHRC, the director, the human rights advocate, and the individual.

H. ~~Step 7:~~ If the SHRC objects in writing to the commissioner's or ~~governing body's~~ director's proposed actions, ~~or both,~~ their actions shall be postponed. The commissioner or ~~governing body, or both,~~ director shall meet with the SHRC at its next regularly scheduled meeting to attempt to arrange a mutually agreeable resolution.

I. ~~Step 8:~~ Final determination regarding the action plan shall be as follows:

1. In the case of services provided directly by the department, the commissioner's action plan shall be final and binding on all parties. However, when the SHRC believes the commissioner's action plan is incompatible with the purpose of ~~these regulations~~ this chapter, it shall notify the board, the protection and advocacy agency, and the Office of the State Inspector General (§ 2.2-308 of the Code of Virginia).

2. In the case of services delivered by all other providers, the action plan of the ~~provider's governing body~~ director shall be reviewed by the commissioner. If the commissioner determines that the provider has failed to develop and carry out an acceptable action plan, the commissioner shall notify the protection and advocacy agency and shall inform the SHRC of the sanctions the department will impose against the provider.

J. ~~Step 9:~~ Upon completion of the process outlined in ~~subsections B through I of~~ this section, the SHRC shall notify the parties and the human rights advocate of the final outcome of the complaint.

Part VII
Reporting Requirements

12VAC35-115-230. Provider requirements for reporting ~~to the department~~.

A. Providers shall collect, maintain, and report the following information concerning abuse, neglect, and exploitation:

1. The director of a facility operated by the department shall report allegations of abuse and neglect via the web-based reporting application in accordance with all applicable operating instructions issued by the commissioner or his designee.

2. The director of a service licensed or funded by the department shall report each allegation of abuse or neglect ~~to the assigned human rights advocate~~ via the web-based reporting application within 24 hours ~~from the~~ of receipt of the allegation (see ~~12VAC35-115-50)~~ 12VAC35-115-175).

3. The investigating authority shall provide a written report of the results of the investigation of abuse or neglect to the director and human rights advocate within 10 working days from the date the investigation began unless an ~~exemption~~ extension has been granted ~~by the department~~ (see ~~12VAC35-115-50)~~ 12VAC35-115-175). This report shall include:

a. Whether abuse, neglect, or exploitation occurred;

b. The type of abuse; and

c. Whether the act resulted in physical or psychological injury.

B. Providers shall collect, maintain, and report the following information concerning deaths and serious injuries:

1. The director of a facility operated by the department shall report to the department deaths and serious injuries in accordance with all applicable operating instructions issued by the commissioner or his designee.

2. The director of a service licensed or funded by the department shall report deaths and serious injuries in writing to the department within 24 hours of discovery and by telephone to the authorized representative within 24 hours.

3. All reports of death and serious injuries shall include:

a. Date and place of the death or serious injury;

b. Nature of the injuries and treatment required; and

c. Circumstances of the death or serious injury.

C. Providers shall collect, maintain and report the following information concerning seclusion and restraint:

1. The director of a facility operated by the department shall report each instance of seclusion or restraint or both in accordance with all applicable operating instructions issued by the commissioner or his designee.

2. The director of a service licensed or funded by the department shall submit an annual report of each instance of seclusion or restraint or both by the 15th of January each year, or more frequently if requested by the department.

3. Each instance of seclusion or restraint or both shall be compiled on a monthly basis and the report shall include:

a. ~~Type(s)~~ Type or types, to include:

(1) Physical restraint (manual hold);

(2) Mechanical restraint;

(3) Pharmacological restraint; ~~and~~ or

(4) Seclusion.

b. Rationale for the use of seclusion or restraint, to include:

(1) Behavioral purpose;

(2) Medical purpose; or

(3) Protective purpose.

c. Duration of the seclusion or restraint, as follows:

(1) The duration of seclusion and restraint used for behavioral purposes is defined as the actual time the individual is in seclusion or restraint from the time of initiation of seclusion or restraint until the individual is released.

(2) The duration of restraint for medical and protective purposes is defined as the length of the episode as indicated in the order.

4. Any instance of seclusion or restraint that does not comply with ~~these regulations~~ this chapter or approved variances, or that results in injury to an individual, shall be reported to the authorized representative, as applicable, and ~~the assigned human rights advocate~~ to the department via the web-based reporting application within 24 hours.

D. ~~The director~~ Providers shall ~~provide~~ report to the human rights advocate and the LHRC information on ~~the type, resolution level, and findings of~~ each complaint of a human rights violation, including a description and its conclusions, and report on implementation of variances, in accordance with the LHRC meeting schedule or as requested by the advocate.

E. Reports required under this section shall be submitted to the department on forms or in an automated format or both developed by the department.

F. The department shall compile all data reported under this section and make this data available to the public and the Office of the State Inspector General (§ 2.2-308 of the Code of Virginia) upon request.

1. The department shall provide the compiled data in writing or by electronic means.

2. The department shall remove all provider-identifying information and all information that could be used to identify a person as an individual receiving services.

G. In the reporting, compiling, and releasing of information and statistical data provided under this section, the department and all providers shall take all measures necessary to ensure that any information identifying individuals is not ~~released~~ disclosed to the public, including encryption of data transferred by electronic means.

H. Nothing in this section is to be construed as requiring the reporting of proceedings, minutes, records, or reports of any ~~committee or nonprofit~~ entity ~~providing a centralized credentialing service which~~ that are identified as privileged pursuant to § 8.01-581.17 of the Code of Virginia.

I. Providers shall report to the Department of Health Professions, Enforcement Division, violations of ~~these regulations~~ this chapter that constitute reportable conditions under ~~§§ 54.1-2400.4, 54.1-2400.6, and 54.1-2909 of the Code of Virginia~~ state law.

Part IX

Responsibilities and Duties

12VAC35-115-250. ~~Offices, composition and duties.~~ (Repealed.)

~~A. Providers and their directors shall:~~

~~1. Identify a person or persons accountable for helping individuals to exercise their rights and resolve complaints regarding services.~~

~~2. Comply with all state laws governing the reporting of abuse and neglect and all procedures set forth in these regulations for reporting allegations of abuse, neglect, or exploitation.~~

~~3. Require competency-based training on these regulations upon employment and at least annually thereafter. Documentation of such competency shall be maintained in the employee's personnel file.~~

~~4. Take all steps necessary to assure compliance with these regulations in all services provided.~~

~~5. Communicate information about the availability of a human rights advocate to individuals and authorized representatives.~~

~~6. Assure one LHRC affiliation within the region as defined by the SHRC. The SHRC may require multi-site providers to have more than one LHRC affiliation within a region if the SHRC determines that additional affiliations are necessary to protect individuals' human rights.~~

~~7. Assure that the appropriate staff attend LHRC meetings in accordance with the LHRC meeting schedule to report on human rights activities, to impart information to the LHRC at the request of the human rights advocate or LHRC, and discuss specific concerns or issues with the LHRC.~~

~~8. Cooperate with the human rights advocate and the LHRC to investigate and correct conditions or practices interfering with the free exercise of individuals' human rights and make sure that all employees cooperate with the human rights advocate and the LHRC in carrying out their duties under these regulations. Notwithstanding the requirements for complaints pursuant to Part V (12VAC35-115-150 et seq.) of this chapter, the provider shall submit a written response indicating intended action to any written recommendation made by the human rights advocate or LHRC within 15 days of the receipt of such recommendation.~~

~~9. Provide the advocate unrestricted access to individuals and individual services records whenever the human rights advocate deems access necessary to carry out rights protection, complaint resolution, and advocacy.~~

10. Submit to the human rights advocate for review and comment any proposed policies, procedures, or practices that may affect individual human rights.

11. Comply with requests by the SHRC, LHRC, and human rights advocate for information, policies, procedures, and written reports regarding compliance with these regulations.

12. Name a liaison to the LHRC, who shall give the LHRC suitable meeting accommodations, clerical support and equipment, and assure the availability of records and employee witnesses upon the request of the LHRC. Oversight and assistance with the LHRC's substantive implementation of these regulations shall be provided by the SHRC. See subsection E of this section.

13. Submit applications for variances to these regulations only as a last resort.

14. Post in program locations information about the existence and purpose of the human rights program.

15. Not influence or attempt to influence the appointment of any person to an LHRC associated with the provider or director.

16. Perform any other duties required under these regulations.

B. Employees of the provider shall, as a condition of employment:

1. Become familiar with these regulations, comply with them in all respects, and help individuals understand and assert their rights.

2. Protect individuals from any form of abuse, neglect, or exploitation (i) by not abusing, neglecting or exploiting any individual; (ii) by not permitting or condoning anyone else abusing, neglecting, or exploiting any individual; and (iii) by reporting all suspected abuse, neglect, or exploitation to the director. Protecting individuals receiving services from abuse also includes using the minimum force necessary to restrain an individual.

3. Cooperate with any investigation, meeting, hearing, or appeal held under these regulations. Cooperation includes giving statements or sworn testimony.

4. Perform any other duties required under these regulations.

C. The human rights advocate shall:

1. Represent any individual making a complaint or, upon request, consult with and help any other representative the individual chooses.

2. Monitor the implementation of an advocacy system for individuals receiving services from the provider or providers to which the advocate is assigned.

3. Promote and monitor provider compliance with these and other applicable individual rights laws, regulations, and policies.

4. Investigate and try to prevent or correct, informally or formally, any alleged rights violations by interviewing, mediating, negotiating, advising, and consulting with providers and their respective governing bodies, directors, and employees.

5. Whenever necessary, file a written complaint with the LHRC for an individual or, where general conditions or practices interfere with individuals' rights, for a group of individuals.

6. Investigate and examine all conditions or practices that may interfere with the free exercise of individuals' rights.

7. Help the individual or the individual's chosen representative during any meeting, hearing, appeal, or other proceeding under these regulations unless the individual or his chosen representative chooses not to involve the human rights advocate.

8. Provide orientation, training, and technical assistance to the LHRCs for which he is responsible.

9. Tell the LHRC about any recommendations made to the director, the provider, the provider's governing body, the state human rights director, or the department for changes in policies, procedures, or practices that have the potential to adversely affect the rights of individuals.

10. Make recommendations to the state human rights director concerning the employment and supervision of other advocates where appropriate.

11. Submit regular reports to the state human rights director, the LHRC, and the SHRC about provider implementation of and compliance with these regulations.

12. Provide consultation to individuals, providers and their governing bodies, directors, and employees regarding individuals' rights, providers' duties, and complaint resolution.

13. Perform any other duties required under these regulations.

D. The Local Human Rights Committee shall:

1. Consist of five or more members appointed by the SHRC.

a. Membership shall be broadly representative of professional and consumer interests. At least two members shall be individuals who are receiving or have received public or private mental health, mental retardation, or substance abuse treatment or habilitation services within five years of their initial appointment. At least one-third of the members shall be consumers or family members of consumers. Remaining appointments shall include persons with interest, knowledge, or training in the mental health, mental retardation, or substance abuse field.

b. At least one member shall be a health care provider.

c. No current employee of the department or a provider shall serve as a member of any LHRC that serves an oversight function for the employing facility or provider.

d. Initial appointments to an LHRC shall be staggered, with approximately one third of the members appointed for a term of three years, approximately one third for a term of two years, and the remainder for a term of one year. After that, all appointments shall be for a term of three years.

e. A person may be appointed for no more than two consecutive three-year terms. A person appointed to fill a vacancy may serve out that term and then be eligible for two additional consecutive terms.

f. Nominations for membership to LHRCs shall be submitted directly to the SHRC through the state human rights director at the department's Office of Human Rights.

2. Permit affiliations of local providers in accordance with the recommendations from the human rights advocate. SHRC approval is required for the denial of an affiliation request.

3. Receive complaints of alleged rights violations filed by or for individuals receiving services from providers with which the LHRC is affiliated and hold hearings according to the procedures set forth in Part V (12VAC35-115-150 et seq.) of this chapter.

4. Conduct investigations as requested by the SHRC.

5. Upon the request of the human rights advocate, provider, director, or an individual or individuals, or on its own initiative, an LHRC may review any existing or proposed policies, procedures, practices, or behavioral treatment plans that could jeopardize the rights of individuals receiving services from the provider with which the LHRC is affiliated. In conducting this review, the LHRC may consult with any human rights advocate, employee of the provider, or anyone else. After this review, the LHRC shall make recommendations to the director concerning changes in these plans, policies, procedures, and practices.

6. Receive, review, and act on applications for variances to these regulations according to 12VAC35-115-220.

7. Receive, review and comment on all behavioral treatment plans involving the use of restraint or time out and seclusion, restraint, or time out policies for affiliated providers.

8. Adopt written bylaws that address procedures for conducting business, electing the chairperson, secretary, and other officers, designating standing committees, and setting the frequency of meetings.

9. Elect from its own members a chairperson to coordinate the activities of the LHRC and to preside at regular committee meetings and any hearings held pursuant to these regulations.

10. Conduct a meeting every quarter or more frequently as necessary to adhere to all time lines as set forth in these regulations.

11. Require members to recuse themselves from all cases wherein they have a financial or other conflict of interest.

12. The LHRC may delegate summary decision making authority to a subcommittee when expedited decisions are required before the next scheduled LHRC meeting to avoid seriously compromising an individual's quality of care, habilitation, or quality of life. The decision of the subcommittee shall be reviewed by the full LHRC at its next meeting.

13. Perform any other duties required under these regulations.

E. The State Human Rights Committee shall:

1. Consist of nine members appointed by the board.

a. Members shall be broadly representative of professional and consumer interests and of geographic areas in the Commonwealth. At least two members shall be individuals who are receiving or have received public or private mental health, mental retardation, or substance abuse treatment or habilitation services within five years of their initial appointment. At least one third of the members shall be consumers or family members of consumers. Remaining appointments shall include persons with interest, knowledge, or training in the mental health, mental retardation, or substance abuse field.

b. At least one member shall be a health care professional.

c. No member can be an employee or board member of the department or a CSB.

d. If there is a vacancy, interim appointments may be made for the remainder of the unexpired term.

e. A person may be appointed for no more than two consecutive three-year terms. A person appointed to fill a vacancy may serve out that term, and then be eligible for two additional consecutive terms.

2. Elect a chairperson from its own members who shall:

a. Coordinate the activities of the SHRC;

b. Preside at regular meetings, hearings, and appeals; and

c. Have direct access to the commissioner and the board in carrying out these duties.

3. Upon request of the commissioner, human rights advocate, provider, director, or an individual or individuals, or on its own initiative, a SHRC may review any existing or proposed policies, procedures, or practices that could jeopardize the rights of individuals receiving services from any provider. In conducting this review, the SHRC may consult with any human rights advocate, employee of the director, or anyone else. After this review, the SHRC shall make recommendations to the director or

commissioner concerning changes in these policies, procedures, and practices.

4. Determine the appropriate number and geographical boundaries of LHRCs and consolidate LHRCs serving only one provider into regional LHRCs whenever consolidation would assure greater protection of rights under these regulations.

5. Appoint members of LHRCs with the advice of the respective LHRC, human rights advocate, and the state human rights director.

6. Advise the commissioner about the employment of the state human rights director and human rights advocates.

7. Conduct at least eight regular meetings per year.

8. Review decisions of LHRCs and, if appropriate, hold hearings and make recommendations to the commissioner, the board, and providers' governing bodies regarding alleged violations of individuals' rights according to the procedures specified in these regulations.

9. Provide oversight and assistance to LHRCs in the performance of their duties hereunder, including the development of guidance documents such as sample bylaws, affiliation agreements, and minutes to increase operational consistency among LHRCs.

10. Review denials of LHRC affiliations.

11. Notify the commissioner and the state human rights director whenever it determines that its recommendations in a particular case are of general interest and applicability to providers, human rights advocates, or LHRCs and assure the availability of the opinion or report to providers, human rights advocates, and LHRCs as appropriate. No document made available shall identify the name of individuals or employees in a particular case.

12. Grant or deny variances according to the procedures specified in Part VI (12VAC35-115-220) of this chapter and review approved variances at least once every year.

13. Make recommendations to the board concerning proposed revisions to these regulations.

14. Make recommendations to the commissioner concerning revisions to any existing or proposed laws, regulations, policies, procedures, and practices to ensure the protection of individuals' rights.

15. Review the scope and content of training programs designed by the department to promote responsible performance of the duties assigned under these regulations by providers, employees, human rights advocates, and LHRC members, and, where appropriate, make recommendations to the commissioner.

16. Evaluate the implementation of these regulations and make any necessary and appropriate recommendations to the board, the commissioner, and the state human rights director concerning interpretation and enforcement of the regulations.

17. Submit to the board and publish an annual report of its activities and the status of human rights in mental health, mental retardation, and substance abuse treatment and services in Virginia and make recommendations for improvement.

18. Adopt written bylaws that address procedures for conducting business; making membership recommendations to the board; electing a chairperson, vice chairperson, secretary, and other officers; appointing members of LHRCs; designating standing committees and their responsibilities; establishing ad hoc committees; and setting the frequency of meetings.

19. Review and approve the bylaws of LHRCs.

20. Require members to recuse themselves from all cases where they have a financial or other conflict of interest.

21. Perform any other duties required under these regulations.

F. The state human rights director shall:

1. Lead the implementation of the statewide human rights program and make ongoing recommendations to the commissioner, the SHRC, and LHRCs for continuous improvements in the program.

2. Advise the commissioner concerning the employment and retention of human rights advocates.

3. Advise providers, directors, advocates, LHRCs, the SHRC, and the commissioner concerning their responsibilities under these regulations and other applicable laws, regulations, policies, and departmental instructions that protect individuals' rights.

4. Organize, coordinate, and oversee training programs designed to promote responsible performance of the duties assigned under these regulations.

5. Periodically visit service settings to monitor the free exercise of rights enumerated in these regulations.

6. Supervise human rights advocates in the performance of their duties under these regulations.

7. Support the SHRC and LHRCs in carrying out their duties under these regulations.

8. Review LHRC decisions and recommendations for general applicability and provide suggestions for training to appropriate entities.

9. Monitor implementation of corrective action plans approved by the SHRC.

10. Perform any other duties required under these regulations.

G. The commissioner shall:

1. Employ the state human rights director after consultation with the SHRC.

2. Employ advocates following consultation with the state human rights director.

~~3. Provide or arrange for assistance and training necessary to carry out and enforce these regulations.~~

~~4. Cooperate with the SHRC and the state human rights director to investigate providers and correct conditions or practices that interfere with the free exercise of individuals' rights.~~

~~5. Advise and consult with the SHRC and the state human rights director concerning the appointment of members of LHRCs.~~

~~6. Maintain current and regularly updated data and perform regular trend analyses to identify the need for corrective action in the areas of abuse, neglect, and exploitation; seclusion and restraint; complaints; deaths and serious injuries; and variance applications.~~

~~7. Assure regular monitoring and enforcement of these regulations, including authorizing unannounced compliance reviews at any time.~~

~~8. Perform any other duties required under these regulations.~~

~~H. The board shall:~~

~~1. Adopt regulations that further define the rights of individuals receiving services from providers covered by these regulations.~~

~~2. Appoint members of the SHRC.~~

~~3. Review and approve the bylaws of the SHRC.~~

~~4. Perform any other duties required under these regulations.~~

12VAC35-115-260. Provider and department responsibilities.

A. Providers, through their directors, shall:

1. Designate a person or persons responsible for helping individuals exercise their rights and resolve complaints regarding services;

2. Take all steps necessary to perform duties required by, and ensure compliance with, this chapter in all services provided;

3. Post information in program locations about the existence and purpose of the human rights program;

4. Communicate information about the availability of a human rights advocate to individuals and authorized representatives, in accordance with 12VAC35-115-40 B 1 and B 2;

5. Ensure access, as needed, to the LHRC for all individuals receiving services;

6. Provide the human rights advocate unrestricted access to an individual and his services records whenever the advocate deems access is necessary to carry out rights protection, complaint resolution, and advocacy on behalf of the individual;

7. Require competency-based training of employees on this chapter upon employment and at least annually thereafter. Documentation of such competency shall be maintained in the employee's personnel file;

8. Comply with all state laws governing the reporting of abuse and neglect and all procedures set forth in this chapter for reporting allegations of abuse, neglect, or exploitation;

9. Submit to the human rights advocate for review and comment proposed policies, procedures, or practices that may affect individual human rights;

10. Ensure appointment of a designated liaison to, and appropriate staff participation with, the LHRC, as required;

11. Cooperate with the human rights advocate and the LHRC to investigate and correct conditions or practices interfering with the free exercise of individuals' human rights and make sure that all employees cooperate with the human rights advocate, the LHRC, and the SHRC in carrying out their duties under this chapter;

12. Comply with requests by the SHRC, LHRC, or human rights advocate for information, policies, procedures, and written reports regarding compliance with this chapter;

13. Ensure the availability of records and employee witnesses upon the request of the LHRC or SHRC;

14. Submit applications for variances to this chapter only as a last resort; and

15. Not influence or attempt to influence the appointment of any person to an LHRC affiliated with the provider or director.

B. Employees of the provider shall, as a condition of employment:

1. Become familiar with this chapter, comply with it in all respects, and help individuals understand and assert their rights;

2. Protect individuals from any form of abuse, neglect, or exploitation by:

a. Not abusing, neglecting, or exploiting any individual;

b. Using the minimum force necessary to restrain an individual;

c. Not permitting or condoning anyone else abusing, neglecting, or exploiting any individual; and

d. Reporting all suspected abuse, neglect, or exploitation to the director; and

3. Cooperate with any investigation, meeting, hearing, or appeal held under this chapter. Cooperation includes giving statements or sworn testimony.

C. Department human rights advocates shall:

1. Represent any individual making a complaint or, upon request, consult with and help any other representative the individual chooses;

2. Provide training to individuals, family members, and providers on this chapter;

3. Investigate and try to prevent or correct any alleged rights violation by interviewing, mediating, negotiating, advising, or consulting with providers and their respective governing bodies, directors, and employees;

4. Provide orientation, training, and technical assistance to the LHRCs for which he is responsible; and

5 Investigate and examine all conditions or practices that may interfere with the free exercise of individuals' rights.

D. The department shall:

1. Employ the state human rights director to lead statewide implementation of the human rights program;

2. Determine, in consultation with the SHRC, the appropriate number and geographical boundaries of LHRCs;

3. Develop information, assistance, training tools, and other resources for individuals and constituents on this chapter;

4. Provide for regular monitoring and enforcement of this chapter, including conducting unannounced compliance reviews at any time;

5. Cooperate with and provide support to the SHRC and LHRCs, including:

a. Training SHRC and LHRC members on their responsibilities, roles, and functions under this chapter;

b. Providing access to topic area consultants as needed to support their fulfilling of their duties under this chapter; and

c. Providing necessary support for SHRC and LHRC investigations, meetings, and hearings; and

6. Maintain current and regularly updated data and perform regular trend analyses to identify the need for corrective action in the areas of abuse, neglect, and exploitation; seclusion and restraint; complaints; deaths and serious injuries; and variance applications.

12VAC35-115-270. State Human Rights Committee and local human rights committees responsibilities.

A. Local human rights committees shall:

1. Review any restriction on the rights of any individual imposed pursuant to 12VAC35-115-50 or 12VAC35-115-100 that lasts longer than seven days or is imposed multiple times during a 30-day period for providers within the LHRC's jurisdiction in accordance with 12VAC35-115-100 B 5;

2. Review next friend designations in accordance with 12VAC35-115-146 B 2;

3. Hold hearings according to the procedures set forth in Part V (12VAC35-115-150 et seq.) of this chapter for any individual served by a provider under the LHRC's jurisdiction;

4. Review behavioral treatment plans in accordance with 12VAC35-115-105;

5. Receive, review, and act on applications for variances to this chapter in accordance with 12VAC35-115-220;

6. Consist of five or more members appointed by the SHRC.

a. Membership shall be broadly representative of professional and consumer interests as required in § 37.2-204 of the Code of Virginia.

b. At least one member shall be a health care provider.

c. No current employee of the department or a provider shall serve as a member of any LHRC that serves an oversight function for the employing facility or provider.

d. Members shall recuse themselves from all cases in which they have a financial or other conflict of interest.

e. Initial appointments to an LHRC shall be staggered, with approximately one-third of the members appointed for terms of three years, approximately one-third for terms of two years, and the remainder for a term or terms of one year. After that, all appointments shall be for terms of three years.

f. A person may be appointed for no more than two consecutive three-year terms. A person appointed to fill a vacancy may serve out that term and then be eligible for two additional consecutive terms.

g. Nominations for membership to LHRCs shall be submitted directly to the SHRC through the state human rights director at the department's Office of Human Rights;

7. Elect a chairperson from its own members who shall:

a. Coordinate the activities of the LHRC; and

b. Preside at regular meetings and hearings held pursuant to this chapter;

8. Meet every quarter or more frequently as necessary to adhere to all timelines as set forth in this chapter; and

9. Adopt written bylaws that address procedures for conducting business; electing the chairperson, secretary, and other officers; designating standing committees; and setting the frequency of meetings.

B. Local human rights committees may delegate authority to a subcommittee when expedited decisions are required before the next scheduled LHRC meeting to avoid seriously compromising an individual's quality of care, habilitation, or quality of life. The decision of the subcommittee shall be reviewed by the full LHRC at its next meeting.

C. The State Human Rights Committee shall:

1. Perform the following responsibilities with respect to the operation of LHRCs:

a. Appoint LHRC members with the advice of the respective LHRC, human rights advocate, and the state human rights director;

b. Review and approve the bylaws of LHRCs; and

c. Provide oversight to and assist LHRCs in the performance of their duties under this chapter, including the development of guidance documents;

2. Review LHRC decisions when required by this chapter and, if appropriate, hold hearings and make recommendations to the commissioner, the board, and providers' governing bodies regarding alleged violations of individuals' rights according to the procedures specified in this chapter;

3. Notify the commissioner and the state human rights director whenever it determines that its recommendations in a particular case are of general interest and applicability to providers, human rights advocates, or LHRCs and ensure that:

a. Its recommendations are communicated to providers, human rights advocates, and LHRCs as appropriate; and

b. The communication of its recommendations does not identify the name of individuals or employees in a particular case;

4. Grant or deny variances according to the procedures specified in Part VI (12VAC35-115-220) of this chapter and review approved variances at least once every year;

5. Submit to the board and publish an annual report of its activities and the status of human rights in services licensed, funded, or operated by the department and make recommendations for improvement;

6. Evaluate the implementation of this chapter and make necessary and appropriate recommendations to the board, the commissioner, and the state human rights director concerning its interpretation and enforcement;

7. Review and make recommendations to the department and board, as appropriate, concerning:

a. The scope and content of training programs designed by the department to promote responsible performance of the duties assigned under this chapter;

b. Existing or proposed policies, procedures, or practices that could jeopardize the rights of individuals receiving services from any provider;

c. Proposed revisions to this chapter; and

d. Revisions to existing or proposed laws, regulations, policies, procedures, and practices that are needed to ensure the protection of individuals' rights;

8. Consist of nine members appointed by the board.

a. Members shall be broadly representative of professional and consumer interests as required in § 37.2-204 of the Code of Virginia;

b. Members shall recuse themselves from all cases in which they have a financial or other conflict of interest;

c. If there is a vacancy, interim appointments may be made by the board for the remainder of the unexpired term;

d. A person may be appointed for no more than two consecutive three-year terms. A person appointed to fill a vacancy may serve out that term and then be eligible for two additional consecutive terms; and

e. No current employee of the department, a CSB, or a behavioral health authority may serve as a member of the SHRC;

9. Elect a chairperson from its own members who shall:

a. Coordinate the activities of the SHRC;

b. Preside at regular meetings, hearings, and appeals; and

c. Have direct access to the commissioner and the board in carrying out these duties;

10. Conduct at least eight regular meetings per year; and

11. Adopt written bylaws that address procedures for conducting business; making membership recommendations to the board; electing a chairperson, vice chairperson, secretary, and other officers; appointing members of LHRCs; designating standing committees and their responsibilities; establishing ad hoc committees; and setting the frequency of meetings.

VA.R. Doc. No. R13-3502; Filed November 17, 2015, 11:53 a.m.

Emergency Regulation

Title of Regulation: **12VAC35-240. Victims of Sterilization Fund Administration (adding 12VAC35-240-10 through 12VAC35-240-70).**

Statutory Authority: § 37.2-203 of the Code of Virginia.

Effective Dates: November 21, 2015, through May 20, 2017.

Agency Contact: Ruth Anne Walker, Regulatory Coordinator, Department of Behavioral Health and Developmental Services, Jefferson Building, 1220 Bank Street, 11th Floor, Richmond, VA 23219, telephone (804) 225-2252, FAX (804) 786-8623, or email ruthanne.walker@dbhds.virginia.gov.

Preamble:

Item 307 T of Chapter 665 of the 2015 Acts of Assembly establishes compensation for individuals who were involuntarily sterilized pursuant to the 1924 Virginia Eugenical Sterilization Act and who are living as of February 1, 2015. The act enacts requirements for the compensation program, including funding limits on claims and a requirement that disbursements be based on the date at which sufficient documentation is provided, authorizes the Department of Behavioral Health and Developmental Services (DBHDS) to pay claims, and requires DBHDS to adopt emergency regulations to implement the act.

The emergency regulation establishes (i) eligibility criteria, (ii) submission of claims, (iii) compensation, (iv) appropriate documentation for verification, and (v) an administrative process for handling claims.

CHAPTER 240
VICTIMS OF STERILIZATION FUND PROGRAM

12VAC35-240-10. Definitions.

"Act" means Chapter 394 of the 1924 Acts of Assembly passed by the Virginia General Assembly on March 20, 1924, known as the Virginia Eugenical Sterilization Act, which provided for the sexual sterilization of individuals admitted to state institutions in certain cases.

"Application" means the Application Form for Filing a Claim for Compensation for Victims of the 1924 Eugenical Sterilization Act made available by the Department of Behavioral Health and Developmental Services.

"Claimant" means any person claiming eligibility who applies for compensation pursuant to this chapter.

"Commissioner" means the Commissioner of the Virginia Department of Behavioral Health and Developmental Services.

"Department" means the Virginia Department of Behavioral Health and Developmental Services.

"Lawfully authorized representative" means (i) a person who is permitted by law or regulation to act on behalf of an individual or (ii) a personal representative of an estate, as defined in § 64.2-100 of the Code of Virginia, of an individual who died on or after February 1, 2015.

"Review panel" means a minimum of three department staff members who are appointed by the commissioner to make final determinations on applications for claims that have been deemed complete pursuant to this chapter.

"Sterilization" means a medical procedure or form of birth control that leaves a male or female unable to reproduce or conceive children and was done pursuant to the Act.

12VAC35-240-20. Eligibility criteria.

An individual or his lawfully authorized representative is eligible to request compensation under this chapter if the individual was:

1. Involuntarily sterilized pursuant to the Act;

2. Sterilized while a patient at Eastern State Hospital; Western State Hospital; Central State Hospital; Southwestern Virginia Mental Health Institute, formerly known as Southwestern State Hospital; or the Central Virginia Training Center, formerly known as the State Colony for Epileptics and Feeble-Minded; and

3. Living as of February 1, 2015.

12VAC35-240-30. Claims for compensation.

A. Any individual who meets the eligibility criteria, or his lawfully authorized representative, if applicable, may submit a claim for compensation.

B. Claimants shall submit applications with proof of identity and proof that the eligibility criteria are met. When an application is submitted for an individual who died on or after February 1, 2015, the application shall include a certified copy of a state issued death certificate.

C. To establish the claimant's proof of identity, a copy of one or more of the following documents bearing a photographic image of the claimant's face and signature shall be submitted with the application form:

1. A state issued driver's license.

2. A state issued identification card.

3. A United States passport.

4. A foreign passport with Visa, I-94 or I-94W.

5. A United States military card, active or retired member.

D. To establish proof of involuntary sterilization pursuant to the Act, a copy of one or more of the following shall be submitted with the application:

1. Letter notifying a parent, guardian, or a lawfully authorized representative that the involuntary sterilization procedure was performed on the claimant.

2. Progress notes from the claimant's hospital record documenting that the involuntary sterilization procedure was performed on the claimant.

3. Case summary from the claimant's hospital record documenting that the involuntary sterilization procedure was performed on the claimant.

4. Physician's order for involuntary sterilization from the claimant's hospital record.

5. Operative record of involuntary sterilization from the claimant's hospital record.

6. Involuntary sterilization record summary from the claimant's hospital record.

7. Nurses' notes documenting post-operative care was provided to the individual claimant after involuntary sterilization of the claimant.

8. Other documents that show that the involuntary sterilization procedure was performed on the claimant pursuant to the Act.

E. Any person submitting a claim on behalf of a claimant shall provide documentation that he is the claimant's lawfully authorized representative.

F. All applications shall be notarized by a notary public.

G. The department shall not accept more than one application in a single mailing.

H. Applications shall be submitted to the department through the United States Postal Service. The department shall not accept any application that is submitted in any other manner including by any shipping company, electronically, delivered by courier service, or in person.

I. The department shall send a notice that the application was received to the claimant or his lawfully authorized representative in writing within seven calendar days of receipt of the application.

12VAC35-240-40. Screening.

A. The department shall screen the application and accompanying documentation for completeness.

B. If the department determines an application to be incomplete, it shall notify the claimant or his lawfully authorized representative that the application is not complete in writing by certified mail no later than seven calendar days following the screening of the application. The notification shall specify the additional documentation required to complete the application.

C. If the application is incomplete, the claimant shall have 60 calendar days from the receipt of the notification to submit the required documentation. If the required documentation is not received within 60 calendar days, the application will be closed, and the claimant will be required to submit a new application.

D. No application shall be considered by the review panel or otherwise acted on until the department determines it to be complete with all required documentation. Completed applications shall be submitted to the review panel for consideration.

12VAC35-240-50. Review panel.

A. The commissioner shall appoint a review panel to consider applications and make final determinations of eligibility for compensation pursuant to this chapter.

B. The review panel shall consider completed applications in the order in which the applications are determined to be complete according to date and time of receipt of all required documentation.

C. The claimant or his lawfully authorized representative shall be notified of the decision of the review panel in writing by certified mail within seven calendar days of the decision.

12VAC35-240-60. Requests for reconsideration.

A. Any claimant, or his lawfully authorized representative, who disagrees with the determination of the department may submit a written request for reconsideration to the commissioner, or his designee, within 30 calendar days of the date of the written notice of denial of a claim pursuant to this chapter.

B. The commissioner, or his designee, shall provide an opportunity for the claimant, or his lawfully authorized representative, to submit for review any additional information or reasons why his claim should be approved as requested.

C. The commissioner, or his designee, after reviewing all submitted materials shall render a written decision on the request for reconsideration within 30 calendar days of the receipt of the request and shall notify the claimant or his lawfully authorized representative in writing. The commissioner's decision shall be binding.

D. Claimants may obtain further review of the decision in accordance with the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

12VAC35-240-70. Compensation.

A. Compensation per verified claim shall be $25,000 and shall be contingent on the availability of funding. All eligible claims shall be compensated in the order in which they are determined by the review panel to be verified and eligible for compensation.

B. Should funding be exhausted prior to the payment of all verified claims, the department shall continue to accept and review applications. Claims determined to be verified after funding has been exhausted shall be maintained by the department according to the date and time the review panel determines a claim is verified and eligible for compensation. Any such claim shall not be denied but the claimant shall be notified in writing that his claim has been determined eligible for compensation, that funding has been exhausted, and that his application will be maintained by the department.

C. Should additional program funding become available, the department shall first compensate claims with verified applications in the order in which they were verified and maintained by the department pursuant to subsection B of this section.

NOTICE: The following form used in administering the regulation was filed by the agency. The form is not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of the form to access it. The form is 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 (12VAC35-240)

Application for Filing a Claim for Compensation for Victims of the 1924 Virginia Eugenical Sterilization Act, VESC Form 1004 (undated, filed 11/2015)

VA.R. Doc. No. R16-4471; Filed November 21, 2015, 8:54 p.m.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF DENTISTRY

Fast-Track Regulation

Titles of Regulations: **18VAC60-21. Regulations Governing the Practice of Dentistry (amending 18VAC60-21-200).**

18VAC60-25. Regulations Governing the Practice of Dental Hygiene (amending 18VAC60-25-10, 18VAC60-25-130, 18VAC60-25-140, 18VAC60-25-150).

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

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 13, 2016.

Effective Date: January 28, 2016.

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.

Basis: Section 54.1-2400 of the Code of Virginia provides the Board of Dentistry the authority to promulgate regulations to administer the regulatory system.

The statutory authority for the board to promulgate regulations to determine the qualifications for initial licensure is found in Chapter 27 (§ 54.1-2700 et seq.) of Title 54.1 of the Code of Virginia.

Purpose: In commenting on the petition for rulemaking that led to this regulatory action, the Commission on Dental Accreditation (CODA) noted that the two commissions agree that the educational programs are equivalent and that no further education is required for eligibility for licensure. The commissioners and staff regularly attend meetings of each commission and participate annually in at least one site visit conducted by the other agency to ensure that accreditation processes in each country continue to be equivalent. With the assurances of equivalency by CODA, the board is confident that graduates of educational programs accredited by the Commission on Dental Accreditation of Canada are as prepared to practice with safety and competency as the graduates of programs in the United States.

Rationale for Using Fast-Track Process: Since the Commission on Dental Accreditation of the American Dental Association has a longstanding reciprocal agreement with the Commission on Dental Accreditation of Canada, the board does not believe this proposal will be controversial. It is using the fast-track rulemaking process to facilitate licensure for any applicant who was educated in Canada and may want to locate his practice in the Commonwealth.

Substance: As requested by a petitioner, the board has amended its regulations to recognize accreditation by the Commission on Dental Accreditation of Canada in addition to the Commission on Dental Accreditation of the American Dental Association for licensure by examination as a dentist or a dental hygienist and for licensure by credentials for dentist.

Issues: The primary advantage to the public is the potential for an increased supply of dentists and dental hygienists to meet the dental care needs of the citizens of the Commonwealth. There are no disadvantages; the two commissions have had reciprocal recognition of educational programs for several decades. 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. Pursuant to a petition for rulemaking, the Board of Dentistry (Board) proposes to recognize dental and dental hygiene programs accredited by the Commission on Dental Accreditation of Canada as meeting the education requirements for licensure in Virginia.

Result of Analysis. The benefits likely exceed the costs for this proposed change.

Estimated Economic Impact. Currently, this regulation requires that applicants for licensure hold a diploma or certificate from a dental program accredited by the Commission on Dental Accreditation of the American Dental Association (ADA). The Board proposes to also recognize diplomas and certifications from dental and dental hygiene programs accredited by the Commission on Dental Accreditation of Canada as their accreditation requirements (and education programs they approve) are essentially equivalent to those approved by the ADA. Recognition of Canadian dental programs will benefit future applicants for licensure as this will add to the number of approved programs that aspiring dental professionals may choose from. This change will also allow individuals who have already gotten degrees or certifications from programs accredited by the Commission on Dental Accreditation of Canada to gain licensure and work in Virginia without having to complete additional costly education. No entities are likely to incur additional costs on account of this regulatory change.

Businesses and Entities Affected. This proposed change will affect all individuals who have received, or will receive, their dental or dental hygiene education from a program accredited by the Commission on Dental Accreditation of Canada and who want to be licensed in Virginia.

Localities Particularly Affected. This proposed change will not particularly affect any locality in the Commonwealth.

Projected Impact on Employment. This proposed change may increase the number or dentists and dental hygienists who meet the requirements for licensure in the Commonwealth.

Effects on the Use and Value of Private Property. This proposed change will likely have no impact on the use or value of private property.

Real Estate Development Costs. This proposed change will likely not affect real estate development costs.

Small Businesses:

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

Costs and Other Effects. No small businesses will incur costs on account of this regulatory change.

Alternative Method that Minimizes Adverse Impact. No small businesses will incur costs on account of this regulatory change.

Adverse Impacts:

Businesses: This proposed change is unlikely to adversely impact any business in the Commonwealth.

Localities: This proposed change is unlikely to adversely impact localities.

Other Entities: This proposed change is unlikely to adversely impact any other entities in the Commonwealth.

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 amendments relating to the addition of the Commission on Dental Accreditation of Canada.

Summary:

The amendments recognize dental and dental hygiene programs accredited by the Commission on Dental Accreditation of Canada as meeting the education requirements for licensure in Virginia.

18VAC60-21-200. Education.

An applicant for unrestricted dental licensure shall be a graduate of and a holder of a diploma or a certificate from a dental program accredited by the Commission on Dental Accreditation of the American Dental Association or the Commission on Dental Accreditation of Canada, which consists of either a pre-doctoral dental education program or at least a 12-month post-doctoral advanced general dentistry program or a post-doctoral dental program of at least 24 months in any other specialty that includes a clinical component.

Part I
General Provisions

18VAC60-25-10. Definitions.

A. The following words and terms when used in this chapter shall have the meanings ascribed to them in § 54.1-2700 of the Code of Virginia:

"Board"

"Dental hygiene"

"Dental hygienist"

"Dentist"

"Dentistry"

"License"

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

"Active practice" means clinical practice as a dental hygienist for at least 600 hours per year.

"ADA" means the American Dental Association.

"Analgesia" means the diminution or elimination of pain in the conscious patient.

"CDAC" means the Commission on Dental Accreditation of Canada.

"CODA" means the Commission on Dental Accreditation of the American Dental Association.

"Code" means the Code of Virginia.

"Dental assistant I" means any unlicensed person under the direction of a dentist or a dental hygienist who renders assistance for services provided to the patient as authorized under this chapter but shall not include an individual serving in purely an administrative, 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 18VAC60-21-150 and 18VAC60-21-160.

"Direction" means the level of supervision (i.e., direct, indirect, or general) that a dentist is required to exercise with a dental hygienist or that a dental hygienist is required to exercise with a dental assistant to direct and oversee the delivery of treatment and related services.

"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. Issuance of the order authorizes the dental hygienist to supervise a dental assistant performing duties delegable to dental assistants I.

"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 (iii) preparing the patient for dismissal following treatment.

"Inhalation" means a technique of administration in which a gaseous or volatile agent, including nitrous oxide, is introduced into the pulmonary tree and whose primary effect is due to absorption through the pulmonary bed.

"Inhalation analgesia" means the inhalation of nitrous oxide and oxygen to produce a state of reduced sensibility to pain without the loss of consciousness.

"Local anesthesia" means the elimination of sensation, especially pain, in one part of the body by the topical application or regional injection of a drug.

"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 VI (18VAC60-21-260 et seq.) of Regulations Governing the Practice of Dentistry.

"Nonsurgical laser" means a laser that is not capable of cutting or removing hard tissue, soft tissue, or tooth structure.

"Parenteral" means a technique of administration in which the drug bypasses the gastrointestinal tract (i.e.,

intramuscular, intravenous, intranasal, submucosal, subcutaneous, or intraocular).

"Topical oral anesthetic" means any drug, available in creams, ointments, aerosols, sprays, lotions, or jellies, that can be used orally for the purpose of rendering the oral cavity insensitive to pain without affecting consciousness.

Part IV
Requirements for Licensure

18VAC60-25-130. General application requirements.

A. All applications for licensure by examination or credentials, temporary permits, or faculty licenses shall include:

1. Verification of completion of a dental hygiene degree or certificate from a CODA or CDAC accredited program;

2. An original grade card from the National Board Dental Hygiene Examination issued by the Joint Commission on National Dental Examinations;

3. A current report from the U.S. Department of Health and Human Services National Practitioner Data Bank (NPDB); and

4. Attestation of having read and understood the laws and the regulations governing the practice of dentistry and dental hygiene in Virginia and of the applicant's intent to remain current with such laws and regulations.

B. If documentation required for licensure cannot be produced by the entity from which it is required, the board, in its discretion, may accept other evidence of qualification for licensure.

18VAC60-25-140. Licensure by examination.

A. An applicant for licensure by examination shall have:

1. Graduated from or have been issued a certificate by a CODA or CDAC accredited program of dental hygiene;

2. Successfully completed the National Board Dental Hygiene Examination given by the Joint Commission on National Dental Examinations; and

3. Successfully completed a board-approved clinical competency examination in dental hygiene.

B. If the candidate has failed any section of a board-approved examination three times, the candidate shall complete a minimum of seven hours of additional clinical training in each section of the examination to be retested in order to be approved by the board to sit for the examination a fourth time.

C. Applicants who successfully completed a board-approved examination five or more years prior to the date of receipt of their applications for licensure by the board may be required to retake a board-approved examination or take board-approved continuing education that meets the requirements of 18VAC60-25-190, unless they demonstrate that they have maintained clinical, unrestricted, and active practice in a jurisdiction of the United States for 48 of the past 60 months immediately prior to submission of an application for licensure.

18VAC60-25-150. Licensure by credentials.

An applicant for dental hygiene licensure by credentials shall:

1. Have graduated from or have been issued a certificate by a CODA or CDAC accredited program of dental hygiene;

2. Be currently licensed to practice dental hygiene in another jurisdiction of the United States and have clinical, ethical, and active practice for 24 of the past 48 months immediately preceding application for licensure;

3. Be certified to be in good standing from each state in which he is currently licensed or has ever held a license;

4. Have successfully completed a clinical competency examination substantially equivalent to that required for licensure by examination;

5. Not have committed any act that would constitute a violation of § 54.1-2706 of the Code; and

6. Have successfully completed the dental hygiene examination of the Joint Commission on National Dental Examinations prior to making application to the board.

VA.R. Doc. No. R15-31; Filed October 23, 2015, 4:08 p.m.

BOARD FOR WATERWORKS AND WASTEWATER WORKS OPERATORS AND ONSITE SEWAGE SYSTEM PROFESSIONALS

Proposed Regulation

Titles of Regulations: **18VAC160-20. Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals Regulations (repealing 18VAC160-20-10 through 18VAC160-20-150).**

18VAC160-30. Waterworks and Wastewater Works Operators Licensing Regulations (adding 18VAC160-30-10 through 18VAC160-30-370).

18VAC160-40. Onsite Sewage System Professionals Licensing Regulations (adding 18VAC160-40-10 through 18VAC160-40-510).

Statutory Authority: §§ 54.1-201 and 54.1-2301 of the Code of Virginia.

Public Hearing Information:

January 28, 2016 - 10 a.m. - Department of Professional and Occupational Regulation, Perimeter Center, 9960 Mayland Drive, Suite 200, Board Room 2, Richmond, Virginia 23233

Public Comment Deadline: February 12, 2016.

Agency Contact: Trisha Henshaw, Executive Director, Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email waterwasteoper@dpor.virginia.gov.

Basis: Subdivision 5 of § 54.1-201 of the Code of Virginia states that the board has the power and duty "To promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer the regulatory system administered by the regulatory board."

Section 54.1-2301 of the Code of Virginia provides the authority for the board to promulgate regulations for the licensure of onsite sewage system professionals, waterworks operators, and wastewater works operators. The content of the regulations is pursuant to the board's discretion, but shall not be in conflict with the purposes of the statutory authority.

Section 54.1-2301 D of the Code of Virginia states that, "The Board, in consultation with the Board of Health, shall adopt regulations for the licensure of (i) onsite soil evaluators; (ii) installers of alternative onsite sewage systems, as defined in § 32.1-163; and (iii) operators of alternative onsite sewage systems, as defined in § 32.1-163. Such regulations shall include requirements for (a) minimum education and training, including approved training courses; (b) relevant work experience; (c) demonstrated knowledge and skill; (d) application fees to cover the costs of the program, renewal fees, and schedules; (e) the division of onsite soil evaluators into classes, one of which shall be restricted to the design of conventional onsite sewage systems; (f) the division of sewage system installers into classes, one of which shall be restricted to the installation of conventional onsite sewage systems; and (g) other criteria the Board deems necessary."

Purpose: The regulations have not undergone a thorough and complete review since the inclusion of the onsite sewage system professional regulations in 2009. A thorough review was necessary to ensure that the regulation complements the current standards and practices of the profession and ancillary agencies involved in the regulation of waterworks, wastewater works, and onsite sewage systems; provides minimal burdens on regulants while still protecting the public's health and safety; and reflect current procedures and policies of the department. The regulations were developed to achieve their intended objective in the most efficient, cost-effective manner, and are clearly written and understandable.

Substance:

1. Repeal the board's current regulations.

2. Add new regulations that govern the practice of waterworks and wastewater works operators to ensure minimally qualified individuals meet requirements for licensure that are more aligned with current true-to-life education and experience of new and renewing applicants and update certain standards of practice as they relate to the industry.

3. Add new regulations that govern the practice of onsite sewage system operators, onsite sewage system installers, and onsite soil evaluators to ensure minimally qualified individuals meet requirements for licensure that are more aligned with current true-to-life education and experience of new and renewing applicants and update certain standards of practice as they relate to the industry.

Issues: The primary advantage to the public is that the revisions will improve the clarity of the regulations and ensure consistency with current board practices, legal requirements, and standards of practice in the industry all to better protect the health, safety, and welfare of citizens of the Commonwealth.

The primary advantage to the Commonwealth is that the revisions to the regulations reflect the importance that Virginia places on ensuring the regulations are the least burdensome but also provide protection to the citizens of the Commonwealth. No disadvantages to the Commonwealth could be identified.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals Regulations (18VAC160-20) includes rules for licensing waterworks and wastewater works operators and onsite sewage system professionals. The Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals (Board) proposes to repeal this regulation and promulgate two new regulations: 1) Waterworks and Wastewater Works Operators Licensing Requirements (18VAC160-30) for the licensing of waterworks and wastewater works operators, and 2) Onsite Sewage System Professionals Licensing Regulations (18VAC160-40) for the licensing of onsite sewage system professionals. As part of this action the Board proposes several changes concerning licensure. In particular, the Board proposes to introduce new master and journeyman categories for onsite sewage system professional licensees.

Result of Analysis. There is insufficient data to accurately compare the magnitude of the benefits versus the costs. Detailed analysis of the benefits and costs can be found in the next section.

Estimated Economic Impact.[1] The current regulation includes the following licenses for onsite sewage system professionals: conventional onsite soil evaluator, alternative onsite soil evaluator, conventional onsite sewage system installer, alternative onsite sewage system installer, conventional onsite sewage system operator, and alternative onsite sewage operator. According to the Department of Professional and Occupational Regulation, a major contention in the onsite sewage system industry – especially among those who have been in the industry for many years (decades or more) – has been the examination requirement for licensure. There are apparently individuals who have learned to perform certain skills in the field competently, but are not able to pass written tests. Due to the presence of these long-standing individuals the Board adopted policies in 2009 for installers, 2010/2011 for operators, and 2011 for onsite soil evaluators that have

allowed unlicensed individuals to work without a licensee present; this has presented numerous complaints and challenges in ensuring that people performing the regulated work are minimally competent.[2] To balance the concerns regarding the examination with the Board's duty to the public of ensuring minimum competency of those engaging in the profession to protect the health, safety, and welfare of the public, the Board's proposed Onsite Sewage System Professionals Licensing Regulations (18VAC160-40) include separate master and journeyman categories for each license listed above.[3]

The "Master" is defined as "an individual who possesses the minimum skills and competency to install or maintain onsite sewage systems or evaluate soil sites as suitable for conventional and alternative onsite sewage systems, and to design conventional and alternative onsite sewage systems." The master licensure categories are essentially equivalent to the licenses in the current regulation, with the exception that masters will have supervisory responsibility of journeymen. Currently licensed individuals would become masters once the proposed Onsite Sewage System Professionals Licensing Regulations become effective. "Journeyman" is defined as "an individual who possesses the minimum skills and competency to assist with the installation or maintenance of onsite sewage systems or assisting in the evaluation of soil sites as suitable for conventional and alternative onsite sewage systems, and to design conventional onsite sewage systems under the direct supervision of a master licensee." Unlike masters, journeymen are not required to pass an exam.

Code of Virginia § 54.1-2302 states that "No person shall operate a waterworks or wastewater works, perform the duties of an onsite soil evaluator, or install or operate an alternative onsite sewage system, without a valid license." Enforcing the Code of Virginia and requiring individuals to become licensed as a journeyman in order to assist with the installation or maintenance of onsite sewage systems or assisting in the evaluation of soil sites as suitable for conventional and alternative onsite sewage systems, and to design conventional onsite sewage systems under the direct supervision of a master licensee will in practice cost these individuals $50 per annum ($100 for two-year license) plus the time and dollar cost of continuing professional education. Improper maintenance, installation, or design of onsite sewage systems can potentially contaminate groundwater and otherwise become a public health hazard. Licensing and regulating journeyman may reduce the health risk for the public. The extent to which this would reduce public health risk is not currently known.

Businesses and Entities Affected. The proposed amendments affect the 4,472 licensed waterworks and wastewater works operators and 1,182 licensed onsite sewage system professionals in the Commonwealth, individuals who have been permitted to work on onsite sewage systems without a licensee present, the firms and public entities that employ them, as well as future licensure applicants.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposal to require journeyman licensure for individuals who assist with the installation or maintenance of onsite sewage systems or assist in the evaluation of soil sites as suitable for conventional and alternative onsite sewage systems, and to design conventional onsite sewage systems, may dissuade a small number of individuals from working in the industry.

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

Real Estate Development Costs. The proposed amendments are unlikely to significantly affect real estate development costs.

Small Businesses:

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

Costs and Other Effects. The proposal to require journeyman licensure will moderately increase costs for those onsite sewage system workers, and perhaps the small firms that employ them if they reimburse their licensure fees and continuing professional education costs.

Alternative Method that Minimizes Adverse Impact. The proposed amendments will not adversely affect small businesses.

Adverse Impacts:

Businesses: The proposal to require journeyman licensure will moderately increase costs for those onsite sewage system workers, and perhaps the firms that employ them if they reimburse their licensure fees and continuing professional education costs.

Localities: The proposed amendments are unlikely to adversely affect localities.

Other Entities: The proposed amendments are unlikely to adversely affect other entities.

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[1] In a separate action (Action 4141) that was initiated prior to this action (Action 4226), the Board proposed to increase the two-year licensure renewal fee from $80 to $100 for all waterworks and wastewater works operators and onsite sewage system professionals. This proposed action (4226) includes the higher renewal fees ($100); in other words, for the purposes of this analysis it is assumed that Action 4141 will go into effect with the fee increase prior to this action. If 4226 were to go into effect first, it would effectively increase renewal fees for licensees by $20 per two-year licensure period.

[2] Source: Department of Professional and Occupational Regulation

[3] This concept is present in similarly regulated professions, including trades (master/journeyman), water well service providers (trainee/master/journeyman), and professional engineers and land surveyors (in-training).

Agency's Response to Economic Impact Analysis: The agency concurs with the analysis with approval.

Regarding the development of master and journeyman license categories and the concern of an adverse impact, the board considered alternative methods of regulation to achieve the board's responsibility to protect the health, safety, and welfare of the public through the license mandate codified in § 54.1-2302 of the Code of Virginia[1], and reiterated in the 18VAC160-20-74 C[2] effective July 1, 2009. As referenced in the economic impact analysis, the board adopted policies during the early implementation of the program to allow many in the industry to continue working without a license while under the supervision of a license-holder.

From July 1, 2009, (the effective date of the initial onsite sewage system professional licensing regulations) until June 30, 2010, individuals were able to apply for a four-year, nonrenewable interim license based on experience and training alone. Once the interim licenses ended, many in the industry found that they would have to take a licensing examination in order to obtain a new license and continue working in the profession. A number of constituents sought legislative remedies[3] due to concerns with the examination. Concerns that were voiced included illiteracy, the applicability of exam content areas, difficulty with passing an examination after so many years, etc. An exam review of all content areas was held, with subject matter experts from the applicable professions, to review all exam questions, references, and applicability to the profession in late 2014. Also in 2014, an extension (SB 657) to the interim license for alternative onsite sewage system installers passed to allow such individuals additional time to take and pass the examination.

When the board was conducting a general review of its regulations, among other important items, the board carefully considered the current license requirements along with its statutory responsibility to protect the public. One alternative the board considered was to require all individuals performing the duties identified in the statute as requiring a license[4], to meet the current license requirements for the applicable classification and category of license, which requires an examination for all license types. This would result in an increased cost[5] to all individuals requiring licensure through application fees, examination fees, and, for some, the cost of study classes and/or materials. Alternatively, the board decided to utilize a license system currently in place for other, similar programs[6]. This would allow those who are performing the work described in § 54.1-2302 of the Code of Virginia, which mandates a license, but are not in a supervisory or responsible charge capacity, to continue performing such work after having demonstrated minimum competency to the board for a license. This also allows the board to take disciplinary action, if necessary, against the licensee actually performing the regulated activity as, currently, the board cannot take disciplinary action against an individual who is performing the work but is not a licensee of the board. As noted in the economic impact analysis for this action, "Licensing and regulating journeyman may reduce the health risk to the public."

Through this revision to the regulations, the board also provided additional options to qualify for licensure, including the acceptance of more degree options and opportunities to qualify for licensure with experience and training and, in some cases, no examination.

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[1] "No person shall operate a waterworks or wastewater works, perform the duties of an onsite soil evaluator, or install or operate an alternative onsite sewage system, without a valid license."

[2] "No individual shall act as a conventional onsite soil evaluator, alternative onsite soil evaluator, conventional onsite sewage system installer, alternative onsite sewage system installer, conventional onsite sewage system operator, or alternative onsite sewage system operator without possessing a valid license issued by the board. Issuance of an alternative license shall void the previously issued conventional license and shall authorize the alternative licensee to perform duties on both conventional and alternative onsite sewage systems consistent with the license category. The board shall issue a license only after an individual has met all experience and examination requirements as set forth in this chapter."

[3] SB 662 (2012), HB 1482 (2013), HB 253 (2014), SB 657 (2014)

[4] "No person shall . . . perform the duties of an onsite soil evaluator, or install or operate an alternative onsite sewage system, without a valid license." "No individual shall act as a conventional onsite soil evaluator, alternative onsite soil evaluator, conventional onsite sewage system installer, alternative onsite sewage system installer, conventional onsite sewage system operator, or alternative onsite sewage system operator without possessing a valid license issued by the board."

[5] Currently $100 application fee, $85 examination fee, plus cost of renewal and continuing education to maintain the license. Licenses are renewed every two years, which requires submittal of the renewal fee and certification of compliance with CPE.

[6] This concept is present in similarly regulated professions, including trades (master/journeyman), water well service providers (trainee/master/journeyman), and professional engineers and land surveyors (in-training).

Summary:

The proposed amendments repeal the existing regulations and create two new chapters: 18VAC160-30 (regulations for the licensing of waterworks and wastewater works operators) and 18VAC160-40 (regulations for the licensing of onsite sewage system professionals).

The proposed regulations include (i) definitions; (ii) fees; (iii) standards of practice and conduct; (iv) qualifications for licensure; (v) requirements for application, examination, continuing education, and renewal and reinstatement of licenses; and (vi) approval and maintenance of training courses. This proposal introduces new master and journeyman categories for onsite sewage system professional licensees.

CHAPTER 30
WATERWORKS AND WASTEWATER WORKS OPERATORS LICENSING REGULATIONS

Part I

Definitions

18VAC160-30-10. Definitions.

A. Section 54.1-2300 of the Code of Virginia provides definitions of the following terms and phrases as used in this chapter:

"Board"

"Onsite sewage system"

"Operator"

"Owner"

"Wastewater works

"Waterworks"

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

"Applicant" means an individual who submits an application with the appropriate fee and other required documentation.

"Application" means a completed, board-prescribed form submitted with the appropriate fee and other required documentation.

"Category" means a profession under the board's purview, which includes waterworks and wastewater works as applicable to the licensure of waterworks and wastewater works operators.

"Classification" means the division within each category of license as it relates to the classified facility. Class 1 represents the highest classification for each category of license.

"Contact hour" means 50 minutes of participation in a structured training activity.

"Department" means the Virginia Department of Professional and Occupational Regulation.

"DEQ" means the Virginia Department of Environmental Quality.

"Direct supervision" means being immediately available and fully responsible for the provision of waterworks and wastewater works operation regulated pursuant to Chapter 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia and this chapter.

"Direct supervisor" means a licensed waterworks or wastewater works operator who assumes the responsibility of direct supervision.

"Licensee" means an individual holding a valid license issued by the board.

"Licensure" means a method of regulation whereby the Commonwealth, through the issuance of a license, authorizes a person possessing the character and minimum skills to engage in the practice of a profession or occupation that without such license is unlawful to practice.

"Maintenance" or "maintain" means performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis. Maintenance shall not include replacement of tanks, drainfield piping, or distribution boxes or work requiring a construction permit and a licensed onsite sewage system installer.

"Operate" means the act of (i) placing into or taking out of service a unit process or unit processes or (ii) making or causing adjustments in the operation of a unit process at a treatment works.

"Renewal" means the process and requirements for periodically approving the continuance of a license.

"Training credit" means a unit of board-approved training or formal education completed by an individual that may be used to substitute for experience when applying for a license.

"Treatment works" means any device or system used in the storage, treatment, disposal, or reclamation of sewage or combinations of sewage and industrial wastes including, but not limited to, pumping power and other equipment and appurtenances, septic tanks, and any works, including land, that are or will be (i) an integral part of the treatment processes or (ii) used for ultimate disposal or residues or effluent resulting from such treatment.

"VDH" means the Virginia Department of Health.

Part II

Entry

18VAC160-30-20. Application procedures.

A. All applicants seeking licensure shall submit an application with the appropriate fee specified in 18VAC160-30-40. Application shall be made on forms provided by the board or its agent.

By submitting the application to the department, the applicant certifies that the applicant has read and understands the applicable statutes and the board's regulations.

The receipt of an application and the deposit of fees by the board does not indicate approval of the application by the board.

B. The board may make further inquiries and investigations with respect to the applicant's qualifications to confirm or amplify information supplied. All applications shall be completed in accordance with the instructions contained herein and on the application. Applications will not be considered complete until all required documents are received by the board. An applicant will not be permitted to sit for the applicable board-approved examination until the application is complete and approved.

C. The applicant will be notified within 30 days of the board's receipt of an initial application if the application is incomplete. An individual who fails to complete the application process within 12 months of receipt of the application in the board's office must submit a new application. An applicant has 12 months from approval of the application to pass the board-approved examination. Failure to pass the board-approved examination within 12 months of approval will result in the applicant being required to submit a new application to be considered for licensure.

D. The applicant shall immediately report all changes in information supplied with the application, if applicable, prior to issuance of the license or expiration of the application or examination period.

18VAC160-30-30. General fee requirements.

All fees are nonrefundable and shall not be prorated. The date on which the fee is received by the department or its agent will determine whether the fee is on time. Checks or money orders shall be made payable to the Treasurer of Virginia.

18VAC160-30-40. Fee schedule.

Fee Type	Fee Amount	When Due
Initial application (for each profession, class, and category of license)	$100	With application
Renewal (for each profession, class, and category of license)	$100	With renewal application
Reinstatement (for each profession, class, and category of license)	$125 (renewal fee + $25 reinstatement fee)	With reinstatement application

18VAC160-30-50. Examination fee.

The fee for examination or reexamination is subject to charges to the department by an outside vendor based on a contract entered into in compliance with Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia). Fees may be adjusted and charged to the candidate in accordance with this contract.

18VAC160-30-60. General requirements for licensure.

A. In addition to the specific qualifications for each category and classification of licensure, each applicant for licensure shall meet the requirements provided in this section.

1. The applicant shall be at least 18 years old.

2. The applicant shall disclose his mailing address. A post office box is only acceptable as a mailing address when a physical address is also provided.

3. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose the following information.

a. All felony convictions.

b. All misdemeanor convictions in any jurisdiction that occurred within three years of the date of application.

Any plea of nolo contendere or finding of guilt regardless of adjudication or deferred adjudication shall be considered a conviction for the purposes of this section. The record of conviction certified or authenticated in such form as to be admissible in evidence under the laws of the jurisdiction where convicted shall be admissible as prima facie evidence of such guilt.

B. The board, at its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

C. The applicant shall report suspensions, revocations, or surrendering of a license, certification, or registration in connection with a disciplinary action or that has been the subject of discipline in any jurisdiction prior to applying for licensure. The board, at its discretion, may deny licensure to any applicant based on prior suspensions, revocations, or surrender of licenses based on disciplinary action by any jurisdiction.

18VAC160-30-70. Examination procedures and conduct.

A. Upon approval of the application, the board will notify the applicant of his eligibility to take the applicable examination. The license will not be issued prior to receipt of a passing score for the applicable examination.

B. An applicant who does not receive a passing score within one year after the date of approval of the application by the board to sit for the examination, must submit a new application and meet the entry requirement in effect at the time of submittal of the new application.

C. The applicant shall follow all rules established by the board with regard to conduct at the examination. Such rules shall include all written instructions communicated prior to the examination date and all instructions communicated at the site, either written or oral, on the date of examination. Failure to comply with all rules established by the board and the testing organization with regard to conduct at the examination may be grounds for denial of the application, voiding of examination scores, or any combination thereof.

18VAC160-30-80. Individuals certified or licensed in another jurisdiction.

Any applicant holding a valid license or certificate in another jurisdiction who meets the requirements of this chapter, including having equivalent experience and education, shall pass the appropriate Virginia examination to become licensed.

18VAC160-30-90. License required.

A. No individual shall serve as an operator of a waterworks or wastewater works without possessing a valid category of license issued by the board in a classification equal to or greater than the classification of the waterworks or wastewater works to be operated.

B. An individual cannot simultaneously hold two licenses of different classifications in the same category.

C. Experience used to qualify for licensure must be obtained under the direct supervision of an operator holding a valid license of the same category and of a classification equal to or higher than the classification of the waterworks or wastewater works at which the experience was gained.

D. Except as provided in subsection E of this section, experience limited solely to the operation and maintenance of wastewater collection systems and water distribution systems, laboratory work, plant maintenance, and other nonoperating duties shall not be counted as experience as an operator or an operator-in-training.

E. Experience operating and maintaining water distribution systems shall only be considered for Class 5 or Class 6 waterworks operator license applicants.

F. Provisional licensure alone shall not authorize an individual to serve as the operator of a classified waterworks or wastewater works facility.

18VAC160-30-100. Full-time experience or equivalent.

For the purposes of this part, experience requirements are expressed in terms of calendar periods of full-time employment as an operator or as an operator-in-training at a waterworks or wastewater works in the same category for which licensure is sought.

1. A year of full-time employment is defined as a minimum of 1,760 hours during a 12-month period or a minimum of 220 workdays in a 12-month period. A workday is defined as attendance at a waterworks or wastewater works to the extent required for proper operation. More than 1,760 hours or 220 workdays during a 12-month period will not be considered as more than one year of full-time employment.

2. Partial credit may be given for actual hours of work or workdays experience if the applicant works as an operator or as an operator-in-training less than full time.

18VAC160-30-110. Qualifications for examination approval.

A. An applicant for licensure as a waterworks or wastewater works operator shall furnish acceptable documentation that one of the following qualifications has been met.

TABLE 1
Waterworks and Wastewater Works Operator Experience and Education

Classes	Education Required	Current License	Minimum Experience	Facility Type	Experience with Substitutions
Class 6 (Waterworks Operator Only)	High school diploma or GED	N/A	Six months	Class 6 or higher facility	N/A
	No high school diploma or GED	N/A	One year	Class 6 or higher facility	N/A
Class 5 (Waterworks Operator Only)	High school diploma or GED	N/A	Six months	Class 5 or higher facility	N/A
	No high school diploma or GED	N/A	One year	Class 5 or higher facility	N/A

Class 4	High school diploma or GED	N/A	Six months	Class 4 or higher facility	N/A
	No high school diploma or GED	N/A	One year	Class 4 or higher facility	N/A
Class 3	Bachelor's or master's degree	N/A	Six months	Class 4 or higher facility	N/A
	Associate's degree	N/A	Nine months	Class 4 or higher facility	Six months
	High school diploma or GED	N/A	One year	Class 4 or higher facility	Six months
	No high school diploma or GED	Class 4 license	Three years	Class 3 or higher facility	One and one-half years
Class 2	Bachelor's or master's degree	N/A	One year	Class 3 or higher facility	Six months
	Associate's degree	N/A	18 months	Class 3 or higher facility	Nine months
	High school diploma or GED	N/A	Two years	Class 3 or higher facility	One year
	No High school diploma or GED	Class 3 license	Five years	Class 2 or higher facility	Three and one-half years
Class 1	Bachelor's or master's degree	Class 2 license	Two years	Class 2 or higher facility	One year
	Associate's degree	Class 2 license	Three years	Class 2 or higher facility	One and one-half years
	High school diploma or GED	Class 2 license	Four years	Class 2 or higher facility	Two years
	No high	Class 2	Nine years	Class 2 or higher facility	Four and one-half years

	school diploma or GED	license			
Where applicable, the current license held, minimum experience, and the facility type must coincide with the category of license for which the application is being submitted.					

B. The direct supervisor shall certify the experience on the application form as accurate and relevant to the classification and category of license for which is being submitted. In the event that a licensed operator is not available to certify the experience of the applicant, the experience may be certified by a representative of the facility owner with first-hand knowledge of the applicant's experience.

18VAC160-30-120. Provisional licensure for nonclassified facility operation.

An applicant for licensure as a provisional waterworks or wastewater works operator shall furnish acceptable documentation of having met all of the requirements of 18VAC160-30-110 except that the experience requirement may be met through experience gained as an operator or operator-in-training of a nonclassified facility. Such experience must be gained under the following conditions:

1. The experience is obtained at a nonclassified facility that is comparable in size and in treatment process as described in 18VAC160-30-360 and 18VAC160-30-370, as applicable.

2. The experience is obtained while performing nonclassified facility operation duties that provide experience comparable to that obtained at a classified facility. Experience limited solely to the operation and maintenance of wastewater collection systems and water distribution systems, laboratory work, plant maintenance, and other nonoperating duties shall not be counted as qualifying experience for Class 1, Class 2, Class 3, or Class 4 provisional licenses but may be counted for a provisional Class 5 or Class 6 license.

3. Any individual holding a provisional license may apply for licensure by submitting evidence of having met 50% of the experience required by 18VAC160-30-110 and submitting the appropriate application.

18VAC160-30-130. Experience substitutions.

A. Experience obtained as a master alternative onsite sewage system operator may be substituted for the Class 4 wastewater works operator in training experience requirements.

B. 18VAC160-30-110 A provides the maximum experience substitutions that may be applied for each applicable class of license.

1. Experience gained in either waterworks or wastewater works operations may be substituted for up to one-half of the required experience in the alternate category so long as the experience was gained in an equivalent or higher class of facility.

2. Education may be substituted for part of the required experience in the category of license applied for at a rate of one month of experience credit for each semester hour of college credit. Coursework must be relevant to the category and classification of the license being sought. The college credit must be from an accredited college or university that is approved or accredited by the Commission of Colleges, a regional or national accreditation association, or by an accreditation agency that is recognized by the U.S. Secretary of Education.

3. Board-approved waterworks or wastewater works operator training may be substituted for experience at a rate of one month experience for each training credit approved by the board.

C. Substitutions shall not exceed 50% of the total experience required for licensure.

18VAC160-30-140. Education.

A. Applicants seeking to qualify for licensure based on completion of an associate's, bachelor's, or master's degree shall submit an official transcript from the school where the applicable degree was obtained. Only degrees from an accredited college or university that is approved or accredited by the Commission on Colleges, a regional or national accreditation association, or by an accrediting agency that is recognized by the U.S. Secretary of Education will be considered. Formal education used to meet a specific education requirement for license entry cannot also be used as a training credit for experience substitution.

B. The following degrees shall be considered to qualify in accordance with 18VAC160-30-110:

1. Bachelor's or master's degree in engineering or engineering technology in a related physical, biological, environmental, or chemical science;

2. Bachelor's degree in a related physical, biological, environmental, or chemical science that includes a minimum 40 semester credit hours in any combination of science and math;

3. Master's degree in a related physical, biological, environmental, or chemical science, and a bachelor's degree in any major such that the combined degrees include a minimum 40 semester credit hours in any combination of science and math; or

4. Associate's degree in waterworks, in wastewater works, or in a related physical, biological, environmental, or chemical science that includes a minimum of 20 credit hours in any combination of science and math.

Part III
Renewal and Reinstatement

18VAC160-30-150. Expiration and renewal.

A. Licenses for waterworks operators shall expire on the last day of February of each odd-numbered year. Licenses for wastewater works operators shall expire on the last day of February of each even-numbered year.

B. Prior to the expiration date shown on the license, the board shall mail a renewal notice to the licensee's address of record. The licensee shall return to the board a renewal notice and the applicable renewal fee. Failure to receive a renewal notice from the board does not relieve the licensee of the obligation to renew. If the licensee fails to receive the renewal notice, a copy of the license may be submitted with the required fee as an application for renewal.

C. By submitting the renewal or reinstatement fee, the licensee is certifying his continued compliance with the Standards of Practice and Conduct (Part VI (18VAC160-30-290 et seq.) of this chapter), as established by the board. In addition, by submitting the renewal or reinstatement fee, licensees are certifying compliance with the continuing professional education requirements of this chapter.

18VAC160-30-160. Reinstatement.

A. If all of the requirements for renewal of the license as specified in 18VAC160-30-150 are not completed within 30 days of the license expiration date, a reinstatement fee shall be required as established in 18VAC160-30-40.

B. A license may be reinstated for up to one year following the expiration date of the license. Any licensee who fails to reinstate the license within 12 months after the expiration date shall apply for a new license and meet entry requirements in effect at the time of the submittal of the new application. Such individual shall be deemed to be eligible to sit for the examination for the same category and classification of license as the expired license.

C. Any regulated activity conducted subsequent to the license expiration date may constitute unlicensed activity and be subject to the prosecution under Chapter 1 (§ 54.1-100 et seq.) of Title 54.1 of the Code of Virginia.

18VAC160-30-170. Status of license during period prior to reinstatement.

A licensee who applies for reinstatement of the license shall be subject to all laws and regulations as if the licensee had been continuously licensed. The licensee shall remain under and be subject to the disciplinary authority of the board during this entire period.

18VAC160-30-180. Board discretion to deny renewal or reinstatement.

The board may deny renewal or reinstatement of a license for the same reasons as the board may refuse initial licensure or discipline a licensee.

The board may deny renewal or reinstatement of a license if the licensee has been subject to a disciplinary proceeding and has not met the terms of an agreement for licensure, has not satisfied all sanctions, or has not fully paid monetary penalties and costs, imposed by the board.

Part IV
Continuing Professional Education

18VAC160-30-190. Continuing professional education.

A. Each licensee shall have completed the following number of continuing professional education (CPE) contact hours during each renewal cycle. CPE provisions do not apply for the renewal of licenses that were held for less than two years on the date of expiration

1. Class 1, Class 2, and Class 3 waterworks and wastewater works operators shall obtain a minimum of 20 contact hours.

2. Class 4 waterworks and wastewater works operators shall obtain a minimum of 16 contact hours.

3. Class 5 waterworks operators shall obtain a minimum of eight contact hours.

4. Class 6 operators shall obtain a minimum of four contact hours.

B. CPE contact hours completed during the license period immediately prior to the expiration date of the license shall be acceptable in order to renew the license. CPE contact hours completed during a licensing renewal cycle to satisfy the CPE requirements of the preceding licensing renewal cycle shall be valid only for that preceding license renewal cycle and shall not be accepted for any subsequent renewal cycles.

C. The licensee will not receive CPE credit for completing the same continuing education course with the same content more than once during a license period.

D. A licensee may receive CPE credit for teaching a course that otherwise meets the requirements of this chapter; however, additional credit shall not be given for subsequent offerings of a course or activity with the same content within the same licensing cycle. In addition, a licensee may receive two hours of CPE no more than once during a single licensing cycle for the initial development or substantial updating of the CPE course.

E. Safety subjects shall not count for more than one half of the total required CPE hours.

18VAC160-30-200. CPE subject matter for waterworks operators.

A. The following course topics will be accepted for CPE credit for waterworks operators:

1. Waterworks operations;

2. Monitoring, evaluating, and adjusting treatment processes and systems;

3. Operating and maintaining equipment;

4. Security and safety procedures;

5. General science and mathematical principles;

6. Administrative processes and procedures applicable to licensure; and

7. Laws and regulations applicable to the profession.

B. Of the total 20 hours required, a minimum of five content hours pertaining to utility management is required of Class 1 and Class 2 waterworks operators.

18VAC160-30-210. CPE subject matter for wastewater works operators.

A. The following course topics will be accepted for CPE credit for wastewater works operators:

1. Wastewater works operations;

2. Monitoring, evaluating, and adjusting treatment processes and systems;

3. Operating and maintaining equipment;

4. Security and safety procedures;

5. General science and mathematical principles;

6. Administrative processes and procedures applicable to licensure; and

7. Laws and regulations applicable to the profession.

B. Of the total 20 hours required, a minimum of five content hours pertaining to utility management is required of Class 1 and Class 2 wastewater works operators.

18VAC160-30-220. Use of training credits and formal education for CPE credit.

Any course approved by the board for substitution as training credits or formal education semester hours, as provided for in Part V (18VAC160-30-240 et seq.) of this chapter, shall also be acceptable on an hour-for-hour basis for CPE contact hours. One semester hour of college credit shall equal 15 CPE contact hours, and one-quarter hour of college credit shall equal 10 CPE credit hours.

18VAC160-30-230. Maintenance of CPE.

A. For a period of at least two years following the end of the license renewal cycle for which the CPE was taken, the following evidence shall be maintained to document completion of the required hours of CPE:

1. Evidence of completion of a structured training activity, which shall consist of the name, address, and telephone number of the sponsor;

2. The dates the licensee participated in the training;

3. Description of the subject matter presented; and

4. A statement from the sponsor verifying the number of hours completed.

B. The board may conduct an audit of its licensees to ensure compliance with the applicable CPE requirements. Licensees who are selected for audit shall provide the necessary documentation stipulated in this section.

Part V
Training Course Approval

18VAC160-30-240. Approval of training courses.

A. Training courses may be substituted for experience pursuant to the provisions of Part II (18VAC160-30-20 et seq.) of this chapter. With the exception of training courses provided pursuant to 18VAC160-30-280, training courses that may be substituted for required experience must be approved by the board prior to commencing.

B. Each training provider seeking course approval shall submit an application for approval on a form provided by the board. Training courses for which experience credit may be granted must be conducted in general conformance with the guidelines of the International Association for Continuing Education and Training (association). The board reserves the right to waive any of the requirements of the association's guidelines on a case-by-case basis. Only classroom, laboratory, and field trip contact time will be used to compute training credits. No credit will be given for breaks, meals, or receptions.

1. Organization. The board will only approve training offered by a sponsor that is an identifiable organization with a mission statement outlining its functions, structure, process, and philosophy and that has a staff of one or more persons with the authority to administer and coordinate a training course.

2. Training course records. The board will only approve training offered by a sponsor that maintains training course records for all participants for a minimum of seven years and that has a written policy on retention and release of training course records.

3. Instructors. The board will only approve training conducted by personnel who have demonstrated competence in the subject being taught, an understanding of the learning objective, and knowledge of the learning process to be used.

4. Objectives. The board will only approve courses that have a series of stated objectives that are pertinent to the tasks performed by a licensee. The training course content must be consistent with those objectives.

5. Course completion requirements. For successful completion of a training course, participants must attend 90% or more of the class contact time and must demonstrate their learning through written examinations, completion of a project, oral examination, or other similar assessment technique.

18VAC160-30-250. Application for training course approval.

A. The board shall consider the following information, to be submitted by the course sponsor or instructor on forms provided by the board:

1. Course information.

a. Course title;

b. Planned audience;

c. Name of sponsor;

d. Name, physical address, email address, and phone number of contact person;

e. Scheduled presentation dates;

f. Detailed course schedule, hour-by-hour, including start and ending times;

g. List of planned breaks;

h. Scheduled presentation location; and

i. Identification of the category and classification of license to which the course is applicable and relevancy to the identified license type.

2. Instructor qualifications.

a. Name of instructor;

b. Title;

c. Employer;

d. Board license number or numbers, if applicable; and

e. Summary of qualifications to teach the course.

3. Training materials.

a. Course objectives. A listing of the course objectives stated in terms of the skills and knowledge the participant will be able to demonstrate as a result of the training.

b. Course outline. A detailed outline showing the planned activities that will occur during the training course, including major topics, planned presentation sequence, laboratory and field activities, audiovisual presentation, and other major activities.

c. Course reference materials. A list of the name, publisher, and publication date for commercially available publications. For reference materials developed by the course sponsor or available exclusively through the course, a copy of the reference.

d. Audiovisual support materials. A listing of any commercially available audiovisual support material that will be used in the program. A brief description of any sponsor or instructor generated audiovisual material that will be used.

e. Handouts. Identification of all commercially available handout materials that will be used, as well as copies of all other planned handouts.

4. Determination of successful completion. A description of the means that will be used to assess the learning of each participant to determine successful completion of the training program, such as examinations, projects, personal evaluations by the instructor, or other recognized evaluation techniques. Correspondence and other distance learning courses must include appropriate testing procedures to verify completion of the course.

B. Recurring training programs. If there are plans to present the same course of instruction routinely at multiple locations with only minor modifications and changes, the board may approve the overall program rather than individual presentations if so requested by the sponsor.

1. The board shall consider all of the information listed in subsection A of this section except those items related to specific offerings of the course.

2. Board approval will apply only to those specific offerings certified by the sponsoring organization as having been conducted by instructors meeting the established criteria and in accordance with the board-approved course outlines and objectives.

18VAC160-30-260. Maintenance of training approval.

A. At times established by the board, the board may require that course providers that have previously obtained course approval provide the board with evidence, in a form set forth by the board, that the provider continues to comply with the requirements of this chapter. Failure to continue to comply with the board's requirements or respond to such a request may result in the board withdrawing its approval.

B. Substantial modifications or changes to the information provided in 18VAC160-30-240 and 18VAC160-30-250 must be reported to the board within 30 days of the change. Failure to report the changes as required may result in the withdrawal of approval by the board.

C. Any change of the address of the training provider shall be reported in writing within 30 days of the change.

D. The board may conduct an audit of the training provider to ensure compliance with this chapter.

18VAC160-30-270. Withdrawal of approval.

The board may withdraw approval of any provider for the following reasons:

1. The courses being offered no longer meet the standards established by the board.

2. The provider, through an agent or otherwise, advertises its services in a fraudulent or deceptive way.

3. The provider, instructor, or designee of the provider falsifies any information relating to the application for approval, course information, and student records.

4. The provider fails to respond to the board or any of its agents.

18VAC160-30-280. Training courses offered by certain entities; board approval not required.

A. Training courses provided by (i) federal, state, or local government agencies; (ii) accredited colleges or universities approved or accredited by the Commission on Colleges; (iii) a regional or national accreditation association; or (iv) an accrediting agency that is recognized by the U.S. Secretary of Education do not require board approval to be used for experience substitution, provided the training course information submitted to the board includes the following:

1. The course must include the continuing education units awarded by the entity.

2. The course must be related to the license category and classification, if applicable, for which experience substitution is sought.

B. The board may request additional information from the provider as necessary to ensure compliance with this section. If such assurance cannot be made by the board, the training course may not be used for experience substitution, or the provider may pursue board approval pursuant to this chapter.

Part VI
Standards of Practice and Conduct

18VAC160-30-290. Grounds for disciplinary action.

The board may place a licensee on probation; impose a monetary penalty in accordance with § 54.1-202 A of the Code of Virginia; or revoke, suspend, or refuse to renew any license when the licensee has been found to have violated or cooperated with others in violating any provision of the regulations of the board or Chapter 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia.

18VAC160-30-300. Maintenance of license.

A. No license issued by the board shall be assigned or otherwise transferred.

B. A licensee shall report, in writing, all changes of address and name to the board within 30 days of the change and shall return the license to the board. In addition to the address of record, a physical address is required for each license. If the licensee holds more than one license, the licensee shall inform the board of all licenses, certificates, and registrations affected by the address change. The board shall not be responsible for the licensee's failure to receive notices or correspondence due to the licensee's failure to report a change of address.

C. Any change in any of the requirements and qualifications for licensure found in Part II (18VAC160-30-20 et seq.) or Part III (18VAC160-30-150 et seq.) of this chapter shall be reported to the board within 30 days of the change.

18VAC160-30-310. Notice of adverse action.

A. Licensees shall notify the board of the following actions against the licensee:

1. Any disciplinary action taken by any jurisdiction, board, or administrative body of competent jurisdiction, including but not limited to any reprimand, license or certificate revocation, suspension or denial, monetary penalty, requirement for remedial education, or other corrective action.

2. Any voluntary surrendering of a related license, certificate, or registration done in connection with a disciplinary action in another jurisdiction.

3. Any conviction, finding of guilt, or plea of guilty, regardless of adjudication or deferred adjudication, in any jurisdiction of the United States of any misdemeanor involving lying, cheating, stealing, sexual offense, drug distribution, or physical injury or relating to the practice of the profession, or of any felony, there being no appeal pending therefrom or the time for appeal having lapsed. Review of convictions shall be subject to the requirements of § 54.1-204 of the Code of Virginia. Any plea of nolo contendere shall be considered a conviction for the purpose of this section.

B. The notice must be made to the board in writing within 30 days of the action. A copy of the order or other supporting documentation must accompany the notice. The record of conviction, finding, or case decision shall be considered prima facie evidence of a conviction or finding of guilt.

18VAC160-30-320. Prohibited acts.

The following acts are prohibited and any violation may result in disciplinary action by the board:

1. Violating, inducing another to violate, cooperating with another to violate, or combining or conspiring with or acting as agent, partner, or associate for another to violate any of the provisions of Chapter 1 (§ 54.1-100 et seq.), 2 (§ 54.1-200 et seq.), or 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia, or any of the regulations of the board.

2. Allowing a license issued by the board to be used by another.

3. Obtaining or attempting to obtain a license by false or fraudulent representation, or maintaining or renewing a license by false or fraudulent representation.

4. A licensee having been convicted, found guilty, or disciplined in any jurisdiction of any offense or violation enumerated in 18VAC160-30-310. Review of convictions shall be subject to the requirements of § 54.1-204 of the Code of Virginia.

5. Failing to inform the board in writing within 30 days that the licensee was convicted, found guilty, or disciplined in any jurisdiction of any offense or violation enumerated in 18VAC160-30-310.

6. Not demonstrating reasonable care, judgment, or application of the required knowledge, skill, and ability in the performance of the licensee's duties.

7. Having undertaken to perform or performed a professional assignment that the licensee is not qualified to perform by education, experience, training, or any combination thereof.

8. Failing to report a change as required by 18VAC160-30-300.

9. Negligence, misconduct, or incompetence in the practice of the profession.

10. Making any misrepresentation or engaging in acts of fraud or deceit in providing professional services.

11. Failing to adequately supervise and review work performed by licensed or unlicensed employees under direct supervision of the licensee.

12. Submitting or recording or assisting another in the submission or recording of false or misleading operational information relating to the performance and monitoring requirements of a waterworks or wastewater works.

13. Failing to act in providing waterworks and wastewater works operator services in a manner that safeguards the interests of the public.

18VAC160-30-330. Conflicts of interest.

The licensee shall:

1. Promptly and fully inform an employer or client of any business association, interest, or circumstance that may influence the licensee's judgment or the quality of service.

2. Not accept compensation, financial or otherwise, from more than one party for services on or pertaining to the same project, unless the circumstances are fully disclosed to and agreed to by all interested parties in writing.

3. Neither solicit nor accept financial or other valuable consideration from material or equipment suppliers for specifying their products or services.

4. Not solicit or accept gratuities, directly or indirectly, from contractors or their agents or other parties dealing with a client or employer in connection with work for which the licensee is responsible.

18VAC160-30-340. Licensee responsibility.

A. The primary obligation of the licensee is to the public. If the licensee's judgment is overruled and not adhered to when advising appropriate parties of circumstances of a substantial threat to the public health, safety, or welfare, the licensee shall inform the employer or client, as applicable, of the possible consequences and notify appropriate authorities.

B. The licensee shall not knowingly associate in a business venture with, or permit the use of the licensee's name by, any person where there is reason to believe that person is engaging in activity of a fraudulent or dishonest nature or is violating any law or regulation of the board.

C. A licensee who has direct knowledge that another individual may be violating any of the provisions of this chapter or the provisions of Chapter 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia shall immediately inform the board in writing and shall cooperate in furnishing any further information or assistance that may be required.

18VAC160-30-350. Response to inquiry and provision of records.

A. A licensee must respond within 10 days to a request by the board or any of its agents regarding any complaint filed with the department.

B. Unless otherwise specified by the board, a licensee of the board shall produce to the board or any of its agents within 10 days of the request any document, book, or record concerning any transaction pertaining to a complaint filed in which the licensee was involved, or for which the licensee is required to maintain records. The board may extend such timeframe upon a showing of extenuating circumstances prohibiting delivery within such 10-day period.

C. A licensee shall not provide a false, misleading, or incomplete response to the board or any of its agents seeking information in the investigation of a complaint filed with the board.

D. With the exception of the requirements of subsections A and B of this section, a licensee must respond to an inquiry by the board or its agent within 21 days.

18VAC160-30-360. Wastewater works.

A. A Class 4 wastewater works licensee may operate any wastewater works as follows:

1. A wastewater works employing biological mechanical methods (i.e., mechanical treatment process defined as those containing aerated and mixed flows using electrical or outside energy sources) with a design hydraulic capacity greater than 1,000 gallons per day but equal to or less than .04 MGD;

2. A wastewater works employing natural treatment methods (referenced in 9VAC25-790-870 as land treatment utilizing a secondary process for pretreatment followed by irrigation, overland flow infiltration-percolation, or combination thereof or aquatic ponds or constructed wetlands) with a design hydraulic capacity greater than 1,000 gallons per day but equal to or less than 1.0 MGD; or

3. Any other wastewater works classified by DEQ or VDH as a Class 4 wastewater works.

B. A Class 3 wastewater works licensee may operate any wastewater works as follows:

1. A wastewater works using biological treatment methods consisting of but not limited to (i) suspended growth reactors, (ii) aerated lagoons, (iii) constructed wetlands, (iv) filters or other attached growth contractors, (v) processes utilizing biological nutrient control, or (vi) processes utilizing land treatment having a design hydraulic capacity greater than 0.04 MGD, but equal to or less than 0.5 MGD;

2. A wastewater works using natural treatment methods (referenced in 9VAC25-790-870 as land treatment utilizing a secondary process for pretreatment followed by irrigation, overland flow infiltration-percolation, or combination thereof or aquatic ponds or constructed wetlands) with a design hydraulic capacity greater than 1.0 MGD;

3. A wastewater works using advanced waste treatment methods consisting of but not limited to (i) ammonia stripping, (ii) breakpoint chlorination, (iii) carbon adsorption, (iv) chemical coagulation, (v) flocculation, (vi) precipitation, (vii) filtration, or (viii) demineralization (i.e., ion exchange, reverse osmosis, or electrodialysis) having a

design hydraulic capacity greater than 1,000 gallons per day but equal to or less than 0.1 MGD; or

4. A wastewater works classified by DEQ or VDH as a Class 3 or Class 4 wastewater works facility.

C. A Class 2 wastewater works licensee may operate any wastewater works as follows:

1. A wastewater works using biological treatment methods consisting of but not limited to (i) suspended growth reactors, (ii) aerated lagoons or constructed wetlands, (iii) filters or other attached growth contactors, (iv) processes utilizing biological nutrient control, or (v) processes utilizing land application having a design hydraulic capacity greater than 0.5 MGD but equal to or less than 5.0 MGD;

2. A wastewater works using advanced waste treatment methods consisting of but not limited to (i) ammonia stripping, (ii) breakpoint chlorination, (iii) carbon adsorption, (iv) chemical coagulation, (v) flocculation, (vi) precipitation, (vii) filtration, (viii) demineralization (i.e., ion exchange, reverse osmosis, or electrodialysis) and having a hydraulic capacity greater than 0.1 MGD but equal to or less than 2.5 MGD; or

3. A wastewater works classified by DEQ or VDH as a Class 2, Class 3, or Class 4 wastewater works.

D. A Class 1 wastewater works licensee may operate any wastewater works as follows:

1. A wastewater works using biological treatment methods consisting of but not limited to (i) suspended growth reactors, (ii) aerated lagoons or constructed wetlands, (iii) filters or other attached growth contactors, (iv) processes utilizing biological nutrient control, (v) processes utilizing land treatment and having a hydraulic capacity greater than 5.0 MGD;

2. A wastewater works using advanced waste treatment methods consisting of but not limited to (i) ammonia stripping, (ii) breaking chlorination, (iii) carbon adsorption, (iv) chemical coagulation, (v) flocculation, (vi) precipitation, (vii) filtration, (viii) demineralization (i.e., ion exchange, reverse osmosis, or electrodialysis) and having a design capacity greater than 2.5 MGD;

3. A wastewater works classified by DEQ or VDH as a Class 1, Class 2, Class 3, or Class 4 wastewater works.

18VAC160-30-370. Waterworks.

A. A Class 6 waterworks licensee may operate any waterworks as follows:

1. A waterworks serving fewer than 400 persons that provides no treatment or employs one or more of the following treatment processes: (i) hypochlorination for disinfection, (ii) corrosion control with calcite or magnesium oxide contactors or solution feed except with caustic, or (iii) sequestration by solution feed; or

2. A waterworks classified by VDH as a Class 6 waterworks.

B. A Class 5 waterworks licensee may operate any waterworks as follows:

1. A waterworks serving 400 or more persons that provides no treatment or employs one or more of the following treatment processes: (i) hypochlorination for disinfection, (ii) corrosion control with calcite or magnesium oxide contactors or solution feed except with caustic, or (iii) sequestration by solution feed; or

2. A waterworks classified by VDH as a Class 5 waterworks.

C. A Class 4 waterworks licensee may operate any waterworks as follows:

1. A waterworks or treatment facility serving fewer than 5,000 persons or having a treatment facility capacity of less than 0.5 MGD and employing one or more of the following: (i) disinfection other than with hypochlorination, (ii) caustic soda feed, (iii) iron and manganese removal, (iv) ion exchange, (v) slow sand filtration, (vi) aeration, (vii) rechlorination other than with hypochlorination, (viii) activated carbon contactors, (ix) membrane or other filtration technologies without chemical coagulation, or (x) fluoridation with a saturator; or

2. A waterworks classified by VDH as a Class 4 waterworks.

D. A Class 3 waterworks licensee may operate any waterworks as follows:

1. A waterworks or treatment facility serving fewer than 5,000 persons or having a treatment facility capacity less than 0.5 MGD, whichever is greater, and employing conventional filtration or chemical coagulation in combination with membrane filtration;

2. A waterworks or treatment facility serving 5,000 or more persons or having a treatment facility capacity of 0.5 MGD or more, whichever is greater, and employing one or more of the following: (i) disinfection other than with hypochlorination, (ii) caustic soda feed, (iii) iron and manganese removal, (iv) ion exchange, (v) slow sand filtration, (vi) aeration, (vii) rechlorination other than with hypochlorination, (viii) activated carbon contactors, (ix) membrane or other filtration technologies without chemical coagulation, or (x) fluoridation with a saturator or acid feed;

3. A waterworks or treatment facility employing fluoridation with other than a saturator not considered a Class 1 or Class 2 waterworks; or

4. A waterworks classified by VDH as a Class 3 waterworks.

E. A Class 2 waterworks licensee may operate any waterworks as follows:

1. A waterworks or treatment facility serving 5,000 or more persons but fewer than 50,000 persons or having a treatment facility capacity of 0.5 MGD or more but less than 5.0 MGD, whichever range applies, and employing rapid rate conventional filtration chemical coagulation in combination with membrane filtration;

2. A waterworks or treatment facility serving fewer than 50,000 persons or having a treatment facility capacity of less than 5.0 MGD employing high rate conventional filtration; or

3. A waterworks classified by the VDH as a Class 2 waterworks.

F. A Class 1 waterworks licensee may operate any waterworks as follows:

1. A waterworks or treatment facility serving 50,000 or more persons or having a treatment facility capacity of 5.0 MGD or more and employing conventional filtration or chemical coagulation in combination with membrane filtration; or

2. A waterworks classified by VDH as a Class 1 waterworks.

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 (18VAC160-30)

Waterworks Operator License Application, A436-1955LIC-v3 (eff. 7/2016)

Provisional Waterworks Operator License Application, A436-1955PLIC-v2 (eff. 7/2016)

Wastewater Works Operator License Application, A436-1965LIC-v2 (eff. 7/2016)

Provisional Wastewater Works Operator License Application, A436-1965PLIC-v2 (eff. 7/2016)

Waterworks and Wastewater Works Operator - Upgrade Provisional License Application, A436-1955_65UPG-v3 (eff. 7/2016)

Out-of-State Facility Description and Experience Verification Application, A436-19STATE EXP-v3 (eff. 4/2015)

Waterworks and Wastewater Works Operator Experience Verification Application, A436-19WWEXP-v3 (eff. 1/2014)

Provisional Description and Experience Verification Application, A436-1955_65PEXP-v3 (eff. 12/2014)

Continuing Professional Education (CPE) Application - Certificate of Completion, A436-19CPE-v3 (eff. 10/2015)

Training Course Approval Application, A465-19CRS-v2 (eff. 5/2013)

Education and Training Substitution Form, A436-19EDTR-v3 (eff. 1/2014)

CHAPTER 40
ONSITE SEWAGE SYSTEM PROFESSIONALS LICENSING REGULATIONS

Part I
Definitions

18VAC160-40-10. Definitions.

A. Section 54.1-2300 of the Code of Virginia provides definitions of the following terms and phrases as used in this chapter:

"Board"

"Onsite sewage system"

"Operator"

"Wastewater works"

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

"Alternative onsite sewage system" means a treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.

"Alternative onsite sewage system installer" means an individual licensed by the board to construct, install, and repair conventional and alternative onsite sewage systems.

"Alternative onsite sewage system operator" means an individual licensed by the board to operate and maintain conventional and alternative onsite sewage systems.

"Alternative onsite soil evaluator" means an individual licensed by the board to evaluate soils and soil properties in relationship to the effect of these properties on the use and management of these soils and the locations for conventional and alternative onsite sewage systems, to certify in accordance with applicable state regulations and local ordinances that sites are suitable for conventional and alternative onsite sewage systems, and to design conventional and alternative onsite sewage systems suitable for the soils.

"Applicant" means an individual who submits an application with the appropriate fee and other required documentation.

"Application" means a completed, board-prescribed form submitted with the appropriate fee and other required documentation.

"Authorized onsite soil evaluator" means an individual holding an authorized onsite soil evaluator certification issued by the Virginia Department of Health that was valid on June 30, 2009.

"Category" means journeyman or master as applicable to the professionals under the board's purview.

"Class" means conventional or alternative as applicable to the professionals under the board's purview.

"Contact hour" means 50 minutes of participation in a structured training activity.

"Conventional onsite sewage system" means a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drainfield.

"Conventional onsite sewage system installer" means an individual licensed by the board to construct, install, and repair conventional onsite sewage systems.

"Conventional onsite sewage system operator" means an individual licensed by the board to operate and maintain a conventional onsite sewage system.

"Conventional onsite soil evaluator" means an individual licensed by the board to evaluate soils and soil properties in relationship to the effects of these properties on the use and management of these soils as the locations for conventional and alternative onsite sewage systems, to certify in accordance with applicable state regulations and local ordinances that sites are suitable for conventional and alternative onsite sewage systems, and to design conventional onsite sewage systems suitable for the soils.

"Department" means the Virginia Department of Professional and Occupational Regulation.

"Direct supervision" means being immediately available and fully responsible for the provision of onsite sewage system services regulated pursuant to Chapter 23 (§ 54.1-2300 et seq.) of Title 54.1 and this chapter.

"Interim license" refers to the initial issuance of professional licenses during the implementation of the onsite sewage system professional licensure program. Such licenses were limited to four years and not renewable.

"Journeyman" means an individual who possesses the minimum skills and competency to assist with the installation or maintenance of onsite sewage systems or assist in the evaluation of soil sites as suitable for conventional and alternative onsite sewage systems and to design conventional onsite sewage systems under the direct supervision of a master licensee.

"Licensee" means an individual holding a valid license issued by the board.

"Licensure" means a method of regulation whereby the Commonwealth, through the issuance of a license, authorizes a person possessing the character and minimum skills to engage in the practice of a profession or occupation that without such license is unlawful to practice.

"Maintenance" or "maintain" means performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis. Maintenance shall not include replacement of tanks, drainfield piping, or distribution boxes or work requiring a construction permit and a licensed onsite sewage system installer.

"Master" means an individual who possess the minimum skills and competency to install or maintain onsite sewage system or evaluate soil sites as suitable for conventional and alternative onsite sewage systems and to design conventional and alternative onsite sewage systems.

"Operate" means the act of (i) placing into or taking out of service a unit process or unit processes or (ii) making or causing adjustments in the operation of a unit process at a treatment works.

"Profession" means the practice of onsite soil evaluation, onsite sewage system installation, and onsite sewage system operation.

"Professional" means an onsite sewage system installer, onsite sewage system operator, or onsite soil evaluator who is licensed pursuant to the provisions of this chapter and is in good standing with the board to practice his profession in this Commonwealth.

"Renewal" means the process and requirements for periodically approving the continuance of a license.

"Sewage" means water-carried and nonwater-carried human excrement or kitchen, laundry, shower, bath, or lavatory wastes separately or together with such underground, surface, storm, or other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments, or other places.

"Training credit" means a unit of board-approved training or formal education completed by an individual that may be used to substitute for experience when applying for a license.

"Treatment works" means any device or system used in the storage, treatment, disposal, or reclamation of sewage or combinations of sewage and industrial wastes including, but not limited to, pumping power and other equipment and appurtenances, septic tanks and any works, including land, that are or will be (i) an integral part of the treatment processes or (ii) used for ultimate disposal or residues or effluent resulting from such treatment.

"VDH" means the Virginia Department of Health.

Part II
Entry

18VAC160-40-20. Application procedures.

A. All applicants seeking licensure shall submit an application with the appropriate fee in 18VAC160-40-40. Applications shall be made on forms provided by the board.

By submitting the application to the department, the applicant certified that the applicant has read and understands the applicable statutes and the board's regulations.

The receipt of an application and the deposit of fees by the board does not indicate approval of the application by the board.

B. The board may make further inquiries and investigations with respect to the applicant's qualifications to confirm or amplify information supplied. All applications shall be completed in accordance with the instructions contained herein and on the application. Applications will not be considered complete until all required documents are received by the board. If an examination is required for licensure, the applicant will not be permitted to sit for the applicable board-approved examination until the application is complete and approved.

C. The applicant will be notified within 30 days of the board's receipt of an initial application if the application is incomplete. An individual who fails to complete the process within 12 months of receipt of the application in the board's office must submit a new application. If applicable, the applicant has 12 months from approval of the application to pass the board-approved examination. Failure to pass the board-approved examination within 12 months of approval will result in the applicant being required to submit a new application to be considered for licensure.

D. The applicant shall immediately report all changes in information supplied with the application, if applicable, prior to the issuance of the license or expiration of the application or examination period.

18VAC160-40-30. General fee requirements.

All fees are nonrefundable and shall not be prorated. The date on which the fee is received by the department or its agent will determine whether the fee is on time. Checks or money orders shall be made payable to the Treasurer of Virginia.

18VAC160-40-40. Fee schedule.

Fee Type	Fee Amount	When Due
Initial application (for each profession, class, and category of license)	$100	With application
Renewal (for each profession, class, and category of license)	$100	With renewal application
Reinstatement (for each profession, class, and category of license)	$125 (renewal fee + $25 reinstatement fee)	With reinstatement application

18VAC160-40-50. Examination fee.

The fee for examination or reexamination is subject to charges to the department by an outside vendor based on a contract entered into in compliance with the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia). Fees may be adjusted and charged to the candidate in accordance with this contract.

18VAC160-40-60. General requirements for licensure.

A. In addition to the specific qualifications for each profession, class, and category of licensure, each applicant for licensure shall meet the requirements provided in this section:

1. The applicant shall be at least 18 years old.

2. The applicant shall disclose his mailing address. A post office box is only acceptable as a mailing address when a physical address is provided.

3. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose the following information:

a. All felony convictions.

b. All misdemeanor convictions that occurred within three years of the date of application.

Any plea of nolo contendere or finding of guilt regardless of adjudication or deferred adjudication shall be considered a conviction for the purposes of this section. The record of conviction certified or authenticated in such form as to be admissible in evidence under the laws of the jurisdiction where convicted shall be admissible as prima facie evidence of such guilt.

B. The board, at its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

C. The applicant shall report suspensions, revocations, or surrendering of a license, certification, or registration in connection with a disciplinary action or that has been subject of discipline in any jurisdiction prior to applying for licensure. The board at its discretion may deny licensure to any applicant based on prior suspensions, revocations, or surrender or licenses based on disciplinary action by any jurisdiction.

18VAC160-40-70. Education and training for experience.

A. Each individual applying for a license may receive credit for up to half of the required experience for:

1. Satisfactory completion of postsecondary courses in wastewater, biology, chemistry, geology, hydraulics, hydrogeology, or soil science at the rate of one month per semester hour or two-thirds of a month per quarter hour; or

2. Satisfactory completion of board-approved onsite sewage system installer or operator or onsite soil evaluation training courses, as applicable to the license sought, at the rate of one month for each training credit earned. Up to one training credit is awarded for each 10 hours of classroom contact time or for each 20 hours of laboratory exercises and field trip contact time. Training

credit is not earned for breaks, meals, receptions, and time other than classroom, laboratory, and field trip contact time.

B. Education used to meet the education requirements to qualify for licensure may not be substituted for experience.

18VAC160-40-80. Examination procedures and conduct.

A. Upon approval of the application, the board will notify the applicant of his eligibility to take the applicable examination. The license will not be issued prior to the receipt of a passing score for the applicable examination.

B. An applicant who does not receive a passing score within one year after the date of approval of the application by the board to sit for the examination must submit a new application and meet entry requirements in effect at the time of the submittal of the new application.

C. In those instances where the applicant is required to take an examination for licensure, the applicant shall follow all rules established by the board with regard to conduct at the examination. Such rules shall include written instructions communicated prior to the examination date and instructions communicated at the site, either written or oral, on the date of the examination. Failure to comply with all rules established by the board and the testing organization with regard to conduct at the examination shall be grounds for denial of the application, voiding of examination scores, or any combination thereof.

18VAC160-40-90. Individuals certified or licensed in another jurisdiction.

Any applicant holding a valid license or certificate in another jurisdiction shall meet the requirements of this chapter, including having equivalent experience and education. The applicant shall pass the appropriate Virginia examination in those instances where an examination for licensure is required.

18VAC160-40-100. Full-time experience or equivalent.

For the purpose of this part, experience requirements are expressed in terms of calendar periods of full-time employment as an operator, installer, or onsite soil evaluator in the same class for which licensure is sought.

1. A year of full-time employment is defined as a minimum of 1,760 hours during a 12-month period or a minimum of 220 workdays in a 12-month period. A workday is defined as performing or assisting in the duties of an installer, operator, or onsite soil evaluator to the extent required for the proper installation or maintenance of onsite sewage systems or the evaluation of soil and soil properties for suitability as locations for onsite sewage systems. More than 1,760 hours or 220 workdays during a 12-month period will not be considered as more than one year of full-time employment.

2. Partial credit may be given for actual hours of work or workdays experience if the applicant works less than full time.

Part III
Onsite Sewage System Installers

18VAC160-40-110. License required.

A. No individual shall install a conventional or alternative onsite sewage system without a valid master onsite sewage system installer license issued by the board.

B. An individual cannot simultaneously hold valid master and journeyman onsite sewage system installer licenses in the same class. Issuance of a master onsite sewage system installer license in a specific class shall void the journeyman onsite sewage system installer license in the same class.

C. An individual cannot simultaneously hold valid conventional and alternative master onsite sewage system installer licenses or convention and alternative journeyman licenses. Issuance of a master alternative onsite sewage system installer license shall void the conventional onsite sewage system installer license.

D. A journeyman onsite sewage system installer must work under the direct supervision of a licensed master onsite sewage system installer. A master onsite sewage system installer is responsible for supervising the provision of onsite sewage system installations by any journeyman onsite sewage system installers under his direct supervision.

E. Experience used to qualify for licensure cannot be verified by a journeyman onsite sewage system installer.

18VAC160-40-120. Qualifications for journeyman conventional onsite sewage system installer licenses.

An applicant for licensure as a journeyman conventional onsite sewage system installer shall furnish acceptable documentation that one of the following qualifications has been met:

	Prerequisites	Exam Required	Education Required	Documented Qualifying Experience
1.	Employee, owner, director, or officer of a properly licensed contractor with a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors	No	No	Six months of full-time experience assisting with the installation of conventional or alternative onsite sewage systems verified by one or more of the following: an onsite soil evaluator, an onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009

2.	None	No	No	One year of full-time experience assisting with the installation of conventional or alternative onsite sewage systems verified by one or more of the following: an onsite soil evaluator, an onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009

18VAC160-40-130. Qualifications for master conventional onsite sewage system installer licenses.

An applicant for licensure as a master conventional onsite sewage system installer shall furnish acceptable documentation that one of the following qualifications has been met:

Prerequisites		Exam Required	Education Required	Documented Qualifying Experience
1.	Employee, owner, director, or officer of a properly licensed contractor with a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors	Yes	20 hours of training approved by the board covering basic installation of conventional or alternative onsite sewage systems	One year of full-time experience installing conventional or alternative onsite sewage systems verified by one or more of the following: an onsite soil evaluator, an onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
2.	Employee, owner, director, or officer of a properly licensed contractor with a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors	Yes	No	Two years of full-time experience installing conventional or alternative onsite sewage systems verified by one or more of the following: an onsite soil evaluator, an onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
3.	Interim installer or journeyman license	Yes	20 hours of training approved by the board covering basic installation of conventional or alternative onsite sewage systems	Two years of full-time experience installing conventional or alternative onsite sewage systems verified by one or more of the following: an onsite soil evaluator, an onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
4.	Interim installer or journeyman installer license	Yes	No	Three years of full-time experience installing conventional or alternative onsite sewage systems verified by one or more of the following: an onsite soil evaluator, an onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009

18VAC160-40-140. Qualification for exemption from examination for master conventional onsite sewage system installer applicants.

Applicants seeking licensure as a conventional onsite sewage system installer may be exempt from the examination, provided the board receives the applicable application before July 1, 2016, and the applicant:

1. Is able to satisfactorily demonstrate that he has been actively engaged in performing the duties of a conventional onsite sewage system installer for at least eight years within the 12-year period immediately preceding the date of the application.

Documentation of qualifying experience may be verified by a conventional or alternative onsite soil evaluator, a conventional or alternative onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009; and

2. Meets the requirements of 18VAC160-40-60.

18VAC160-40-150. Qualifications for journeyman alternative onsite sewage system installer licenses.

An applicant for licensure as an alternative onsite sewage system installer shall furnish acceptable documentation that one of the following qualifications has been met:

	Prerequisites	Exam Required	Education Required	Documented Qualifying Experience
1.	Employee, owner, director, or officer of a properly licensed contractor with a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors	No	No	One year of full-time experience assisting with the installation of alternative onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
2.	None	No	No	Two years of full-time experience assisting with the installation of alternative onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009

18VAC160-40-160. Qualifications for master alternative onsite sewage system installer licenses.

An applicant for licensure as a master alternative onsite sewage system installer shall furnish acceptable documentation that one of the following qualifications has been met:

	Prerequisites	Exam Required	Education Required	Documented Qualifying Experience
1.	Employee, owner, director, or officer of a properly licensed contractor with a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors	Yes	No	Two years of full-time experience installing alternative onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
2.	No	Yes	20 hours of training approved by the board covering basic installation of alternative onsite sewage systems	Three years of full-time experience installing alternative onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009

3.	Interim alternative onsite sewage system installer or conventional onsite sewage system installer license	Yes	No	18 months of full-time experience installing alternative onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
4.	No	Yes	20 hours of training approved by the board covering the basic installation of alternative onsite sewage systems	18 months of full-time experience installing alternative onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system installer, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009

Part IV
Onsite Sewage System Operators

18VAC160-40-170. License required.

A. No individual shall operate a conventional or alternative onsite sewage system without a valid master onsite sewage system operator license issued by the board.

B. An individual cannot simultaneously hold valid master and onsite sewage system operator licenses in the same class. Issuance of a master onsite sewage system operator license in a specific class shall void the journeyman onsite sewage system operator license in the same class.

C. An individual cannot simultaneously hold valid conventional and alternative onsite sewage system operator licenses or conventional and alternative journeyman onsite sewage system operator licenses. Issuance of a master alternative onsite sewage system operator license shall void the conventional onsite sewage system operator license.

D. A journeyman onsite sewage system operator must work under the direct supervision of a licensed master onsite sewage system operator. An onsite sewage system operator is responsible for supervising the operation of the onsite sewage system by any journeyman onsite sewage system operator under his responsibility.

E. Experience used to qualify for licensure cannot be verified by a journeyman onsite sewage system operator.

18VAC160-40-180. Qualifications for journeyman conventional onsite sewage system operator licenses.

An applicant for licensure as a journeyman conventional onsite sewage system operator shall furnish acceptable documentation that the following qualification has been met:

Prerequisites	Exam Required	Education Required	Documented Qualifying Experience
None	No	No	Six months of full-time experience assisting with the operation and maintenance of conventional or alternative onsite sewage systems verified by one or more of the following: an onsite soil evaluator, an onsite sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009

18VAC160-40-190. Qualifications for master conventional onsite sewage system operator licenses.

An applicant for licensure as a master conventional onsite sewage system operator shall furnish acceptable documentation that one of the following qualifications has been met:

Prerequisites		Exam Required	Education Required	Documented Qualifying Experience
1.	Wastewater works operator license	Yes	No	None

2.	No	Yes	10 hours of education approved by the board covering the basics of operation and maintenance of conventional onsite sewage systems	Six months of full-time experience in the operation and maintenance of conventional or alternative onsite sewage systems verified by one or more of the following: an onsite soil evaluator, an onsite sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
3.	No	Yes	No	One year of full-time experience in the operation and maintenance of conventional or alternative onsite sewage systems verified by one or more of the following: an onsite soil evaluator, an onsite sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009

18VAC160-40-200. Qualification for exemption from examination for master conventional onsite sewage system operator applicants.

Applicants seeking licensure as a master conventional onsite sewage system operator may be exempt from the examination provided the applicant:

1. Is able to satisfactorily demonstrate that he has been actively engaged in performing the duties of a conventional onsite sewage system operator for at least four years. Documentation of qualifying experience may be verified by a conventional or alternative soil evaluation, a conventional or alternative onsite sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009; and

2. Meets the requirements of 18VAC160-40-60.

18VAC160-40-210. Qualifications for journeyman alternative onsite sewage system operator licenses.

An applicant for licensure as a journeyman alternative onsite sewage operator shall furnish acceptable documentation that one of the following qualifications has been met:

Prerequisites		Exam Required	Education Required	Documented Qualifying Experience
1.	None	No	20 hours of education approved by the board covering the basics of operation and maintenance of alternative onsite sewage systems	One year of full-time experience assisting with the operation and maintenance of alternative onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
2.	None	No	None	Two years of full-time experience assisting with the operation and maintenance of alternative onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009

18VAC160-40-220. Qualifications for master alternative onsite sewage system operator licenses.

An applicant for licensure as a master alternative onsite sewage system operator shall furnish acceptable documentation that one of the following has been met:

	Prerequisites	Exam Required	Education Required	Documented Qualifying Experience
1.	Held or holds a conventional onsite sewage system operator license	Yes	10 hours of training approved by the board covering the basics of operation and maintenance of alternative onsite sewage systems	One year of full-time experience in the operation and maintenance of onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
2.	Held or holds a conventional onsite sewage system operator license	Yes	No	One year of full-time experience in the operation and maintenance of onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
3.	None	Yes	20 hours of training approved by the board covering the basics of operation and maintenance of alternative onsite sewage systems	Two years of full-time experience in the operation and maintenance of onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
4.	Wastewater works operator license	Yes	No	Six months of full-time experience in the operation and maintenance of onsite sewage systems verified by one or more of the following: an alternative onsite soil evaluator, an alternative onsite sewage system operator, a professional engineer, or an authorized onsite soil evaluator certified by VDH before July 1, 2009
5.	Wastewater works operator license	Yes	20 hours of training approved by the board in basics of operation and maintenance of alternative onsite sewage systems	No

Part V
Onsite Soil Evaluator

18VAC160-40-230. License required.

A. Notwithstanding the provisions of Chapter 4 (§ 54.1-400 et seq.) of Title 54.1 of the Code of Virginia, no individual shall evaluate soils and soil properties for suitability as locations for or design conventional or alternative onsite sewage systems without possessing a valid license issued by the board.

B. An individual cannot simultaneously hold master and journeyman onsite soil evaluator licenses in the same class. Issuance of a master onsite soil evaluator license in a specific class shall void the journeyman onsite soil evaluator license in the same class.

C. An individual cannot simultaneously hold valid conventional and alternative onsite soil evaluator licenses or conventional and alternative journeyman onsite soil evaluator licenses. Issuance of an alternative master onsite soil evaluator license shall void the conventional onsite soil evaluator license.

D. A journeyman onsite soil evaluator must work under the direct supervision of a master onsite soil evaluator. A master onsite soil evaluator of an equal or greater class is responsible for supervising the provision of onsite soil evaluations and designs by any journeyman onsite soil evaluator under his responsibility.

E. Experience to qualify for licensure cannot be verified by a journeyman onsite soil evaluator.

18VAC160-40-240. Qualifications for journeyman conventional onsite soil evaluator licenses.

An applicant for licensure as a journeyman conventional onsite soil evaluator shall furnish acceptable documentation that one of the following has been met:

Prerequisites		Exam Required	Education Required	Documented Qualifying Experience
1.	Virginia professional soil scientist license	No	No	No
2.	No	No	No	One and one-half years of full-time experience assisting in the evaluation of site and soil conditions and design of conventional onsite sewage systems verified by one or more of the following: an authorized soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an onsite soil evaluator
3.	No	No	VDH onsite system training	One year of full-time experience assisting in the evaluation of site and soil conditions and design of conventional onsite sewage systems verified by one or more of the following: an authorized soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an onsite soil evaluator

18VAC160-40-250. Qualifications for master conventional onsite soil evaluator licenses.

An applicant for licensure as a master conventional onsite soil evaluator shall furnish acceptable documentation that one of the following qualifications has been met:

Prerequisites		Exam Required	Education Required	Documented Qualifying Experience
1.	No	Yes	Master's or bachelor's degree	One and one-half years of full-time experience evaluating site and soil conditions and designing conventional onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an onsite soil evaluator

2.	No	Yes	Associate's degree	Three years of full-time experience evaluating site and soil conditions and designing conventional onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an onsite soil evaluator
3.	No	Yes	VDH onsite sewage system program	Two years of full-time experience evaluating site and soil conditions and designing conventional onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an onsite soil evaluator
4.	Journeyman or interim conventional onsite soil evaluator	Yes	No	Three years of full-time experience evaluating site and soil conditions and designing conventional onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an onsite soil evaluator

18VAC160-40-260. Qualifications for journeyman alternative onsite soil evaluator licenses.

An applicant for licensure as a journeyman alternative onsite soil evaluator shall furnish acceptable documentation that one of the following qualifications has been meet:

Prerequisites		Exam Required	Education Required	Documented Qualifying Experience
1.	Virginia professional soil scientist license	No	No	One year of full-time experience assisting in the evaluation of site and soil conditions and design of alternative onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an alternative soil evaluator
2.	Possess or held either a valid interim alternative onsite soil evaluator license or a conventional onsite soil evaluator license	No	No	One year of full-time experience assisting in the evaluation of site and soil conditions and design of alternative onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an alternative soil evaluator
3.	An authorized onsite soil evaluator certified by VDH before July 1, 2009	No	No	One year of full-time experience assisting in the evaluation of site and soil conditions and design of alternative onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an alternative soil evaluator
4.	No	No	No	Two years of full-time experience assisting in the evaluation of site and soil conditions and design of alternative onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an alternative soil evaluator

18VAC160-40-270. Qualifications for master alternative onsite soil evaluator licenses.

An applicant for licensure as a master alternative onsite soil evaluator shall furnish acceptable documentation that one of the following qualifications has been met:

	Prerequisites	Exam Required	Education Required	Documented Qualifying Experience
1.	No	Yes	Master's or bachelor's degree	One and one-half years of full-time experience evaluating site and soil conditions and designing alternative onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an alternative onsite soil evaluator
2.	No	Yes	Associate's degree	Three years of full-time experience evaluating site and soil conditions and designing alternative onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an alternative onsite soil evaluator
3.	Held or holds a conventional onsite soil evaluator license	Yes	No	Two years of full-time experience evaluating site and soil conditions and designing alternative onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an alternative onsite soil evaluator
4.	No	Yes	No	Three years of full-time experience evaluating site and soil conditions and designing alternative onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an alternative onsite soil evaluator
5.	An authorized onsite soil evaluator certified by VDH before July 1, 2009	Yes	No	Two years of full-time experience evaluating site and soil conditions and designing alternative onsite sewage systems verified by one or more of the following: an authorized onsite soil evaluator certified by VDH before July 1, 2009, a professional engineer, or an alternative onsite soil evaluator

18VAC160-40-280. Acceptable degree programs and verification procedures.

A. Applicants seeking to qualify for licensure based on completion of an associate's, bachelor's, or master's degree shall submit an official transcript form the school where the applicable degree was obtained. Only degrees from an accredited college or university that is approved or accredited by the Commission on Colleges, a regional or national accreditation association, or by an accrediting agency that is recognized by the U.S. Secretary of Education will be considered. The following degrees shall be considered to qualify in accordance with 18VAC160-40-250 and 18VAC160-40-270:

1. Bachelor's or master's degree in soil science, biology, chemistry, engineering, environmental science, geology, agronomy, earth science, or environmental health.

2. Associate's degree in wastewater works, environmental science, or engineering technology.

3. Bachelor's degree in a related physical, biological, environmental, or chemical science that includes a minimum of 40 semester credit hours in any combination of science and math.

B. Any applicant who has earned a degree from an institution outside of the United States shall have the degree authenticated and evaluated by an education credential evaluation services. The board reserves the right to reject any evaluation submitted by the applicant.

Part VI
Renewal and Reinstatement

18VAC160-40-290. Expiration and renewal.

A. A license shall expire two years from the last day of the month in which it was issued.

B. Prior to the expiration date shown on the license, the board shall mail a renewal notice to the licensee's address of record. The licensee shall return a renewal notice and the applicable renewal fee. Failure to receive a renewal notice from the board does not relieve the licensee of the obligation to renew. If the licensee fails to receive the renewal notice, a copy of the license may be submitted with the required fee as an application for renewal.

C. By submitting the renewal fee, the licensee is certifying his continued compliance with the Standards of Practice and Conduct (Part VI (18VAC160-40-440 et seq.) of this chapter) as established by the board. In addition, by submitting the renewal fee, licensees are certifying compliance with the continuing professional education requirements of this chapter.

18VAC160-40-300. Reinstatement.

A. If all the requirements for renewal of the license as specified in 18VAC160-40-290 are not completed within 30 days of the license expiration date, a reinstatement fee shall be required as established in 18VAC160-40-40.

B. A license may be reinstated for up to one year following the expiration date of the license. Any licensee who fails to reinstate the license within 12 months after the expiration date shall apply for a new license and meet entry requirements in effect at the time of submittal of the new application. The individual shall be deemed to be eligible to sit for the examination for the same profession, class, and category of license as the expired license, if an examination is applicable.

C. By submitting the reinstatement fee, the licensee is certifying his continued compliance with the Standards of Practice and Conduct (Part VI (18VAC160-40-440 et seq.) of this chapter) as established by the board. In addition, by submitting the reinstatement fee, licensees are certifying compliance with the continued professional education requirements of this chapter.

D. Any regulated activity conducted subsequent to the license expiration date may constitute unlicensed activity and be subject to prosecution under Chapter 1 (§ 54.1-100 et eq.) of Title 54.1 of the Code of Virginia.

18VAC160-40-310. Status of license during period prior to reinstatement.

A licensee who applies for reinstatement of the license shall be subject to all laws and regulations as if the regulant had been continuously licensed. The licensee shall remain under and be subject to the disciplinary authority of the board during the entire period.

18VAC160-40-320. Board discretion to deny renewal or reinstatement.

A. The board may deny renewal or reinstatement of license for the same reasons as the board may refuse initial licensure or discipline a licensee.

B. The board may deny renewal or reinstatement of a licensee if the licensee has been subject to a disciplinary proceeding and has not met the terms of an agreement for licensure, has not satisfied all sanctions, or has not fully paid monetary penalties and costs imposed by the board.

Part VII
Continuing Professional Education

18VAC160-40-330. Continuing professional education.

A. Each licensee shall have completed the following number of continuing professional education (CPE) contact hours during each renewal cycle. CPE provisions do not apply to licenses that were held for less than two years on the date of expiration.

1. Master alternative and conventional onsite soil evaluators, onsite sewage system installers, and onsite sewage system operators shall obtain a minimum of 20 contact hours.

2. Journeyman alternative and conventional onsite soil evaluators, onsite sewage system installers, and onsite sewage system operators shall obtain a minimum of 10 contact hours.

B. CPE courses completed during the license period immediately prior to the expiration date of the license shall be acceptable in order to renew the license. CPE courses completed during a license renewal cycle to satisfy the CPE requirements of the preceding licensing renewal cycle shall be valid only for that preceding license renewal cycle and shall not be accepted for subsequent renewal cycles.

C. The licensee will not receive credit for completing the same CPE course with the same content more than once during a license period.

D. A licensee may receive CPE credit for teaching a course that otherwise meets the requirements of this chapter; however, additional credit shall not be given for subsequent offering of a course or activity with the same content within the same licensing cycle. In addition a licensee may receive two hours of CPE no more than once during a single licensing cycle for the initial development or substantial updating of a CPE course.

E. For all licenses, safety subjects shall not count for more than one half of the total required CPE hours.

18VAC160-40-340. CPE subject matter for onsite sewage system installers.

The following course topics will be accepted for CPE credit for onsite sewage installers:

1. Sewage system installation;

2. Operating and maintaining equipment;

3. Security and safety procedures;

4. General science and mathematical principles;

5. Administrative knowledge and procedures applicable to the profession;

6. Laws and regulations applicable to the profession;

7. Monitoring, evaluating and adjusting treatment processes (alternative onsite sewage system installers only); and

8. Management and supervision principles (master onsite sewage system installer only, maximum of five credit hours).

18VAC160-40-350. CPE subject matter for onsite sewage system operators.

The following course topics will be accepted for credit for onsite sewage system operators:

1. Onsite system operations;

2. Monitoring, evaluating, and adjusting treatment processes;

3. Operating and maintaining equipment;

4. Security and safety procedures;

5. General science and mathematical principles;

6. Administrative knowledge applicable to the profession;

7. Laws and regulations applicable to the profession; and

8. Management and supervision principles (applicable to master onsite sewage system operations only, maximum of five credit hours).

18VAC160-40-360. CPE subject matter for onsite soil evaluators.

The following course topics will be accepted for credit for onsite soil evaluators:

1. Site and soil evaluations;

2. Security and safety procedures;

3. System design;

4. Inspections;

5. General science and mathematical principles;

6. Administrative knowledge and procedures applicable to the profession;

7. Laws and regulations applicable to the profession; and

8. Management and supervision principles (applicable to master onsite soil evaluators only, maximum of five contact hours).

18VAC160-40-370. Use of training credits and formal education for CPE credit.

Any course approved by the board for substitution as training credits or formal education semester hours, as provided for in 18VAC160-40-70 or 18VAC160-40-280, shall also be acceptable on an hour-for-hour basis for CPE contact hours. One semester hour of college credit shall equal 15 CPE contact hours, and one-quarter hour of college credit shall equal 10 CPE hours. The training credits or formal education must be applicable to the license for which CPE credit is sought.

18VAC160-40-380. Maintenance of CPE.

A. For a period of at least two years following the end of the license renewal cycle for which the CPE was taken, the following evidence shall be maintained to document completion of the required CPE.

1. Evidence of completion of a structured training activity, which shall consist of the name, address, and telephone number of the sponsor;

2. The dates the licensee participated in the training;

3. Description of the subject matter presented; and

4. A statement from the sponsor verifying the number of hours completed.

B. The board may conduct an audit of its licensees to ensure compliance with the applicable CPE requirements. Licensees who are selected for audit shall provide the necessary documentation stipulated in this section.

Part VIII
Training Course Approval

18VAC160-40-390. Approval of training courses.

A. Training courses may be substituted for experience pursuant to the provisions of 18VAC160-40-70. With the exception of training courses provided pursuant to 18VAC160-40-330, training courses that may be substituted for required experience must be approved by the board prior to commencing in accordance with the provisions of this section.

B. Each training provider seeking course approval shall submit an application for approval on a form provided by the board. Training courses for which experience credit may be granted must be conducted in general conformance with the guidelines of the International Association for Continued Education and Training (association). The board reserves the right to waive any of the requirements of the association's guidelines on a case-by-case basis. Only classroom, laboratory, and field trip contact time will be used to compute training credits. No credit will be given for breaks, meals, or receptions.

1. Organization. The board will only approve training offered by a sponsor that is an identifiable organization with a mission statement outlining its functions structure, process, and philosophy and that has a staff of one or more persons with the authority to administer and coordinate the training course.

2. Training course records. The board will only approve training offered by a sponsor that maintains records for all participants for a minimum of seven years and that has a written policy on retention and release of records.

3. Instructors. The board will only approve training conducted by personnel who have demonstrated competency in the subject being taught, an understanding of the learning objective, and knowledge of the learning process to be used.

4. Objectives. The board will only approve courses that have a series of stated objectives that are pertinent to the tasks performed by the licensee. The training course content must be consistent with those objectives.

5. Course completion requirements. For successful completion of a training course, participants must attend 90% or more of the class contact time and must demonstrate their learning through written examinations, completion of a project, oral examination, or other similar assessment techniques.

18VAC160-40-400. Application for training course approval.

A. The board shall consider the following information, to be submitted by the course sponsor or instructor on forms provided by the board:

1. Course information.

a. Course title;

b. Planned audience;

c. Name of sponsor;

d. Name, physical address, email address, and phone number of contact person;

e. Scheduled presentation dates;

f. Detailed course schedule, hour-by-hour including begin and end times;

g. List of planned breaks;

h. Scheduled presentation location; and

i. Identification of the profession, category, and class of license to which the course is applicable and relevancy to the identified license type.

2. Instructor qualifications.

a. Name of instructor;

b. Title;

c. Employer;

d. Board license number or numbers, if applicable; and

e. Summary of qualifications to teach the course.

3. Training materials.

a. Course objectives. A listing of the course objectives stated in terms of the skills and knowledge the participant will be able to demonstrate as a result of the training.

b. Course outline. A detailed outline showing the planned activities that will occur during the training course, including major topics, planned presentation sequence, laboratory and field activities, audiovisual presentations, and other major activities.

c. Course reference materials. A list of the name, publisher, and publication date for commercially available publications. For reference materials developed by the course sponsor or available exclusively through the course, a copy of the reference.

d. Audiovisual support materials. A listing of any commercially available audiovisual support material that will be used in the program. A brief description of any sponsor or instructor generated audiovisual material that will be used.

e. Handouts. Identification of all commercially available handout materials that will be used, as well as copies other planned handouts.

4. Determination of successful completion. A description of the means that will be used to assess the learning of each participant to determine successful completion of training program, such as examinations, projects, personal evaluations by the instructor, or other recognized evaluation techniques. Correspondence and other distance learning courses must include appropriate testing procedures to verify completion of the course.

B. Recurring training programs. If there are plans to present the same course of instruction routinely at multiple locations with only minor modifications and changes, the board may approve the overall program rather than individual presentations if so required by the sponsor.

1. The board shall consider all of the information listed in subsection A of this section except those items related to specific offerings of the course.

2. Board approval will apply only to those specific offerings certified by the sponsoring organization as having been conducted by instructors meeting the established criteria and in accordance with the board-approved course outlines and objectives.

18VAC160-40-410. Maintenance of training course approval.

A. At times established by the board, the board may require that course providers that have previously obtained course approval provide the board with evidence, in a form set forth by the board, that the provider continues to comply with the requirements of this chapter. Failure to continue to comply with the board's requirements or respond to such a request may result in the board withdrawing its approval.

B. Substantial modifications or changes to the information provided in 18VAC160-40-390 and 18VAC160-40-400 must be reported to the board within 30 days of the change. Failure to report the changes as required may result in the withdrawal of approval by the board.

C. Any change of address of the training provider shall be reported in writing within 30 days of the change.

D. The board may conduct an audit of the training provider to ensure continued compliance with this chapter.

18VAC160-40-420. Withdrawal of approval.

The board may withdraw approval of any provider for the following reasons:

1. The course or courses being offered no longer meet the standards established by the board.

2. The provider, through an agent or otherwise, advertises its services in a fraudulent or deceptive way.

3. The provider, instructor, or designee of the provider falsifies any information relating to the application for approval, course information, or student records.

4. The provider fails to respond to the board or any of its agents.

18VAC160-40-430. Training course offered by certain entities, board approval not required.

A. Training courses provided by (i) federal, state, or local government agencies; (ii) accredited colleges or universities approved or accredited by the Commission on Colleges; (iii) a regional or national accreditation association; or (iv) an accrediting agency that is recognized by the U.S. Secretary of Education do not require board approval to be used for experience substitution, provided the training course information submitted to the board includes the following:

1. The course must include the continuing education hours awarded by the entity.

2. The course must be related to the profession, category, or class, if applicable, for which experience substitution is sought.

B. The board may require additional information from the provider as necessary to ensure compliance with this section. If such assurance cannot be made by the board, the training course may not be used for experience substitution, or the provider may pursue board approval pursuant to this chapter.

Part IX
Standards of Practice and Conduct

18VAC160-40-440. Grounds for disciplinary action.

The board may place a licensee on probation; impose a monetary penalty in accordance in § 54.1-202 A of the Code of Virginia; or revoke, suspend, or refuse to renew any license when the licensee has been found to have violated or cooperated with others in violating any provision of the regulations of the board or Chapter 23 (§ 54.1-2300 et.seq.) of Title 54.1 of the Code of Virginia.

18VAC160-40-450. Maintenance of license.

A. No license issued by the board shall be assigned or otherwise transferred.

B. A licensee shall report, in writing, all changes of the address of record and name to the board within 30 days of the change and shall return the license to the board. In addition to the address of record, a physical address is required for each license. If the licensee holds more than one license, the licensee shall inform the board of all licenses, certificates, and registrations affected by the name or address change. The board shall not be responsible for the licensee's failure to receive notices or correspondence due to the licensee's failure to report a change of name or address.

C. Any change in any of the requirements and qualifications for licensure found in Part II (18VAC160-40-20 et seq.), III (18VAC160-40-110 et seq.), or IV (18VAC160-40-170 et seq.) of this chapter shall be reported to the board within 30 days of the change.

18VAC160-40-460. Notice of adverse action.

A. Licensees shall notify the board of the following actions against the licensee.

1. Any disciplinary action taken by any jurisdiction, board, or administrative body of competent jurisdiction, including but not limited to any reprimand, license or certificate revocation, suspension or denial, monetary penalty, requirement for remedial education, or other corrective action.

2. Any voluntary surrendering of a related license, certificate, or registration done in connection with a disciplinary action in another jurisdiction.

3. Any conviction, finding of guilt, or plea of guilty, regardless of adjudication or deferred adjudication, in any jurisdiction of the United States of any misdemeanor involving lying, cheating, stealing, sexual offense, drug distribution, physical injury, or relating to the practice of the profession or of any felony, there being no appeal pending therefrom or the time for appeal having lapsed. Review of convictions shall be subject to the requirements of § 54.1-204 of the Code of Virginia. Any plea of nolo contendere shall be considered a conviction for the purpose of this section.

B. Notices to the board must be made in writing within 30 days of the action. A copy of the order or other supporting documentation must accompany the notice. The record of conviction finding or case decision shall be considered prima facie evidence of a conviction or finding of guilt.

18VAC160-40-470. Prohibited acts.

The following acts are prohibited and any violation may result in disciplinary action by the board:

1. Violating, inducing another to violate, cooperating with another to violate, or combining or conspiring with or acting as agent, partner, or associate for another to violate

any of the provisions of Chapter 1 (§ 54.1-100 et seq.), 2 (§ 54.1-200 et seq.), or 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia, or any of the regulations of the board.

2. Allowing a license issued by the board to be used by another.

3. Obtaining or attempting to obtain a license by false or fraudulent representation, or maintaining or renewing a license by false or fraudulent representation.

4. A licensee having been convicted, found guilty, or disciplined in any jurisdiction of any offense or violation enumerated in 18VAC160-40-460. Review of convictions shall be subject to the requirements of § 54.1-204 of the Code of Virginia.

5. Failing to inform the board in writing within 30 days that the licensee was convicted or found guilty or disciplined in any jurisdiction of any offense or violation enumerated in 18VAC160-40-460.

6. Not demonstrating reasonable care, judgment, or application of the required knowledge, skill, and ability in the performance of the licensee's duties.

7. Having undertaken to perform or performed a professional assignment that the licensee is not qualified to perform by education, experience, training, or any combination thereof.

8. Failing to report a change as required by 18VAC160-40-450.

9. Negligence, misconduct, or incompetence in the practice of the profession.

10. Making any misrepresentation or engaging in acts of fraud or deceit in advertising, soliciting, or in providing professional services.

11. Failing to adequately supervise and review work performed by unlicensed employees or journeyman licensees under the direct supervision of the master licensee.

12. Failure to obtain any permit, approval, or other document required by VDH related to the design, installation, repair, or operation of an onsite sewage system.

13. Knowingly signing plans, drawings, reports, specifications, maps, or other documents related to an onsite sewage system not prepared or reviewed and approved by the licensee.

14. Knowingly misrepresenting factual information in expressing a professional opinion.

15. Failing to act in providing professional services in a manner that safeguards the interests of the public.

18VAC160-40-480. Conflicts of interest.

The licensee shall:

1. Promptly and fully inform an employer or client of any business association, interest, or circumstance that may influence the licensee's judgment of the quality of service.

2. Not accept compensation, financial or otherwise, from more than one party for services on or pertaining to the same project, unless the circumstances are fully disclosed to and agreed to by all interested parties in writing.

3. Neither solicit nor accept financial or other valuable consideration from material or equipment suppliers for specifying their products or services.

4. Not solicit or accept gratuities, directly or indirectly, from contractors or their agents or other parties dealing with a client or employer in connection with work for which the licensee is responsible.

18VAC160-40-490. Licensee responsibility.

A. The primary obligation of the licensee is to the public. If the licensee's judgment is overruled and not adhered to when advising appropriate parties of circumstances of a substantial threat to the public health, safety, or welfare, the licensee shall inform the employer and client, as applicable, of the possible consequences and notify appropriate authorities.

B. The licensee shall not knowingly associate in a business venture with, or permit the use of the licensee's name by, any person or firm where there is reason to believe that person or firm is engaging in activity of a fraudulent or dishonest nature or is violating any law or regulation of the board.

C. A licensee who has direct knowledge that another individual or firm may be violating any of the provisions of this chapter or the provisions of Chapter 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia shall immediately inform the board in writing and shall cooperate in furnishing any further information or assistance that may be required.

D. Except as provided in subsection E of this section, a licensee shall not utilize the evaluations, design, drawings, or work of another licensee without the knowledge and written consent of the licensee or organization of ownership that originated the design, drawings, or work.

E. A licensee who relies on information in VDH files or has received permission to modify or otherwise utilize the evaluation, design, drawings, or work of another licensee pursuant to subsection D or E of this section may certify that work only after a thorough review of the evaluation, design, drawings or work and after he determines that he is willing to assume full responsibility for all design, drawings, or work on which he relies for his opinion.

18VAC160-40-500. Response to inquiry and provision of records.

A. A licensee must respond within 10 days to a request by the board or any of its agents regarding any complaint filed with the department.

B. Unless otherwise specified by the board, a licensee of the board shall produce to the board or any of its agents within 10

days of the request any document, book, or record concerning any transaction pertaining to a complaint filed in which the licensee was involved, or for which the licensee is required to maintain records. The board may extend such timeframe upon a showing of extenuating circumstances prohibiting delivery within such 10-day period.

C. A licensee shall not provide a false, misleading, or incomplete response to the board or any of its agents seeking information in the investigation of a complaint filed with the board.

D. With the exception of the requirements of subsection A or B of this section, a licensee must respond to an inquiry by the board or its agent within 21 days.

18VAC160-40-510. Master licensee's professional responsibilities.

A. Any work performed by a journeyman regulated pursuant to Chapter 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia and this chapter shall be under the direct supervision of the master. Such master and journeyman shall have an employment or written contractual relationship.

B. Each master shall maintain documentation of the employment or contractual relationship with each journeyman under the master's direct supervision. Such documentation shall be kept for a minimum of five years and shall include, at a minimum, the beginning and ending dates of the employment or contractual relationship.

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 (18VAC160-40)

Onsite Soil Evaluator - License Application, A465-1940LIC-v2 (eff. 7/2016)

Onsite Sewage System Operator License Application, A465-1942LIC-v2 (eff. 7/2016)

Waiver of Examination - Master Conventional Onsite Sewage System Operator License Application, A436-1942WAIV-v2 (eff. 7/2016)

Onsite Sewage System Installer License Application, A465-1944LIC-v3 (eff. 7/2016)

Onsite Sewage System Applicant Experience Verification Application, A436-19OSSPEXP-v4 (eff. 7/2016)

Continuing Professional Education (CPE) Application - Certificate of Completion, A436-19CPE-v3 (eff. 10/2015)

Training Course Approval Application, A465-19CRS-v2 (eff. 5/2013)

Education and Training Substitution Form, A436-19EDTR-v3 (eff. 1/2014)

Suspension of Examination - License Application Conventional Onsite Sewage System Installer, A436-1944WAIVE-v4 (eff. 8/2015)

VA.R. Doc. No. R15-4114; Filed November 13, 2015, 11:50 a.m.

TITLE 22. SOCIAL SERVICES

STATE BOARD OF SOCIAL SERVICES

Proposed Regulation

Titles of Regulations: **22VAC40-700. Child Protective Services Central Registry Information (repealing 22VAC40-700-10, 22VAC40-700-20, 22VAC40-700-30).**

22VAC40-705. Child Protective Services (amending 22VAC40-705-10, 22VAC40-705-30 through 22VAC40-705-80, 22VAC40-705-110 through 22VAC40-705-140, 22VAC40-705-160, 22VAC40-705-180).

22VAC40-720. Child Protective Services Release of Information to Family Advocacy Representatives of the United States Armed Forces (repealing 22VAC40-720-10, 22VAC40-720-20).

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

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: February 12, 2016.

Agency Contact: Mary Walter, Child Protective Services Consultant, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7569, FAX (804) 726-7499, or email mary.walter@dss.virginia.gov.

Basis: Section § 63.2-217 of the Code of Virginia gives the State Board of Social Services the responsibility to make rules and regulations to carry out the purposes of social services. Chapter 15 (§ 63.2-1500 et seq.) of Title 63.2 of the Code of Virginia provides the authority for the Child Protective Services (CPS) program.

Purpose: This regulatory action is essential to protect the health, safety, and welfare of children at risk for child abuse or neglect. The goal of this regulatory action is to conduct a review of 22VAC40-705, amend existing CPS requirements and add new requirements to make the CPS regulation consistent with the Code of Virginia, clarify and strengthen the CPS program while balancing the rights of alleged abusers with protecting children and families, and reduce the number of regulations the public may have to review to find CPS information.

Substance: The provisions of the repealed regulations (22VAC40-700 and 22VAC40-720) will be incorporated into 22VAC40-705. The two repealed regulations include

requirements for reporting to the Military Family Advocacy Program and retention time of names of abusers and victims involved in founded investigations within the CPS central registry. This action will reduce the total number of regulations for the CPS program from four to two. A separate regulation, 22VAC40-730, provides requirements specific to conducting investigations of child abuse and neglect in an out-of-family setting by a nonfamilial caretaker.

Statutory changes made in 2013 necessitate additions and amendments to the regulation. These include provisions for (i) suspending sexual abuse and child death investigations if reports generated outside the local agency are necessary to make a disposition and (ii) notification to local school boards for all founded investigations that involve any school employee.

Substantive proposed changes include adding:

- Definitions for "near fatality" and "response time";
- The requirement for reports to be acted upon and the victim child to be interviewed within the determined response time;
- The federal requirement to notify relatives within 30 days of removal;
- A requirement for a risk assessment to be completed for all investigations;
- Provision for suspending certain investigations;
- Retention requirements for serious sexual abuse records;
- A requirement to notify school boards for all employees in founded investigations and notify the individual of this action; and
- Training requirements for all CPS staff.

Substantive proposed changes include removing:

- A requirement to invalidate reports for substance exposed infant if mother sought counseling;
- Directive for not rendering founded dispositions for substance exposed infants; and
- Reference to exact timeframes for emergency removals.

Proposed amendments clarify the definition of mental abuse or neglect, responsibilities for mandated reporting of substance abuse exposure for newborns, release of information to the Military Family Advocacy, release of information when there is a legitimate interest, and release of information while there is a pending criminal investigation. General proposed changes (i) improve the consistency of terminology used within this regulation, such as the use of the term "electronic recording" versus "audio taping"; (ii) adjust numbering, order, and format to improve the organization and flow of requirements; and (iii) correct statutory references to ensure the most current and accurate citation.

Issues: One of the primary advantages to the public and individual private citizens will be a clearer understanding of the processes involved when making a report to CPS and the actions that are taken by CPS. The public will benefit from having CPS staff receiving current, best practice training annually. Local departments of social services (LDSS) will benefit from amendments to the regulation that provide clarity and enhance existing requirements. The public, the Commonwealth, and LDSS will benefit from having fewer regulations. There are no disadvantages to the Commonwealth. LDSS will need to support the training of local staff when the revised regulation is finalized.

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 repeal 22VAC40-700 and 22VAC40-720 and consolidate the rules contained in these regulations into 22VAC40-705 so that all rules relating to child protective services are in one regulation. The Board also proposes to make many clarifying changes, as well as several substantive changes, to current language contained in 22VAC40-705. The substantive changes proposed by the Board include:

1) Removing language that requires child protective services workers to have some indication of abuse or neglect other than prenatal drug or alcohol exposure to make a finding that a newborn has been abused or neglected and

2) Requiring child protective services (CPS) workers and supervisors to complete a minimum of 24 hours of continuing education annually.

Result of Analysis. Benefits outweigh costs for most proposed regulatory changes. For two regulatory changes, there is insufficient information to ascertain whether benefits will outweigh costs.

Estimated Economic Impact. The Board proposes to make many clarifying changes to this regulation. None of these clarifying changes impose new restrictions or requirements on any entity but instead are aimed at making regulatory text more understandable. Consequently, no entity is likely to incur any costs on account of these changes; to the extent that CPS rules are made less opaque, affected entities will likely benefit from them.

Currently, regulations require child protective services workers to have some indication of abuse or neglect other than prenatal drug or alcohol exposure to make a finding that a newborn has been abused or neglected. The Board proposes to remove this requirement from regulation while leaving it in DSS policy at the behest of the Attorney General's Office. In general, language that is part of the Virginia Administrative Code is more protective of the public than language that is in agency policy because it is normally legally binding and because regulatory language can normally only be changed through a process that provides public notice and opportunities for the public to affect the proposed changes, but agencies do not necessarily follow a similar process when

policy is changed. Because of this, parents of drug exposed infants and members of the general public who might want an opportunity to become involved when there is a shift in the rules Local Department of Social Services (LDSS) work under will likely be worse off if this language is removed from the regulation. There is insufficient information to gauge whether benefits that might accrue on account of this change would outweigh the costs for these individuals.

Current regulations do not require CPS workers to complete any continuing education. The Board now proposes to require all CPS workers and supervisors to complete 24 hours of continuing education annually. Board staff reports that local LDSS do not normally have to pay for continuing education classes because there are many class options available at no additional cost to them. They can, for instance have CPS staff take online classes available through the Commonwealth's online Knowledge Center, or staff can participate in online and face-to-face classes and seminars offered through the State Department of Social Services as well as other state and federal agencies. Board staff reports that CPS workers and supervisors will be paid for time spent completing required continuing education. This means that LDSS will incur implicit costs for time that workers and supervisors spend meeting this proposed requirement instead of completing their normal job tasks. The value of that time can be calculated by multiplying the number of CPS workers and supervisors by their hourly wages then by the 24 hours of newly required continuing education. Exact numbers of CPS workers and supervisors are not available but would be a subset of the total number of equivalent Family Service Specialists that are in the employ of LDSS (2,245).[1] These workers have an average salary of roughly $48,000 per year (or roughly $23 per hour).[2] Using these numbers, implicit cost of LDSS time spent in annual training for each affected CPS worker and supervisor would be roughly $552. To the extent that continuing education helps CPS workers complete their job tasks more efficiently or improves outcomes for CPS programs, LDSSs will benefit from this requirement. There is insufficient information to ascertain whether any such benefit will outweigh the costs listed above.

Businesses and Entities Affected. These proposed regulatory changes will affect all 120 LDSSs and their CPS workers and supervisors, as well as families who are the subject of abuse or neglect investigations and other individuals who might be interested in the rules that govern child protective services.

Localities Particularly Affected. These proposed regulatory changes will affect all 120 LDSS.

Projected Impact on Employment. The proposed amendments are unlikely to significantly affect employment.

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

Small Businesses: Costs and Other Effects. These proposed regulatory changes affect LDSSs and members of the public but are unlikely to directly affect any small business in the Commonwealth.

Small Businesses: Alternative Method that Minimizes Adverse Impact. These proposed regulatory changes affect LDSSs and members of the public but are unlikely to directly affect any small business in the Commonwealth.

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

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[1]Information provided by the State Department of Social Services.
[2]$48,000 divided by 2080 which is assumed to be the number of hours normally worked in a year.

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:

Proposed amendments include adding (i) definitions for "near fatality" and "response time," (ii) a requirement for reports to be acted upon and the victim child to be interviewed within a determined response time, (iii) a federal requirement to notify relatives within 30 days of removal, (iv) a requirement for a risk assessment to be completed for all investigations, (v) provisions for suspending certain investigations, (vi) retention requirements for serious sexual abuse records, (vii) a requirement to notify school boards for all employees in founded investigations and to notify the individual of this action, (viii) and training requirements for all Child Protective Services staff.

Proposed amendments include removing (i) a requirement to invalidate reports for substance exposed infant if the mother sought counseling, (ii) the directive for not rendering founded dispositions for substance exposed infants, and (iii) a reference to exact timeframes for emergency removals.

Proposed amendments generally (i) clarify the definition of "mental abuse or neglect," the responsibilities for mandated reporting of substance abuse exposure for newborns, the release of information to the Military Family Advocacy, the release of information when there is a legitimate interest, and the release of information while there is a pending criminal investigation; (ii) reorganize and renumber sections for clarity; and (iii) update references to the Code of Virginia.

22VAC40-705-10. Definitions.

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

"Abuser or neglector" means any person who is found to have committed the abuse and/or neglect of a child pursuant to Chapter 15 (§ 63.2-1500 et seq.) of Title 63.2 of the Code of Virginia.

"Administrative appeal rights" means the child protective services appeals procedures for a local level informal conference and a state level hearing pursuant to § 63.2-1526 of the Code of Virginia, under which an individual who is found to have committed abuse and/or neglect may request that the local department's records be amended.

"Alternative treatment options" means treatments used to prevent or treat illnesses or promote health and well-being outside the realm of modern conventional medicine.

"Appellant" means anyone who has been found to be an abuser and/or neglector and appeals the founded disposition to the director of the local department of social services, an administrative hearing officer, or to circuit court.

"Assessment" means the process by which child protective services workers determine a child's and family's needs.

"Caretaker" means any individual having the responsibility of providing care for a child and includes the following: (i) parent or other person legally responsible for the child's care; (ii) any other person who has assumed caretaking responsibility by virtue of an agreement with the legally responsible person; (iii) persons responsible by virtue of their positions of conferred authority; and (iv) adult persons residing in the home with the child.

"Case record" means a collection of information maintained by a local department, including written material, letters, documents, tapes, photographs, film or other materials regardless of physical form about a specific child protective services investigation, family or individual.

"Central Registry" means a subset of the child abuse and neglect information system and is the name index with identifying information of individuals named as an abuser and/or neglector in founded child abuse and/or neglect complaints or reports not currently under administrative appeal, maintained by the department.

"Certified substance abuse counselor" means a person certified to provide substance abuse counseling in a state-approved public or private substance abuse program or facility.

"Child abuse and neglect information system" means the computer system ~~which~~ that collects and maintains information regarding incidents of child abuse and neglect involving parents or other caretakers. The computer system is composed of three parts: the statistical information system with nonidentifying information, the Central Registry of founded complaints not on appeal, and a database that can be accessed only by the department and local departments that contains all nonpurged CPS reports. This system is the official state automated system.

"Child protective services" means the identification, receipt and immediate response to complaints and reports of alleged child abuse and/or neglect for children under 18 years of age. It also includes assessment, and arranging for and providing necessary protective and rehabilitative services for a child and his family when the child has been found to have been abused or neglected or is at risk of being abused or neglected.

"Child protective services worker" means one who is qualified by virtue of education, training and supervision and is employed by the local department to respond to child protective services complaints and reports of alleged child abuse and/or neglect.

"Chronically and irreversibly comatose" means a condition caused by injury, disease or illness in which a patient has suffered a loss of consciousness with no behavioral evidence of self-awareness or awareness of surroundings in a learned manner other than reflexive activity of muscles and nerves for low-level conditioned response and from which to a reasonable degree of medical probability there can be no recovery.

"Collateral" means a person whose personal or professional knowledge may help confirm or rebut the allegations of child abuse and/or neglect or whose involvement may help ensure the safety of the child.

"Complaint" means any information or allegation of child abuse and/or neglect made orally or in writing pursuant to § 63.2-100 of the Code of Virginia.

"Consultation" means the process by which the alleged abuser and/or neglector may request an informal meeting to discuss the investigative findings with the local department prior to the local department rendering a founded disposition of abuse and/or neglect against that person pursuant to § 63.2-1526 A of the Code of Virginia.

"Controlled substance" means a drug, substance or marijuana as defined in § 18.2-247 of the Code of Virginia including those terms as they are used or defined in the Drug Control Act, Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1 of the Code of Virginia. The term does not include alcoholic beverages or tobacco as those terms are defined or used in Title 3.1 or Title 4.1 of the Code of Virginia.

"Department" means the Virginia Department of Social Services.

"Differential response system" means that local departments of social services may respond to valid reports or complaints of child abuse or neglect by conducting either a family assessment or an investigation.

"Disposition" means the determination of whether or not child abuse and/or neglect has occurred.

"Documentation" means information and materials, written or otherwise, concerning allegations, facts and evidence.

"Family Advocacy Program representative" means the professional employed by the United States Armed Forces who has responsibility for the program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up and reporting of family violence, pursuant to ~~22VAC40-720-20~~ 22VAC40-705-140.

"Family assessment" means the collection of information necessary to determine:

1. The immediate safety needs of the child;

2. The protective and rehabilitative services needs of the child and family that will deter abuse or neglect;

3. Risk of future harm to the child; and

4. Alternative plans for the child's safety if protective and rehabilitative services are indicated and the family is unable or unwilling to participate in services. These arrangements may be made in consultation with the caretaker(s) of the child.

"First source" means any direct evidence establishing or helping to establish the existence or nonexistence of a fact. Indirect evidence and anonymous complaints do no constitute first source evidence.

"Founded" means that a review of the facts shows by a preponderance of the evidence that child abuse and/or neglect has occurred. A determination that a case is founded shall be based primarily on first source evidence; in no instance shall a determination that a case is founded be based solely on indirect evidence or an anonymous complaint.

"He" means he or she.

"His" means his or her.

"Identifying information" means name, social security number, address, race, sex, and date of birth.

"Indirect evidence" means any statement made outside the presence of the child protective services worker and relayed to the child protective services worker as proof of the contents of the statement.

"Informed opinion" means that the child has been informed and understands the benefits and risks, to the extent known, of the treatment recommended by conventional medical providers for his condition and the alternative treatment being considered as well as the basis of efficacy for each, or lack thereof.

"Investigation" means the collection of information to determine:

1. The immediate safety needs of the child;

2. The protective and rehabilitative services needs of the child and family that will deter abuse or neglect;

3. Risk of future harm to the child;

4. Alternative plans for the child's safety if protective and rehabilitative services are indicated and the family is unable or unwilling to participate in services;

5. Whether or not abuse or neglect has occurred;

6. If abuse or neglect has occurred, who abused or neglected the child; and

7. A finding of either founded or unfounded based on the facts collected during the investigation.

"Investigative narrative" means the written account of the investigation contained in the child protective services case record.

"Legitimate interest" means a lawful, demonstrated privilege to access the information as defined in § ~~63.2-104~~ 63.2-105 of the Code of Virginia.

"Licensed substance abuse treatment practitioner" means a person who (i) is trained in and engages in the practice of substance abuse treatment with individuals or groups of individuals suffering from the effects of substance abuse or dependence, and in the prevention of substance abuse or dependence and (ii) is licensed to provide advanced substance abuse treatment and independent, direct and unsupervised treatment to such individuals or groups of individuals, and to plan, evaluate, supervise, and direct substance abuse treatment provided by others.

"Life-threatening condition" means a condition that if left untreated more likely than not will result in death and for which the recommended medical treatments carry a probable chance of impairing the health of the individual or a risk of terminating the life of the individual.

"Local department" means the city or county local agency of social services or department of public welfare in the Commonwealth of Virginia responsible for conducting investigations or family assessments of child abuse and/or neglect complaints or reports pursuant to § 63.2-1503 of the Code of Virginia.

"Local department of jurisdiction" means the local department in the city or county in Virginia where the alleged victim child resides or in which the alleged abuse and/or neglect is believed to have occurred. If neither of these is known, then the local department of jurisdiction shall be the local department in the county or city where the abuse and/or neglect was discovered.

"Mandated reporters" means those persons who are required to report suspicions of child abuse and/or neglect pursuant to § 63.2-1509 of the Code of Virginia.

"Monitoring" means contacts with the child, family and collaterals which provide information about the child's safety and the family's compliance with the service plan.

"Multidisciplinary teams" means any organized group of individuals representing, but not limited to, medical, mental health, social work, education, legal and law enforcement, which will assist local departments in the protection and prevention of child abuse and neglect pursuant to § 63.2-1503 K of the Code of Virginia. Citizen representatives may also be included.

"Near fatality" means an act that, as certified by a physician, places the child in serious or critical condition. Serious or critical condition is a life-threatening condition or injury.

"Notification" means informing designated and appropriate individuals of the local department's actions and the individual's rights.

"Particular medical treatment" means a process or procedure that is recommended by conventional medical providers and accepted by the conventional medical community.

"Preponderance of evidence" means the evidence as a whole shows that the facts are more probable and credible than not. It is evidence which is of greater weight or more convincing than the evidence offered in opposition.

"Purge" means to delete or destroy any reference data and materials specific to subject identification contained in records maintained by the department and the local department pursuant to §§ 63.2-1513 and 63.2-1514 of the Code of Virginia.

"Reasonable diligence" means the exercise of justifiable and appropriate persistent effort.

"Report" means either a complaint as defined in this section or an official document on which information is given concerning abuse and neglect. ~~A~~ Pursuant to § 63.2-1509 of the Code of Virginia, a report is required to be made by persons designated herein and by local departments in those situations in which a response to a complaint from the general public reveals suspected child abuse and/or neglect pursuant to ~~subdivision 5 of~~ the definition of abused or neglected child in § 63.2-100 of the Code of Virginia.

"Response time" means the urgency in which a valid report of suspected child abuse or neglect is initiated by the local department based on the child's immediate safety or other factors.

"Safety plan" means an immediate course of action designed to protect a child from abuse or neglect.

"Service plan" means a plan of action to address the service needs of a child and/or his family in order to protect a child and his siblings, to prevent future abuse and neglect, and to preserve the family life of the parents and children whenever possible.

"State automated system" means the "child abuse and neglect information system" as previously defined.

"Substance abuse counseling or treatment services" are services provided to individuals for the prevention, diagnosis, treatment, or palliation of chemical dependency, which may include attendant medical and psychiatric complications of chemical dependency.

"Sufficiently mature" is determined on a case-by-case basis and means that a child has no impairment of his cognitive ability and is of a maturity level capable of having intelligent views on the subject of his health condition and medical care.

"Terminal condition" means a condition caused by injury, disease or illness from which to a reasonable degree of medical probability a patient cannot recover and (i) the patient's death is imminent or (ii) the patient is chronically and irreversibly comatose.

"Unfounded" means that a review of the facts does not show by a preponderance of the evidence that child abuse or neglect occurred.

"Valid report or complaint" means the local department of social services has evaluated the information and allegations of the report or complaint and determined that the local department shall conduct an investigation or family assessment because the following elements are present:

1. The alleged victim child or children are under the age of 18 at the time of the complaint or report;

2. The alleged abuser is the alleged victim child's parent or other caretaker;

3. The local department receiving the complaint or report is a local department of jurisdiction; and

4. The circumstances described allege suspected child abuse or neglect.

"Withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening condition by providing treatment (including appropriate nutrition, hydration, and medication) which in the treating physician's or physicians' reasonable medical judgment will most likely be effective in ameliorating or correcting all such conditions.

22VAC40-705-30. Types of abuse and neglect.

A. Physical abuse occurs when a caretaker creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon a child a physical injury by other than accidental means or creates a substantial risk of death, disfigurement, or impairment of bodily functions, including, but not limited to, a child who is with his parent or other person responsible for his care either (i) during the manufacture or attempted manufacture of a Schedule I or II controlled substance or (ii) during the unlawful sale of such substance by that child's parents or other person responsible for his care, where such manufacture, or attempted manufacture or unlawful sale would constitute a felony violation of § 18.2-248 of the Code of Virginia.

B. Physical neglect occurs when there is the failure to provide food, clothing, shelter, necessary medical treatment, or supervision for a child to the extent that the child's health or safety is endangered. This also includes abandonment and situations where the parent's or caretaker's own incapacitating behavior or absence prevents or severely limits the performing of child caring tasks pursuant to § 63.2-100 of the Code of Virginia. This also includes a child under the age of 18 years whose parent or other person responsible for his care knowingly leaves the child alone in the same dwelling as a person, not related by blood or marriage, who has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902 of the Code of Virginia. In situations where the neglect is the result of family poverty and there are no outside resources available to the family, the parent or caretaker shall not be

determined to have neglected the child; however, the local department may provide appropriate services to the family.

1. Physical neglect may include multiple occurrences or a one-time critical or severe event that results in a threat to health or safety.

2. Physical neglect may include failure to thrive.

a. Failure to thrive occurs as a syndrome of infancy and early childhood ~~which~~ that is characterized by growth failure, signs of severe malnutrition, and variable degrees of developmental retardation.

b. Failure to thrive can only be diagnosed by a physician and is caused by nonorganic factors.

3. Physical neglect may include medical neglect.

~~C.~~ a. Medical neglect occurs when there is the failure by the caretaker to obtain or follow through with a complete regimen of medical, mental, or dental care for a condition ~~which~~ that if untreated could result in illness or developmental delays ~~pursuant to § 63.2-100 of the Code of Virginia~~. However, a decision by parents or other persons legally responsible for the child to refuse a particular medical treatment for a child with a life-threatening condition shall not be deemed a refusal to provide necessary care if (i) such decision is made jointly by the parents or other person legally responsible for the child and the child; (ii) the child has reached 14 years of age and sufficiently mature to have an informed opinion on the subject of his medical treatment; (iii) the parents or other person legally responsible for the child and the child have considered alternative treatment options; and (iv) the parents or other person legally responsible for the child and the child believe in good faith that such decision is in the child's best interest.

b. Medical neglect also includes withholding of medically indicated treatment.

~~1.~~ (1) A child who, in good faith, is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination ~~pursuant to § 63.2-100 of the Code of Virginia~~ shall not for that reason alone be considered a neglected child in accordance with § 63.2-100 of the Code of Virginia.

~~2.~~ (2) For the purposes of this ~~regulation~~ chapter, "withholding of medically indicated treatment" does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when in the treating physician's or physicians' reasonable medical judgment:

~~a.~~ (a) The infant is chronically and irreversibly comatose;

~~b.~~ (b) The infant has a terminal condition and the provision of such treatment would~~: (1) Merely~~ (i) merely prolong dying; ~~(2) Not~~ (ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; ~~(3) Otherwise~~ (iii) otherwise be futile in terms of the survival of the infant; or ~~(4) Be~~ (iv) be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

~~D.~~ C. Mental abuse or neglect occurs when a caretaker creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon a child a mental injury by other than accidental means or creates a substantial risk of impairment of mental functions.

1. Mental abuse or neglect includes acts of omission by the caretaker resulting in harm to a child's psychological or emotional health or development.

2. Professional documentation supporting a nexus between the actions or inactions of the caretaker and the mental dysfunction or threat of dysfunction demonstrated by the child is required in order to make a founded disposition.

3. Mental abuse or neglect may include failure to thrive.

~~1.~~ a. Failure to thrive occurs as a syndrome of infancy and early childhood ~~which~~ that is characterized by growth failure, signs of severe malnutrition, and variable degrees of developmental retardation.

~~2.~~ b. Failure to thrive can only be diagnosed by a physician and is caused by nonorganic factors.

~~E.~~ D. Sexual abuse occurs when ~~there is~~ the child's parents or other persons responsible for the care commits or allows to be committed any act of sexual exploitation or any sexual act upon a child in violation of the law ~~which is committed or allowed to be committed by the child's parents or other persons responsible for the care of the child pursuant to § 63.2-100 of the Code of Virginia~~.

22VAC40-705-40. Complaints and reports of suspected child abuse and/or neglect.

A. Persons who are mandated to report are those individuals defined in § 63.2-1509 of the Code of Virginia.

1. Mandated reporters shall report immediately any suspected abuse or neglect that they learn of in their professional capacity~~. No person shall be required to make a report pursuant to § 63.2-1509 of the Code of Virginia if~~ unless the person has actual knowledge that the same matter has already been reported to the local department or the department's toll-free child abuse and neglect hotline.

2. Pursuant to § 63.2-1509 of the Code of Virginia, ~~if information is received by a teacher, staff member, resident, intern, or nurse in the course of his professional services~~ mandated reporters in a hospital, school, or other similar institution, ~~such person~~ may ~~in place of said report, immediately notify~~ make reports of suspected abuse or neglect immediately to the person in charge of the institution or department, or his designee, who shall then make such report forthwith ~~If the initial report of suspected abuse or neglect is made to the person in charge of the institution or department, or his designee, such person shall (i) notify the teacher, staff member, resident, intern, or~~

~~nurse who made the initial report when the report of suspected child abuse or neglect is made to the local department or to the department's toll free child abuse and neglect hotline; (ii) provide the name of the individual receiving the report; and (iii) forward any communication resulting from the report, including any information about any actions taken regarding the report, to the person who made the initial report.~~ on the mandated reporters' behalf. This person shall notify the mandated reporter when and to whom he made the report, as well as forward any other communication resulting from the report, including any action taken, to the mandated reporter.

3. Mandated reporters shall disclose all information that is the basis for the suspicion of child abuse or neglect and shall make available, upon request, to the local department any records and reports that document the basis for the complaint and/or report.

4. ~~A~~ Pursuant to § 63.2-1509 D of the Code of Virginia, a mandated reporter's failure to report as soon as possible, but no longer than 24 hours after having reason to suspect a reportable offense of child abuse or neglect, shall result in a fine. ~~In cases evidencing acts of rape, sodomy, or object sexual penetration as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2 of the Code of Virginia, a person who knowingly and intentionally fails to make the report required pursuant to § 63.2-1509 of the Code of Virginia shall be guilty of a Class 1 misdemeanor.~~

5. A person who knowingly and intentionally fails to make a report in cases of rape, sodomy, or object sexual penetration shall be guilty of a Class 1 misdemeanor.

~~5.~~ 6. Pursuant to § 63.2-1509 B of the Code of Virginia, ~~a "reason~~ certain specified facts indicating that a newborn may have been exposed to a controlled substance prior to birth are sufficient to suspect that a child is abused or neglected~~"~~. This shall include (i) a finding made by a health care provider within six weeks of the birth of a child that the results of toxicology studies of the child indicate the presence of a controlled substance that was not prescribed for the mother by a physician; (ii) a finding made by a health care provider within six weeks of the birth of a child that the child was born dependent on a controlled substance that was not prescribed by a physician for the mother and has demonstrated withdrawal symptoms; (iii) a diagnosis made by a health care provider at any time following a child's birth that the child has an illness, disease, or condition which, to a reasonable degree of medical certainty, is attributable to in utero exposure to a controlled substance that was not prescribed by a physician for the mother or the child; or (iv) a diagnosis made by a health care provider at any time following a child's birth that the child has a fetal alcohol spectrum disorder attributable to in utero exposure to alcohol. ~~When "reason to suspect" is based upon this subsection, such fact shall be included in the report along with the facts relied upon by the person making the report. Any report made pursuant to § 63.2-1509 A of the Code of Virginia constitutes a valid report of abuse or neglect and requires a child protective services investigation or family assessment, unless the mother sought treatment or counseling as required in this section and pursuant to § 63.2-1505 B of the Code of Virginia.~~

a. Pursuant to § 63.2-1509 of the Code of Virginia, whenever a health care provider makes a finding pursuant to § 63.2-1509 A of the Code of Virginia, then the health care provider or his designee must make a report to child protective services immediately. ~~Pursuant to § 63.2-1509 D of the Code of Virginia, a health care provider who fails to make a report pursuant to § 63.2-1509 A of the Code of Virginia is subject to a fine.~~

b. When a report or complaint alleging abuse or neglect is made pursuant to § 63.2-1509 ~~A~~ B of the Code of Virginia, then the local department must immediately assess the infant's circumstances and any threat to the infant's health and safety. Pursuant to 22VAC40-705-110 A, the local department must conduct an initial safety assessment.

c. When a report or complaint alleging abuse or neglect is made pursuant to § 63.2-1509 ~~A~~ B of the Code of Virginia, then the local department must immediately determine whether to petition a juvenile and domestic relations district court for any necessary services or court orders needed to ensure the safety and health of the infant.

~~d. Within five days of receipt of a report made pursuant to § 63.2-1509 A of the Code of Virginia, the local department shall invalidate the complaint if the following two conditions are met: (i) the mother of the infant sought substance abuse counseling or treatment during her pregnancy prior to the infant's birth and (ii) there is no evidence of child abuse and/or neglect by the mother after the infant's birth.~~

~~(1) The local department must notify the mother immediately upon receipt of a complaint made pursuant to § 63.2-1509 A of the Code of Virginia. This notification must include a statement informing the mother that, if the mother fails to present evidence within five days of receipt of the complaint that she sought substance abuse counseling/treatment during the pregnancy, the report will be accepted as valid and an investigation or family assessment initiated.~~

~~(2) If the mother sought counseling or treatment but did not receive such services, then the local department must determine whether the mother made a substantive effort to receive substance abuse treatment before the child's birth. If the mother made a substantive effort to receive treatment or counseling prior to the child's birth, but did not receive such services due to no fault of her own, then~~

~~the local department should invalidate the complaint or report.~~

~~(3)~~ d. If the mother sought ~~or received~~ substance abuse counseling or treatment, but there is evidence, other than exposure to a controlled substance, that the child may be abused or neglected, then the local department ~~may initiate the~~ shall conduct an investigation or family assessment.

e. Substance abuse counseling or treatment includes, but is not limited to, education about the impact of alcohol, controlled substances and other drugs on the fetus and on the maternal relationship; education about relapse prevention to recognize personal and environmental cues ~~which~~ that may trigger a return to the use of alcohol or other drugs.

f. The substance abuse counseling or treatment should attempt to serve the purposes of improving the pregnancy outcome, treating the substance abuse disorder, strengthening the maternal relationship with existing children and the infant, and achieving and maintaining a sober and drug-free lifestyle.

g. The substance abuse counseling or treatment services must be provided by a professional. Professional substance abuse treatment or counseling may be provided by a certified substance abuse counselor or a licensed substance abuse treatment practitioner.

~~h. Facts indicating that the infant may have been exposed to controlled substances prior to birth are not sufficient, in and of themselves, to render a founded disposition of abuse or neglect. The local department must establish, by a preponderance of the evidence, that the infant was abused or neglected according to the statutory and regulatory definitions of abuse and neglect.~~

~~i.~~ h. The local department may provide assistance to the mother in locating and receiving substance abuse counseling or treatment.

B. Persons who may report child abuse and/or neglect include any individual who suspects that a child is being abused and/or neglected pursuant to § 63.2-1510 of the Code of Virginia.

C. Complaints and reports of child abuse and/or neglect may be made anonymously. ~~An anonymous complaint, standing alone, shall not meet the preponderance of evidence standard necessary to support a founded determination.~~

D. Any person making a complaint and/or report of child abuse and/or neglect shall be immune from any civil or criminal liability in connection therewith, unless ~~the court decides~~ it is proven that such person acted in bad faith or with malicious intent pursuant to § 63.2-1512 of the Code of Virginia.

E. When the identity of the reporter is known to the department or local department, these agencies shall ~~make every effort to protect~~ not disclose the reporter's identity. Upon request, the local department shall advise the person who was the subject of an unfounded investigation if the complaint or report was made anonymously.

F. If a person suspects that he is the subject of a report or complaint of child abuse and/or neglect made in bad faith or with malicious intent, that person may petition the court for access to the record including the identity of the reporter or complainant pursuant to § 63.2-1514 of the Code of Virginia.

G. Any person age 14 years or older who makes or causes to be made a knowingly false complaint or report of child abuse and/or neglect and is convicted shall be guilty of a Class 1 misdemeanor for a first offense pursuant to § 63.2-1513 of the Code of Virginia.

1. A subsequent conviction results in a Class 6 felony.

2. Upon receipt of notification of such conviction, the department will retain a list of convicted reporters.

3. The subject of the records may have the records purged upon presentation of ~~proof~~ a certified copy of such conviction.

H. To make a complaint or report of child abuse and/or neglect, a person may telephone the department's toll-free child abuse and neglect hotline or contact a local department of jurisdiction pursuant to § 63.2-1510 of the Code of Virginia.

1. The local department of jurisdiction that first receives a complaint or report of child abuse and/or neglect shall assume responsibility to ensure that a family assessment or an investigation is conducted.

2. A local department may ask another local department that is a local department of jurisdiction to assist in conducting the family assessment or investigation. If assistance is requested, the local department shall comply.

3. A local department may ask another local department through a cooperative agreement to assist in conducting the family assessment or investigation.

4. If a local department employee is suspected of abusing and/or neglecting a child, the complaint or report of child abuse and/or neglect shall be made to the juvenile and domestic relations district court of the county or city where the alleged abuse and/or neglect was discovered. The judge shall assign the report to a local department that is not the employer of the subject of the report, or, if the judge believes that no local department in a reasonable geographic distance can be impartial in responding to the reported case, the judge shall assign the report to the court service unit of his court for evaluation pursuant to §§ 63.2-1509 and 63.2-1510 of the Code of Virginia. The judge may consult with the department in selecting a local department to respond.

5. In cases where an employee at a private or state-operated hospital, institution, or other facility or an employee of a school board is suspected of abusing or neglecting a child in such hospital, institution, or other

facility or public school, the local department shall request the department and the relevant private or state-operated hospital, institution, or other facility or school board to assist in conducting a joint investigation in accordance with regulations adopted by the board, in consultation with the Departments of Education, Health, Medical Assistance Services, Behavioral Health and Developmental Services, Juvenile Justice, and Corrections.

22VAC40-705-50. Actions to be taken upon receipt of a complaint or report.

A. All complaints and reports of suspected child abuse and/or neglect shall be recorded in the child abuse and neglect information system and either screened out or determined to be valid ~~within five days of~~ upon receipt and if valid, acted on within the determined response time. A record of all reports and complaints made to a local department or to the department, regardless of whether the report or complaint was found to be a valid complaint of abuse and/or neglect, shall be retained for one year from the date of the complaint unless a subsequent report is made.

B. In all valid complaints or reports of child abuse and/or neglect the local department of social services shall determine whether to conduct an investigation or a family assessment. A valid complaint or report is one in which:

1. The alleged victim child or children are under the age of 18 years at the time of the complaint and/or report;

2. The alleged abuser is the alleged victim child's parent or other caretaker;

3. The local department receiving the complaint or report is a local department of jurisdiction; and

4. The circumstances described allege suspected child abuse and/or neglect as defined in § 63.2-100 of the Code of Virginia.

C. The local department shall not conduct a family assessment or investigate complaints or reports of child abuse and/or neglect that fail to meet all of the criteria in subsection B of this section.

D. The local department shall report certain cases of suspected child abuse or neglect to the local attorney for the Commonwealth and the local law-enforcement agency pursuant to § 63.2-1503 D of the Code of Virginia.

E. Pursuant to § 63.2-1503 ~~J~~ D of the Code of Virginia, the local ~~departments~~ department shall develop, where practical, a memoranda of understanding for responding to reports of child abuse and neglect with local law enforcement and the local office of the commonwealth's attorney.

F. The local department shall report to the following when the death of a child is involved:

1. When abuse and/or neglect is suspected in any case involving the death of a child, the local department shall report the case immediately to the regional medical examiner and the local law-enforcement agency pursuant to § 63.2-1503 E of the Code of Virginia.

2. When abuse and/or neglect is suspected in any case involving the death of a child, the local department shall report the case immediately to the attorney for the Commonwealth and the local law-enforcement agency pursuant to § 63.2-1503 D of the Code of Virginia.

3. The local department shall contact the department immediately upon receiving a complaint involving the death of a child and at the conclusion of the investigation.

4. The department shall immediately, upon receipt of information, report on all child fatalities to the state board in a manner consistent with department policy and procedures approved by the board. At a minimum, the report shall contain information regarding any prior statewide child protective services involvement of the family, alleged perpetrator, or victim.

G. Valid complaints or reports shall be screened for high priority based on the following:

1. The immediate danger to the child;

2. The severity of the type of abuse or neglect alleged;

3. The age of the child;

4. The circumstances surrounding the alleged abuse or neglect;

5. The physical and mental condition of the child; and

6. Reports made by mandated reporters.

H. The local department shall initiate an immediate response but not later than within the determined response time. The response shall be a family assessment or an investigation. Any valid report may be investigated, but in accordance with § 63.2-1506 C of the Code of Virginia, those cases shall be investigated that involve~~:~~ (i) sexual abuse, (ii) a child fatality, (iii) abuse or neglect resulting in a serious injury as defined in § 18.2-371.1 of the Code of Virginia, (iv) a child having been taken into the custody of the local department of social services, or (v) a caretaker at a state-licensed child day care center, religiously exempt child day center, regulated family day home, private or public school, or hospital or any institution.

1. The purpose of an investigation is to collect the information necessary to determine or assess the following:

a. Immediate safety needs of the child;

b. Whether or not abuse or neglect has occurred;

c. Who abused or neglected the child;

d. To what extent the child is at risk of future harm~~, either immediate or longer term~~;

e. What types of services can meet the needs of this child or family; and

f. If services are indicated and the family appears to be unable or unwilling to participate in services, what alternate plans will provide for the child's safety.

2. The purpose of a family assessment is to engage the family in a process to collect the information necessary to determine or assess the following:

a. Immediate safety needs of the child;

b. The extent to which the child is at risk of future harm~~, either immediate or longer term~~;

c. The types of services that can meet the needs of this child or family; and

d. If services are indicated and the family appears to be unable or unwilling to participate in services, the plans that will be developed in consultation with the family to provide for the child's safety. These arrangements may be made in consultation with the caretaker(s) of the child.

3. The local department shall use reasonable diligence to locate any child for whom a report or complaint of suspected child abuse and/or neglect has been received and determined valid ~~or~~ and persons who are the subject of a valid report if the whereabouts of such persons are unknown to the local department pursuant to § 63.2-1503 F of the Code of Virginia.

4. The local department shall document its attempts to locate the child and family.

5. In the event the alleged victim child or children cannot be found, the time the child cannot be found shall not be computed as part of the 45-60-day time frame to complete the investigation, pursuant to subdivision B 5 of § 63.2-1505 of the Code of Virginia.

22VAC40-705-60. Authorities of local departments.

When responding to valid complaints or reports, local departments have the following authorities:

1. To talk to any child suspected of being abused and/or neglected, or child's siblings, without the consent of and outside the presence of the parent or other caretaker, as set forth by § 63.2-1518 of the Code of Virginia.

2. To take or arrange for photographs and x-rays of a child who is the subject of a complaint without the consent of and outside the presence of the parent or other caretaker, as set forth in § 63.2-1520 of the Code of Virginia.

3. To take a child into custody on an emergency removal ~~for up to 72 96 hours~~ under such circumstances as set forth in § 63.2-1517 of the Code of Virginia.

a. A child protective services ~~(CPS)~~ worker planning to take a child into ~~72 96 hour~~ emergency custody shall first consult with a supervisor. However, this requirement shall not delay action on the ~~CPS~~ child protective services worker's part if a supervisor cannot be contacted and the situation requires immediate action.

b. When circumstances warrant that a child be taken into emergency custody during a family assessment, the report shall be reassigned immediately to an investigation.

c. Any person who takes a child into custody pursuant to § 63.2-1517 of the Code of Virginia shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent.

d. The local department shall have the authority to have a complete medical examination made of the child including a written medical report and, when appropriate, photographs and x-rays pursuant to § 63.2-1520 of the Code of Virginia.

e. When a child in ~~72 96 hour~~ emergency custody is in need of immediate medical or surgical treatment, the local director of social services or his ~~designee(s)~~ designee may consent to such treatment when the parent does not provide consent and a court order is not immediately obtainable.

f. When a child is not in the local department's custody, the local department cannot consent to medical or surgical treatment of the child.

g. When a child is removed, every effort must be made to obtain an emergency removal order within four hours. Reasons for not doing so shall be stated in the petition for an emergency removal order.

h. Every effort shall be made to provide notice of the removal in person to the parent or guardian as soon as practicable.

i. Within 30 days of removing a child from the custody of the parents or legal guardians, the local department shall exercise due diligence to identify and notify in writing all maternal and paternal grandparents and other adult relatives of the child and explain the options they have to participate in the care and placement of the child, unless the local department determines such notification is not in the best interest of the child. These notifications shall be documented in the state automated system. When notification to any of these relatives is not made, the child protective services worker shall document the reasons in the state automated system.

22VAC40-705-70. Collection of information.

A. When conducting an investigation the local department shall seek first-source information about the allegation of child abuse and/or neglect. When applicable, the local department shall include in the case record: police reports; depositions; photographs; physical, medical and psychological reports; and any electronic recordings of interviews.

B. When completing a family assessment, the local department shall gather all relevant information in collaboration with the family, to the degree possible, in order to determine the child and family services needs related to current safety or future risk of harm to the child.

C. All information collected for a family assessment or an investigation must be entered in the state automated system

and maintained according to § 63.2-1514 for unfounded investigations or family assessments or according to ~~22VAC40-700-30~~ 22VAC40-705-130 for founded investigations. The automated record entered in the ~~statewide automation~~ state automated system is the official record. When documentation is not available in electronic form, it must be maintained in the hard copy portion of the record. Any hard copy information, including photographs and recordings, shall be noted as an addendum to the official record.

22VAC40-705-80. Family assessment and investigation contacts.

A. During the course of the family assessment, the child protective services ~~(CPS)~~ worker shall ~~make and record~~ document in writing in the state automated system the following contacts and observations. When any of these contacts or observations is not made, the child protective services worker shall document in writing why the specific contact or observation was not made.

1. The child protective services worker shall conduct a face-to-face interview with and observe the alleged victim child ~~and siblings~~ within the determined response time.

2. The child protective services worker shall conduct a face-to-face interview with and observe all minor siblings residing in the home.

~~2.~~ 3. The child protective services worker shall conduct a face-to-face interview with the alleged victim child's parents or guardians and/or any caretaker named in the report.

~~3.~~ 4. The child protective services worker shall observe the family environment, contact pertinent collaterals, and review pertinent records in consultation with the family.

B. During the course of the investigation, the child protective services ~~(CPS)~~ worker shall ~~make and record~~ document in writing in the state automated system the following contacts and observations. When any of these contacts or observations is not made, the ~~CPS~~ child protective services worker shall ~~record~~ document in writing why the specific contact or observation was not made.

1. The child protective services worker shall conduct a face-to-face interview with and observation of the alleged victim child ~~and siblings~~ within the determined response time. All interviews with alleged victim children must be electronically recorded except when the child protective services worker determines that:

a. The child's safety may be endangered by electronically recording his statement;

b. The age and/or developmental capacity of the child makes electronic recording impractical;

c. A child refuses to participate in the interview if electronic recording occurs; or

d. In the context of a team investigation with law-enforcement personnel, the team or team leader determines that ~~audio-taping~~ electronic recording is not appropriate.

e. The victim provided new information as part of a family assessment and it would be detrimental to reinterview the victim and the child protective services worker provides a detailed narrative of the interview in the investigation record.

In the case of an interview conducted with a nonverbal child where none of the above exceptions apply, it is appropriate to electronically record the questions being asked by the child protective services worker and to describe, either verbally or in writing, the child's responses. A child protective services worker shall document in detail in the record and discuss with supervisory personnel the basis for a decision not to electronically record an interview with the alleged victim child.

A child protective services finding may be based on the written narrative of the child protective services worker in cases where an electronic recording is unavailable due to equipment failure or the above exceptions.

2. The child protective services worker shall conduct a face-to-face interview and observe all minor siblings residing in the home.

~~2.~~ 3. The child protective services ~~(CPS)~~ worker shall conduct a face-to-face interview with the alleged abuser and/or neglector.

a. The ~~CPS~~ child protective services worker shall inform the alleged abuser and/or neglector of his right to ~~tape~~ electronically record any communication pursuant to § 63.2-1516 of the Code of Virginia.

b. If requested by the alleged abuser and/or neglector, the local department shall provide the necessary equipment in order to electronically record the interview and retain a copy of the electronic recording.

~~3.~~ 4. The child protective services worker shall conduct a face-to-face interview with the alleged victim child's parents or guardians.

~~4.~~ 5. The child protective services worker shall observe the environment where the alleged victim child lives. This requirement may be waived in complaints of child abuse and neglect involving caretakers in state licensed and religiously exempted child care centers, regulated and unregulated family day care homes, private and public schools, group residential facilities, hospitals or institutions.

~~5.~~ 6. The child protective services worker shall observe the site where the alleged incident took place.

~~6.~~ 7. The child protective services worker shall conduct interviews with collaterals who have pertinent information relevant to the investigation and the safety of the child.

~~7.~~ 8. Pursuant to § 63.2-1505 of the Code of Virginia, local departments may obtain and consider statewide criminal history record information from the Central Criminal Records Exchange on any individual who is the subject of a child abuse and neglect investigation where there is evidence of child abuse or neglect and the local department is evaluating the safety of the home and whether removal is necessary to ensure the child's safety. The local department may also obtain a criminal record check on all adult household members residing in the home of the alleged abuser and/or neglector and where the child visits. Pursuant to § 19.2-389 of the Code of Virginia, local departments are authorized to receive criminal history information on the person who is the subject of the investigation as well as other adult members of the household for the purposes in § 63.2-1505 of the Code of Virginia. The results of the criminal record history search may be admitted into evidence if a child abuse or neglect petition is filed in connection with the child's removal. Local departments are prohibited from dissemination of this information excepted as authorized by the Code of Virginia.

22VAC40-705-110. Assessments in family assessments and investigations.

A. In both family assessments and investigations the child protective services worker shall conduct an initial safety assessment of the child's circumstances and threat of danger or harm, and where appropriate shall make a safety plan to provide for the protection of the child.

B. In all ~~founded cases and in~~ completed family assessments and investigations, the child protective services worker shall ~~make~~ conduct a risk assessment to determine whether or not the child is in jeopardy of future abuse and/or neglect and whether or not intervention is necessary to protect the child.

C. In investigations, the child protective services worker shall make a dispositional assessment after collecting and ~~synthesizing~~ assessing information about the alleged abuse or neglect.

D. In all investigations with a founded disposition, the child protective services worker shall assess the severity of the abuse or neglect and shall assign a level. The three levels of founded dispositions are:

1. Level 1. This level includes those injuries or conditions, real or threatened, that result in or were likely to have resulted in serious harm to a child.

2. Level 2. This level includes injuries or conditions, real or threatened, that result in or were likely to have resulted in moderate harm to a child.

3. Level 3. This level includes injuries or conditions, real or threatened, that result in or were likely to have resulted in minimal harm to a child.

22VAC40-705-120. ~~Complete the family assessment or investigation~~ Extensions; suspensions; track changes; local conferences.

A. The local department shall promptly notify the alleged abuser and/or neglector and the alleged victim's parents or guardians of any extension of the deadline for the completion of the family assessment or investigation pursuant to ~~§ 63.2-1506 B 3 or subdivision 5 of~~ § 63.2-1505 B 5 or § 63.2-1506 B 3 of the Code of Virginia. The child protective services worker shall document the notifications and the reason for the need for additional time in the case record.

B. ~~At the completion of the family assessment, the subject of the report shall be notified orally and in writing of the results of the assessment.~~ Pursuant to § 63.2-1505 B 5 of the Code of Virginia, in an investigation involving the death of a child or alleged sexual abuse of a child while waiting for records that are necessary to make a finding and the records are not available to the local department due to circumstances beyond the local department's control, the time during which the records are unavailable shall not be computed as part of the determination deadlines set out in § 63.2-1505 B 5 of the Code of Virginia. When such unavailability of records occurs, the local department shall promptly notify the alleged abuser or neglector and the alleged victim's parents or guardians that the records are unavailable and the effect of the unavailability on the completion of the investigation. The child protective services worker shall document the notifications and the reason for the suspension in the case record. Upon receipt of the records necessary to make a finding, the local department shall complete the investigation.

C. The subject of the report shall be notified immediately if during the course of completing the family assessment the situation is reassessed and determined to meet the requirements, as specified in § 63.2-1506 B 7 of the Code of Virginia, to be investigated.

D. The subject of the report or complaint may consult with the local department to hear and refute evidence collected during the investigation. Whenever a criminal charge is also filed against the alleged abuser for the same conduct involving the same victim child as investigated by the local department, sharing the evidence prior to the court hearing is prohibited. No information gathered during a joint investigation with law enforcement shall be released by the local department unless authorized by the investigating law-enforcement agency or the local attorney for the Commonwealth pursuant to § 63.2-1516.1 B of the Code of Virginia.

E. Local conference.

1. If the alleged abuser and/or neglector is found to have committed abuse or neglect, that alleged abuser and/or neglector may, within 30 days of being notified of that determination, submit a written request for an amendment of the determination and the local department's related records pursuant to § 63.2-1526 A of the Code of Virginia.

The local department shall conduct an informal conference in an effort to examine the local department's disposition and reasons for it and consider additional information about the investigation and disposition presented by the alleged abuser and/or neglector.

2. The local conference shall be conducted in accordance with 22VAC40-705-190.

22VAC40-705-130. Report family assessment or investigation conclusions.

A. Unfounded investigation.

~~A.~~ 1. Pursuant to § 63.2-1514 of the Code of Virginia, the local department shall report all unfounded case dispositions to the child abuse and neglect information system when disposition is made.

~~1.~~ 2. The department shall retain ~~unfounded~~ complaints or reports with an unfounded disposition in the child abuse and neglect information system to provide local departments with information regarding prior investigations.

~~2.~~ 3. This record shall be kept separate from the Central Registry and accessible only to the department and to local departments.

~~3.~~ 4. The record of the ~~unfounded case~~ investigation with an unfounded disposition shall be purged one year after the date of the complaint or report if there are no subsequent ~~founded or unfounded~~ complaints and/or reports regarding the individual against whom allegations of abuse and/or neglect were made or regarding the same child in that one year.

~~4. The record of the family assessment shall be purged three years after the date of the complaint or report if there are no subsequent complaints and/or reports regarding the individual against whom allegations of abuse and/or neglect were made or regarding the same child in those three years.~~

~~5. If the individual against whom allegations of abuse and/or neglect were made or if the same child is involved in subsequent complaints and/or reports, the information from all complaints and/or reports shall be maintained until the last purge date has been reached.~~

~~6.~~ 5. The individual against whom an unfounded disposition for allegations of abuse and/or neglect ~~were~~ was made may request in writing that the local department retain the record for an additional period of up to two years.

~~7.~~ 6. The individual against whom allegations of abuse and/or neglect were made may request in writing that both the local department and the department shall immediately purge the record ~~after a court rules~~ upon presentation of a certified copy of a court order that there has been a civil action that determined that the complaint or report was made in bad faith or with malicious intent pursuant to § 63.2-1514 of the Code of Virginia.

B. Founded investigation.

~~B.~~ 1. The local department shall report all founded ~~case~~ dispositions to the child abuse and neglect information system for inclusion in the Central Registry pursuant to ~~subdivision 5 of § 63.2-1505~~ § 63.2-1515 of the Code of Virginia ~~and 22VAC40-700-30~~.

2. Identifying information about the abuser and/or neglector and the victim child or children reported include demographic information, type of abuse or neglect, and date of the complaint.

3. The identifying information shall be retained based on the determined level of severity of the abuse or neglect pursuant to ~~the regulation dealing with retention in the Central Registry, 22VAC40-700-30~~ 22VAC40-705-110:

a. Eighteen years past the date of the complaint for all complaints determined by the local department to be founded as Level 1.

b. Seven years past the date of the complaint for all complaints determined by the local department to be founded as Level 2.

c. Three years past the date of the complaint for all complaints determined by the local department to be founded as Level 3.

4. Pursuant to § 63.2-1514 A of the Code of Virginia, all records related to founded, Level 1 dispositions of sexual abuse shall be maintained by the local department for a period of 25 years from the date of the complaint. This applies to all investigations with founded dispositions on or after July 1, 2010. This retention timeframe will not be reflected in the Central Registry past the purge dates set out in this subsection.

C. Family assessments.

1. The record of the family assessment shall be purged three years after the date of the complaint or report if there are no subsequent complaints or reports regarding the individual against whom allegations of abuse or neglect were made or regarding the same child in those three years.

2. The individual against whom allegations of abuse or neglect were made may request in writing that both the local department and the department shall immediately purge the record upon presentation of a certified copy of a court order that there has been a civil action that determined that the complaint or report was made in bad faith or with malicious intent pursuant to § 63.2-1514 of the Code of Virginia.

D. In all family assessments or investigations, if the individual against whom the allegations of abuse or neglect is involved in any subsequent complaint or report, the information from all complaints or reports shall be maintained until the last purge date has been reached.

22VAC40-705-140. Notification of findings.

A. Upon completion of the investigation or family assessment the local child protective services worker shall make notifications as provided in this section.

B. Individual against whom allegations of abuse and/or neglect were made.

1. When the disposition is unfounded, the child protective services worker shall inform the individual against whom allegations of abuse and/or neglect were made of this finding. This notification shall be in writing with a copy to be maintained in the case record. The individual against whom allegations of abuse and/or neglect were made shall be informed that he may have access to the case record and that the case record shall be retained by the local department for one year unless requested in writing by such individual that the local department retain the record for up to an additional two years.

a. If the individual against whom allegations of abuse and/or neglect were made or the subject child is involved in subsequent complaints, the information from all complaints shall be retained until the last purge date has been reached.

b. The local worker shall notify the individual against whom allegations of abuse and/or neglect were made of the procedures set forth in § 63.2-1514 of the Code of Virginia regarding reports or complaints alleged to be made in bad faith or with malicious intent.

c. ~~When~~ In accordance with § 32.1-283.1 D of the Code of Virginia when an unfounded disposition is made in an investigation that involves a child death, the child protective services worker shall inform the individual against whom allegations of abuse and/or neglect were made that the case record will be retained for the longer of 12 months or until the State Child Fatality Review Team has completed its review of the case ~~pursuant to § 32.1-283.1 D of the Code of Virginia~~.

2. When the abuser and/or neglector in a founded ~~complaint~~ disposition is a foster parent of the victim child, the local department shall place a copy of this notification letter in the child's foster care record and in the foster home provider record.

3. When the abuser or neglector in a founded disposition is a full-time, part-time, permanent, or temporary employee of a school division, the local department shall notify the relevant school board of the founded complaint pursuant to § 63.2-1505 B 7 of the Code of Virginia.

4. The local department shall notify the Superintendent of Public Instruction when an individual holding a license issued by the Board of Education is the subject of a founded complaint of child abuse or neglect and shall transmit identifying information regarding such individual if the local department knows the person holds a license issued by the Board of Education and after all rights to any appeal provided by § 63.2-1526 of the Code of Virginia have been exhausted.

~~3.~~ 5. No disposition of founded or unfounded shall be made in a family assessment. At the completion of the family assessment the subject of the report shall be notified orally and in writing of the results of the assessment. The child protective services worker shall notify the individual against whom allegations of abuse or neglect were made of the procedures set forth in § 63.2-1514 of the Code of Virginia regarding reports or complaints alleged to be made in bad faith or with malicious intent.

C. Subject child's parents or guardian.

1. When the disposition is unfounded, the child protective services worker shall inform the parents or guardian of the subject child in writing, when they are not the individuals against whom allegations of child abuse and/or neglect were made, that the ~~complaint~~ investigation involving their child ~~was determined to be~~ resulted in an unfounded disposition and the length of time the child's name and information about the case will be maintained. The child protective services worker shall file a copy in the case record.

2. When the disposition is founded, the child protective services worker shall inform the parents or guardian of the child in writing, when they are not the abuser and/or neglector, that the complaint involving their child was determined to be founded and the length of time the child's name and information about the case will be retained in the Central Registry. The child protective services worker shall file a copy in the case record.

3. When the founded ~~case~~ disposition of abuse or neglect does not name the parents or guardians of the child as the abuser or neglector and when the abuse or neglect occurred in a licensed or unlicensed day care center, a regulated family day home, a private or public school, a child-caring institution or a residential facility for juveniles, the parent or guardian must be consulted and must give permission for the child's name to be entered into the central registry pursuant to § 63.2-1515 of the Code of Virginia.

D. Complainant.

1. When an unfounded disposition is made, the child protective services worker shall notify the complainant, when known, in writing that the complaint was investigated and determined to be unfounded. The worker shall file a copy in the case record.

2. When a founded disposition is made, the child protective services worker shall notify the complainant, when known, in writing that the complaint was investigated and necessary action was taken. The local worker shall file a copy in the case record.

3. When a family assessment is completed, the child protective services worker shall notify the complainant,

when known, that the complaint was assessed and necessary action taken.

E. Family Advocacy Program.

~~When a founded disposition is made, the child protective services worker shall notify the Family Advocacy Program representative in writing as set forth in 22VAC40-720-20. When a family assessment is conducted and the family is determined to be in need of services, the child protective services worker may notify the Family Advocacy Program representative in writing as set forth in 22VAC40-720-20.~~

1. Pursuant to § 63.2-1503 N of the Code of Virginia, in all investigations with a founded disposition or family assessment that involve an active duty member of the United States Armed Forces or members of his household, information regarding the disposition, type of abuse or neglect, and the identity of the abuser or neglector shall be provided to the appropriate Family Advocacy Program representative. This notification shall be made in writing within 30 days after the administrative appeal rights of the abuser or neglector have been exhausted or forfeited.

2. The military member shall be advised that this information regarding the founded disposition or family assessment is being provided to the Family Advocacy Program representative and shall be given a copy of the written notification sent to the Family Advocacy Program representative.

3. Pursuant to § 63.2-105 of the Code of Virginia, when an active duty member of the United States Armed Forces or a member of his household is involved in an investigation, family assessment, or provision of services case, any information regarding child protective services reports, complaints, investigations, family assessments, and follow up may be shared with the appropriate Family Advocacy Program representative of the United States Armed Forces when the local department determines such release to be in the best interest of the child. In these situations, coordination between child protective services and the Family Advocacy Program is intended to facilitate identification, treatment, and service provision to the military family.

4. When needed by the Family Advocacy Program representative to facilitate treatment and service provision to the military family, any other additional information not prohibited from being released by state or federal law or regulation shall also be provided to the Family Advocacy Program representative when the local department determines such release to be in the best interest of the child.

22VAC40-705-160. Releasing information.

A. In the following instances of mandatory disclosure the local department shall release child protective services information. The local department may do so without any written release.

1. Report to attorney for the Commonwealth and law enforcement pursuant to § 63.2-1503 D of the Code of Virginia.

2. Report to the regional medical examiner's office pursuant to ~~§§ 32.1-283.1 C and~~ § 63.2-1503 E ~~F~~ of the Code of Virginia.

~~3. If a court mandates disclosure of information from a child abuse and neglect case record, the local department must comply with the request. The local department may challenge a court action for the disclosure of the case record or any contents thereof. Upon exhausting legal recourse, the local department shall comply with the court order.~~

~~4. When a family assessment or investigation is completed, the child protective services worker shall notify the complainant/reporter that either a complaint/report is unfounded or that necessary action is being taken.~~

~~5.~~ 3. Any individual, including an individual against whom allegations of child abuse and/or neglect were made, may exercise his ~~Privacy Protection Act~~ Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq. of the Code of Virginia) rights to access personal information related to himself ~~which~~ that is contained in the case record including, with the individual's notarized consent, a search of the Central Registry ~~pursuant to § 2.2-3704 of the Code of Virginia~~.

~~6.~~ 4. When the material requested includes personal information about other individuals, the local department shall be afforded a reasonable time in which to redact those parts of the record relating to other individuals.

~~7.~~ 5. Pursuant to the Child Abuse Prevention and Treatment Act, as amended (42 USC § 5101 et seq.), and federal regulations (45 CFR Part 1340), the local department shall provide case-specific information about child abuse and neglect reports and investigations to citizen review panels when requested.

~~8.~~ 6. Pursuant to the Child Abuse Prevention and Treatment Act, as amended (42 USC § 5101 et seq.), the department shall develop guidelines to allow for public disclosure in instances of child fatality or near fatality.

~~9.~~ 7. An individual's right to access information under the ~~Privacy Protection Act~~ Government Data Collection and Dissemination Practices Act is stayed during criminal prosecution pursuant to § ~~2.2-3802~~ 63.2-1526 C of the Code of Virginia.

~~10.~~ 8. The local department shall disclose and release to the United States Armed Forces Family Advocacy Program child protective services information as required pursuant to ~~22VAC40-720-20~~ 22VAC40-705-140.

~~11.~~ 9. Child protective services shall, on request by the Division of Child Support Enforcement, supply information pursuant to § 63.2-103 of the Code of Virginia.

~~12.~~ 10. The local department shall release child protective services information to a court appointed special advocate pursuant to § 9.1-156 A of the Code of Virginia.

~~13.~~ 11. The local department shall release child protective services information to a court-appointed guardian ad litem pursuant to § 16.1-266 ~~E~~ G of the Code of Virginia.

B. The local department may use discretion in disclosing or releasing child protective services case record information, investigative and on-going services to parties having a legitimate interest when the local department deems disclosure to be in the best interest of the child. The local department may disclose such information without a court order and without a written release pursuant to § 63.2-105 of the Code of Virginia.

~~C. The local department shall not release the identity of persons reporting incidents of child abuse or neglect, unless court ordered, in accordance with § 63.2-1526 of the Code of Virginia, 42 USC § 5101 et seq., and federal regulations (45 CFR Part 1340).~~

~~D.~~ C. Prior to disclosing information to any individuals or organizations, and to be consistent with § ~~63.2-104~~ 63.2-105 of the Code of Virginia, ~~pursuant to § 63.2-1500 of the Code of Virginia,~~ the local department must ~~be satisfied that~~ consider the factors described in subdivisions 1, 2, and 3 of this subsection as some of the factors necessary to determine whether a person has a legitimate interest and the disclosure of information is in the best interest of the child:

1. The information will be used only for the purpose for which it is made available;

2. Such purpose shall be related to the goal of child protective or rehabilitative services; and

3. The confidential character of the information will be preserved to the greatest extent possible.

D. In the following instances, the local department shall not release child protective services information:

1. The local department shall not release the identity of persons reporting incidents of child abuse or neglect, unless court ordered, in accordance with § 63.2-1526 of the Code of Virginia, 42 USC § 5101 et seq., and federal regulations (45 CFR Part 1340).

2. In all complaints or reports that are being investigated jointly with law enforcement, no information shall be released by the local department unless authorized by the law-enforcement officer or his supervisor or the attorney for the Commonwealth pursuant to § 63.2-1516.1 B of the Code of Virginia.

22VAC40-705-180. Training.

A. The department shall implement a uniform training plan for child protective services workers and supervisors. The plan shall establish minimum standards for all child protective services workers and supervisors in the Commonwealth of Virginia.

B. Workers and supervisors shall complete skills and policy training specific to child abuse and neglect investigations and family assessments within the first two years of their employment.

C. All child protective services workers and supervisors shall complete a minimum of 24 contact hours of continuing education or training annually. This requirement begins after completion of initial training mandates and no later than three years from the date of hire.

VA.R. Doc. No. R13-3636; Filed November 12, 2015, 8:49 a.m.

Fast-Track Regulation

Title of Regulation: **22VAC40-780. Elimination of Financial Eligibility Criteria for Direct Social Services (amending 22VAC40-780-60).**

Statutory Authority: §§ 63.2-217 and 63.2-614 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 13, 2016.

Effective Date: February 1, 2016.

Agency Contact: Phyl Parrish, Policy, Legislation and Regulatory Manager, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7926, FAX (804) 726-7499, or email phyl.parrish@dss.virginia.gov.

Basis: Section 63.2-217 of the Code of Virginia provides the authority for the State Board of Social Services to adopt regulations to carry out the purpose of Title 63.2. Section 63.2-319 of the Code of Virginia requires local departments of social services (LDSS) to provide child welfare and other services. Section 63.2-407 of the Code of Virginia provides that counties and cities may provide public assistance and social services as authorized by the State Board of Social Services.

Purpose: The purpose of the regulatory action is to change the title of the regulation to make it more accurately reflect the regulation's content and purpose. It is also to remove unnecessary language that may cause individuals to think the regulation addresses services delivered as part of public assistance programs. This regulation is essential in that it provides authority for LDSS to provide direct services impacting the safety of children and the welfare of children and their families.

Rationale for Using Fast-Track Process: The fast-track rulemaking process is appropriate for the promulgation of this regulatory action because the two changes being made are simple and intended to clarify, and it is unlikely anyone would comment on them. In the past two periodic reviews of this regulation, including the most recent one ending June 8, 2015, no comments were received.

Substance: The title of the regulation is being changed from "Elimination of Financial Eligibility for Direct Social

Services" to "Eligibility for Direct Social Services." In 22VAC40-780-60, a sentence stating that all persons needing social services may be served on a universal access basis, except for services delivered as part of an employment services program, is being changed to remove the reference to employment services programs.

Issues: The regulation is being changed to clarify the title and remove unnecessary language. More clarity in the regulation is an advantage to the public and to the LDSS that use this regulation for authority for their provision of direct social services. There are no disadvantages to the public or the Commonwealth.

Small Business Impact Review Report of Findings: This regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Social Services (Board) proposes to change this regulation's title and eliminate language that is unrelated to the purposes of this regulation.

Result of Analysis. Benefits likely outweigh costs for these proposed changes.

Estimated Economic Impact. This regulation's current title is "Elimination of Financial Eligibility Criteria for Direct Social Services" and the regulation currently contains a part of a sentence that refers to employment services programs, which fall under public assistance programs not direct social services. The Board proposes to change the title of this regulation to "Eligibility for Direct Social Services" and to remove the reference to employment services programs from the regulatory text. No entities are likely to incur costs on account of either of these changes. Both changes will likely increase the clarity of the regulation as they remove language that might cause confusion.

Businesses and Entities Affected. Board staff reports that these changes will affect all 120 local Departments of Social Services and any of their clients who qualify for direct social services.

Localities Particularly Affected. No locality in the Commonwealth will be particularly affected by these proposed changes.

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

Effects on the Use and Value of Private Property. These proposed changes will likely have no impact on the use or value of private property.

Real Estate Development Costs. These proposed changes will likely not affect real estate development costs.

Small Businesses:

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

Costs and Other Effects. No small businesses will incur costs on account of these regulatory changes.

Alternative Method that Minimizes Adverse Impact. No small businesses will incur costs on account of these regulatory changes.

Adverse Impacts:

Businesses: No businesses will incur costs on account of these regulatory changes.

Localities: These proposed changes are unlikely to adversely impact localities.

Other Entities: These proposed changes are unlikely to adversely impact any other entity in the Commonwealth.

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

Summary:

The amendments (i) change the title of the regulation and (ii) remove unnecessary language in 22VAC40-780-60 referring to employment services programs, which are benefit or public assistance programs rather than social services programs.

CHAPTER 780

~~ELIMINATION OF FINANCIAL~~ ELIGIBILITY ~~CRITERIA~~ FOR DIRECT SOCIAL SERVICES

22VAC40-780-60. Universal access.

Local departments of social services may choose one of two options in providing direct services on a universal access basis:

1. All persons needing direct services may be served on a universal access basis ~~except for services delivered as a part of employment services programs~~; or

2. Only persons needing the following services may be served on a universal access basis:

a. Intake services;

b. Family services (services provided to prevent child abuse and neglect, independent adoptions, and court activities);

c. Adult protective services;

d. Child protective services;

e. Foster care or adoption services; or

f. Adult services (services provided to elderly and incapacitated adults at risk of abuse, neglect, or exploitation).

VA.R. Doc. No. R16-4436; Filed November 12, 2015, 8:57 a.m.

VIRGINIA BOARD FOR ASBESTOS, LEAD, AND HOME INSPECTORS

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Virginia Board for Asbestos, Lead, and Home Inspectors conducted a small business impact review of **18VAC15-11, Public Participation Guidelines**, and determined that this regulation should be retained in its current form. The Virginia Board for Asbestos, Lead, and Home Inspectors is publishing its report of findings dated November 24, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Section 2.2-4007.02 of the Code of Virginia mandates the agency to solicit the input of interested parties in the formation and development of its regulations. Therefore, the continued need for the regulation is established in statute. The regulation is necessary to protect public health, safety, and welfare by establishing public participation guidelines that promote public involvement in the development, amendment, or repeal of an agency's regulation. By soliciting the input of interested parties, the agency is better equipped to effectively regulate the occupation or profession. Since no complaints or comments were received during the public comment period, there does not appear to be a reason to amend or repeal the regulation. The regulation is clearly written and easily understandable. The regulation does not overlap, duplicate, or contravene federal or state law or regulation. The most recent periodic review of the regulation occurred in 2011. On November 19, 2015, the board discussed the regulation and, for the reasons stated in this paragraph, determined that the regulation should not be amended or repealed but should be retained in its current form.

Contact Information: Trisha Henshaw, Executive Director, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email alhi@dpor.virginia.gov.

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Virginia Board for Asbestos, Lead, and Home Inspectors conducted a small business impact review of **18VAC15-20, Virginia Asbestos Licensing Regulations**, and determined that this regulation should be retained in its current form. The Virginia Board for Asbestos, Lead, and Home Inspectors is publishing its report of findings dated November 24, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Section 54.1-201.5 of the Code of Virginia mandates the board to promulgate regulations. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation. The board protects the safety and welfare of the citizens of the Commonwealth by ensuring that only those individuals and firms that meet specific criteria set forth in the statutes and regulations are eligible to receive a license or training program accreditation. The board is also tasked with ensuring that its regulants meet standards of practice that are set forth in the regulations. No comments or complaints were received during the public comment period. The regulation is clearly written, is easily understandable, and does not overlap, duplicate, or conflict with federal or state law or regulation. The most recent periodic review of the regulation occurred in 2011. On November 19, 2015, the board discussed the regulation and, for the reasons stated in this paragraph, determined that the regulation should not be amended or repealed but should be retained in its current form.

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Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Virginia Board for Asbestos, Lead, and Home Inspectors conducted a small business impact review of **18VAC15-30, Virginia Lead-Based Paint Activities Regulations**, and determined that this regulation should be retained in its current form. The Virginia Board for Asbestos, Lead, and Home Inspectors is publishing its report of findings dated November 24, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Section 54.1-201.5 of the Code of Virginia mandates the board to promulgate regulations. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation. The board protects the safety and welfare of the citizens of the Commonwealth by ensuring that only those individuals and firms that meet specific criteria set forth in the statutes and regulations are eligible to receive a license or training program accreditation. The board is also tasked with ensuring that its regulants meet standards of practice that are set forth in the regulations. No comments or complaints were received during the public comment period. The regulation is clearly written, is easily understandable, and does not overlap, duplicate, or conflict with federal or state law or regulation. The most recent periodic review of the regulation occurred in 2011. On November 19, 2015, the board discussed the regulation and, for the reasons stated in this paragraph, determined that the regulation should not be amended or repealed but should be retained in its current form.

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telephone (804) 367-8595, FAX (866) 350-5354, or email alhi@dpor.virginia.gov.

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Virginia Board for Asbestos, Lead, and Home Inspectors conducted a small business impact review of **18VAC15-40, Virginia Certified Home Inspectors Regulations**, and determined that this regulation should be retained in its current form. The Virginia Board for Asbestos, Lead, and Home Inspectors is publishing its report of findings dated November 24, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Section 54.1-201.5 of the Code of Virginia mandates the board to promulgate regulations. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation. The board protects the safety and welfare of the citizens of the Commonwealth by ensuring that only those individuals who meet specific criteria set forth in the statutes and regulations are eligible to receive a certificate. The board is also tasked with ensuring that its regulants meet standards of practice that are set forth in the regulations. No comments or complaints were received during the public comment period. The regulation is clearly written, is easily understandable, and does not overlap, duplicate, or conflict with federal or state law or regulation. The most recent periodic review of the regulation occurred in 2011. On November 19, 2015, the board discussed the regulation and, for the reasons stated in this paragraph, determined that the regulation should not be amended or repealed but should be retained in its current form.

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AUCTIONEERS BOARD

Notice of Periodic Review and Small Business Impact Review

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Auctioneers Board is currently reviewing each of the regulations listed below to determine whether the regulation should be repealed, amended, or retained in its current form. The review of each regulation will be guided by the principles in Executive Order 17 (2014). Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

18VAC25-11, Public Participation Guidelines

18VAC25-21, Regulations of the Virginia Auctioneers Board

The comment period begins December 14, 2015, and ends January 4, 2016.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall, and a report of the small business impact review will be published in the Virginia Register of Regulations.

Contact Information: Marian H. Brooks, Regulatory Board Administrator, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (866) 465-6206, or email auctioneers@dpor.virginia.gov.

BOARD FOR CONTRACTORS

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Board for Contractors conducted a small business impact review of **18VAC50-11, Public Participation Guidelines**, and determined that this regulation should be retained in its current form. The Board for Contractors is publishing its report of findings dated November 24, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Section 2.2-4007.02 of the Code of Virginia mandates the agency to solicit the input of interested parties in the formation and development of its regulations. Therefore, the continued need for the regulation is established in statute. The regulation is necessary to protect public health, safety, and welfare by establishing public participation guidelines that promote public involvement in the development, amendment, or repeal of an agency's regulation. By soliciting the input of interested parties, the agency is better equipped to effectively regulate the occupation or profession. Since no relevant complaints or comments were received during the public comment period, there does not appear to be a reason to amend or repeal the regulation. The regulation is clearly written and easily understandable. The regulation does not overlap, duplicate, or contravene federal or state law or regulation. This is the first periodic review of the regulation since becoming effective in 2008. On October 20, 2015, the Board for Contractors reviewed the regulation and, for the reasons stated in this paragraph, determined that the regulation should not be amended or repealed but should be retained in its current form.

Contact Information: Eric L. Olson, Executive Director, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-2785, FAX (866) 430-1033, or email contractors@dpor.virginia.gov.

DEPARTMENT OF FORENSIC SCIENCE

Approval of Field Tests for Detection of Drugs

In accordance with 6VAC40-30, the Regulations for the Approval of Field Tests for Detection of Drugs, and under the authority of the Code of Virginia, the following field tests for detection of drugs are approved field tests:

ODV INCORPORATED
13386 INTERNATIONAL PARKWAY
JACKSONVILLE, FL 32218-2383

ODV NarcoPouch

Drug or Drug Type:	Manufacturer's Field Test:
Heroin	902 – Marquis Reagent
Amphetamine	902 – Marquis Reagent
Methamphetamine	902 – Marquis Reagent
3,4–Methylenedioxymethamphetamine (MDMA)	902 – Marquis Reagent
Cocaine Hydrochloride	904 or 904B – Cocaine HCl and Base Reagent
Cocaine Base	904 or 904B – Cocaine HCl and Base Reagent
Barbiturates	905 – Dille-Koppanyi Reagent
Lysergic Acid Diethylamide (LSD)	907 – Ehrlich's (Modified) Reagent
Marijuana	908 – Duquenois – Levine Reagent
Hashish Oil	908 – Duquenois – Levine Reagent
Marijuana	909 – K N Reagent
Hashish Oil	909 – K N Reagent
Phencyclidine (PCP)	914 – PCP Methaqualone Reagent
Heroin	922 – Opiates Reagent
Methamphetamine	923 – Methamphetamine/Ecstasy Reagent
3,4–Methylenedioxymethamphetamine (MDMA)	923 – Methamphetamine/Ecstasy Reagent
Heroin	924 – Mecke's (Modified) Reagent
Diazepam	925 – Valium/Ketamine Reagent
Ketamine	925 – Valium/Ketamine Reagent
Ephedrine	927 – Ephedrine Reagent
gamma – Hydroxybutyrate (GHB)	928 – GHB Reagent

ODV NarcoTest

Drug or Drug Type:	Manufacturer's Field Test:
Heroin	7602 – Marquis Reagent
Amphetamine	7602 – Marquis Reagent
Methamphetamine	7602 – Marquis Reagent
3,4–Methylenedioxymethamphetamine (MDMA)	7602 – Marquis Reagent
Barbiturates	7605 – Dille-Koppanyi Reagent
Lysergic Acid Diethylamide (LSD)	7607 – Ehrlich's (Modified) Reagent
Marijuana	7608 – Duquenois Reagent
Hashish Oil	7608 – Duquenois Reagent
Marijuana	7609 – K N Reagent
Hashish Oil	7609 – K N Reagent
Cocaine Hydrochloride	7613 – Scott (Modified) Reagent
Cocaine Base	7613 – Scott (Modified) Reagent
Phencyclidine (PCP)	7614 – PCP Methaqualone Reagent
Heroin	7622 – Opiates Reagent
Methamphetamine	7623– Methamphetamine/Ecstasy Reagent
3,4–Methylenedioxymethamphetamine (MDMA)	7623– Methamphetamine/Ecstasy Reagent
Heroin	7624 – Mecke's Reagent

Diazepam	7625 – Valium/Ketamine Reagent
Ketamine	7625 – Valium/Ketamine Reagent
Ephedrine	7627 – Chen's Reagent Ephedrine
gamma – Hydroxybutyrate (GHB)	7628 – GHB Reagent

SIRCHIE FINGERPRINT LABORATORIES
100 HUNTER PLACE
YOUNGSVILLE, NC 27596

NARK

Drug or Drug Type	Manufacturer's Field Test:
Narcotic Alkaloids	1 – Mayer's Reagent
Heroin	1 – Mayer's Reagent
Morphine	1 – Mayer's Reagent
Amphetamine	1 – Mayer's Reagent
Methamphetamine	1 – Mayer's Reagent
Opium Alkaloids	2 – Marquis Reagent
Heroin	2 – Marquis Reagent
Morphine	2 – Marquis Reagent
Amphetamine	2 – Marquis Reagent
Methamphetamine	2 – Marquis Reagent
3,4–Methylenedioxymethamphetamine (MDMA)	2 – Marquis Reagent
Meperidine (Demerol) (Pethidine)	2 – Marquis Reagent
Heroin	3 – Nitric Acid
Morphine	3 – Nitric Acid
Cocaine Hydrochloride	4 – Cobalt Thiocyanate Reagent
Cocaine Base	4 – Cobalt Thiocyanate Reagent
Procaine	4 – Cobalt Thiocyanate Reagent
Tetracaine	4 – Cobalt Thiocyanate Reagent
Barbiturates	5 – Dille-Koppanyi Reagent
Heroin	6 – Mandelin Reagent
Morphine	6 – Mandelin Reagent
Amphetamine	6 – Mandelin Reagent
Methamphetamine	6 – Mandelin Reagent
Lysergic Acid Diethylamide (LSD)	7 – Ehrlich's Reagent
Marijuana	8 – Duquenois Reagent
Hashish	8 – Duquenois Reagent
Hashish Oil	8 – Duquenois Reagent
Tetrahydrocannabinol (THC)	8 – Duquenois Reagent
Marijuana	9 – NDB (Fast Blue B Salt) Reagent
Hashish	9 – NDB (Fast Blue B Salt) Reagent
Hashish Oil	9 – NDB (Fast Blue B Salt) Reagent
Tetrahydrocannabinol (THC)	9 – NDB (Fast Blue B Salt) Reagent
Cocaine Base	13 – Cobalt Thiocyanate/Crack Test

NARK II

Drug or Drug Type:	Manufacturer's Field Test:
Narcotic Alkaloids	01 – Marquis Reagent
Heroin	01 – Marquis Reagent
Morphine	01 – Marquis Reagent
Amphetamine	01 – Marquis Reagent
Methamphetamine	01 – Marquis Reagent
3,4–Methylenedioxymethamphetamine (MDMA)	01 – Marquis Reagent
Morphine	02 – Nitric Acid

Heroin	02 – Nitric Acid
Barbiturates	03 – Dille-Koppanyi Reagent
Lysergic Acid Diethylamide (LSD)	04 – Ehrlich's Reagent
Marijuana	05 – Duquenois – Levine Reagent
Hashish	05 – Duquenois – Levine Reagent
Hashish Oil	05 – Duquenois – Levine Reagent
Tetrahydrocannabinol (THC)	05 – Duquenois – Levine Reagent
Cocaine Hydrochloride	07 – Scott's (Modified) Reagent
Cocaine Base	07 – Scott's (Modified) Reagent
Phencyclidine (PCP)	09 – Phencyclidine Reagent
Opiates	10 – Opiates Reagent
Heroin	10 – Opiates Reagent
Morphine	10 – Opiates Reagent
Buprenorphine	10 – Special Opiates Reagent
Heroin	11 – Mecke's Reagent
3,4–Methylenedioxymethamphetamine (MDMA)	11 – Mecke's Reagent
Pentazocine	12 – Talwin/Pentazocine Reagent
Ephedrine	13 – Ephedrine Reagent
Diazepam	14 – Valium Reagent
Methamphetamine	15 – Methamphetamine (Secondary Amines Reagent)
Narcotic Alkaloids	19 – Mayer's Reagent
Heroin	19 – Mayer's Reagent
Morphine	19 – Mayer's Reagent
Amphetamine	19 – Mayer's Reagent
Methamphetamine	19 – Mayer's Reagent
3,4-Methylenedioxypyrovalerone (MDPV)	24 – MDPV (Bath Salts) Reagent
Beta-keto-N-methyl-3,4-benzodioxyolybutanamine (other name: butylone)	24 – MDPV Synthetic Cathinones Reagent
3,4-Methylenedioxyethcathinone (other name: ethylone)	24 – MDPV Synthetic Cathinones Reagent
3,4-Methylenedioxymethcathinone (other name: methylone)	24 – MDPV Synthetic Cathinones Reagent
Naphthylpyrovalerone (other name: naphyrone)	24 – MDPV Synthetic Cathinones Reagent
Beta-keto-methylbenzodioxolylpentanamine (other name: pentylone)	24 – MDPV Synthetic Cathinones Reagent
4-Methylmethcathinone (Mephedrone)	25 – Mephedrone (Bath Salts) Reagent
Alpha-pyrrolidinovalerophenone (other name: alpha-PVP)	26 – A-PVP (Synthetic Stimulant) Reagent
4-Bromo-2,5-dimethoxyphenethylamine (other name: 2C-B)	29 - 2C Reagent
2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (other name: 2C-C)	29 – 2C Reagent
4-Ethyl-2,5-dimethoxyphenethylamine (other name: 2C-E)	29 – 2C Reagent
4-Iodo-2,5-dimethoxyphenethylamine (other name: 2C-I)	29 – 2C Reagent
2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (other name: 2C-N)	29 – 2C Reagent
2,5-dimethoxy-4-(n)-propylthiophenethylamine (other name: 2C-T-7)	29 – 2C Reagent
Psilocybin	30 – Psilocybin/Psilocin Reagent
Methamphetamine	31 – Liebermann Reagent
Morphine	31 – Liebermann Reagent

ARMOR HOLDINGS, INCORPORATED
13386 INTERNATIONAL PARKWAY
JACKSONVILLE, FL 32218-2383

NIK

Drug or Drug Type:	Manufacturer's Field Test:
Heroin	Test A 6071 – Marquis Reagent

Amphetamine	Test A 6071 – Marquis Reagent
Methamphetamine	Test A 6071 – Marquis Reagent
3,4–Methylenedioxymethamphetamine (MDMA)	Test A 6071 – Marquis Reagent
Morphine	Test B 6072 – Nitric Acid Reagent
Barbiturates	Test C 6073 – Dille-Koppanyi Reagent
Lysergic Acid Diethylamide (LSD)	Test D 6074 – LSD Reagent System
Marijuana	Test E 6075 – Duquenois – Levine Reagent
Hashish Oil	Test E 6075 – Duquenois – Levine Reagent
Tetrahydrocannabinol	Test E 6075 – Duquenois – Levine Reagent
Cocaine Hydrochloride	Test G 6077 – Scott (Modified) Reagent
Cocaine Base	Test G 6077 – Scott (Modified) Reagent
Cocaine Hydrochloride	6500 or 6501 – Cocaine ID Swab
Cocaine Base	6500 or 6501 – Cocaine ID Swab
Phencyclidine (PCP)	Test J 6079 – PCP Reagent System
Heroin	Test K 6080 – Opiates Reagent
Heroin	Test L 6081 – Brown Heroin Reagent System
gamma – Hydroxybutyrate (GHB)	Test O 6090 – GHB Reagent
Ephedrine	Test Q 6085 – Ephedrine Reagent
Pseudoephedrine	Test Q 6085 – Ephedrine Reagent
Diazepam	Test R 6085 – Valium Reagent
Methamphetamine	Test U 6087 – Methamphetamine Reagent
3,4–Methylenedioxymethamphetamine (MDMA)	Test U 6087 – Methamphetamine Reagent
Methadone	Test W 6088 – Mandelin Reagent System

MISTRAL SECURITY INCORPORATED
7910 WOODMONT AVENUE SUITE 820
BETHESDA, MD 20814

Drug or Drug Type:	Manufacturer's Field Test:
Heroin	Detect 4 Drugs Aerosol
Amphetamine	Detect 4 Drugs Aerosol
Methamphetamine	Detect 4 Drugs Aerosol
Marijuana	Detect 4 Drugs Aerosol
Hashish Oil	Detect 4 Drugs Aerosol
Methamphetamine	Meth 1 and 2 Aerosol
Heroin	Herosol Aerosol
Marijuana	Cannabispray 1 and 2 Aerosol
Hashish Oil	Cannabispray 1 and 2 Aerosol
Cocaine Hydrochloride	Coca-Test Aerosol
Cocaine Base	Coca-Test Aerosol
Marijuana	Pen Test – D4D
Phencyclidine	Pen Test – D4D
Amphetamine	Pen Test – D4D
Ketamine	Pen Test – D4D
Methamphetamine	Pen Test – D4D
Ephedrine	Pen Test – D4D
Heroin	Pen Test – D4D
Methadone	Pen Test – D4D
Buprenorphine	Pen Test – D4D
Opium	Pen Test – D4D
Phenobarbital	Pen Test – Barbitusol
Marijuana	Pen Test – Cannabis Test
Phencyclidine	Pen Test – Coca Test
Cocaine Hydrochloride	Pen Test – Coca Test
Cocaine Base	Pen Test – Coca Test
Buprenorphine	Pen Test – C&H Test

Cocaine Hydrochloride	Pen Test – C&H Test
Cocaine Base	Pen Test – C&H Test
Ephedrine	Pen Test – C&H Test
Ketamine	Pen Test – C&H Test
Heroin	Pen Test – C&H Test
Lysergic Acid Diethylamide (LSD)	Pen Test – C&H Test
Methadone	Pen Test – C&H Test
Methamphetamine	Pen Test – C&H Test
Heroin	Pen Test – Herosol
Methadone	Pen Test – Herosol
Lysergic Acid Diethylamide	Pen Test – LSD Test
Methamphetamine	Pen Test – Meth/X Test
3,4-Methylenedioxymethamphetamine (MDMA)	Pen Test – Meth/X Test
Morphine	Pen Test – Opiatest
Opium	Pen Test – Opiatest
Diazepam	Pen Test – BZO
Ephedrine	Pen Test – Ephedrine
Pseudoephedrine	Pen Test – Ephedrine
Amphetamine	101 PDT Marquis Reagent
Heroin	101 PDT Marquis Reagent
3,4-Methylenedioxymethamphetamine (MDMA)	101 PDT Marquis Reagent
Phenobarbital	107 PDT Dille-Koppanyi Reagent
Lysergic Acid Diethylamide	110 PDT Modified Ehrlich Reagent
Marijuana	119 PDT KN Reagent
Cocaine Hydrochloride	122 PDT Modified Scott Reagent
Cocaine Base	122 PDT Modified Scott Reagent
Methaqualone	143 PDT Methaqualone/PCP Reagent
Phencyclidine	143 PDT Methaqualone/PCP Reagent
Heroin	140 PDT Modified Mecke's Reagent
gamma-Hydroxybutyrate (GHB)	149 PDT GHB Reagent
Ephedrine	155 PDT Chen's Reagent
Diazepam	158 PDT Valium/Rohypnol Reagent
Flunitrazepam	158 PDT Valium/Rohypnol Reagent
Ketamine	161 PDT Morris Reagent
Methamphetamine	164 PDT Methamphetamine (MDMA/Ecstasy) Reagent
3,4-Methylenedioxymethamphetamine (MDMA)	164 PDT Methamphetamine (MDMA/Ecstasy) Reagent
Psilocybin	167 PDT Psilocybin Reagent
3,4-Methylenedioxypyrovalerone (MDPV)	170 PDT Bath Salts: MDPV Reagent
4-Methylmethcathinone (Mephedrone)	173 PDT Bath Salts: Mephedrone Reagent
Morphine	137 PDT Opiates Reagent

JANT PHARMACAL CORPORATION
16255 VENTURA BLVD., #505
ENCINO, CA 91436

Formerly available through:
MILLENNIUM SECURITY GROUP

Accutest IDenta

Drug or Drug Type:	Manufacturer's Field Test:
Marijuana	ACS3000 Marijuana/Hashish (Duquenois-Levine Reagent)
Hashish Oil	ACS3000 Marijuana/Hashish (Duquenois-Levine Reagent)
Heroin	Heroin Step 1 and Step 2
Cocaine Hydrochloride	Cocaine/Crack Step 1 and Step 2
Cocaine Base	Cocaine/Crack Step 1 and Step 2

3,4–Methylenedioxymethamphetamine (MDMA)	MDMA Step 1 and Step 2
Methamphetamine	Methamphetamine Step 1 and Step 2

COZART PLC
92 MILTON PARK
ABINGDON, OXFORDSHIRE ENGLAND OX14 4RY

Drug or Drug Type:	Manufacturer's Field Test:
Cocaine	Cocaine Solid Field Test

LYNN PEAVEY COMPANY
10749 WEST 84TH TERRACE
LEXEXA, KS 66214

QuickCheck

Drug or Drug Type:	Manufacturer's Field Test:
Marijuana	Marijuana (Duquenois-Levine Reagent) – 10120
Marijuana	Marijuana – 10121
Hashish Oil	Marijuana (Duquenois-Levine Reagent) – 10120
Hashish Oil	Marijuana – 10121
Heroin	Marquis – 10123
Heroin	Heroin - 10125
Cocaine Hydrochloride	Cocaine – 10124
Cocaine Base	Cocaine – 10124
Methamphetamine	Meth/Ecstasy – 10122
Methamphetamine	Marquis – 10123
MDMA	Meth/Ecstasy – 10122
MDMA	Marquis - 10123

M.M.C. INTERNATIONAL B.V.
FRANKENTHALERSTRAAT 16-18
4816 KA BREDA
THE NETHERLANDS

Drug or Drug Type:	Manufacturer's Field Test:
Heroin	Opiates/Amphetamine Test (Ampoule)
Morphine	Opiates/Amphetamine Test (Ampoule)
Amphetamine	Opiates/Amphetamine Test (Ampoule)
Methamphetamine	Opiates/Amphetamine Test (Ampoule)
Codeine	Opiates/Amphetamine Test (Ampoule)
Marijuana	Cannabis Test (Ampoule)
Hashish Oil	Cannabis Test (Ampoule)
Cocaine Hydrochloride	Cocaine/Crack Test (Ampoule)
Cocaine Base	Cocaine/Crack Test (Ampoule)
Heroin	Heroin Test (Ampoule)
Ketamine	Ketamine Test (Ampoule)
Methadone	Methadone Test (Ampoule)
Methamphetamine	Crystal Meth/XTC Test (Ampoule)
3,4-Methylenedioxymethamphetamine (MDMA)	Crystal Meth/XTC Test (Ampoule)
Morphine	M&H Test (Ampoule)
Heroin	M&H Test (Ampoule)
Ephedrine	Ephedrine HCL Test (Ampoule)
Pseudoephedrine	Ephedrine HCL Test (Ampoule)
Pentazocine	Pentazocine Test (Ampoule)
Buprenorphine	Buprenorphine HCL Test (Ampoule)
Gamma Butyrolactone (GBL)	GBL Test (Ampoule)

Gamma Hydroxybutyric acid (GHB)	GHB Test (Ampoule)
Oxycodone	Oxycodone Test (Ampoule)
Oxymetholone	Steroids Test B (Ampoule)
Testosterone	Steroids Test B (Ampoule)
Methandrostenolone	Steroids Test B (Ampoule)
Phenylacetone	PMK/BMK(BMK) Test (Ampoule)
Lysergic Acid Diethylamide (LSD)	LSD Test (Ampoule)
Phencyclidine (PCP)	PCP Test (Ampoule)
Methaqualone	Methaqualone Test (Ampoule)
Amobarbital	Barbiturates Test (Ampoule)
Pentobarbital	Barbiturates Test (Ampoule)
Phenobarbital	Barbiturates Test (Ampoule)
Secobarbital	Barbiturates Test (Ampoule)
Propoxyphene	Propoxyphene Test (Ampoule)
Diazepam	V&R Test (Ampoule)
Cocaine Hydrochloride	Cocaine/Crack Test (Spray)
Cocaine Base	Cocaine/Crack Test (Spray)
Cocaine Hydrochloride	Cocaine Trace Wipes
Cocaine Base	Cocaine Trace Wipes
Morphine	Opiate Cassette
Heroin	Opiate Cassette
3,4-Methylenedioxymethamphetamine (MDMA)	MDMA/Ecstasy Cassette
Methamphetamine	Methamphetamine Cassette
Amphetamine	Amphetamine Cassette
Cocaine Hydrochloride	Cocaine/Crack NarcoSpray®
Phencyclidine (PCP)	Cocaine/Crack NarcoSpray®
Methaqualone	Cocaine/Crack NarcoSpray®
gamma-Butyrolactone (GBL)	Cocaine/Crack NarcoSpray®
3,4-Methylenedioxypyrovalerone (MDPV)	Cocaine/Crack NarcoSpray®
Cocaine Base	Cocaine/Crack NarcoSpray®
Ketamine	General Screening NarcoSpray®
Heroin	General Screening NarcoSpray®
Marijuana	General Screening NarcoSpray®
Methamphetamine	General Screening NarcoSpray®
3,4-Methylenedioxymethamphetamine (MDMA)	General Screening NarcoSpray®
Phencyclidine (PCP)	General Screening NarcoSpray®

REDXDEFENSE
7642 STANDISH PLACE
ROCKVILLE, MD 20855

XCAT

Drug or Drug Type:	Manufacturer's Field Test:
Cocaine Hydrochloride	COC-210 Card
Cocaine base	COC-210 Card
Phencyclidine	COC-210 Card
Heroin	HER-110 Card
Amphetamine	AMP-500 Card
Methamphetamine	AMP-500 Card
3,4-Methylenedioxymethamphetamine (MDMA)	AMP-500 Card
Butylone	AMP-500 Card
Methedrone	AMP-500 Card
Methylone	AMP-500 Card
Mephedrone	AMP-500 Card
N-Benzylpiperazine (N-BZP)	AMP-500 Card

Mescaline	AMP-500 Card
2C-I	AMP-500 Card

DETECTACHEM LLC
4100 GREENBRIAR DR
SUITE 180
STAFFORD, TX 77477

SEEKERe

Drug or Drug Type:	Manufacturer's Field Test:
Codeine	SEEKERe / Opiates Test Card
Morphine	SEEKERe / Opiates Test Card
Heroin	SEEKERe / Opiates Test Card
Cocaine Hydrochloride	SEEKERe / Cocaine Test Card
Cocaine Base	SEEKERe / Cocaine Test Card
Methamphetamine	SEEKERe / Meth/MDMA Test Card
3,4-Methylenedioxymethamphetamine (MDMA)	SEEKERe / Meth/MDMA Test Card
Marijuana	SEEKERe / Marijuana/THC Test Card
JWH-018	SEEKERe / Synthetic Cannabinoids Test Card

VIRGINIA LOTTERY

Director's Orders

The following Director's Orders of the Virginia Lottery were filed with the Virginia Registrar of Regulations on November 24, 2015. The orders may be viewed at the Virginia Lottery, 900 East Main Street, Richmond, VA, or at the office of the Registrar of Regulations, 201 North 9th Street, 2nd Floor, Richmond, VA.

Director's Order Number One Hundred Twenty (15)

Virginia Lottery's "New Year's Millionaire Raffle Promotion" Final Rules for Operation (effective November 3, 2015)

Director's Order Number One Hundred Forty-Six (15)

Virginia's Computer-Generated Lottery Game Powerball® Final Rules for Game Operation (This Director's Order becomes effective on October 10, 2015, fully replaces any and all prior Virginia Lottery "Powerball" game rules, and shall remain in full force and effect unless amended or rescinded by further Director's Order)

Director's Order Number One Hundred Fifty-One (15)

Virginia's Computer-Generated Lottery Game Cash4Life® Final Rules for Game Operation (This Director's Order becomes effective on November 19, 2015, fully replaces any and all prior Virginia Lottery Cash4Life® Virginia-specific game rules, and shall remain in full force and effect unless amended or rescinded by further Director's Order)

Director's Order Number One Hundred Fifty-Two (15)

Virginia's Computer-Generated Lottery Game Mega Millions Final Rules for Game Operation (This Director's Order becomes effective on November 19, 2015, fully replaces any and all prior Virginia Lottery "Mega Millions" game rules, and shall remain in full force and effect unless amended or rescinded by further Director's Order)

Director's Order Number One Hundred Sixty (15)

Virginia's Lottery's "Bank A Million Coupon" Final Rules for Operation (effective October 27, 2015)

Director's Order Number One Hundred Sixty-One (15)

"Holiday Games Llama Sign" Virginia Lottery Retailer Incentive Program (This Director's Order becomes effective on December 1, 2015, and shall remain in full force and effect until ninety (90) days after the conclusion of the incentive program, unless otherwise extended by the Director)

Director's Order Number One Hundred Sixty-Two (15)

Virginia's Lottery's "Food Lion MVP Kiosk Coupon Promotion" Final Rules for Operation (effective November 4, 2015)

BOARD OF NURSING

Notice of Periodic Review and Small Business Impact Review

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board of Nursing is conducting a periodic review and small business impact review of **18VAC90-50, Regulations Governing the Certification of Massage Therapists**. The review of this regulation will be guided by the principles in Executive Order 17 (2014).

The purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any

issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

The comment period begins December 14, 2015, and ends January 13, 2016.

Comments may be submitted online to the Virginia Regulatory Town Hall at http://www.townhall.virginia.gov/L/Forums.cfm. Comments may also be sent to Elaine J. Yeatts, Regulatory Coordinator, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4688, or email elaine.yeatts@dhp.virginia.gov.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Department of Professional and Occupational Regulation conducted a small business impact review of **18VAC120-30, Regulations Governing Polygraph Examiners**, and determined that this regulation should be retained in its current form. The Department of Professional and Occupational Regulation is publishing its report of findings dated November 24, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

1) Sections 54.1-201.5 and 54.1-1802 of the Code of Virginia mandate the Director of the Department of Professional and Occupational Regulation to promulgate regulations. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation. The regulation does not have an adverse economic impact on small businesses or on individual licensure or registration. Rather, the regulation allows individuals who meet specific minimum competencies to become licensed or obtain intern registration in Virginia.

2) No complaints or comments were received.

3) The regulation is clearly written and is easily understandable.

4) The regulation does not overlap, duplicate, or conflict with federal or state law or regulation.

5) The most recent evaluation occurred in 2011. No changes, including changes in technology and economic conditions, have been identified that would affect licensed individuals seeking registration as a polygraph examiner intern or licensure as a polygraph examiner. The director, for the reasons stated above, determined that the regulation should not be amended or repealed but should be retained in its current form.

Contact Information: Eric L. Olson, Executive Director, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-7226, FAX (866) 430-1033, or email polygraph@dpor.virginia.gov.

REAL ESTATE APPRAISER BOARD

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Real Estate Appraiser Board conducted a small business impact review of **18VAC130-11, Public Participation Guidelines**, and determined that this regulation should be retained in its current form. The Real Estate Appraiser Board is publishing its report of findings dated November 18, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Section 2.2-4007.02 of the Code of Virginia mandates the agency to solicit the input of interested parties in the formation and development of its regulations. Therefore, the continued need for the regulation is established in statute. The regulation is necessary to protect public health, safety, and welfare by establishing public participation guidelines that promote public involvement in the development, amendment, or repeal of an agency's regulation. By soliciting the input of interested parties, the agency is better equipped to effectively regulate the occupation or profession. Since no complaints or comments were received during the public comment period, there does not appear to be a reason to amend or repeal the regulation. The regulation is clearly written and easily understandable. The regulation does not overlap, duplicate, or contravene federal or state law or regulation. The most recent periodic review of the regulation occurred in 2012. On November 17, 2015, the board discussed the regulation and, for the reasons stated above, determined that the regulation should not be amended or repealed but should be retained in its current form.

Contact Information: Christine Martine, Executive Director, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8552, FAX (866) 826-8863, or email reappraisers@dpor.virginia.gov.

REAL ESTATE APPRAISER BOARD

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Real Estate Appraiser Board conducted a small business impact review of **18VAC130-20, Real Estate Appraiser Board Rules and Regulations**, and determined that this regulation should be retained in its current form. The Real Estate Appraiser Board is publishing its report of findings dated November 18, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Section 54.1-201.5 of the Code of Virginia mandates the board to promulgate regulations. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation. The board protects the safety and welfare of the citizens of the Commonwealth by ensuring that only those individuals who meet specific criteria set forth in the statutes and regulations are eligible to receive a real estate appraiser license and business registration. The board is also tasked with ensuring that its regulants meet standards of practice that are set forth in the regulations. No comments or complaints were received during the public comment period. The regulation is clearly written, is easily understandable, and does not overlap, duplicate, or conflict with federal or state law or regulation. The most recent evaluation occurred in 2012. The board discussed the regulation and, for the reasons stated in this paragraph, determined that the regulation should not be amended or repealed but should be retained in its current form.

Contact Information: Christine Martine, Executive Director, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8552, FAX (866) 826-8863, or email reappraisers@dpor.virginia.gov.

STATE WATER CONTROL BOARD

Proposed Consent Order for Neff Lumber Mills, Inc.

An enforcement action has been proposed for Neff Lumber Mills, Inc. for violations at the Neff Lumber Mills, Inc. facility in Broadway, Virginia. The State Water Control Board proposes to issue a consent order to Neff Lumber Mills, Inc., to address noncompliance with State Water Control Law. A description of the proposed action is available at the Department of Environmental Quality office named below or online at www.deq.virginia.gov. Karen Hensley will accept comments by email at karen.hensley@deq.virginia.gov, FAX at (540) 574-7878, or postal mail at Department of Environmental Quality, Valley Regional Office, P.O. Box 3000, Harrisonburg, VA 22801, from December 14, 2015, to January 13, 2016.

VIRGINIA CODE COMMISSION

Notice to State Agencies

Contact Information: *Mailing Address:* Virginia Code Commission, General Assembly Building, 201 North 9th Street, 2nd Floor, Richmond, VA 23219; *Telephone:* Voice (804) 786-3591; *Email:* varegs@dls.virginia.gov.

Meeting Notices: Section 2.2-3707 C of the Code of Virginia requires state agencies to post meeting notices on their websites and on the Commonwealth Calendar at http://www.virginia.gov/connect/commonwealth-calendar.

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

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