



# VIRGINIA

## REGISTER OF REGULATIONS

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Virginia Code Commission

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# VIRGINIA REGISTER INFORMATION PAGE

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

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

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

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

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

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

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

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

A regulation becomes effective at the conclusion of the 30-day final adoption period, or at any other later date specified by the promulgating agency, unless (i) a legislative objection has been filed, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 21-day objection period; (ii) the Governor exercises his authority to require the agency to provide for additional public comment, in which event the regulation,

unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the period for which the Governor has provided for additional public comment; (iii) the Governor and the General Assembly exercise their authority to suspend the effective date of a regulation until the end of the next regular legislative session; or (iv) the agency suspends the regulatory process, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 30-day public comment period and no earlier than 15 days from publication of the readopted action.

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

## **FAST-TRACK RULEMAKING PROCESS**

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

## **EMERGENCY REGULATIONS**

Pursuant to § 2.2-4011 of the Code of Virginia, an agency, upon consultation with the Attorney General, and at the discretion of the Governor, may adopt emergency regulations that are necessitated by an emergency situation. An agency may also adopt an emergency regulation when Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment. The emergency regulation becomes operative upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. Emergency regulations are limited to no more than 18 months in duration; however, may be extended for six months under certain circumstances as provided for in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Register*. During the time the emergency status is in effect, the agency may proceed with the adoption of permanent regulations through the usual procedures. To begin promulgating the replacement regulation, the agency must (i) file the Notice of Intended Regulatory Action with the Registrar within 60 days of the effective date of the emergency regulation and (ii) file the proposed regulation with the Registrar within 180 days of the effective date of the emergency regulation. If the agency chooses not to adopt the regulations, the emergency status ends when the prescribed time limit expires.

## **STATEMENT**

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

## **CITATION TO THE VIRGINIA REGISTER**

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

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

Members of the Virginia Code Commission: **John S. Edwards**, Chair; **James M. LeMunyon**, Vice Chair; **Gregory D. Habeeb**; **Ryan T. McDougle**; **Robert L. Calhoun**; **Carlos L. Hopkins**; **Leslie L. Lilley**; **E.M. Miller, Jr.**; **Thomas M. Moncure, Jr.**; **Christopher R. Nolen**; **Timothy Oksman**; **Charles S. Sharp**; **Mark J. Vucci**.

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

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# PUBLICATION SCHEDULE AND DEADLINES

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

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## September 2017 through August 2018

<u>Volume: Issue</u>	<u>Material Submitted By Noon*</u>	<u>Will Be Published On</u>
34:1	August 16, 2017	September 4, 2017
34:2	August 30, 2017	September 18, 2017
34:3	September 13, 2017	October 2, 2017
34:4	September 27, 2017	October 16, 2017
34:5	October 11, 2017	October 30, 2017
34:6	October 25, 2017	November 13, 2017
34:7	November 8, 2017	November 27, 2017
34:8	November 21, 2017 ( <b>Tuesday</b> )	December 11, 2017
34:9	December 6, 2017	December 25, 2017
34:10	December 19, 2017 ( <b>Tuesday</b> )	January 8, 2018
34:11	January 3, 2018	January 22, 2018
34:12	January 17, 2018	February 5, 2018
34:13	January 31, 2018	February 19, 2018
34:14	February 14, 2018	March 5, 2018
34:15	February 28, 2018	March 19, 2018
34:16	March 14, 2018	April 2, 2018
34:17	March 28, 2018	April 16, 2018
34:18	April 11, 2018	April 30, 2018
34:19	April 25, 2018	May 14, 2018
34:20	May 9, 2018	May 28, 2018
34:21	May 23, 2018	June 11, 2018
34:22	June 6, 2018	June 25, 2018
34:23	June 20, 2018	July 9, 2018
34:24	July 3, 2018 ( <b>Tuesday</b> )	July 23, 2018
34:25	July 18, 2018	August 6, 2018
34:26	August 1, 2018	August 20, 2018

\*Filing deadlines are Wednesdays unless otherwise specified.

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# NOTICES OF INTENDED REGULATORY ACTION

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## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### BOARD OF COUNSELING

#### 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 Counseling intends to consider amending **18VAC115-20, Regulations Governing the Practice of Professional Counseling**. The purpose of the proposed action is to recognize hours acquired in accredited doctoral programs as meeting a portion of the hours of supervised practice required for licensure. The board voted to initiate a regulatory action in response to a petition for rulemaking requesting acceptance of supervised practicum and internship hours in a doctoral program accredited by the Council for Accreditation of Counseling and Related Educational Programs. The board will determine the specific number of hours to be credited towards completion of a supervised residency and qualification for those hours following receipt of comment on this notice.

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

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

Public Comment Deadline: October 4, 2017.

Agency Contact: Jaime Hoyle, Executive Director, Board of Counseling, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4406, FAX (804) 527-4435, or email [jaime.hoyle@dhp.virginia.gov](mailto:jaime.hoyle@dhp.virginia.gov).

VA.R. Doc. No. R17-12; Filed August 4, 2017, 2:37 p.m.

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

Statutory Authority: §§ 51.5-131 and 51.5-145 of the Code of Virginia.

Public Comment Deadline: October 4, 2017.

Agency Contact: Paige McCleary, Adult Protective Services Division Director, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Henrico, VA 23229, telephone (804) 662-7605, FAX (804) 662-9531, TTY (800) 464-9950, or email [paige.mccleary@dars.virginia.gov](mailto:paige.mccleary@dars.virginia.gov).

VA.R. Doc. No. R18-5230; Filed August 4, 2017, 2:38 p.m.

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## TITLE 22. SOCIAL SERVICES

### DEPARTMENT FOR AGING AND REHABILITATIVE 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 for Aging and Rehabilitative Services intends to consider promulgating **22VAC30-130, Adult Services Standards**. The purpose of the proposed action is to establish adult services standards for the provision of services provided by the local departments of social services to an adult with impairment. The new regulation will include definitions, the principles inherent in the provision of adult services, the process for client intake and service delivery, the targeted service population, the types of services that may be provided, and eligibility for services. Additional revisions to the regulation content may be proposed based on public comments received.

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# REGULATIONS

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

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## Symbol Key

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

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## TITLE 2. AGRICULTURE

### BOARD OF AGRICULTURE AND CONSUMER SERVICES

#### Forms

**REGISTRAR'S NOTICE:** A form used in administering the following regulation has been filed by the Department of Agriculture and Consumer Services. 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, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

**Title of Regulation:** **2VAC5-111. Public and Private Animal Shelters.**

**Contact Information:** Dr. Kathryn MacDonald, Program Manager, Office of Animal Care and Emergency Response, Department of Agriculture and Consumer Services, P.O. Box 1163, Richmond, VA 23218, telephone (804) 786-2483, or email [kathryn.macdonald@vdacs.virginia.gov](mailto:kathryn.macdonald@vdacs.virginia.gov).

FORMS (2VAC5-111)

~~Animal Facility Inspection Report, VDACS AC 10 (rev. 7/2015)~~

~~Animal Facility Inspection Form Shelter, VDACS AC 10-A (eff. 3/2016)~~

~~Animal Facility Inspection Form Animal Care, VDACS AC 10 B (rev. 7/2015)~~

~~Animal Facility Inspection Form Operations, VDACS AC 10 C (rev. 7/2015)~~

[Animal Shelter Inspection Form, VDACS AC-10 \(rev. 8/2017\)](#)

VA.R. Doc. No. R18-5233; Filed August 16, 2017, 10:18 a.m.

#### Forms

**REGISTRAR'S NOTICE:** A form used in administering the following regulation has been filed by the Department of Agriculture and Consumer Services. 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, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

**Title of Regulation:** **2VAC5-150. Rules and Regulations Governing the Transportation of Companion Animals.**

**Contact Information:** Dr. Kathryn MacDonald, Program Manager, Office of Animal Care and Emergency Response, Department of Agriculture and Consumer Services, P.O. Box 1163, Richmond, VA 23218, telephone (804) 786-2483, or email [kathryn.macdonald@vdacs.virginia.gov](mailto:kathryn.macdonald@vdacs.virginia.gov).

FORMS (2VAC5-150)

~~Animal Facility Inspection Report, VDACS AC 10 (rev. 7/15)~~

~~Animal Facility Inspection Form Animal Transport, VDACS AC 10 1 (rev. 7/15)~~

[Animal Shelter Inspection Form, VDACS AC-10 \(rev. 8/2017\)](#)

VA.R. Doc. No. R18-5235; Filed August 16, 2017, 10:30 a.m.



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## TITLE 4. CONSERVATION AND NATURAL RESOURCES

### DEPARTMENT OF MINES, MINERALS AND ENERGY

#### Fast-Track Regulation

**Titles of Regulations:** **4VAC25-20. Board of Coal Mining Examiners Certification Requirements (amending 4VAC25-20-15, 4VAC25-20-50, 4VAC25-20-70, 4VAC25-20-180, 4VAC25-20-340 through 4VAC25-20-400; adding 4VAC25-20-185).**

**4VAC25-35. Certification Requirements for Mineral Miners (amending 4VAC25-35-110).**

**Statutory Authority:** §§ 45.1-161.28 and 45.1-161.34 of the Code of Virginia.

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

**Public Comment Deadline:** October 4, 2017.

**Effective Date:** October 19, 2017.

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

**Basis:** Section 45.1-161.28 of the Code of Virginia grants authority to the Board of Coal Mining Examiners to regulate the certification of persons who work in coal mines in the Commonwealth.

Purpose: The purpose of the regulatory action is to better protect the health, safety, and welfare of the citizens of the Commonwealth by modifying or eliminating obsolete language in the regulations. Doing so will allow the department to inspect its permitted sites more safely and efficiently.

Rationale for Using Fast-Track Rulemaking Process: This action will be noncontroversial because it is clarifying regulations and does not create additional regulatory burdens on individuals or businesses.

Substance: The substantive changes to the regulations are the modification of language for clarity or the removal of obsolete language. Obsolete language is removed to keep the regulation up to date. Language has been added to illustrate the distinction between surface mine foremen and inspectors and underground mine foremen and inspectors. Finally, language is added to allow individuals carrying a valid coal surface mine inspector certification to receive a certification to inspect mineral mines.

Issues: The advantages to the Commonwealth and the public are increased safety and efficiency at the permitted mine sites. There are no known disadvantages.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Coal Mining Examiners (Board) proposes to separate the Mine Inspector designation into Underground Mine Inspector and Surface Mine Inspector. Additionally, the Board proposes to amend language for improved clarity and to remove obsolete text.

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

Estimated Economic Impact. Mine inspectors are employed by the Department of Mines, Minerals and Energy (DMME). The current regulation specifies the requirements to become a certified (coal) Mine Inspector in section 4VAC25-20-180, titled Mine Inspector. The Board proposes to change the title of section 4VAC25-20-180 to Underground Mine Inspector, and create a new section 4VAC25-20-185 titled Surface Mine Inspector. There are already separate sections and requirements for Underground Mine Foreman certification and Surface Mine Foreman certification.

The proposed new Surface Mine Inspector certification section specifies that "Applicants who already possess a valid underground mine inspector certification pursuant to 4VAC25-180 shall be deemed to have met the requirements of this section." Thus current certified Mine Inspectors and future certified Underground Mine Inspectors would be certified for inspecting both surface mines and underground mines under the existing and unchanging requirements. Individuals who become certified as Surface Mine Inspectors by completing the requirements listed in the proposed section 4VAC25-20-185 would not be certified to inspect

underground mines unless they also satisfied the requirements in the Underground Mine Inspector certification section.

The requirements under the proposed new Surface Mine Inspector certification section differ from the existing Mine Inspector and proposed Underground Mine Inspector certification sections by requiring that applicants: 1) hold a valid Surface Mine Foreman Certificate rather than a valid Underground Mine Foreman Certificate, and 2) meet the continuing education requirements for surface mine foreman rather than underground mine foreman, and 3) pass the surface mine inspector examination rather than the underground mine inspector examination. According to DMME, the Surface Mine Inspector certification requirements are easier to meet than the Underground Mine Inspector certification requirements as there are specific dangers associated with underground mines that are not present on the surface. Thus introducing the new proposed Surface Mine Inspector certification would be beneficial in that individuals who are qualified for such certification and would only be doing surface inspection would not need to spend the time and effort obtaining additional training for underground safety issues that would not be applicable to their work.

Businesses and Entities Affected. The proposed amendments affect DMME and coal mine inspectors. All coal mine inspectors are employed by DMME.

Localities Particularly Affected. Coal is only mined in counties in far Southwest Virginia (Russell, Lee, Scott, Wise, Tazewell, Dickenson and Buchanan).

Projected Impact on Employment. The proposed amendments would be unlikely to significantly affect employment.

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

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 proposed amendments are unlikely to affect costs for small businesses.

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

Adverse Impacts:

Businesses. The proposed amendments do not adversely affect businesses.

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# Regulations

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Localities. The proposed amendments do not adversely affect localities.

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

Agency's Response to Economic Impact Analysis: The Department of Mines, Minerals and Energy concurs with the economic impact analysis conducted by the Department of Planning and Budget.

## Summary:

*The amendments clarify distinctions between underground mine certifications and surface mine certifications and remove or modify obsolete language.*

### Part I

#### General and Specific Requirements for Certification

#### **4VAC25-20-15. Definitions.**

~~A. This chapter works with the Virginia Mine Safety Act, Title 45.1 of the Code of Virginia. Refer to § 45.1-161.8 for other definitions related to this chapter.~~

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

"Appropriately related work experience" means work experience which demonstrates the applicant's skill and level of responsibility in performing tasks, and prepares and equips him to perform in the capacity of a certified person.

"BCME" means Board of Coal Mining Examiners.

"Chief" means the Chief of the Division of Mines.

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

"Division" means the Division of Mines.

"DMLR" means Division of Mined Land Reclamation.

"EMT" means emergency medical technician.

"GCM" means general coal miner.

"MSHA" means the Mine Safety and Health Administration.

"Virginia coal mine safety regulations" ~~mean 4VAC25-50-10 et seq.~~ means 4VAC25-60 through 4VAC25-120 ~~10 et seq.~~ 4VAC25-125.

~~"Virginia Mine Safety Act" means Chapters 14.2 (§ 45.1-161.7 et seq.) through 14.6 (§ 45.1-161.304 et seq.) and Chapter 18 (§ 45.1-221 et seq.) of Title 45.1 of the Code of Virginia.~~

### Part II

#### Certification Requirements

#### **4VAC25-20-50. First-class Underground mine foreman.**

A. Applicants shall possess five years mining experience, three of which shall be underground, and shall pass the ~~first~~ class underground mine foreman, map, and gas detection examinations.

B. Applicants shall be given three years credit for a degree in mining engineering from an approved four-year college or two years credit for a degree in mining technology.

C. Applicants shall be at least 23 years of age.

D. ~~Beginning August 20, 1997, certified~~ Certified mine foremen shall complete the continuing education requirements in this section within two years from the date of their certification and every two years thereafter. The holder of the certificate shall submit documentation to the division indicating the required continuing education has been completed prior to these deadlines.

E. The holder of the certificate, in order to receive continuing education credit, shall satisfactorily complete a ~~first class an~~ underground mine foreman continuing education course approved by the chief and taught by a certified instructor or other instructor approved by the chief.

F. The ~~first class~~ underground mine foreman shall complete at least four hours of continuing education every two years.

G. The content of the continuing education course shall include, ~~but is not limited to,~~ the:

1. Coal Mine Safety Act, Chapter 14.2 (§ 45.1-161.7 et seq.) of Title 45.1 of the Code of Virginia;
2. Virginia coal mine safety regulations;
3. Responsibilities of ~~first-class~~ underground mine foreman;
4. Virginia coal mine safety policies and division operators' memos; and
5. Review of fatalities and accident trends in Virginia underground coal mines.

H. A maximum of four hours in excess of the required hours may be carried over to the next continuing education period.

I. Failure to complete continuing education requirements shall result in suspension of a person's certification pending completion of continuing education. If the continuing education requirement is not met within two years from the suspension date, the certification shall be revoked by the BCME.

J. The division shall send notice of any suspension to the last address the certified person reported to the division in accordance with 4VAC25-20-20 I. Upon request, DMME will provide the mine operator and other interested parties with a list of individuals whose certification is in suspension or has been revoked.

#### **4VAC25-20-70. Surface mine foreman.**

A. Applicants shall possess five years of surface coal mining experience.

B. Applicants shall pass the surface mine foreman, first aid, and gas detection examinations.

C. ~~Beginning August 20, 1997, certified~~ Certified persons shall complete the continuing education requirements in this section within two years from the date of their certification

and every two years thereafter. The holder of the certificate shall submit documentation to the division indicating the required continuing education has been completed prior to these deadlines.

D. The holder of the certificate, in order to receive continuing education credit, shall satisfactorily complete a surface mine foreman continuing education course approved by the chief and taught by a certified instructor or other instructor approved by the chief.

E. The surface mine foreman shall complete at least four hours of continuing education every two years.

F. The content of the continuing education course shall include, ~~but is not limited to~~, the:

1. Coal Mine Safety Act, Chapter 14.2 (§ 45.1-161.7 et seq.) of Title 45.1 of the Code of Virginia;
2. Virginia coal mine safety regulations;
3. Responsibilities of surface mine foreman;
4. Virginia coal mine safety policies and division operators' memos; and
5. Review of fatalities and accident trends in Virginia surface coal mines.

G. A maximum of four hours in excess of the required hours may be carried over to the next continuing education period.

H. Failure to complete continuing education requirements shall result in suspension of a person's certification pending completion of continuing education. If the continuing education requirement is not met within two years from the suspension date, the certification shall be revoked by the BCME.

I. The division shall send notice of any suspension to the last known address of the certified person reported to the division in accordance with 4VAC25-20-20 I. Upon request, DMME will provide the mine operator and other interested parties with a list of individuals whose certification is in suspension or has been revoked.

#### **4VAC25-20-180. Mine Underground mine inspector.**

A. Applicants shall possess mining experience as described in § 45.1-161.20 of the Code of Virginia.

B. Applicants shall be given three years credit for a degree in mining engineering from an approved four-year college.

C. Applicants shall hold a valid ~~First-Class~~ Underground Mine Foreman Certificate.

D. Applicants shall meet the continuing education requirements of 4VAC25-20-50 for ~~first-class~~ underground mine foreman.

E. Applicants shall pass the underground mine inspector examination.

F. A certificate will not be issued until an applicant is employed by the DMME and shall only remain valid while the person is employed by the department.

#### **4VAC25-20-185. Surface mine inspector.**

A. Applicants shall possess mining experience as described in § 45.1-161.20 of the Code of Virginia.

B. Applicants shall be given three years credit for a degree in mining engineering from an approved four-year college.

C. Applicants shall hold a valid Surface Mine Foreman Certificate.

D. Applicants shall meet the continuing education requirements of 4VAC25-20-70 for surface mine foreman.

E. Applicants shall pass the surface mine inspector examination.

F. A certificate will not be issued until an applicant is employed by DMME and shall only remain valid while the person is employed by the department.

G. Applicants who already possess a valid underground mine inspector certification pursuant to 4VAC25-20-180 shall be deemed to have met the requirements of this section.

#### Part IV

#### On-Site Examination of Underground Mine Foreman

#### **4VAC25-20-340. Examinations.**

A. When a an underground mine is issued a closure order or violation related to a hazardous roof or ventilation condition, the underground mine foreman may be examined to determine his knowledge of the roof control plan and ventilation requirements in the area of his responsibility at the mine. The examination shall be conducted on the surface at the mine site on the day the violation or closure order is issued.

B. The chief shall develop a pool of no more than 50 questions addressing the areas listed in subsection D of this section, which shall be approved by the BCME. These questions shall be available on request and should be incorporated as part of continuing education and other training for underground mine foremen.

C. A division inspector shall administer a written examination using 10 questions from the approved pool. The foreman shall answer eight out of 10 questions correctly to demonstrate thorough understanding of the mine's roof or ventilation plans. The inspector shall select questions from the pool which are most relevant to the conditions or practices resulting in the order of closure or violation.

D. The underground mine foreman may refer to roof control, ventilation, bleeder, or other plans available to him when examined at the surface of an underground mine. Any underground mine foreman performing tasks requiring certification or otherwise directing work in ventilation or roof support shall be able to provide the following information:

1. Describe the roof control requirements set out in the mine's roof control plan in the area of the foreman's responsibility.



2. Describe the frequency and methods of any required testing of roof, face and ribs in the area of the foreman's responsibility.
3. Show how the roof control practices in the area of the foreman's responsibility comply with the requirements of the roof control plan.
4. Describe the frequency and contents of any pre-shift, on-shift, and, when applicable, weekly examinations of mine ventilation required in the area of the foreman's responsibility.
5. Describe the requirements for action under the mine's fan stoppage plan in the area of the foreman's responsibility.
6. Describe any requirements for face ventilation controls used in the area of the foreman's responsibility.
7. Describe any requirements under the mine bleeder plan in the area of the foreman's responsibility.
8. Describe the requirements for mine ventilation controls such as regulators, ventilation doors, and other similar controls in the area of the foreman's responsibility.
9. Describe the minimum volume of air required in the area of the foreman's responsibility.
10. Describe the minimum requirements for quality of air (oxygen, carbon dioxide, and methane) in the area of the foreman's responsibility.
11. Describe the procedure to follow in the area of the foreman's responsibility upon an accumulation of methane at:
  - a. 1.0% or greater not less than 12 inches from the roof, face, ribs, or floor;
  - b. Greater than 1.0% in a split that ventilates any group of active areas;
  - c. 1.5% (or 2.0% as applicable) in a split of air returning from areas where coal is being extracted or is capable of being extracted; or
  - d. 5.0% or greater in any area of the mine.

E. The division inspector completing an examination of a an underground mine foreman under this part shall discuss the results of the exam with the foreman before leaving the mine.

#### **4VAC25-20-350. Actions brought before the BCME.**

A. The examination shall be the basis of any enforcement action brought before the board for failure to display a thorough understanding of the roof control plan and ventilation for the area of the mine for which he is responsible.

B. Refusal of the underground mine foreman to submit to examination will constitute just cause to be brought before the board and may result in suspension of certification and revocation of certification by the board.

## Part V

### Guidelines for On-Site Examination of a an Underground Mine Foreman

#### **4VAC25-20-360. Purpose and scope.**

A. Section 45.1-161.35 A of the Code of Virginia provides for on-site examination of a an underground mine foreman by a mine inspector to determine that the foreman has a thorough understanding of the roof control plan and ventilation for the area of the mine for which he is responsible. The procedures followed by the inspector in conducting an on-site examination of a an underground mine foreman must be consistent with requirements in Part IV (4VAC25-20-340 et seq.) of this chapter. This includes the use of questions approved by the board which are administered in accordance with this chapter.

B. The purpose of examining a an underground mine foreman is to measure and evaluate his knowledge and understanding of mine roof control and ventilation for the areas of his responsibility. ~~Mine~~ Underground mine foremen are required to demonstrate this and other elements of mine safety when they become certified to act as mine foremen in the Commonwealth of Virginia.

C. An on-site examination by the mine inspector will only be initiated when there is just cause that the underground mine foreman has failed to maintain safe roof control and ventilation for his area of responsibility at the mine. Just cause for an on-site examination of a an underground mine foreman by a mine inspector must be based on issuance of an order of closure or violation related to a hazardous condition pertaining to roof control or ventilation.

#### **4VAC25-20-370. Determination by the inspector to conduct an on-site examination.**

A. An order of closure issued in accordance with § 45.1-161.91 of the Code of Virginia, or notice of violation issued in accordance with § 45.1-161.90 of the Code of Virginia that relate to roof control or ventilation hazards, shall be reviewed at the time it is issued for evidence of underground mine foreman negligence, which could require on-site examination of the mine foreman by the mine inspector. In making the determination whether or not to conduct an on-site examination, the mine inspector must establish the following:

1. The roof or ventilation hazards cited resulted from performing his duties with less than ordinary care. Ordinary care means the use of such care as a reasonably prudent and careful underground mine foreman could use under similar circumstances.
2. The underground mine foreman knew or should have known of the existence of the hazardous condition.

B. When these criteria have been established, the mine inspector will undertake an on-site examination of the underground mine foreman.

**4VAC25-20-380. Notification of intent to conduct an on-site examination.**

A. The mine inspector will notify the underground mine foreman of an order of closure or notice of violation for a hazardous condition related to roof control or ventilation in the area of the foreman's responsibility. The inspector will let him know that he intends to invoke the provision of the law for an on-site examination of the foreman.

B. The following approach will be taken by the mine inspector in giving notice to the underground mine foreman:

1. The notification will be given by the inspector in private.
2. The inspector will be courteous and professional in explaining the reason for the on-site examination.
3. The inspector will explain the procedures he will follow in conducting the on-site examination.

**4VAC25-20-390. Procedures for conducting on-site examination.**

A. The on-site examination of the underground mine foreman will be handled in such a way as to not prevent the foreman from performing his duties. The on-site examination must be conducted, to the extent possible, immediately on arrival outside on the surface on the day the order of closure or notice of violation is issued.

B. These procedures will be followed in conducting the on-site examination:

1. The examination will be administered in a written format.
2. The mine inspector will choose the 10 questions from the approved pool related to the condition or practice being cited by the order of closure or notice of violation.
3. The underground mine foreman will be provided sufficient time to write out his answers to the questions. He may refer to plans or other information available to him. However, no other person may assist him in answering the questions. The mine inspector will remain with the mine foreman during the written examination.
4. The mine inspector will read the questions being asked to the underground mine foreman if requested and should answer any questions from the mine foreman which could help to clarify his understanding of the questions.
5. The underground mine foreman may respond to the questions orally. In this case, the mine inspector will record the response of the mine foreman to each question on the examination form, have the foreman sign the form as accurately representing the response, and provide the mine foreman a copy promptly upon completion.

**4VAC25-20-400. Results of the on-site examination.**

A. The mine inspector will promptly check the responses given by the underground mine foreman for each of the 10 questions asked. At least eight of the 10 questions must be answered correctly to successfully complete the on-site examination. The results of the on-site examination will be

reviewed promptly with the underground mine foreman. A copy of the written on-site examination completed by the underground mine foreman will be provided to him promptly by the mine inspector.

B. The circumstances related to the on-site examination of the underground mine foreman, including pass or fail results, will be described in the inspector's report, and will be reviewed as part of the closeout of the scheduled inspection activity for the mine.

C. The chief will notify the underground mine foreman and mine operator in writing of the petition to the BCME for a formal hearing. Should a petition for a hearing be requested, the hearing would be conducted in accordance with Part VI (4VAC25-20-410 et seq.) of this chapter.

D. If a an underground mine foreman successfully appeals a violation which resulted in an on-site evaluation and further establishes to the BCME that he had a thorough knowledge of such plans, then the failure of the on-site examination shall not be used in any other revocation against the foreman.

**4VAC25-35-110. Mine Mineral mine inspector.**

In addition to the requirements set forth in § 45.1-161.292:11 of the Code of Virginia, mine inspector applicants shall demonstrate knowledge and competence in those areas specified in § 45.1-161.292:12 of the Code of Virginia through the examination process. A certificate will not be issued until an applicant is employed by the department. Applicants who already possess a valid coal mine inspector certification pursuant to 4VAC25-20-180 or 4VAC25-20-185 shall be deemed to have met the requirements of this section.

VA.R. Doc. No. R18-5018; Filed August 7, 2017, 7:41 a.m.



**TITLE 7. ECONOMIC DEVELOPMENT**

**DEPARTMENT OF SMALL BUSINESS AND SUPPLIER DIVERSITY**

**Final Regulation**

**REGISTRAR'S NOTICE:** The Department of Small Business and Supplier Diversity is claiming an exemption from the Administrative Process Act in accordance with subdivision 8 of § 2.2-1606 of the Code of Virginia, which exempts regulations implementing certification programs for small, women-owned, and minority-owned businesses and employment services organizations from the Administrative Process Act pursuant to subdivision B 2 of § 2.2-4002 of the Code of Virginia.

Title of Regulation: **7VAC13-20. Regulations to Govern the Certification of Small, Women-Owned, and Minority-Owned Businesses (amending 7VAC13-20-80, 7VAC13-20-140, 7VAC13-20-150, 7VAC13-20-160, 7VAC13-20-200; adding 7VAC13-20-155).**

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Statutory Authority: § 2.2-1606 of the Code of Virginia.

Effective Date: October 4, 2017.

Agency Contact: Reba O'Connor, Regulatory Coordinator, Department of Small Business and Supplier Diversity, 101 North 14th Street, 11th Floor, Richmond, VA 23219, telephone (804) 593-2005, or email reba.oconnor@sbsd.virginia.gov.

Summary:

*The amendments are promulgated as a result of legislation enacted at the 2017 Session of the General Assembly. The amendments (i) extend the small, women-owned, and minority-owned (SWaM) certification period from three years to five years (Chapter 836); (ii) provide that any out-of-state business applying for certification in Virginia as a SWaM business must possess the equivalent certification in its home state as a prerequisite for approval in Virginia and provide that an out-of-state business with a state of origin that does not have a SWaM business certification program is exempt from the requirements of this provision (Chapter 573); and (iii) mandate certification without any additional paperwork of any SWaM business that has obtained certification under any federal SWaM business certification program (Chapter 380).*

**7VAC13-20-80. Eligible out-of-state business enterprise.**

The department may certify a non-Virginia-based business if:

1. It meets the applicable eligibility standards for certification as a small, women-owned, or minority-owned business; and
2. The state in which the business has its principal place of business does not deny a like certification to a Virginia-based small, women-owned, or minority-owned business or provide a preference to small, women-owned, or minority-owned firms that is not available to Virginia-based businesses.
3. Effective July 1, 2017, any out-of-state business applying for certification in Virginia as a small, women-owned, or minority-owned business must have the equivalent certification in the state in which the business has its principal place of business. An out-of-state business that has its principle place of business in a state that does not have a small, women-owned, or minority-owned business certification program shall be exempt from the requirements of this provision.

**7VAC13-20-140. Procedures for initial certification of businesses previously certified by other qualifying local, state, or private sector, or federal certification programs.**

A. A business certified by the department under this section shall be certified for a period of up to ~~three~~ five years unless:

1. The certification is revoked by the department or the program issuing the original certification;
2. The business is no longer in business; or

3. The business is no longer eligible as a small, women-owned, or minority-owned business.

B. A business certified under this section is responsible for notifying the department of any change in legal structure, ownership, control, management, or status of the business or its certification within 30 calendar days of such change. Failure to do so may be grounds for revocation of certification.

C. It shall be the responsibility of the certified business to notify the department of any change of name, address, or contact information and to keep the department informed of its current address and contact information. Changes of name and address must be reported to the department in writing within 30 calendar days of such change. Failure to do so may be grounds for revocation of certification. The department shall not be liable or responsible if a certified business fails to receive notices, communications, or correspondence based upon the certified business's failure to notify the department of any change of address or to provide correct address and contact information.

**7VAC13-20-150. Procedures for initial certification.**

A. Any business that meets the criteria for certification may file an official application with the department.

B. The application will be reviewed initially for completeness. The department may conduct an onsite visit of the business to obtain or clarify any information. The onsite visit may be scheduled or unannounced.

C. The department may request the applicant to provide additional information or documentation to provide clarification and substantiation of certain criteria or to resolve any ambiguities or inconsistencies in an application.

D. The department may impose a time limit in which the applicant must provide the requested information. A reasonable extension may be given by the department for good cause shown by the applicant. Requests for time extensions must be made to the department in writing and should specify the length of time for which the extension is being requested and the reasons for the request. Failure to provide such information or documentation shall render the application administratively closed.

E. After reviewing the application, the department shall issue either a notice of certification or a notice of denial of certification stating the reasons for denial.

F. A business certified by the department under this section shall be certified for a period of ~~three~~ five years unless (i) the certification is revoked before the end of the ~~three-year~~ five-year period, (ii) the business is no longer in business, or (iii) the business is no longer eligible as a small, women-owned, or minority-owned business.

G. The applicant shall be responsible for notifying the department immediately of any change in legal structure, ownership, control, management, or status of the business

within 30 calendar days of such change. Failure to do so may be grounds for revocation of certification.

H. It shall be the responsibility of the applicant, the certified business, or both to notify the department of any change of name, address, or contact information and to keep the department informed of the current address and contact information. Changes of name and address must be reported to the department in writing within 30 calendar days of such change. Failure to do so within 30 calendar days of such change may be grounds for revocation of certification. The department shall not be liable or responsible if a certified business fails to receive notices, communications, or correspondence based upon the certified business's failure to notify the department of any change of address or to provide correct address and contact information.

**7VAC13-20-155. Procedures for initial certification of businesses certified under certain federal certification programs.**

A. Any business that has obtained certification as a small, women-owned, or minority-owned business from an agency of the United States government through a formal, regulatory certification process, other than a self-certification process, may receive the corresponding certification as a small, women-owned, or minority-owned business from the department by filing an application with the department.

B. The application will be reviewed initially for completeness. The application need not include additional paperwork beyond that necessary to (i) accurately identify the business name, type, location, and ownership; (ii) provide proof of the corresponding federal certification, including the duration of such certification; and (iii) provide contact information for the designated representative of the business.

C. After reviewing the application, the department shall issue either a notice of certification or a notice of denial of certification stating the reasons for denial.

D. A business certified by the department under this section shall be certified for a period of five years unless (i) the certification is revoked before the end of the five-year period, (ii) the business is no longer in business, or (iii) the corresponding federal certification of the business expires or is otherwise revoked or terminated.

E. The applicant shall be responsible for notifying the department immediately of any change in status of the business or its corresponding federal certification within 30 calendar days of such change. Failure to do so may be grounds for revocation of certification.

F. It shall be the responsibility of the applicant, the certified business, or both to notify the department of any change of name, address, or contact information and to keep the department informed of the current address and contact information. Changes of name and address must be reported to the department in writing within 30 calendar days of such change. Failure to do so within 30 calendar days of such

change may be grounds for revocation of certification. The department shall not be liable or responsible if a certified business fails to receive notices, communications, or correspondence based upon the certified business's failure to notify the department of any change of address or to provide correct address and contact information.

**7VAC13-20-160. Procedures for renewal of certification or recertification.**

A. To maintain its certification status, a certified business must apply to renew its certification prior to the end of the ~~three-year~~ five-year certification period using the forms and procedures specified by the department.

B. The certification of a business that fails to apply for renewal or recertification prior to the end of the ~~three-year~~ five-year certification period shall terminate automatically on the expiration of the certification.

C. The department may, but in no event shall be required to, notify the business of the pending expiration of its certification prior to the certification expiration.

**7VAC13-20-200. Criteria for revocation of certification.**

The department may revoke the certification of a business that it finds no longer qualifies as a small, women-owned, or minority-owned business. Grounds for revocation of certification may include the following:

1. The organization, structure, management, or control of the certified women-owned or minority-owned business has changed to the extent that it no longer satisfies the requirement of ownership, control, and active management of the business by women or minority individuals.
2. The number of employees or revenues exceeds the requirements for certification of a small business or the small business no longer satisfies the requirements to be independently owned and operated.
3. The business fails to submit the required documentation or to comply with a reasonable request from the department for records or information within the allotted time.
4. The business knowingly provides false or misleading information in support of its initial application or its application for recertification or in response to the department's request for records or information.
5. The business is based in a state that denies like certifications to Virginia-based small, women-owned, or minority-owned businesses or that provides a preference for small, women-owned, or minority-owned businesses that is not available to Virginia-based businesses.
6. Effective July 1, 2017, any out-of-state business applying for recertification in Virginia as a small, women-owned, or minority-owned business must have the equivalent certification in the state in which the business has its principal place of business. An out-of-state business which has its principle place of business in a state that does

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not have a small, women-owned, or minority-owned business certification program shall be exempt from the requirements of this provision.

V.A.R. Doc. No. R18-5184; Filed August 3, 2017, 2:12 p.m.

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## TITLE 9. ENVIRONMENT

### VIRGINIA WASTE MANAGEMENT BOARD

#### Forms

**REGISTRAR'S NOTICE:** A form used in administering the following regulation has been filed by the Virginia Waste Management Board. 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, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

**Title of Regulation:** **9VAC20-90. Solid Waste Management Permit Action Fees and Annual Fees.**

**Contact Information:** Melissa Porterfield, Department of Environmental Quality, 629 East Main Street, Richmond, VA 23219, telephone (804) 698-4238, or email [melissa.porterfield@deq.virginia.gov](mailto:melissa.porterfield@deq.virginia.gov).

FORMS (9VAC20-90)

[Solid Waste Information and Assessment Program - Reporting Table, Form DEQ 50-25 with Statement of Economic Benefits Form and Instructions \(rev. 11/2014\)](#)

~~[Solid Waste Annual Permit Fee Quarter Payment Form PF001 \(rev. 8/2016\)](#)~~

[Solid Waste Annual Permit Fee Quarter Payment Form PF001 \(rev. 7/2017\)](#)

V.A.R. Doc. No. R18-5220; Filed August 14, 2017, 10:12 a.m.

### STATE WATER CONTROL BOARD

#### Final Regulation

**REGISTRAR'S NOTICE:** The following regulatory action is exempt from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 c of the Code of Virginia, which excludes regulations that are necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation. The State Water Control Board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Titles of Regulations:** **9VAC25-580. Underground Storage Tanks: Technical Standards and Corrective Action Requirements (amending 9VAC25-580-10 through 9VAC25-580-190, 9VAC25-580-210, 9VAC25-580-250, 9VAC25-580-260, 9VAC25-580-280, 9VAC25-580-310,**

**9VAC25-580-320, 9VAC25-580-330, 9VAC25-580-370; adding 9VAC25-580-82, 9VAC25-580-85, 9VAC25-580-380, 9VAC25-580-390; repealing Appendices I and II).**

**9VAC25-590. Petroleum Underground Storage Tank Financial Responsibility Requirements (amending 9VAC25-590-10, 9VAC25-590-20, 9VAC25-590-30, 9VAC25-590-40, 9VAC25-590-60, 9VAC25-590-160, 9VAC25-590-170, 9VAC25-590-180, 9VAC25-590-190, 9VAC25-590-240, 9VAC25-590-250, 9VAC25-590-260; adding 9VAC25-590-15).**

**Statutory Authority:** §§ 62-1.44.15 and 62.1-44.34:9 of the Code of Virginia; 42 USC § 6901 et seq.; 40 CFR Parts 280 and 281.

**Effective Date:** January 1, 2018.

**Agency Contact:** Russell P. Ellison, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4269, FAX (804) 698-4266, or email [russell.ellison@deq.virginia.gov](mailto:russell.ellison@deq.virginia.gov).

#### Summary:

*On July 15, 2015, the U.S. Environmental Protection Agency (EPA) published a final rule titled "Revising Underground Storage Tank Regulations - Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training" in 80 FR 41566-41683. This federal rule modified regulatory requirements concerning underground storage tanks (USTs) found in 40 CFR Part 280 and was adopted in response to the federal Energy Policy Act (EPAct) of 2005. This regulatory action revises Virginia's Underground Storage Tanks: Technical Standards and Corrective Action Requirements (9VAC25-580) and Virginia's Petroleum Underground Storage Tank Financial Responsibility Requirements (9VAC25-590) for consistency with the modifications and requirements found in 40 CFR Part 280.*

*Amendments to Virginia's Underground Storage Tanks: Technical Standards and Corrective Action Requirements address the following: (i) secondary containment requirements for new and replaced tanks and piping; (ii) compatibility requirements; (iii) notification changes; (iv) periodic operation, inspection, and maintenance requirements for UST systems; (v) UST systems deferred in the 1988 UST regulation; (vi) inclusion of new release prevention and detection technologies; (vii) codes of practice updates; and (viii) editorial corrections and technical amendments. In addition, the amendments revise secondary containment requirements to be consistent with EPA's regulatory requirements. Existing operator training and delivery prohibition requirements, which were based on EPA's previous guidance, are retained with minor revisions.*

*The July 15, 2015, final rule also revised 40 CFR 280 Subpart H - Financial Responsibility. Therefore, this regulatory action revises the Petroleum Underground*

*Storage Tank Financial Responsibility Requirements so that USTs previously deferred from regulation, airport hydrant fuel distribution systems, field constructed tanks, and USTs that are temporarily closed are now required to comply with financial responsibility requirements.*

#### Part I

#### Definitions, Applicability, and ~~Interim Prohibition~~ Installation Requirements for Partially Excluded UST Systems

#### 9VAC25-580-10. Definitions.

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

"Aboveground release" means any release to the surface of the land or to surface water. This includes, ~~but is not limited to,~~ releases from the aboveground portion of a UST system and aboveground releases associated with overfills and transfer operations as the regulated substance moves to or from a UST system.

"Airport hydrant fuel distribution system" or "airport hydrant system" means an UST system that fuels aircraft and operates under high pressure with large diameter piping that typically terminates into one or more hydrants (fill stands). The airport hydrant system begins where fuel enters one or more tanks from an external source such as a pipeline, barge, rail car, or other motor fuel carrier.

"Ancillary equipment" means any devices including, ~~but not limited to,~~ such devices as piping, fittings, flanges, valves, and pumps used to distribute, meter, or control the flow of regulated substances to and from an UST.

~~"Below ground~~ Belowground release" means any release to the subsurface of the land and to ~~ground water~~ groundwater. This includes, ~~but is not limited to,~~ releases from the belowground portions of an underground storage tank system and belowground releases associated with overfills and transfer operations as the regulated substance moves to or from an underground storage tank.

"Beneath the surface of the ground" means beneath the ground surface or otherwise covered with earthen materials.

"Board" means the State Water Control Board.

"Building official" means the executive official of the local government building department empowered by § 36-105 of the Code of Virginia to enforce and administer the Virginia Uniform Statewide Building Code (USBC) (§ 36-97 et seq. of the Code of Virginia).

"Cathodic protection" is a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, a tank system can be cathodically protected through the application of either galvanic anodes or impressed current.

"Cathodic protection tester" means a person who can demonstrate an understanding of the principles and

measurements of all common types of cathodic protection systems as applied to buried or submerged metal piping and tank systems. At a minimum, such persons must have education and experience in soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements of buried metal piping and tank systems.

"CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 USC § 9601 et seq.).

"Compatible" means the ability of two or more substances to maintain their respective physical and chemical properties upon contact with one another for the design life of the tank system under conditions likely to be encountered in the UST.

~~"Community water system" means a public water system that serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.~~

"Connected piping" means all underground piping including valves, elbows, joints, flanges, and flexible connectors attached to a tank system through which regulated substances flow. For the purpose of determining how much piping is connected to any individual UST system, the piping that joins two UST systems should be allocated equally between them.

"Containment sump" means a liquid-tight container that protects the environment by containing leaks and spills of regulated substances from piping, dispensers, pumps, and related components in the containment area. Containment sumps may be single walled or secondarily contained and located at the top of the tank (tank top or submersible turbine pump sump), underneath the dispenser (under-dispenser containment sump), or at other points in the piping run (transition or intermediate sump).

"Corrosion expert" means a person who, by reason of thorough knowledge of the physical sciences and the principles of engineering and mathematics acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be accredited or certified as being qualified by the National Association of Corrosion Engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control of buried or submerged metal piping systems and metal tanks.

"De minimis" means trivial and beyond the intent of regulation, as that term is used at 53 ~~Fed. Reg.~~ FR 37108-37109.

"Delivery prohibition" is prohibiting the delivery, deposit, or acceptance of product to an underground storage tank system that has been determined to be ineligible by the board for such delivery, deposit, or acceptance.

"Delivery prohibition tag" means a tag, device, or mechanism on the tank's fill pipes that clearly identifies an underground storage tank system as ineligible for product

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delivery. The tag or device is easily visible to the product deliverer and clearly states and conveys that it is unlawful to deliver to, deposit into, or accept product into the ineligible underground storage tank system. The tag, device, or mechanism is generally tamper resistant.

"Dielectric material" means a material that does not conduct direct electrical current. Dielectric coatings are used to electrically isolate UST systems from the surrounding soils. Dielectric bushings are used to electrically isolate portions of the UST system (e.g., tank from piping).

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

"Dispenser" means equipment located aboveground that dispenses regulated substances from the UST system.

"Dispenser system" means the dispenser and the equipment necessary to connect the dispenser to the underground storage tank system.

"Electrical equipment" means underground equipment that contains dielectric fluid that is necessary for the operation of equipment such as transformers and buried electrical cable.

"Excavation zone" means the volume containing the tank system and backfill material bounded by the ground surface, walls, and floor of the pit and trenches into which the UST system is placed at the time of installation.

~~"Existing community water system or existing potable drinking water well" means a community water system or potable drinking water well is in place when a new installation or replacement of an underground tank, piping, or motor fuel dispensing system begins.~~

"Existing tank system" means a tank system used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988. Installation is considered to have commenced if:

1. The owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system; and if
2. a. Either a continuous ~~on-site~~ onsite physical construction or installation program has begun; or  
b. The owner or operator has entered into contractual obligations, which cannot be ~~cancelled~~ cancelled or modified without substantial loss, for physical construction at the site or installation of the tank system to be completed within a reasonable time.

"Farm tank" is a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. "Farm" includes fish hatcheries, rangeland and nurseries with growing operations.

"Field-constructed tank" means a tank constructed in the field. For example, a tank constructed of concrete that is

poured in the field, or a steel or fiberglass tank primarily fabricated in the field is considered field constructed.

"Flow-through process tank" is a tank that forms an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process. Flow-through process tanks do not include tanks used for the storage of materials prior to their introduction into the production process or for the storage of finished products or by-products from the production process.

"Free product" refers to a regulated substance that is present as a nonaqueous phase liquid (e.g., liquid not dissolved in water).

"Gathering lines" means any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations.

"Hazardous substance UST system" means an underground storage tank system that contains a hazardous substance defined in § 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (42 USC § 9601 et seq.) (but not including any substance regulated as a hazardous waste under subtitle C of RCRA) or any mixture of such substances and petroleum, and which is not a petroleum UST system.

"Heating oil" means petroleum that is No. 1, No. 2, No. 4-light, No. 4-heavy, No. 5-light, No. 5-heavy, and No. 6 technical grades of fuel oil; other residual fuel oils (including Navy Special Fuel Oil and Bunker C); and other fuels when used as substitutes for one of these fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.

"Hydraulic lift tank" means a tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air or hydraulic fluid to operate lifts, elevators, and other similar devices.

"Liquid trap" means sumps, well cellars, and other traps used in association with oil and gas production, gathering, and extraction operations (including gas production plants), for the purpose of collecting oil, water, and other liquids. These liquid traps may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream.

"Maintenance" means the normal operational upkeep to prevent an underground storage tank system from releasing product.

~~"Motor fuel" means petroleum or a petroleum-based substance that is motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any grade of gasoline, and is a complex blend of hydrocarbons typically used in the operation of a motor engine. This definition applies to blended petroleum motor fuels such as biodiesel and ethanol blends that contain more than a de minimis amount of petroleum or petroleum-~~

based substance, such as motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any blend containing one or more of these substances (for example, motor gasoline blended with alcohol).

~~"Motor fuel dispenser system" means the motor fuel dispenser and the equipment necessary to connect the dispenser to the underground storage tank system. The equipment necessary to connect the motor fuel dispenser to the underground storage tank system may include check valves, shear valves, unburied risers or flexible connectors, or other transitional components that are beneath the dispenser and connect the dispenser to the underground piping.~~

"New tank system" means a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988 (See also "existing tank system").

"Noncommercial purposes" with respect to motor fuel means not for resale.

"On the premises where stored" with respect to heating oil means UST systems located on the same property where the stored heating oil is used.

"Operational life" refers to the period beginning when installation of the tank system has commenced until the time the tank system is properly closed under Part VII (9VAC25-580-310 et seq.) of this chapter.

"Operator" means any person in control of, or having responsibility for, the daily operation of the UST system.

"Overfill release" is a release that occurs when a tank is filled beyond its capacity, resulting in a discharge of the regulated substance to the environment.

"Owner" means:

1. In the case of a UST system in use on November 8, 1984, or brought into use after that date, any person who owns an UST system used for storage, use, or dispensing of regulated substances; and
2. In the case of any UST system in use before November 8, 1984, but no longer in use on that date, any person who owned such UST immediately before the discontinuation of its use.

The term "owner" shall not include any person who, without participating in the management of an underground storage tank or being otherwise engaged in petroleum production, refining, and marketing, holds indicia of ownership primarily to protect the holder's security interest in the tank.

"Person" means an individual, trust, firm, joint stock company, corporation, including a government corporation, partnership, association, any state or agency thereof, municipality, county, town, commission, political subdivision of a state, any interstate body, consortium, joint venture, commercial entity, the government of the United States or any unit or agency thereof.

"Petroleum UST system" means an underground storage tank system that contains petroleum or a mixture of petroleum with de minimis quantities of other regulated substances. Such systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

"Pipe" or "piping" means a hollow cylinder or the tubular conduit that is constructed of nonearthen materials that routinely contains and conveys regulated substances from the underground tank(s) to the dispenser(s) or other end use equipment. Such piping includes any elbows, couplings, unions, valves, or other in-line fixtures that contain and convey regulated substances from the underground tank(s) to the dispenser(s). Pipe or piping does not include vent, vapor recovery, or fill lines.

"Pipeline facilities (including gathering lines)" are new and existing pipe rights-of-way and any associated equipment, facilities, or buildings.

~~"Potable drinking water well" means any hole (dug, driven, drilled, or bored) that extends into the earth until it meets groundwater that supplies water for a noncommunity public water system, or otherwise supplies water for household use (consisting of drinking, bathing, cooking, or other similar uses). Such wells may provide water to entities such as a single family residence, group of residences, businesses, schools, parks, campgrounds, and other permanent or seasonal communities.~~

"Product deliverer" is any person who delivers or deposits product into an underground storage tank.

~~"Public water system" means a system for the provision to the public of water for human consumption through pipes or, after August 5, 1998, other constructed conveyances, if such system has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. Such term includes (i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system and (ii) any collection or pretreatment storage facilities not under such control that are used primarily in connection with such system. Such term does not include any "special irrigation district." A public water system is either a "community water system" or a "noncommunity water system."~~

"RCRA" means the federal Resource Conservation and Recovery Act of 1976 as amended (42 USC § 6901 et seq.).

"Regulated substance" means an element, compound, mixture, solution, or substance that, when released into the environment, may present substantial danger to the public health or welfare, or the environment. The term "regulated substance" includes:

1. Any substance defined in § 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (42 USC § 9601 et



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seq.), but not any substance regulated as a hazardous waste under subtitle C of the Resource Conservation and Recovery Act (RCRA) of 1976 (42 USC § 6901 et seq.); and

2. Petroleum, including crude oil or any fraction thereof, that is liquid at standard conditions of temperature and pressure (60°F and 14.7 pounds per square inch absolute). The term "regulated substance" includes ~~but is not limited to~~ petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons ~~derived from crude oil through processes of separation, conversion, upgrading, and finishing,~~ such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

"Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an UST into ~~ground water~~ groundwater, surface water or subsurface soils.

"Release detection" means determining whether a release of a regulated substance has occurred from the UST system into the environment or a leak has occurred into the interstitial space between the UST system and its secondary barrier or secondary containment around it.

"Repair" means to restore to proper operating condition a tank, a pipe, spill prevention equipment, overflow prevention equipment, corrosion protection equipment, release detection equipment, or other UST system component that has caused a release of product from the UST system or has failed to function properly.

~~"Replace" means, when applied to underground storage tanks and piping, to remove an underground storage tank and install a new underground storage tank or to remove and put back greater than 50% of the length of a piping run excluding connectors (such as flexible connectors) connected to an underground storage tank.~~

"Replaced" means:

1. For a tank - to remove a tank and install another tank.
2. For piping - to remove 50% or more of piping and install other piping, excluding connectors, connected to a single tank. For tanks with multiple piping runs, this definition applies independently to each piping run.

"Residential tank" is a tank located on property used primarily for dwelling purposes.

"SARA" means the Superfund Amendments and Reauthorization Act of 1986.

"Secondary containment" or "secondarily contained" means a release prevention and release detection system for ~~an underground a tank and/or or piping. For purposes of this definition, release prevention means an underground tank and/or piping having an inner and outer barrier and release detection means a method of monitoring the space between the inner and outer barriers for a leak or release of regulated substances from the underground tank and/or piping. This system has an inner and outer barrier with an interstitial space~~

that is monitored for leaks. This term includes containment sumps when used for interstitial monitoring of piping.

"Septic tank" is a water-tight covered receptacle designed to receive or process, through liquid separation or biological digestion, the sewage discharged from a building sewer. The effluent from such receptacle is distributed for disposal through the soil, and settled solids and scum from the tank are pumped out periodically and hauled to a treatment facility.

"Storm water or ~~waste water~~ wastewater collection system" means piping, pumps, conduits, and any other equipment necessary to collect and transport the flow of surface water run-off resulting from precipitation, or domestic, commercial, or industrial wastewater to and from retention areas or any areas where treatment is designated to occur. The collection of storm water and wastewater does not include treatment except where incidental to conveyance.

"Surface impoundment" is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials) that is not an injection well.

"Tank" is a stationary device designed to contain an accumulation of regulated substances and constructed of nonearthen materials (e.g., concrete, steel, plastic) that provide structural support.

~~"Underdispenser Under-dispenser containment" or "UDC"~~ means containment underneath a dispenser ~~that will~~ system designed to prevent leaks from the dispenser and piping within or above the UDC from reaching soil or groundwater.

"Underground area" means an underground room, such as a basement, cellar, shaft or vault, providing enough space for physical inspection of the exterior of the tank situated on or above the surface of the floor.

"Underground release" means any belowground release.

"Underground storage tank" or "UST" means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10% or more beneath the surface of the ground. This term does not include any:

1. Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;
2. Tank used for storing heating oil for consumption on the premises where stored;
3. Septic tank;
4. Pipeline facility (including gathering lines):
  - a. Regulated under the Natural Gas Pipeline Safety Act of 1968 (49 USC § 1671 et seq.);
  - b. Regulated under the Hazardous Liquid Pipeline Safety Act of 1979 (49 USC § 2001 et seq.); or
  - c. Which is an intrastate pipeline facility regulated under state laws comparable to the provisions of the law

referred to in ~~subdivisions~~ subdivision 4 a or 4 b of this definition;

5. Surface impoundment, pit, pond, or lagoon;
6. Storm water or wastewater collection system;
7. Flow-through process tank;
8. Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or
9. Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

The term "underground storage tank" or "UST" does not include any pipes connected to any tank ~~which~~ that is described in subdivisions 1 through 9 of this definition.

"Upgrade" means the addition or retrofit of some systems such as cathodic protection, lining, or spill and overflow controls to improve the ability of an underground storage tank system to prevent the release of product.

"UST system" or "tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

"Wastewater treatment tank" means a tank that is designed to receive and treat an influent wastewater through physical, chemical, or biological methods.

**9VAC25-580-20. Applicability.**

A. The requirements of this chapter apply to all owners and operators of an UST system as defined in 9VAC25-580-10 except as otherwise provided in subsections B, ~~and C,~~ and D of this section. ~~Any UST system listed in subsection C of this section must meet the requirements of 9VAC25-580-30.~~

1. Previously deferred UST systems. Airport hydrant fuel distribution systems, UST systems with field-constructed tanks, and UST systems that store fuel solely for use by emergency power generators must meet the requirements of this chapter as follows:

- a. Airport hydrant fuel distribution systems and UST systems with field-constructed tanks must meet the requirements in Part X (9VAC25-580-380 et seq.) of this chapter.
- b. UST systems that store fuel solely for use by emergency power generators installed before September 15, 2010, must have met all applicable requirements of this chapter before September 15, 2010, except that the requirements of Part IV (9VAC25-580-130 et seq.) of this chapter must be met before (insert date three years after effective date of rule).
- c. UST systems that store fuel solely for use by emergency power generators installed on or after September 15, 2010, must meet all applicable requirements of this chapter at installation.

2. Any UST system listed in subsection C of this section must meet the requirements of 9VAC25-580-30.

B. Exclusions. The following UST systems are excluded from the requirements of this chapter:

1. Any UST system holding hazardous wastes listed or identified under Subtitle C of the Solid Waste Disposal Act (~~33 USC § 1251 et seq.~~), (42 USC § 6901) or a mixture of such hazardous waste and other regulated substances.
2. Any wastewater treatment tank system that is part of a wastewater treatment facility regulated under § 402 or § 307(b) of the Clean Water Act.
3. Equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks.
4. Any UST system whose capacity is 110 gallons or less.
5. Any UST system that contains a de minimis concentration of regulated substances.
6. Any emergency spill or overflow containment UST system that is expeditiously emptied after use.

C. ~~Deferrals. Partial Exclusions.~~ Parts II (9VAC25-580-50 et seq.), III (9VAC25-580-80 et seq.), IV, V (9VAC25-580-190 et seq.), VII (9VAC25-580-310 et seq.), ~~and IX (9VAC25-580-370 et seq.), and X~~ of this chapter do not apply to any of the following types of UST systems:

1. Wastewater treatment tank systems not covered under 9VAC25-580-20 B 2 of this section;
2. Aboveground storage tanks associated with:
  - a. Airport hydrant fuel distribution systems regulated under Part X of this chapter; and
  - b. UST systems with field-constructed tanks regulated under Part X of this chapter.
3. Any UST systems containing radioactive material that are regulated under the Atomic Energy Act of 1954 (42 USC § 2011 et seq.); and
- ~~3.~~ 4. Any UST system that is part of an emergency generator system at nuclear power generation facilities regulated licensed by the Nuclear Regulatory Commission under and subject to Nuclear Regulatory Commission requirements regarding design and quality criteria, including 10 CFR Part 50, Appendix A;
4. ~~Airport hydrant fuel distribution systems; and~~
5. ~~UST systems with field-constructed tanks.~~

D. ~~Deferrals. Part IV does not apply to any UST system that was installed before September 15, 2010 (i.e., the effective date of the secondary containment requirements in subdivision 7 of 9VAC25-580-50) and stores fuel solely for use by emergency power generators.~~

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## **9VAC25-580-30. ~~Interim prohibition for deferred~~ Installation requirements for partially excluded UST systems.**

~~No person may~~ Owners and operators must install an UST system listed in subsection C of 9VAC25-580-20 ~~for the purpose of storing regulated substances unless the UST system~~ (whether of single-wall or double-wall construction) that meets the following requirements:

1. Will prevent releases due to corrosion or structural failure for the operational life of the UST system;
2. Is cathodically protected against corrosion, constructed of noncorrodible material, steel clad with a noncorrodible material, or designed in a manner to prevent the release or threatened release of any stored substance; and
3. Is constructed or lined with material that is compatible with the stored substance.

Note: The following codes of practice may be used as guidance for complying with this section:

(a) NACE International Standard Practice SP0285, External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection;

(b) NACE International Standard Practice SP0169, Control of External Corrosion on Underground or Submerged Metallic Piping Systems;

(c) American Petroleum Institute Recommended Practice 1632, Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems; or

(d) Steel Tank Institute Recommended Practice R892, Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Storage and Dispensing Systems.

## **9VAC25-580-40. Permitting and inspection requirements for all UST systems.**

In all instances of installation, upgrade, repair and closure where a UST system is constructed, enlarged, altered, repaired or closed all UST systems must be permitted and inspected in accordance with 9VAC25-580-50, 9VAC25-580-60, 9VAC25-580-110, 9VAC25-580-160, 9VAC25-580-170, 9VAC25-580-310 ~~and~~, 9VAC25-580-320, 9VAC25-580-380, and 9VAC25-580-390.

### Part II

UST Systems: Design, Construction, Installation, and Notification

## **9VAC25-580-50. Performance standards for new UST systems.**

~~Owners and operators must obtain a permit, the required inspections and a Certificate of Use issued in accordance with the provisions of the Virginia Uniform Statewide Building Code. No UST system shall be installed or placed into use without the owner and operator having obtained the required permit, inspections and Certificate of Use from the building official under the provisions of the Virginia Uniform~~

~~Statewide Building Code ( § 36-97 et seq. of the Code of Virginia).~~

~~In the case of state owned facilities the Department of General Services shall function as the building official in accordance with § 36-98.1 of the Code of Virginia.~~

~~In the case of federal facilities the building official must be contacted. Owners and operators must obtain a permit, the required inspections and a Certificate of Use must be issued in accordance with the provisions of the Virginia Uniform Statewide Building Code.~~

In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the ~~following~~ requirements in this section.

Tanks and piping installed or replaced on or after September 15, 2010, must be secondarily contained and use interstitial monitoring in accordance with subdivision 7 of 9VAC25-580-160, except for suction piping that meets the requirements of subdivisions 2 a (2) (a) through (e) of 9VAC25-580-140. Secondary containment must be able to contain regulated substances leaked from the primary containment until they are detected and removed and prevent the release of regulated substances to the environment at any time during the operational life of the UST system. For cases where the piping is considered to be replaced, the entire piping run must be secondarily contained.

### 1. Tanks.

Each tank must be properly designed and constructed, and any portion underground that routinely contains product must be protected from corrosion, in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

a. The tank is constructed of fiberglass-reinforced plastic; NOTE: The following ~~industry~~ codes of practice may be used to comply with subdivision 1 a of this section:

(1) Underwriters Laboratories Standard 1316, "Standard for Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products", Alcohols, and Alcohol-Gasoline Mixtures; Underwriters or

(2) Underwriter's Laboratories of Canada CAN4 S615-M83, "S615 Standard for Reinforced Plastic Underground Tanks for Petroleum Products"; or American Society of Testing and Materials Standard D4021-86, "Standard Specification for Glass Fiber-Reinforced Polyester Underground Petroleum Storage Tanks." Flammable and Combustible Liquids.

b. The tank is constructed of steel and cathodically protected in the following manner:

(1) The tank is coated with a suitable dielectric material;

- (2) Field-installed cathodic protection systems are designed by a corrosion expert;
- (3) Impressed current systems are designed to allow determination of current operating status as required in subdivision 3 of 9VAC25-580-90; and

(4) Cathodic protection systems are operated and maintained in accordance with 9VAC25-580-90; or

NOTE: The following codes ~~and standards of practice~~ may be used to comply with subdivision 1 b of this section:

(a) ~~Steel Tank Institute "Specification for STI-P3 System of STI-P3<sup>®</sup> Specification and Manual for External Corrosion Protection of Underground Steel—Storage Tanks";~~

(b) Underwriters Laboratories Standard 1746, "External Corrosion Protection Systems for Steel Underground Storage Tanks";

(c) ~~Underwriters Laboratories of Canada CAN4 S603-M85, "S603, Standard for Steel Underground Tanks for Flammable and Combustible Liquids," and CAN4 G03.1 M85, S603.1, "Standard for Galvanic External Corrosion Protection Systems for Steel Underground Tanks for Flammable and Combustible Liquids," and CAN4 S631 M84, and S631, Standard for Isolating Bushings for Steel Underground Tanks Protected with Coatings and Galvanic Systems External Corrosion Protection Systems";~~ or

~~(d) National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems," and Underwriters Laboratories Standard 58 "Standard for Steel Underground Tanks for Flammable and Combustible Liquids."~~

(d) Steel Tank Institute Standard F841, Standard for Dual Wall Underground Steel Storage Tanks; or

(e) NACE International Standard Practice SP0285, External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection, and Underwriters Laboratories Standard 58, Standard for Steel Underground Tanks for Flammable and Combustible Liquids.

c. The tank is constructed of ~~a steel fiberglass reinforced plastic composite~~ steel and clad or jacketed with a noncorrodible material; or

NOTE: The following ~~industry~~ codes of practice may be used to comply with subdivision 1 c of this section:

(1) ~~Underwriters Laboratories Standard 1746, "External Corrosion Protection Systems for Steel Underground Storage Tanks," or the Association for Composite Tanks ACT-100, "Specification for the Fabrication of FRP Clad Underground Storage Tanks.";~~

(2) Steel Tank Institute ACT-100<sup>®</sup> Specification F894, Specification for External Corrosion Protection of FRP Composite Steel Underground Storage Tanks;

(3) Steel Tank Institute ACT-100-U<sup>®</sup> Specification F961, Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks; or

(4) Steel Tank Institute Specification F922, Steel Tank Institute Specification for Permatank<sup>®</sup>.

d. The tank construction and corrosion protection are determined by the board to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than subdivisions 1 a ~~through, 1 b, and 1 c~~ of this section.

2. Piping. The piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

a. The piping is constructed of ~~fiberglass reinforced plastic~~; a noncorrodible material.

NOTE: The following codes ~~and standards of practice~~ may be used to comply with subdivision 2 a of this section:

(1) Underwriters Laboratories ~~Subject Standard~~ Standard 971, "Nonmetallic Underground Piping for Flammable Liquids"; or

(2) Underwriters Laboratories ~~Standard 567, "Pipe Connectors for Flammable and Combustible and LP Gas";~~ of Canada Standard S660, Standard for Nonmetallic Underground Piping for Flammable and Combustible Liquids.

(3) ~~Underwriters Laboratories of Canada Guide ULC-107, "Glass Fiber Reinforced Plastic Pipe and Fittings for Flammable Liquids"; and~~

(4) ~~Underwriters Laboratories of Canada Standard CAN 4 S633 M81, "Flexible Underground Hose Connectors."~~

b. The piping is constructed of steel and cathodically protected in the following manner:

(1) The piping is coated with a suitable dielectric material;

(2) Field-installed cathodic protection systems are designed by a corrosion expert;

(3) Impressed current systems are designed to allow determination of current operating status as required in subdivision 3 of 9VAC25-580-90; and

(4) Cathodic protection systems are operated and maintained in accordance with 9VAC25-580-90; or

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NOTE: The following codes ~~and standards~~ of practice may be used to comply with subdivision 2 b of this section:

~~(a) National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code";~~

~~(b) American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage Systems";~~

~~(c) (a) American Petroleum Institute Publication Recommended Practice 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems"; and~~

~~(d) National Association of Corrosion Engineers Standard RP-01-69, "Control of External Corrosion on Submerged Metallic Piping Systems."~~

(b) Underwriters Laboratories Subject 971A, Outline of Investigation for Metallic Underground Fuel Pipe;

(c) Steel Tank Institute Recommended Practice R892, Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Storage and Dispensing Systems;

(d) NACE International Standard Practice SP0169, Control of External Corrosion on Underground or Submerged Metallic Piping Systems; or

(e) NACE International Standard Practice SP0285, External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection.

c. The piping construction and corrosion protection are determined by the board to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than the requirements in subdivisions 2 a ~~through~~ and 2 b of this section.

### 3. Spill and overfill prevention equipment.

a. Except as provided in ~~subdivision~~ subdivisions 3 b and 3 c of this section, to prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the following spill and overfill prevention equipment:

(1) Spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe (for example, a spill catchment basin); and

(2) Overfill prevention equipment that will:

(a) Automatically shut off flow into the tank when the tank is no more than 95% full;

(b) Alert the transfer operator when the tank is no more than 90% full by restricting the flow into the tank or triggering a high-level alarm; or

(c) Restrict the flow 30 minutes prior to overfilling, alert the transfer operator with a high level alarm one minute

before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.

b. Owners and operators are not required to use the spill and overfill prevention equipment specified in subdivision 3 a of this section if:

(1) Alternative equipment is used that is determined by the board to be no less protective of human health and the environment than the equipment specified in subdivision 3 a (1) or 3 a (2) of this section; or

(2) The UST system is filled by transfers of no more than 25 gallons at one time.

c. Flow restrictors used in vent lines may not be used to comply with subdivision 3 a (2) of this section when overfill protection is installed or replaced on or after (insert effective date of the amendment).

d. Spill and overfill protection equipment must be periodically tested or inspected in accordance with 9VAC25-580-82.

### 4. Installation. ~~All tanks and piping~~

a. The UST system must be properly installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and in accordance with the manufacturer's instructions.

b. Owners and operators must obtain a permit and the required inspections in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia). No UST system shall be installed or placed into use without the owner and operator having obtained the required permit and inspections from the building official under the provisions of the Virginia Uniform Statewide Building Code.

In the case of state-owned facilities, the Department of General Services shall function as the building official in accordance with § 36-98.1 of the Code of Virginia.

In the case of federal facilities, the building official must be contacted. Owners and operators must obtain a permit and the required inspections must be issued in accordance with the provisions of the Virginia Uniform Statewide Building Code.

NOTE: Tank and piping system installation practices and procedures described in the following codes of practice may be used to comply with the requirements of subdivision 4 of this section:

a. (1) American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage System";

~~b. (2) Petroleum Equipment Institute Publication RP100, "Recommended Practices for Installation of Underground Liquid Storage Systems"; or~~

~~e. American National Standards Institute Standard B31.3, "Petroleum Refinery Piping," and American National Standards Institute Standard B31.4 "Liquid Petroleum Transportation Piping System." (3) National Fire Protection Association Standard 30, Flammable and Combustible Liquids Code and Standard 30A, Code for Motor Fuel Dispensing Facilities and Repair Garages.~~

NOTE: These industry codes require that prior to bringing the system into use the following tests be performed: (i) tank tightness test (air); (ii) pipe tightness test (air or hydrostatic); and (iii) precision system test ~~in accordance with NFPA 329 (detection of .05 gal/hr leak rate).~~

5. Certification of installation. All owners and operators must ensure that one or more of ~~options a through d~~ of the following methods of certification, testing, or inspection in subdivisions 5 a through 5 d of this section is performed, and a Certificate of Use permit has been issued in accordance with the provisions of the Virginia Uniform Statewide Building Code to demonstrate compliance with subdivision 4 of this section. A certification of compliance on the UST Notification form must be submitted to the board in accordance with 9VAC25-580-70.

- a. The installer has been certified by the tank and piping manufacturers;
- b. The installation has been inspected and certified by a registered professional engineer with education and experience in UST system installation;
- c. All work listed in the manufacturer's installation checklists has been completed; or
- d. The owner and operator have complied with another method for ensuring compliance with subdivision 4 of this section that is determined by the board to be no less protective of human health and the environment.

6. Release detection. Release detection shall be provided in accordance with Part IV (9VAC25-580-130 et seq.) of this chapter.

**7. Secondary containment.**

~~a. Each new or replaced petroleum underground storage tank, or piping connected to any petroleum underground storage tank, installed within 1,000 feet of any existing community water system or existing potable drinking water well must be secondarily contained in accordance with 9VAC25-580-140 A. In the case of a replacement of a petroleum underground storage tank or the piping connected to the petroleum underground storage tank, the secondary containment requirements shall apply only to the specific petroleum underground storage tank or piping run being replaced, not to other petroleum underground storage tanks and connected pipes comprising such system. The entire piping run must be secondarily contained if more than 50% of the length of a piping run connected to a petroleum underground storage tank is to be replaced.~~

~~b. Motor fuel dispenser systems. Each new motor fuel dispenser system installed within 1,000 feet of any existing community water system or existing potable drinking water well shall have underdispenser containment in accordance with 9VAC25-580-140 B. A motor fuel dispenser system is considered new when:~~

- ~~(1) A dispenser is installed at a location where there previously was no dispenser (new UST system or new dispenser location at an existing UST system), or~~
- ~~(2) An existing dispenser is removed and replaced with another dispenser and the equipment used to connect the dispenser to the UST system is replaced. This equipment may include unburied flexible connectors or risers or other transitional components that are beneath the dispenser and connect the dispenser to the piping.~~

~~e. If an owner or operator intends to install a new petroleum UST system that is located greater than 1,000 feet from any existing community water system or existing potable drinking water well and the owner or operator will install a potable drinking water well at the new facility that is within 1,000 feet of the petroleum underground storage tanks, piping, or motor fuel dispenser systems as part of the new UST installation, then secondary containment and underdispenser containment are required, regardless of whether the well is installed before or after the petroleum underground storage tanks, piping, and motor fuel dispenser systems are installed.~~

~~d. A tank owner or operator who intends to install an UST system or motor fuel dispenser system that will not meet the requirements in subdivision 7 a or c of this subsection must demonstrate to the board that the distance from the proposed new or replacement petroleum underground storage tank or piping or motor fuel dispenser system to the existing community water system or existing potable drinking water well is greater than 1,000 feet.~~

~~(1) The tank owner or operator shall make such a demonstration by submitting to the board a map showing the distance from the proposed new or replacement petroleum underground storage tank or piping or motor fuel dispenser system to the existing community water system or existing potable drinking water well. If the distance is greater than 1,000 feet but less than 2,000 feet, the map must be prepared by a licensed professional surveyor. If the distance is greater than 2,000 feet, the map is not required to be prepared by a licensed professional surveyor. The tank owner or operator must submit the map to the board at least 30 days prior to the installation.~~

~~(2) The map must delineate the distance from the proposed new or replacement petroleum underground storage tank or piping or motor fuel dispenser system to the closest existing community water system or existing~~

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~~potable drinking water well. The distance must be measured from the closest part of the proposed new or replacement petroleum underground storage tank or piping or motor fuel dispenser system to:~~

~~(a) The closest part of the nearest existing community water system including such components as the location of the wellhead(s) for ground water or location of the intake point(s) for surface water, water lines, processing tanks, and water storage tanks; and water distribution or service lines under the control of the community water system operator; and~~

~~(b) The wellhead of the nearest existing potable drinking water well.~~

~~e. The requirement for secondary containment does not apply to:~~

~~(1) Petroleum underground storage tanks that are not new or not replaced in a manifolded UST system;~~

~~(2) Piping runs that are not new or not replaced on petroleum underground storage tanks with multiple piping runs;~~

~~(3) Suction piping that meets the requirements at 9VAC 25-580-140 C 2 b (1) through (5) or piping that manifolds two or more petroleum USTs together;~~

~~(4) Repairs meant to restore a petroleum underground storage tank, pipe, or dispenser to operating condition. For purposes of this subsection, a repair is any activity that does not meet the definition of "replace"; and~~

~~(5) Other instances approved by the board where equivalent protection is provided.~~

7. Dispenser systems. Each UST system must be equipped with under-dispenser containment for any new dispenser system installed on or after September 15, 2010.

a. A dispenser system is considered new when both the dispenser and the equipment needed to connect the dispenser to the underground storage tank system are installed at an UST facility. The equipment necessary to connect the dispenser to the underground storage tank system includes check valves, shear valves, unburied risers or flexible connectors, or other transitional components that are underneath the dispenser and connect the dispenser to the underground piping.

b. Under-dispenser containment must be liquid-tight on its sides, bottom, and at any penetrations. Under-dispenser containment must allow for visual inspection and access to the components in the containment system or be periodically monitored for leaks from the dispenser system.

## **9VAC25-580-60. Upgrading of existing UST systems.**

Owners and operators must permanently close in accordance with Part VII (9VAC25-580-310 et seq.) of this chapter any UST system that does not meet the new UST system performance standards in 9VAC25-580-50 or has not been

upgraded in accordance with subdivisions 2, 3, and 4 of this section. This does not apply to previously deferred UST systems described in Part X (9VAC25-580-380 et seq.) of this chapter and where an upgrade is determined to be appropriate by the board.

Owners and operators must obtain a permit and the required inspections in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia).

A permit from the building official must be obtained prior to upgrading any UST system. No upgraded UST system shall be placed into use unless and until the system is inspected in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia).

In the case of state-owned facilities, the Department of General Services shall function as the building official in accordance with § 36-98.1 of the Code of Virginia.

In the case of federal facilities the building official must be contacted. Owners and operators must obtain a permit and the required inspections in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia).

1. Alternatives allowed. ~~Not later than December 22, 1998,~~ ~~all~~ All existing UST systems must comply with one of the following requirements:

a. New UST system performance standards under 9VAC25-580-50;

b. The upgrading requirements in subsections subdivisions 2 through 5, 3, and 4 of this section; or

c. Closure requirements under Part VII of this chapter, including applicable requirements for corrective action under Part VI (9VAC25-580-230 et seq.) of this chapter.

2. Tank upgrading requirements. Steel tanks must be upgraded to meet one of the following requirements in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory:

a. Interior lining. ~~A tank may be~~ Tanks upgraded by internal lining ~~if~~ must meet the following:

(1) The lining ~~is~~ was installed in accordance with the requirements of 9VAC25-580-110; and

(2) Within 10 years after lining, and every five years thereafter, the lined tank is internally inspected and found to be structurally sound with the lining still performing in accordance with original design specifications. If the internal lining is no longer performing in accordance with original design specifications and cannot be repaired in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory, then the lined tank must be permanently closed in accordance with Part VII of this chapter.

b. Cathodic protection. ~~A tank may be~~ Tanks upgraded by cathodic protection ~~if the cathodic protection system meets~~ must meet the requirements of 9VAC25-580-50 1 b (2), (3), and (4) and the integrity of the tank ~~is~~ must have been ensured using one of the following methods:

- (1) The tank ~~is~~ was internally inspected and assessed to ensure that the tank ~~is~~ was structurally sound and free of corrosion holes prior to installing the cathodic protection system; ~~or~~
- (2) The tank ~~has~~ had been installed for less than 10 years and is monitored monthly for releases in accordance with subsections 4 through ~~8~~ 9 of 9VAC25-580-160; ~~or~~
- (3) The tank ~~has~~ had been installed for less than 10 years and ~~is~~ was assessed for corrosion holes by conducting two tightness tests that meet the requirements of subsection 3 of 9VAC25-580-160. The first tightness test ~~must be~~ have been conducted prior to installing the cathodic protection system. The second tightness test ~~must be~~ have been conducted between three and six months following the first operation of the cathodic protection system; or
- (4) The tank ~~is~~ was assessed for corrosion holes by a method that is determined by the board to prevent releases in a manner that is no less protective of human health and the environment than subdivisions 2 b (1) ~~through~~, (2), and (3) of this section.

c. Internal lining combined with cathodic protection. ~~A tank may be~~ Tanks upgraded by both internal lining and cathodic protection ~~if~~ must meet the following:

- (1) The lining ~~is~~ was installed in accordance with the requirements of 9VAC25-580-110; and
- (2) The cathodic protection system meets the requirements of subdivisions 1 b (2), (3), and (4) of 9VAC25-580-50.

NOTE: The following historical codes ~~and standards~~ may be used to comply of practice were listed as options for complying with subdivision 2 of this section:

- (a) American Petroleum Institute Publication 1631, "Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks";
- (b) National Leak Prevention Association Standard 631, "Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection";
- (c) National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems"; and
- (d) American Petroleum Institute ~~Publication~~ Recommended Practice 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems."

NOTE: The following codes of practice may be used to comply with the periodic lining inspection requirement in subdivision 2 a (2) of this section:

- (a) American Petroleum Institute Recommended Practice 1631, Interior Lining and Periodic Inspection of Underground Storage Tanks;
- (b) National Leak Prevention Association Standard 631, Chapter B Future Internal Inspection Requirements for Lined Tanks; or
- (c) Ken Wilcox Associates Recommended Practice, Recommended Practice for Inspecting Buried Lined Steel Tanks Using a Video Camera.

3. Piping upgrading requirements. Metal piping that routinely contains regulated substances and is in contact with the ground must be cathodically protected in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and must meet the requirements of subdivisions 2 b (2), (3) and (4) of 9VAC25-580-50.

NOTE: The codes ~~and standards~~ of practice listed in the note following subdivision 2 b of 9VAC25-580-50 may be used to comply with this requirement.

4. Spill and overflow prevention equipment. To prevent spilling and overflowing associated with product transfer to the UST system, all existing UST systems must comply with ~~new~~ UST system spill and overflow prevention equipment requirements specified in subsection 3 of 9VAC25-580-50.

5. Release detection. Release detection shall be provided in accordance with Part IV of this chapter.

**9VAC25-580-70. Notification requirements.**

~~A. Any owner who brings an underground storage tank system into use after~~ After May 8, 1986, an owner must submit notice of a tank system's existence to the board within 30 days of bringing such the underground storage tank system into use, submit, in the form prescribed in APPENDIX I of this chapter, a notice of existence of such tank system to the board. Owners must use a UST Notification form approved by the board.

~~B. Any change in ownership, tank status (e.g., temporarily/permanently closed out), tank/piping systems (e.g., upgrades such as addition of corrosion protection, internal lining, release detection), or substance stored (e.g., change from petroleum to hazardous substance) requires the UST owner to submit an amended notification form, or other documentation approved by the board, within 30 days after such change/upgrade change or upgrade occurs or is brought into use. Owners may provide notice for several tanks using one notification form, but owners with tanks located at more than one place of operation must file a separate notification form for each separate place of operation.~~

~~B-~~ C. Under Virginia UST notification requirements effective July 1, 1987, owners of property who have actual



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knowledge of underground storage tanks on such property that were taken out of service before January 1, 1974, yet are still in the ground, must notify the board on the notification form.

NOTE: Under the federal UST Notification Program, owners and operators of UST systems that were in the ground on or after May 8, 1986, unless taken out of operation on or before January 1, 1974, were required to notify the board in accordance with the Hazardous and Solid Waste Amendments of 1984, P.L. 98-616 (42 USC § 9603), on a form published by EPA on November 8, 1985, (50 FR 46602) unless notice was given pursuant to § 103(c) of CERCLA. Owners and operators who have not complied with the notification requirements may use portions I through VI of the ~~notification form contained in APPENDIX I of this chapter~~ UST Notification form approved by the board.

~~C. Notices required to be submitted under subsection A of this section must provide all of the information in Sections I through VI of the prescribed form (APPENDIX I) for each tank for which notice must be given. Notices for tanks installed after December 22, 1988, must also provide all of the information in Section VII of the prescribed form (APPENDIX I) for each tank for which notice must be given.~~

D. All owners and operators of new UST systems must certify in the notification form compliance with the following requirements:

1. Installation of tanks and piping under ~~subsection subdivision~~ 5 of 9VAC25-580-50;
2. Cathodic protection of steel tanks and piping under ~~subsections subdivisions~~ 1 and 2 of 9VAC25-580-50;
3. Financial responsibility under financial responsibility regulations promulgated by the board under 9VAC25-590.
4. Release detection under 9VAC25-580-140 and 9VAC25-580-150.

E. All owners and operators of new UST systems must ensure that the installer certifies in the notification form that the methods used to install the tanks and piping comply with the requirements in subsection 4 of 9VAC25-580-50.

F. Beginning October 24, 1988, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under subsection A of this section. The statement provided in ~~APPENDIX II of this chapter~~ the following note, when used on shipping tickets and invoices, may be used to comply with this requirement:;

NOTE: A federal law (the Solid Waste Disposal Act, 42 USC § 6901 et seq.) requires owners of certain underground storage tanks to notify implementing agencies of the existence of their tanks. Notifications must be made within 30 days of bringing the tank into use. Consult EPA's regulations at 40 CFR 280.22 to determine if you are affected by this law.

## Part III

### General Operating Requirements

#### **9VAC25-580-80. Spill and overfill control.**

A. Owners and operators must ensure that releases due to spilling or overfilling do not occur. The owner and operator must ensure that the volume available in the tank is greater than the volume of product to be transferred to the tank before the transfer is made and that the transfer operation is monitored constantly to prevent overfilling and spilling.

NOTE: The transfer procedures described in National Fire Protection Association ~~Publication Standard 385 Standard for Tank Vehicles for Flammable and Combustible Liquids or American Petroleum Institute Recommended Practice 1007, Loading and Unloading of MC 306/DOT 406 Cargo Tank Motor Vehicles~~ may be used to comply with this subsection A of this section. Further guidance on spill and overfill prevention appears in American Petroleum Institute ~~Publication 1621, "Recommended Practice 1621, for Bulk Liquid Stock Control at Retail Outlets," and National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code."~~

B. The owner and operator must report, investigate, and clean up any spills and overfills in accordance with 9VAC25-580-220.

#### **9VAC25-580-82. Periodic testing of spill prevention equipment and containment sumps used for interstitial monitoring of piping and periodic inspection of overfill prevention equipment.**

A. Owners and operators of UST systems with spill and overfill prevention equipment and containment sumps used for interstitial monitoring of piping must meet these requirements to ensure the equipment is operating properly and will prevent releases to the environment:

1. Spill prevention equipment (such as a catchment basin, spill bucket, or other spill containment device) and containment sumps used for interstitial monitoring of piping must prevent releases to the environment by meeting one of the following:

a. The equipment is double walled and the integrity of both walls is periodically monitored as described in 9VAC25-580-85 A 1 a (1) at a frequency not less than the frequency of the walkthrough inspections described in 9VAC25-580-85. Within 30 days of discontinuing periodic monitoring under this subdivision, owners and operators must conduct a test in accordance with subdivision A 1 b of this section and begin meeting the requirements of that subdivision; or

b. The spill prevention equipment and containment sumps used for interstitial monitoring of piping are tested at least once every three years to ensure the equipment is liquid tight by using vacuum, pressure, or liquid testing in accordance with one of the following criteria:

(1) Requirements developed by the manufacturer (Note: Owners and operators may use this option only if the manufacturer has developed requirements);

(2) Code of practice developed by a nationally recognized association or independent testing laboratory; or

(3) Requirements determined by the board to be no less protective of human health and the environment than the requirements listed in subdivisions A 1 b (1) and (2) of this section.

2. Overfill prevention equipment must be inspected at least once every three years. At a minimum, the inspection must ensure that overfill prevention equipment is set to activate at the correct level specified in subdivision 3 of 9VAC25-580-50 and will activate when regulated substance reaches that level. Inspections must be conducted in accordance with one of the criteria in subdivisions 1 b (1), (2), or (3) of this subsection.

NOTE: The following code of practice may be used to comply with subdivisions A 1 b and A 2 of this section: Petroleum Equipment Institute Publication RP 1200, Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities.

B. Owners and operators must begin meeting these requirements as follows:

1. For UST systems in use before (insert effective date of amendment), the initial spill prevention equipment test, containment sump test, and overfill prevention equipment inspection must be conducted not later than (insert date three years after effective date of amendment).

2. For UST systems brought into use on or after (insert effective date of amendment), these requirements apply at installation.

C. Owners and operators must maintain records as follows in accordance with 9VAC25-580-120 for spill prevention equipment, containment sumps used for interstitial monitoring of piping, and overfill prevention equipment:

1. All records of testing or inspection must be maintained for three years; and

2. For spill prevention equipment and containment sumps used for interstitial monitoring of piping not tested every three years, documentation showing that the prevention equipment is double walled and the integrity of both walls is periodically monitored must be maintained for as long as the equipment is periodically monitored.

### **9VAC25-580-85. Periodic operation and maintenance walkthrough inspections.**

A. To properly operate and maintain UST systems, not later than (insert date three years after effective date of amendment) owners and operators must meet one of the following:

1. Conduct a walkthrough inspection that, at a minimum, checks the following equipment as specified below:

a. Every 30 days (Exception: spill prevention equipment at UST systems receiving deliveries at intervals greater than every 30 days may be checked prior to each delivery):

(1) Spill prevention equipment – visually check for damage; remove liquid or debris; check for and remove obstructions in the fill pipe; check the fill cap to make sure it is securely on the fill pipe; and, for double walled spill prevention equipment with interstitial monitoring, check for a leak in the interstitial area; and

(2) Release detection equipment – check to make sure the release detection equipment is operating with no alarms or other unusual operating conditions present and ensure records of release detection testing are reviewed and current; and

b. Annually:

(1) Containment sumps – visually check for damage, leaks to the containment area, or releases to the environment; remove liquid (in contained sumps) or debris; and, for double walled sumps with interstitial monitoring, check for a leak in the interstitial area; and

(2) Handheld release detection equipment – check devices such as tank gauge sticks or groundwater bailers for operability and serviceability;

2. Conduct operation and maintenance walkthrough inspections according to a standard code of practice developed by a nationally recognized association or independent testing laboratory that checks equipment comparable to subdivision 1 of this subsection; or

3. Conduct operation and maintenance walkthrough inspections according to a protocol developed by the board that checks equipment comparable to subdivision 1 of this subsection.

B. Owners and operators must maintain records (in accordance with 9VAC25-580-120) of operation and maintenance walkthrough inspections for one year. Records must include a list of each area checked, whether each area checked was acceptable or needed action taken, a description of actions taken to correct an issue, and delivery records if spill prevention equipment is checked less frequently than every 30 days due to infrequent deliveries.

NOTE: The following code of practice may be used to comply with subdivision A 2 of this section: Petroleum Equipment Institute Recommended Practice RP 900, Recommended Practices for the Inspection and Maintenance of UST Systems.

### **9VAC25-580-90. Operation and maintenance of corrosion protection.**

All owners and operators of steel metal UST systems with corrosion protection must comply with the following

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requirements to ensure that releases due to corrosion are prevented ~~for as long as until~~ the UST system is ~~used to store regulated substances; permanently closed or undergoes a change-in-service pursuant to 9VAC25-580-320;~~

1. All corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground.

2. All UST systems equipped with cathodic protection systems must be inspected for proper operation by a qualified cathodic protection tester in accordance with the following requirements:

a. Frequency. All cathodic protection systems must be tested within six months of installation and at least every three years thereafter; and

b. Inspection criteria. The criteria that are used to determine that cathodic protection is adequate as required by this section must be in accordance with a code of practice developed by a nationally recognized association.

NOTE: ~~National Association of Corrosion Engineers Standard RP 02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems,"~~ The following codes of practice may be used to comply with subdivision 2 b of this section:

(1) NACE International Test Method TM0101, Measurement Techniques Related to Criteria for Cathodic Protection of Underground Storage Tank Systems;

(2) NACE International Test Method TM0497, Measurement Techniques Related to Criteria for Cathodic Protection on Underground or Submerged Metallic Piping Systems;

(3) Steel Tank Institute Recommended Practice R051, Cathodic Protection Testing Procedures for STI-P3<sup>®</sup> USTs;

(4) NACE International Standard Practice SP0285, External Control of Underground Storage Tank Systems by Cathodic Protection; or

(5) NACE International Standard Practice SP0169, Control of External Corrosion on Underground or Submerged Metallic Piping Systems.

3. UST systems with impressed current cathodic protection systems must also be inspected every 60 days to ensure the equipment is running properly. These systems only provide the necessary corrosion protection when in continuous operation. Such equipment shall be installed so that it cannot be inadvertently shut off.

4. For UST systems using cathodic protection, records of the operation of the cathodic protection must be maintained (in accordance with 9VAC25-580-120) to demonstrate

compliance with the performance standards in this section. These records must provide the following:

a. The results of the last three inspections required in subdivision 3 of this section; and

b. The results of testing from the last two inspections required in subdivision 2 of this section.

## **9VAC25-580-100. Compatibility.**

A. Owners and operators must use an UST system made of or lined with materials that are compatible with the substance stored in the UST system.

B. Owners and operators must notify the board at least 30 days prior to switching to a regulated substance containing greater than 10% ethanol, greater than 20% biodiesel, or any other regulated substance identified by the board. In addition, owners and operators with UST systems storing these regulated substances must meet one of the following:

1. Demonstrate compatibility of the UST system, including the tank, piping, containment sumps, pumping equipment, release detection equipment, spill equipment, and overflow equipment. Owners and operators may demonstrate compatibility of the UST system by using one of the following options:

a. Certification or listing of UST system equipment or components by a nationally recognized, independent testing laboratory for use with the regulated substance stored; or

b. Equipment or component manufacturer approval. The manufacturer's approval must be in writing, indicate an affirmative statement of compatibility, specify the range of biofuel blends the equipment or component is compatible with, and be from the equipment or component manufacturer; or

2. Use another option determined by the board to be no less protective of human health and the environment than the options listed in subdivision 1 of this subsection.

C. Owners and operators must maintain records in accordance with subdivision 2 of 9VAC25-580-120 documenting compliance with subsection B of this section for as long as the UST system is used to store the regulated substance.

NOTE: ~~Owners and operators storing alcohol blends may use the following codes to comply with the requirements of this section: The following code of practice may be useful in complying with this section:~~

~~1. American Petroleum Institute Publication Recommended Practice 1626, "Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Service Filling Stations"; and,~~

~~2. American Petroleum Institute Publication 1627, "Storage and Handling of Gasoline Methanol/Cosolvent Blends at Distribution Terminals and Service Stations."~~

**9VAC25-580-110. Repairs allowed.**

Owners and operators must obtain a permit and the required inspections in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia).

A permit from the building official must be obtained prior to repairing any UST system. No repaired UST system shall be placed into use unless and until the system is inspected in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia).

In the case of state-owned facilities the Department of General Services shall function as the building official in accordance with § 36-98.1 of the Code of Virginia.

In the case of federal facilities the building official must be contacted. Owners and operators must obtain a permit and the required inspections in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia).

Owners and operators of UST systems must ensure that repairs will prevent releases due to structural failure or corrosion as long as the UST system is used to store regulated substances. The repairs must meet the following requirements:

1. Repairs to UST systems must be properly conducted in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory.

NOTE: The following codes ~~and standards of practice~~ may be used to comply with subdivision 1 of this section:

- a. National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code";
- b. American Petroleum Institute ~~Publication~~ Recommended Practice RP 2200, "Repairing Crude Oil, Liquefied Petroleum Gas, and Product Pipelines";
- c. American Petroleum Institute ~~Publication~~ Recommended Practice RP 1631, "~~Recommended Practice for the Interior Lining of Existing Steel and~~ Periodic Inspection of Underground Storage Tanks"; ~~and~~
- d. National Fire Protection Association Standard 326, Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair;
- e. National Leak Prevention Association Standard 631, "~~Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection.~~" Chapter A, Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks;
- f. Steel Tank Institute Recommended Practice R972, Recommended Practice for the Addition of Supplemental Anodes to STI-P3® Tanks;

g. NACE International Standard Practice SP 0285, External Control of Underground Storage Tank Systems by Cathodic Protection; or

h. Fiberglass Tank and Pipe Institute Recommended Practice T-95-02, Remanufacturing of Fiberglass Reinforced Plastic (FRP) Underground Storage Tanks.

2. Repairs to fiberglass-reinforced plastic tanks may be made by the manufacturer's authorized representatives or in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory.

3. Metal pipe sections and fittings that have released product as a result of corrosion or other damage must be replaced. ~~Fiberglass Noncorrodible~~ pipes and fittings may be repaired in accordance with the manufacturer's specifications.

4. Repairs to secondary containment areas of tanks and piping used for interstitial monitoring and to containment sumps used for interstitial monitoring of piping must have the secondary containment tested for tightness according to the manufacturer's instructions, a code of practice developed by a nationally recognized association or independent testing laboratory, or according to requirements established by the board within 30 days following the date of completion of the repair.

~~Repaired~~ 5. All other repairs to tanks and piping must be tightness tested in accordance with ~~subsection~~ subdivision 3 of 9VAC25-580-160 and subdivision 2 of 9VAC25-580-170 within 30 days following the date of the completion of the repair except as provided in subdivisions 4 a through e of this section below:

- a. The repaired tank is internally inspected in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory;
- b. The repaired portion of the UST system is monitored monthly for releases in accordance with a method specified in ~~subsections~~ subdivisions 4 through & 9 of 9VAC25-580-160; or
- c. Another test method is used that is determined by the board to be no less protective of human health and the environment than those listed ~~above~~ in subdivisions a and b of this subdivision 5.

NOTE: The following codes of practice may be used to comply with subdivisions 4 and 5 of this section:

- (1) Steel Tank Institute Recommended Practice R012, Recommended Practice for Interstitial Tightness Testing of Existing Underground Double Wall Steel Tanks; or
- (2) Fiberglass Tank and Pipe Institute Protocol, Field Test Protocol for Testing the Annular Space of Installed Underground Fiberglass Double and Triple-Wall Tanks With Dry Annular Space.

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(3) Petroleum Equipment Institute Recommended Practice RP1200, Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities.

~~5.~~ 6. Within six months following the repair of any cathodically protected UST system, the cathodic protection system must be tested in accordance with subdivisions 2 and 3 of 9VAC25-580-90 to ensure that it is operating properly.

7. Within 30 days following any repair to spill or overflow prevention equipment, the repaired spill or overflow prevention equipment must be tested or inspected as appropriate, in accordance with 9VAC25-580-82 to ensure it is operating properly.

~~6.~~ 8. UST system owners and operators must maintain records in accordance with 9VAC25-580-120 of each repair for the remaining operating life of until the UST system that demonstrate compliance with the requirements of this section is permanently closed or undergoes a change-in-service pursuant to 9VAC25-580-320.

## **9VAC25-580-120. Reporting and recordkeeping.**

Owners and operators of UST systems must cooperate fully with inspections, monitoring and testing conducted by the board, as well as requests for document submission, testing, and monitoring by the owner or operator pursuant to § 9005 of Subtitle I of the ~~Resource Conservation and Recovery Solid Waste Disposal~~ Act, as amended.

1. Reporting. Owners and operators must submit the following information to the board:

a. Notification for all UST systems (9VAC25-580-70), which includes certification of installation for new UST systems (subdivision 5 of 9VAC25-580-50); and notification when any person assumes ownership of an UST system (9VAC25-580-70);

b. Notification prior to UST systems switching to certain regulated substances (subsection B of 9VAC25-580-100);

~~c.~~ d. Reports of all releases including suspected releases (9VAC25-580-190), spills and overfills (9VAC25-580-220), and confirmed releases (9VAC25-580-240);

~~e.~~ d. Corrective actions planned or taken including initial abatement measures (9VAC25-580-250), site characterization (9VAC25-580-260), free product removal (9VAC25-580-270), and corrective action plan (9VAC25-580-280); and

~~f.~~ e. An amended notification form must be submitted within 30 days after permanent closure or change-in-service (9VAC25-580-320).

2. Recordkeeping. Owners and operators must maintain the following information:

a. Documentation of operation of corrosion protection equipment (~~9VAC25-580-90~~); (subdivision 4 of 9VAC25-580-90);

b. Documentation of compatibility for UST systems (subsection C of 9VAC25-580-100);

~~c.~~ d. Documentation of UST system repairs (subdivision ~~6~~ 8 of 9VAC25-580-110);

~~e.~~ Recent d. Documentation of compliance and applicable installation records for spill and overflow prevention equipment and containment sumps used for interstitial monitoring of piping (subsection C of 9VAC25-580-82);

e. Documentation of periodic walkthrough inspections (subsection B of 9VAC25-580-85);

f. Documentation of compliance with release detection requirements (9VAC25-580-180); and

~~f.~~ g. Results of the site investigation conducted at permanent closure (9VAC25-580-350); and

~~e.~~ h. Documentation of operator training required by 9VAC25-580-125, including verification of training for current Class A, Class B, and Class C operators, and current list of operators and written instructions or procedures for Class C operators ~~in accordance with (9VAC25-580-125) (relating to operator training).~~

3. Availability and maintenance of records. Owners and operators must keep the records required either:

a. At the UST site and immediately available for inspection by the board; or

b. At a readily available alternative site and be provided for inspection to the board upon request.

In the case of permanent closure records required under 9VAC25-580-350, owners and operators are also provided with the additional alternative of mailing closure records to the board if they cannot be kept at the site or an alternative site as indicated above.

## **9VAC25-580-125. Operator training.**

A. Definitions.

1. For purposes of this section, "Class A operator" means an operator who has primary responsibility to operate and maintain the underground storage tank system and facility. The Class A operator's responsibilities include managing resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements. In general, Class A operators focus on the broader aspects of the underground storage tank statutory and regulatory requirements and standards necessary to properly operate and maintain the underground storage tank system and facility.

2. For purposes of this section, "Class B operator" means an operator who implements applicable underground storage tank regulatory requirements and standards in the field or at the underground storage tank facility. A Class B

operator oversees and implements the day-to-day aspects of operations, maintenance, and recordkeeping for the underground storage tanks at one or more facilities.

3. For purposes of this section, "Class C operator" means the person responsible for responding to alarms or other indications of emergencies caused by spills or releases from underground storage tank systems and equipment failures. A Class C operator, generally, is the first line of response to events indicating emergency conditions.

B. Requirements for trained operators.

1. Owners and operators of UST systems shall designate Class A, Class B, and Class C operators for each UST system or facility that has underground storage tanks.

a. A person may be designated for more than one class of operator.

b. Any person designated for more than one class of operator shall successfully complete the required training under subsection C of this section for each operator class for which he is designated.

c. Persons trained in accordance with subsection C of this section may perform operator duties consistent with their training when employed or contracted by the tank owner or operator to perform these functions.

~~2. Designated operators shall successfully complete required training under subsection C of this section no later than August 8, 2012.~~

~~3.~~ Class A operators shall be familiar with training requirements for each class of operator and may provide required training for Class C operators.

~~4.~~ ~~3.~~ Class B operators shall be familiar with Class B and Class C operator responsibilities and may provide training for Class C operators.

~~5.~~ ~~4.~~ Trained operators shall be readily available to respond to suspected/confirmed releases, other unusual operating conditions and equipment shut-offs or failures.

a. The Class A or Class B operator shall be available for immediate telephone consultation when an UST facility is in operation. A Class A or Class B operator shall be able to be onsite at the facility within a reasonable time to perform necessary functions.

b. For manned facilities, a Class C operator shall be onsite whenever the UST facility is in operation. After September 15, 2010, written instructions or procedures shall be maintained and visible at manned UST facilities for persons performing duties of the Class C operator to follow and to provide notification necessary in the event of emergency conditions.

c. For unmanned facilities, a Class C operator shall be available for immediate telephone consultation and shall be able to be onsite within a reasonable time to perform necessary functions. Emergency contact information shall be prominently displayed at the site. After

September 15, 2010, written instructions or procedures shall be maintained and visible at unmanned UST facilities for persons performing duties of the Class C operator to follow and to provide notification necessary in the event of emergency conditions.

C. Required training.

1. Class A operators shall successfully complete a training course approved by the board that includes a general knowledge of UST system requirements. Training shall provide information that should enable the operator to make informed decisions regarding compliance and ensuring that appropriate persons are fulfilling operation, maintenance, and recordkeeping requirements and standards of this chapter and/or federal underground storage tank requirements in 40 CFR Part 280 (relating to technical standards and corrective action requirements for owners and operators of underground storage tanks (UST)), including, at a minimum, the following:

- a. Spill and overfill prevention;
- b. Release detection and related reporting requirements;
- c. Corrosion protection;
- d. Emergency response;
- e. Product and equipment compatibility;
- f. Financial responsibility;
- g. Notification and storage tank registration requirements;
- h. Temporary and permanent closure requirements; and
- i. Class B and Class C operator training requirements.

2. Class B operators shall successfully complete a training course approved by the board that includes an in-depth understanding of operation and maintenance aspects of UST systems and related regulatory requirements. Training shall provide specific information on the components of UST systems, materials of construction, methods of release detection and release prevention applied to UST systems and components. Training shall address operation and maintenance requirements of this chapter and/or federal underground storage tank requirements in 40 CFR Part 280, including, at a minimum, the following:

- a. Spill and overfill prevention;
- b. Release detection and related reporting requirements;
- c. Corrosion protection and related testing;
- d. Emergency response;
- e. Product and equipment compatibility;
- f. Reporting and recordkeeping requirements; and
- g. Class C operator training requirements.

3. Class C operators. At a minimum, training provided by the tank owner or Class A or Class B operator shall enable the Class C operator to take action in response to emergencies caused by spills or releases and alarms from

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an underground storage tank. Training shall include written instructions or procedures for the Class C operator to follow and to provide notification necessary in the event of emergency conditions.

4. Successful completion for Class A and Class B operators means completion of the entire training course and demonstration of knowledge of the course material as follows:

- a. Receipt of a passing grade (a score of 80% or better) on an examination of material presented in the training course, or demonstration through practical (hands-on) application to the trainer of operation and maintenance checks of underground storage tank equipment, including performance of release detection at the UST facility, at the conclusion of onsite training; and
- b. Receipt of a training certificate by an approved trainer upon verification of successful completion of training under this section.

5. Reciprocity. The board may also recognize successful completion of Class A and Class B operator training on regulatory standards consistent with 40 CFR Part 280, which is recognized by other state or implementing agencies and which is approved by EPA as meeting operator training grant guidelines published by EPA.

6. The tank owner and operator shall incur the costs of the training.

#### D. Timing of training.

1. An owner and operator shall ensure that Class A, Class B and Class C operators are trained as soon as practicable after September 15, 2010, contingent upon availability of approved training providers, but not later than August 8, 2012.

2. When a Class A or Class B operator is replaced after August 8, 2012, a new operator shall be trained within 60 days of assuming duties for that class of operator.

3. Class C operators shall be trained before assuming duties of a Class C operator. After September 15, 2010, written instructions or procedures shall be provided to Class C operators to follow and to provide notification necessary in the event of emergency conditions. Class C operators shall be briefed on these instructions or procedures at least annually (every 12 months), which may be concurrent with annual safety training required under Occupational Safety and Health Administration, 29 CFR Part 1910 (relating to Occupational Safety and Health Standards).

#### E. Retraining.

1. Owners and operators of UST systems shall ensure that Class A and B operators in accordance with subsection C of this section are retrained if the board determines that the UST system is out of compliance with the requirements of 9VAC25-580-30 through 9VAC25-580-190. At a minimum, Class A and Class B operators shall successfully

complete retraining in the areas identified as out of compliance.

2. Class A and B operators shall complete training pursuant to this subsection no later than 90 days from the date the board identifies the noncompliance.

#### F. Documentation.

1. Owners and operators of underground storage tank facilities shall prepare and maintain a list of designated Class A, Class B, and Class C operators. The list shall represent the current Class A, Class B, and Class C operators for the UST facility and shall include:

- a. The name of each operator, class of operation trained for, and the date each operator successfully completed initial training and refresher training, if any.
- b. For Class A and Class B operators that are not permanently onsite or assigned to more than one facility, telephone numbers to contact the operators.

2. A copy of the certificates of training for Class A and Class B operators shall be on file as long as each operator serves in that capacity at the facility or three years, whichever is longer, and readily available, and a copy of the facility list of Class A, Class B, and Class C operators and Class C operator instructions or procedures shall be kept onsite and immediately available for manned UST facilities and readily available for unmanned facilities (see subdivision 2 e h of 9VAC25-580-120 relating to reporting and recordkeeping).

3. Class C operator and owner contact information, including names and telephone numbers, and any emergency information shall be conspicuously posted at unmanned facilities.

### Part IV

#### Release Detection

#### **9VAC25-580-130. General requirements for all petroleum and hazardous substance UST systems.**

A. Owners and operators of ~~new and existing~~ UST systems must provide a method, or combination of methods, of release detection that:

1. Can detect a release from any portion of the tank and the connected underground piping that routinely contains product;
2. Is installed, and calibrated, ~~operated, and maintained~~ in accordance with the manufacturer's instructions, including routine maintenance and service checks for operability or running condition; ~~and~~

3. Beginning on (insert date three years after effective date of amendment), is operated and maintained, and electronic and mechanical components are tested for proper operation, in accordance with one of the following: (i) manufacturer's instructions; (ii) a code of practice developed by a nationally recognized association or independent testing laboratory; or (iii) requirements

determined by the board to be no less protective of human health and the environment than the two options listed in subdivisions 1 and 2 of this subsection. A test of the proper operation must be performed at least annually and, at a minimum, as applicable to the facility, cover the following components and criteria:

- a. Automatic tank gauge and other controllers: test alarm; verify system configuration; test battery backup;
- b. Probes and sensors: inspect for residual buildup; ensure floats move freely; ensure shaft is not damaged; ensure cables are free of kinks and breaks; test alarm operability and communication with controller;
- c. Automatic line leak detector: test operation to meet criteria in subdivision 1 of 9VAC25-580-170 by simulating a leak;
- d. Vacuum pumps and pressure gauges: ensure proper communication with sensors and controller; and
- e. Handheld electronic sampling equipment associated with groundwater and vapor monitoring: ensure proper operation.

NOTE: The following code of practice may be used to comply with subdivision 3 of this subsection. Petroleum Equipment Institute Publication RP 1200, Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities.

~~3- 4.~~ Meets the performance requirements in 9VAC25-580-160 or 9VAC25-580-170; or Part X (9VAC25-580-380 et seq.) of this chapter as applicable with any performance claims and their manner of determination described in writing by the equipment manufacturer or installer. In addition, the methods used after December 22, 1990, listed in subdivisions 2, 3, 4, 8, and 9 of 9VAC25-580-160; subdivisions 1 and 2 of 9VAC25-580-170; and Part X except for methods permanently installed prior to that date, must be capable of detecting the leak rate or quantity specified for that method in subdivisions 2, 3, and 4 of 9VAC25-580-160 or subdivisions 1 and 2 of 9VAC25-580-170 the corresponding section of the regulation with a probability of detection of 0.95 and a probability of false alarm of 0.05.

B. When a release detection method operated in accordance with the performance standards in 9VAC25-580-160 ~~or~~ 9VAC25-580-170, or Part X of this chapter indicates a release may have occurred, owners and operators must notify the board in accordance with Part V (9VAC25-580-190 et seq.) of this chapter.

~~C. Owners and operators of all UST systems must comply with the release detection requirements of this part by December 22 of the year listed in the following table:~~

SCHEDULE FOR PHASE IN OF RELEASE DETECTION

Year system was installed	Year when release detection is required (by December 22 of the year indicated)				
	1989	1990	1991	1992	1993
Before 1965 or date unknown	RD	P			
1965-1969		P/RD			
1970-1974		P	RD		
1975-1979		P		RD	
1980-1988		P			RD

~~New tanks (after December 22, 1988) immediately upon installation.~~

~~P = Must begin release detection for all pressurized piping in accordance with subdivision C 2 a of 9VAC25-580-140.~~

~~RD = Must begin release detection for tanks and suction piping in accordance with subdivisions C 1 and C 2 b of 9VAC25-580-140, and 9VAC25-580-150.~~

~~D. C. Any existing UST system that cannot apply a method of release detection that complies with the requirements of this part must complete the closure procedures in Part VII (9VAC25-580-310 et seq.) of this chapter, by the date on which release detection is required for that UST system under subsection C of this section. For previously deferred UST systems described in Parts I (9VAC25-580-10 et seq.) and X of this chapter, this requirement applies on or after the effective dates described in 9VAC25-580-20 A 1 b and c and 9VAC25-580-380 A 1.~~

**9VAC25-580-140. Requirements for petroleum UST systems.**

~~A. Owners and operators of petroleum UST systems required to have secondary containment under subdivision 7 of 9VAC25-580-50 must provide secondary containment and release detection for tanks and piping as follows:~~

- ~~1. Secondary containment systems must be designed, constructed, and installed to:
 
  - a. Contain regulated substances released from the tank system until they are detected and removed;
  - b. Prevent the release of regulated substances to the environment at any time during the operational life of the UST system; and~~



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- ~~e. Be checked for evidence of a release at least every 30 days.~~
- ~~2. Double-walled tanks must be designed, constructed, and installed to:
  - ~~a. Contain a release from any portion of the inner tank within the outer wall; and~~
  - ~~b. Detect the failure of the inner wall.~~~~
- ~~3. External liners (including vaults) must be designed, constructed, and installed to:
  - ~~a. Contain 100% of the capacity of the largest tank within its boundary;~~
  - ~~b. Prevent the interference of precipitation or groundwater intrusion with the ability to contain or detect a release of regulated substances; and~~
  - ~~c. Surround the tank completely (i.e., it is capable of preventing lateral as well as vertical migration of regulated substances).~~~~
- ~~4. Underground piping must be equipped with secondary containment that satisfies the requirements of subdivision 1 of this subsection (e.g., trench liners, jacketing of double-walled pipe). In addition, underground piping that conveys regulated substances under pressure must be equipped with an automatic line leak detector in accordance with subdivision 1 of 9VAC25-580-170.~~
- ~~5. Perform interstitial monitoring in accordance with subdivision 7 of 9VAC25-580-160.~~

~~B. Owners and operators of petroleum USTs required to have secondary containment under subdivision 7 of 9VAC25-580-50 must have motor fuel underdispenser containment that is liquid tight on its sides, bottom, and at any penetrations; be compatible with the substance conveyed by the piping; and allow for visual inspection and access to the components in the containment system or be monitored.~~

~~C. Owners and operators of petroleum UST systems not required to have secondary containment under subdivision 7 of 9VAC25-580-50 must provide release detection for tanks and piping as follows:~~

- ~~1. Tanks. Tanks must be monitored for releases as follows:
  - ~~a. Tanks installed before September 15, 2010, must be monitored for releases at least every 30 days for releases using one of the methods listed in subdivisions 4 through 8 & 9 of 9VAC25-580-160 except that:
    - ~~(1) UST systems that meet the performance standards in subdivisions 1 through 5 of 9VAC25-580-50 or subdivisions 1 through 4 of 9VAC25-580-60 may use both monthly inventory control requirements in subdivision 1 or 2 of 9VAC25-580-160, and tank tightness testing (conducted in accordance with subdivision 3 of 9VAC25-580-160) at least every five years until December 22, 1998, or until 10 years after the tank is was installed or upgraded under subdivision 2 of 9VAC25-580-60, whichever is later; and~~~~~~

- ~~b. UST systems that do not meet the performance standards in 9VAC25-580-50 or 9VAC25-580-60 may use monthly inventory controls (conducted in accordance with subdivision 1 or 2 of 9VAC25-580-160) and annual tank tightness testing (conducted in accordance with subdivision 3 of 9VAC25-580-160) until December 22, 1998, when the tank must be upgraded under 9VAC25-580-60 or permanently closed under 9VAC25-580-320; and~~
- ~~e. (2) Tanks with capacity of 550 gallons or less may use weekly and tanks with a capacity of 551 to 1000 gallons that meet the tank diameter criteria in subdivision 2 of 9VAC25-580-160 may use manual tank gauging (conducted in accordance with subdivision 2 of 9VAC25-580-160).~~
- ~~b. Tanks installed on or after September 15, 2010, must be monitored for releases at least every 30 days in accordance with subdivision 7 of 9VAC25-580-160.~~

~~2. Piping. Underground piping that routinely contains regulated substances must be monitored for releases in a manner that meets one of the following requirements:~~

- ~~a. Piping installed before September 15, 2010, must meet one of the following:
  - ~~(1) Pressurized piping. Underground piping that conveys regulated substances under pressure must:
    - ~~(1) (a) Be equipped with an automatic line leak detector conducted in accordance with subdivision 1 of 9VAC25-580-170; and~~
    - ~~(2) (b) Have an annual line tightness test conducted in accordance with subdivision 2 of 9VAC25-580-170 or have monthly monitoring conducted in accordance with subdivision 3 of 9VAC25-580-170.~~~~
  - ~~(2) Suction piping. Underground piping that conveys regulated substances under suction must either have a line tightness test conducted at least every three years and in accordance with subdivision 2 of 9VAC25-580-170, or use a monthly monitoring method conducted in accordance with subdivision 3 of 9VAC25-580-170. No release detection is required for suction piping that is designed and constructed to meet the following standards:
    - ~~(1) (a) The below-grade piping operates at less than atmospheric pressure;~~
    - ~~(2) (b) The below-grade piping is sloped so that the contents of the pipe will drain back into the storage tank if the suction is released;~~
    - ~~(3) (c) Only one check valve is included in each suction line;~~
    - ~~(4) (d) The check valve is located directly below and as close as practical to the suction pump; and~~~~~~

~~(5) (e)~~ A method is provided that allows compliance with subdivisions 2 b a (2) ~~(b) through (4), (c), and (d)~~ of this subsection to be readily determined.

b. Piping installed or replaced on or after September 15, 2010, must meet one of the following:

(1) Pressurized piping must be monitored for releases at least every 30 days in accordance with subdivision 7 of 9VAC25-580-160 and be equipped with an automatic line leak detector in accordance with subdivision 1 of 9VAC25-580-170.

(2) Suction piping must be monitored for releases at least every 30 days in accordance with subdivision 7 of 9VAC25-580-160. No release detection is required for suction piping that meets the requirements of subdivisions 2 a (2) (a) through (e) of this section.

**9VAC25-580-150. Requirements for hazardous substance UST systems.**

Owners and operators of hazardous substance UST systems must provide ~~release detection containment~~ that meets the following requirements and monitor these systems using subdivision 7 of 9VAC25-580-160 at least every 30 days:

~~1. Release detection at existing UST systems must meet the requirements for petroleum UST systems in 9VAC25-580-140. By December 22, 1998, all existing hazardous substance UST systems must meet the release detection requirements for new systems in subdivision 2 of this section.~~

~~2. Release detection at new hazardous substance UST systems must meet the following requirements:~~

~~a. 1. Secondary containment systems must be designed, constructed and installed to:~~

~~(1) a. Contain regulated substances ~~released~~ leaked from the tank system primary containment until they are detected and removed;~~

~~(2) b. Prevent the release of regulated substances to the environment at any time during the operational life of the UST system; and~~

~~(3) c. Be checked for evidence of a release at least every 30 days.~~

NOTE: The provisions of 40 CFR 265.193, Containment and Detection of Releases, may be used to comply with these requirements for tanks installed before September 15, 2010.

~~b. 2. Double-walled tanks must be designed, constructed, and installed to:~~

~~(1) a. Contain a ~~release leak~~ from any portion of the inner tank within the outer wall; and~~

~~(2) b. Detect the failure of the inner wall.~~

~~e. 3. External liners (including vaults) must be designed, constructed, and installed to:~~

~~(1) a. Contain 100% of the capacity of the largest tank within its boundary;~~

~~(2) b. Prevent the interference of precipitation or ~~ground-water~~ groundwater intrusion with the ability to contain or detect a release of regulated substances; and~~

~~(3) c. Surround the tank completely (i.e., it is capable of preventing lateral as well as vertical migration of regulated substances).~~

~~d. 4. Underground piping must be equipped with secondary containment that satisfies the requirements of ~~subdivision 2 a~~ of this section (e.g., trench liners, ~~jacketing of~~ double-walled pipe). In addition, underground piping that conveys regulated substances under pressure must be equipped with an automatic line leak detector in accordance with subdivision 1 of 9VAC25-580-170.~~

~~e. Other 5. For hazardous substance UST systems installed before September 15, 2010, other methods of release detection may be used if owners and operators:~~

~~(1) a. Demonstrate to the board that an alternate method can detect a release of the stored substance as effectively as any of the methods allowed in subsections 2 through & 2 of 9VAC25-580-160 can detect a release of petroleum;~~

~~(2) b. Provide information to the board on effective corrective action technologies, health risks, and chemical and physical properties of the stored substance, and the characteristics of the UST site; and~~

~~(3) c. Obtain approval from the board to use the alternate release detection method before the installation and operation of the new UST system.~~

**9VAC25-580-160. Methods of release detection for tanks.**

Owners and operators must obtain a permit and the required inspections in accordance with 9VAC25-580-50 or 9VAC25-580-60 for the ~~methods of installation of certain~~ release detection equipment contained in ~~subsections subdivisions 4 through & 2 of 9VAC25-580-160~~ this section.

Each method of release detection for tanks used to meet the requirements of 9VAC25-580-140 must be conducted in accordance with the following and be designed to detect releases at the earliest possible time for the specific method chosen:

1. Inventory control. Product inventory control (or another test of equivalent performance) must be conducted monthly to detect a release of at least 1.0% of flow-through plus 130 gallons on a monthly basis in the following manner:

a. Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank are recorded each operating day;

b. The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest ~~one-eighth~~ 1/8 of an inch;

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- c. The regulated substance inputs are reconciled with delivery receipts by measurement of the tank inventory volume before and after delivery;
- d. Deliveries are made through a drop tube that extends to within one foot of the tank bottom;
- e. Product dispensing is metered and recorded according to regulations of the Bureau of Weights and Measures of the Virginia Department of Agriculture and Consumer Services for meter calibration within their jurisdiction; for all other product dispensing meter calibration, an accuracy of six cubic inches for every five gallons of product withdrawn is required; and
- f. The measurement of any water level in the bottom of the tank is made to the nearest ~~one eighth~~ 1/8 of an inch at least once a month.

NOTE: Practices described in the American Petroleum Institute Publication 1621, "Recommended Practice for RP 1621 Bulk Liquid Stock Control at Retail Outlets," may be used, where applicable, as guidance in meeting the requirements of this subsection.

2. Manual tank gauging. Manual tank gauging must meet the following requirements:

- a. Tank liquid level measurements are taken at the beginning and ending of a period of ~~at least 36 hours~~ using the appropriate minimum duration of test value in the table below during which no liquid is added to or removed from the tank;
- b. Level measurements are based on an average of two consecutive stick readings at both the beginning and ending of the period;
- c. The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest ~~&frac18;~~ 1/8 of an inch;
- d. A leak release is suspected and subject to the requirements of Part V (9VAC25-580-190 et seq.) if the variation between beginning and ending measurements exceeds the weekly or monthly standards in the following table:

Nominal tank capacity	Weekly standard (one test)	Monthly standard (average of four tests)
550 gallons or less	10 gallons	5 gallons
551-1,000 gallons	13 gallons	7 gallons
1,001-2,000 gallons	26 gallons	13 gallons

<u>Nominal Tank Capacity</u>	<u>Minimum Duration of Test</u>	<u>Weekly Standard (One Test)</u>	<u>Monthly Standard (Four Test Average)</u>
<u>550 gallons or less</u>	<u>36 hours</u>	<u>10 gallons</u>	<u>5 gallons</u>
<u>551 - 1,000 gallons (when tank diameter is 64 inches)</u>	<u>44 hours</u>	<u>9 gallons</u>	<u>4 gallons</u>
<u>551 - 1,000 gallons (when tank diameter is 48 inches)</u>	<u>58 hours</u>	<u>12 gallons</u>	<u>6 gallons</u>
<u>551 - 1,000 gallons (also requires periodic tank tightness testing)</u>	<u>36 hours</u>	<u>13 gallons</u>	<u>7 gallons</u>
<u>1001 - 2,000 gallons (also requires periodic tank tightness testing)</u>	<u>36 hours</u>	<u>26 gallons</u>	<u>13 gallons</u>

e. ~~Only tanks~~ Tanks of 550 gallons or less nominal capacity and tanks with a nominal capacity of 551 to 1,000 gallons that meet the tank diameter criteria in the table in subsection 2 d of this section may use this as the sole method of release detection. ~~Tanks~~ All other tanks with a nominal capacity of 551 to 2,000 gallons may use the method in place of ~~manual~~ inventory control in ~~subsection subdivision 1 of 9VAC25-580-160~~ this section. Tanks of greater than 2,000 gallons nominal capacity may not use this method to meet the requirements of this part.

3. Tank tightness testing. Tank tightness testing (or another test of equivalent performance) must be capable of detecting a 0.1 gallon per hour leak rate from any portion of the tank that routinely contains product while accounting for the effects of thermal expansion or contraction of the product, vapor pockets, tank deformation, evaporation or condensation, and the location of the water table.

4. Automatic tank gauging. Equipment for automatic tank gauging that tests for the loss of product and conducts inventory control must meet the following requirements:

a. The automatic product level monitor test can detect a 0.2 gallon per hour leak rate from any portion of the tank that routinely contains product; ~~and~~

b. ~~Inventory~~ The automatic tank gauging equipment must meet the inventory control (or another other test of equivalent performance) is conducted in accordance with the requirements of subsection subdivision 1 of 9VAC25-580-160. this section; and

c. The test must be performed with the system operating in one of the following modes:

(1) In-tank static testing conducted at least once every 30 days; or

(2) Continuous in-tank leak detection operating on an uninterrupted basis or operating within a process that allows the system to gather incremental measurements to determine the leak status of the tank at least once every 30 days.

5. Vapor monitoring. Testing or monitoring for vapors within the soil gas of the excavation zone must meet the following requirements:

a. The materials used as backfill are sufficiently porous (e.g., gravel, sand, crushed rock) to readily allow diffusion of vapors from releases into the excavation area;

b. The stored regulated substance, or a tracer compound placed in the tank system, is sufficiently volatile (e.g., gasoline) to result in a vapor level that is detectable by the monitoring devices located in the excavation zone in the event of a release from the tank;

c. The measurement of vapors by the monitoring device is not rendered inoperative by the ~~ground-water groundwater~~, rainfall, or soil moisture or other known interferences so that a release could go undetected for more than 30 days;

d. The level of background contamination in the excavation zone will not interfere with the method used to detect releases from the tank;

e. The vapor monitors are designed and operated to detect any significant increase in concentration above background of the regulated substance stored in the tank

system, a component or components of that substance, or a tracer compound placed in the tank system;

f. In the UST excavation zone, the site is assessed to ensure compliance with the requirements in subdivisions ~~5~~ a through d of this ~~section~~ subdivision 5 and to establish the number and positioning of monitoring wells that will detect releases within the excavation zone from any portion of the tank that routinely contains product; and

g. Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

6. ~~Ground-water~~ Groundwater monitoring. Testing or monitoring for liquids on the ~~ground-water~~ groundwater must meet the following requirements:

a. The regulated substance stored is not readily miscible in water and has a specific gravity of less than one;

b. ~~Ground-water~~ Groundwater is never more than 20 feet from the ground surface and the hydraulic conductivity of the soils between the UST system and the monitoring wells or devices is not less than 0.01 cm/sec (e.g., the soil should consist of gravels, coarse to medium sands, coarse silts or other permeable materials);

c. The slotted portion of the monitoring well casing must be designed to prevent migration of natural soils or filter pack into the well and to allow entry of regulated substance on the water table into the well under both high and low ~~ground-water~~ groundwater conditions;

d. Monitoring wells shall be sealed from the ground surface to the top of the filter pack;

e. Monitoring wells or devices intercept the excavation zone or are as close to it as is technically feasible;

f. The continuous monitoring devices or manual methods used can detect the presence of at least ~~&frac18;~~ 1/8 of an inch of free product on top of the ~~ground-water~~ groundwater in the monitoring wells;

g. Within and immediately below the UST system excavation zone, the site is assessed to ensure compliance with the requirements in subdivisions ~~6~~ a through e of this ~~section~~ subdivision 6 and to establish the number and positioning of monitoring wells or devices that will detect releases from any portion of the tank that routinely contains product; and

h. Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

7. Interstitial monitoring. Interstitial monitoring between the UST system and a secondary barrier immediately around or beneath it may be used, but only if the system is designed, constructed and installed to detect a leak from any portion of the tank that routinely contains product and also meets one of the following requirements:

a. For double-walled UST systems, the sampling or testing method can detect a ~~release~~ leak through the inner

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wall in any portion of the tank that routinely contains product;

~~NOTE: The provisions outlined in the Steel Tank Institute's "Standard for Dual Wall Underground Storage Tanks" may be used as guidance for aspects of the design and construction of underground steel double-walled tanks.~~

b. For UST systems with a secondary barrier within the excavation zone, the sampling or testing method used can detect a release leak between the UST system and the secondary barrier;

(1) The secondary barrier around or beneath the UST system consists of artificially constructed material that is sufficiently thick and impermeable (at least  $10^{-6}$  cm/sec for the regulated substance stored) to direct a release leak to the monitoring point and permit its detection;

(2) The barrier is compatible with the regulated substance stored so that a release leak from the UST system will not cause a deterioration of the barrier allowing a release to pass through undetected;

(3) For cathodically protected tanks, the secondary barrier must be installed so that it does not interfere with the proper operation of the cathodic protection system;

(4) The ~~ground-water~~ groundwater, soil moisture, or rainfall will not render the testing or sampling method used inoperative so that a release could go undetected for more than 30 days;

(5) The site is assessed to ensure that the secondary barrier is always above the ~~ground-water~~ groundwater and not in a 25-year flood plain, unless the barrier and monitoring designs are for use under such conditions; and,

(6) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

c. For tanks with an internally fitted liner, an automated device can detect a release leak between the inner wall of the tank and the liner, and the liner is compatible with the substance stored.

8. Statistical inventory reconciliation. Release detection methods based on the application of statistical principles to inventory data similar to those described in subdivision 1 of this section must meet the following requirements:

- a. Report a quantitative result with a calculated leak rate;
- b. Be capable of detecting a leak rate of 0.2 gallon per hour or a release of 150 gallons within 30 days; and
- c. Use a threshold that does not exceed one-half the minimum detectible leak rate.

9. Other methods. Any other type of release detection method, or combination of methods, can be used if:

- a. It can detect a 0.2 gallon per hour leak rate or a release of 150 gallons within a month with a probability of

detection of 0.95 and a probability of false alarm of 0.05; or

b. The board may approve another method if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in ~~subsections~~ subdivisions 3 through 8 of this section. In comparing methods, the board shall consider the size of release that the method can detect and the frequency and reliability with which it can be detected. If the method is approved, the owner and operator must comply with any conditions imposed by the board on its use to ensure the protection of human health and the environment.

## **9VAC25-580-170. Methods of release detection for piping.**

Owners and operators must obtain a permit and the required inspections in accordance with 9VAC25-580-50 or 9VAC25-580-60 for the ~~methods~~ installation of certain release detection equipment contained in subdivisions 1 through 3 of ~~9VAC25-580-170~~ of this section.

Each method of release detection for piping used to meet the requirements of 9VAC25-580-140 must be conducted in accordance with the following:

1. Automatic line leak detectors. Methods ~~which~~ that alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of three gallons per hour at 10 pounds per square inch line pressure within one hour. An annual test of the operation of the leak detector must be conducted in accordance with ~~the manufacturer's requirements~~ subdivision A 3 c of 9VAC25-580-130.
2. Line tightness testing. A periodic test of piping may be conducted only if it can detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure.
3. Applicable tank methods. ~~Any~~ Except as described in subdivision 1 of 9VAC25-580-140, any of the methods in ~~subsections~~ subdivisions 5 through 8 ~~9~~ of 9VAC25-580-160 may be used if they are designed to detect a release from any portion of the underground piping that routinely contains regulated substances.

## **9VAC25-580-180. Release detection recordkeeping.**

All UST system owners and operators must maintain records in accordance with 9VAC25-580-120 demonstrating compliance with all applicable requirements of this part. These records must include the following:

1. All written performance claims pertaining to any release detection system used, and the manner in which these claims have been justified or tested by the equipment manufacturer or installer, must be maintained for five years from the date of installation or as long as the method of release detection is used, whichever is greater. Not later than (insert date three years after effective date of amendment), records of site assessments required under subdivisions 5 f and 6 g of 9VAC25-580-160 must be

maintained for as long as the methods are used. Records of site assessments developed after (insert effective date of amendment) must be signed by a professional engineer or professional geologist, or equivalent licensed professional with experience in environmental engineering, hydrogeology, or other relevant technical discipline acceptable to the board;

2. The results of any sampling, testing, or monitoring must be maintained for at least one year, or for another reasonable period of time determined by the board, except ~~that the~~ as follows:

a. The results of annual operation tests conducted in accordance with subdivision A 3 of 9VAC25-580-130 must be maintained for three years. At a minimum, the results must list each component tested, indicate whether each component tested meets criteria in subdivision A 3 of 9VAC25-580-130 or needs to have action taken, and describe any action taken to correct an issue;

b. The results of tank tightness testing conducted in accordance with ~~subsection~~ subdivision 3 of 9VAC25-580-160 must be retained until the next test is conducted; and

c. The results of tank tightness testing, line tightness testing, and vapor monitoring using a tracer compound placed in the tank system conducted in accordance with 9VAC25-580-390 D must be retained until the next test is conducted; and

3. Written documentation of all calibration, maintenance, and repair of release detection equipment permanently located on-site must be maintained for at least one year after the servicing work is completed or for such longer period as may be required by the board. Any schedules of required calibration and maintenance provided by the release detection equipment manufacturer must be retained for five years from the date of installation.

Part V

Release Reporting, Investigation, and Confirmation

**9VAC25-580-190. Reporting of suspected releases.**

Owners and operators of UST systems must report to the board within 24 hours and follow the procedures in 9VAC25-580-210 for any of the following conditions:

1. The discovery by owners and operators or others of released regulated substances at the UST site or in the surrounding area (such as the presence of free product or vapors in soils, basements, sewer and utility lines, and nearby surface water);

2. Unusual operating conditions observed by owners and operators (such as the erratic behavior of product dispensing equipment, the sudden loss of product from the UST system, ~~or~~ an unexplained presence of water in the ~~tank~~ tank, or liquid in the interstitial space of secondarily contained systems), ~~unless system equipment is found to~~

~~be defective but not leaking, and is immediately repaired or replaced;~~

a. The system equipment or component is found not to be releasing regulated substances to the environment;

b. Any defective system equipment or component is immediately repaired or replaced; and

c. For secondarily contained systems, except as provided for in subdivision 7 b (4) of 9VAC25-580-160, any liquid in the interstitial space not used as part of the interstitial monitoring method (for example, brine filled) is immediately removed.

3. Monitoring results, including investigation of an alarm, from a release detection method required under 9VAC25-580-140 and 9VAC25-580-150 that indicate a release may have occurred unless:

a. The monitoring device is found to be defective, and is immediately repaired, recalibrated or replaced, and additional monitoring does not confirm the initial result; ~~or~~

b. The leak is contained in the secondary containment and:

(1) Except as provided for in subdivision 7 b (4) of 9VAC25-580-160, any liquid in the interstitial space not used as part of the interstitial monitoring method (for example, brine filled) is immediately removed; and

(2) Any defective system equipment or component is immediately repaired or replaced;

c. In the case of inventory control, described in subdivision 1 of 9VAC25-580-160, a second month of data or in the case of manual tank gauging, a second week or month as prescribed in the chart under subdivision 2 d of 9VAC25-580-160 does not confirm the initial result, or the investigation determines no release has occurred; or

d. The alarm was investigated and determined to be a nonrelease event (for example, from a power surge or caused by filling the tank during release detection testing).

**9VAC25-580-210. Release investigation and confirmation steps.**

Unless corrective action is initiated in accordance with Part VI (9VAC25-580-230 et seq.) of this chapter, owners and operators must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under 9VAC25-580-190 within seven days, or another reasonable time period specified by the board upon written request made and approved within seven days after reporting of the suspected release.

The following steps are required for release investigation and confirmation:

1. System test. Owners and operators must conduct tests (according to the requirements for tightness testing in

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~~subsection subdivision 3 of 9VAC25-580-160 and subdivision 2 of 9VAC25-580-170) that determine whether a leak exists in that portion of the tank that routinely contains product, or the attached delivery piping, or both or, as appropriate, secondary containment testing described in subdivision 4 of 9VAC25-580-110.~~

a. ~~Owners~~ The test must determine whether:

~~(1) A leak exists in that portion of the tank that routinely contains product or in the attached delivery piping; or~~

~~(2) A breach of either wall of the secondary containment has occurred.~~

b. ~~If the system test confirms a leak into the interstice or a release, owners and operators must repair, replace or, upgrade, or close the UST system. In addition, owners and operators must~~ begin corrective action in accordance with Part VI if the test results for the system, tank, or delivery piping indicate that a ~~leak~~ release exists.

~~b. c.~~ Further investigation is not required if the test results for the system, tank, and delivery piping do not indicate that a ~~leak~~ release exists and if environmental contamination is not the basis for suspecting a release.

e. ~~d.~~ Owners and operators must conduct a site check as described in subdivision 2 of this section if the test results for the system, tank, and delivery piping do not indicate that a ~~leak~~ release exists but environmental contamination is the basis for suspecting a release.

2. Site check. Owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the nature of the stored substance, the type of initial alarm or cause for suspicion, the type of backfill, the depth of ~~ground-water~~ groundwater, and other factors appropriate for identifying the presence and source of the release. Samples shall be tested according to established EPA analytical methods or methods approved by the board.

a. If the test results for the excavation zone or the UST site indicate that a release has occurred, owners and operators must begin corrective action in accordance with Part VI of this chapter.

b. If the test results for the excavation zone or the UST site do not indicate that a release has occurred, further investigation is not required.

## **9VAC25-580-250. Initial abatement measures and site check.**

A. Unless directed to do otherwise by the board, owners and operators must perform the following abatement measures:

1. Remove as much of the regulated substance from the UST system as is necessary to prevent further release to the environment;

2. Visually inspect any aboveground releases or exposed ~~below-ground~~ belowground releases and prevent further migration of the released substance into surrounding soils and ~~ground-water~~ groundwater;

3. Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the UST excavation zone and entered into subsurface structures (such as sewers or basements);

4. Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement, or corrective action activities. If these remedies include treatment or disposal of soils, the owner and operator must comply with applicable state and local requirements;

5. Measure for the presence of a release where contamination is most likely to be present at the UST site, unless the presence and source of the release have been confirmed in accordance with the site check required by subdivision 2 of 9VAC25-580-210 or the closure site assessment of subsection A of 9VAC25-580-330. In selecting sample types, sample locations, and measurement methods, the owner and operator must consider the nature of the stored substance, the type of backfill, depth to ~~ground-water~~ groundwater and other factors as appropriate for identifying the presence and source of the release. Samples shall be tested according to established EPA analytical methods or methods approved the board; and

6. Investigate to determine the possible presence of free product, and begin free product removal as soon as practicable and in accordance with 9VAC25-580-270.

B. Within 20 days after release confirmation, or within another reasonable period of time determined by the board upon written request made and approved within 20 days after release confirmation, owners and operators must submit a report to the board summarizing the initial abatement steps taken under subsection A of this section and any resulting information or data.

## **9VAC25-580-260. Site characterization.**

A. Owners and operators must assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in 9VAC25-580-230 and 9VAC25-580-240. This information must include, but is not necessarily limited to, the following:

1. Data on the material released and the estimated quantity of release;

2. Data from available sources or site investigations concerning the following:

a. Site assessment to include: data on the physical/chemical properties of the contaminant; nature and quantity and extent of the release; evidence that free product is found to need recovery; geologic/hydrologic site characterization; current and projected land/water

uses; water quality; subsurface soil conditions; evidence that contaminated soils are in contact with the ~~ground water~~ groundwater; locations of subsurface conduits (e.g., sewers, utility lines, etc.); and climatological conditions. Samples collected for this site characterization shall be tested according to established EPA analytical methods or methods approved by the board;

b. Risk (exposure) assessment to include: evidence that wells of the area have been affected; use and approximate locations of wells potentially affected by the release; identification of potential and impacted receptors; migration routes; surrounding populations; potential for additional environmental damage;

c. Remediation assessment to include: potential for remediation and applicability of different remediation technologies to the site.

3. Results of the site check required under subdivision A 5 of 9VAC25-580-250; and

4. Results of the free product investigations required under subdivision A 6 of 9VAC25-580-250, to be used by owners and operators to determine whether free product must be recovered under 9VAC25-580-270.

B. Within 45 days of release confirmation or another reasonable period of time determined by the board upon written request made and approved within 45 days after release confirmation, owners and operators must submit the information collected in compliance with subsection A of this section to the board in a manner that demonstrates its applicability and technical adequacy, or in a format and according to the schedule required by the board.

**9VAC25-580-280. Corrective action plan.**

A. At any point after reviewing the information submitted in compliance with 9VAC25-580-240 ~~through, 9VAC25-580-250, and~~ 9VAC25-580-260, the board may require owners and operators to submit additional information or to develop and submit a corrective action plan for responding to contaminated soils and ~~ground water~~ groundwater. If a plan is required, owners and operators must submit the plan according to a schedule and format established by the board. Alternatively, owners and operators may, after fulfilling the requirements of 9VAC25-580-240 ~~through, 9VAC25-580-250, and~~ 9VAC25-580-260, choose to submit a corrective action plan for responding to contaminated soil and ~~ground water~~ groundwater. In either case, owners and operators are responsible for submitting a plan that provides for adequate protection of human health and the environment as determined by the board, and must modify their plan as necessary to meet this standard.

B. In conjunction with the information provided under subdivision A 2 of 9VAC25-580-260 (site assessment, risk (exposure) assessment, and remediation assessment), the corrective action plan must include the following information:

1. Detailed conceptual design including narrative description of technologies and how they will be applied at the site;
2. Projected remediation end points/degree of remediation;
3. Schedule of project implementation;
4. Schedule to achieve projected end points;
5. Operational and post-operational monitoring schedules (to include data submittals);
6. Proposed disposition of any wastes and discharges (if applicable);
7. Actions taken to obtain any necessary federal, state and local permits to implement the plan; and
8. Proposed actions to notify persons directly affected by the release or the planned corrective action.

C. The board will approve the corrective action plan only after ensuring that implementation of the plan will adequately protect human health, safety, and the environment. In making this determination, the board will consider the following factors as appropriate:

1. The physical and chemical characteristics of the regulated substance, including its toxicity, persistence, and potential for migration;
2. The hydrogeologic characteristics of the facility and the surrounding area;
3. The proximity, quality, and current and future uses of nearby surface water and ~~ground water~~ groundwater;
4. The potential effects of residual contamination on nearby surface water and ~~ground water~~ groundwater;
5. The site, risk (exposure), and remediation assessments as required by subdivision A 2 of 9VAC25-580-260; and
6. Any information assembled in compliance with this part.

D. Upon approval of the corrective action plan or as directed by the board, owners and operators must implement the plan, including modifications to the plan made by the board. They must monitor, evaluate, and report the results of implementing the plan in accordance with a schedule and in a format established by the board.

E. Owners and operators may, in the interest of minimizing environmental contamination and promoting more effective cleanup, begin cleanup of soil and ~~ground water~~ groundwater before the corrective action plan is approved provided that they:

1. Notify the board of their intention to begin cleanup and obtain written approval to proceed with an agreed upon activity;
2. Comply with any conditions imposed by the board, including halting cleanup or mitigating adverse consequences from cleanup activities; and
3. Incorporate these self-initiated cleanup measures in the corrective action plan that is submitted to the board for approval.



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## Part VII

### Out-of-Service UST Systems and Closure

#### **9VAC25-580-310. Temporary closure.**

Owners and operators must obtain a permit and the required inspections in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia).

A permit from the building official must be obtained prior to temporary tank closure. No UST system shall be temporarily closed unless and until the system is inspected in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia).

In the case of state-owned facilities the Department of General Services shall function as the building official in accordance with § 36-98.1 of the Code of Virginia.

In the case of federal facilities the building official must be contacted. Owners and operators must obtain a permit and the required inspections in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ 36-97 et seq. of the Code of Virginia).

1. When an UST system is temporarily closed, owners and operators must continue operation and maintenance of corrosion protection in accordance with 9VAC25-580-90, and any release detection in accordance with ~~Part~~ Parts IV (9VAC25-580-130 et seq.) and X (9VAC25-580-380 et seq.) of this chapter. Parts V (9VAC25-580-190 et seq.) and VI (9VAC25-580-230 et seq.) of this chapter must be complied with if a release is suspected or confirmed. However, release detection ~~is~~ and release detection operation and maintenance testing and inspections in Parts III (9VAC25-580-80 et seq.) and IV of this chapter are not required as long as the UST system is empty. The UST system is empty when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (one inch) of residue, or 0.3% by weight of the total capacity of the UST system, remain in the system. In addition, spill and overflow operation and maintenance testing and inspections in Part III of this chapter are not required.

2. When an UST system is temporarily closed for three months or more, owners and operators must also comply with the following requirements:

- a. Leave vent lines open and functioning; and
- b. Cap and secure all other lines, pumps, manways, and ancillary equipment.

3. When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet either performance standards in 9VAC25-580-50 for new UST systems or the upgrading requirements in 9VAC25-580-60, except that the spill and overflow equipment requirements do not have to be met. Owners and operators must permanently close the substandard UST systems at the end

of this 12-month period in accordance with 9VAC25-580-320 through 9VAC25-580-350, unless the building official provides an extension of the 12-month temporary closure period. Owners and operators must complete a site assessment in accordance with 9VAC25-580-330 before such an extension can be applied for.

#### **9VAC25-580-320. Permanent closure and changes-in-service.**

Owners and operators must obtain a permit and the required inspections in accordance with the Virginia Uniform Statewide Building Code (§ ~~36-47~~ 36-97 et seq. of the Code of Virginia).

A permit from the building official must be obtained prior to permanent tank closure or a change-in-service. No UST system shall be permanently closed or changed-in-service unless and until the system is inspected in accordance with the provisions of the Virginia Uniform Statewide Building Code (§ ~~36-47~~ 36-97 et seq. of the Code of Virginia).

If such closure is in response to immediate corrective actions that necessitate timely tank removal, then the building official must be notified and the official's directions followed until a permit is issued.

In the case of state-owned facilities the Department of General Services shall function as the building official in accordance with § 36-98.1 of the Code of Virginia.

In the case of federal facilities the building official must be contacted. Owners and operators must obtain a permit and the required inspections in accordance with the provisions of the Virginia Uniform Statewide Building Code.

1. Owners and operators must within 30 days after either permanent closure or a change-in-service submit an amended UST notification form (~~Appendix I~~) to the board.

2. The required assessment of the excavation zone under 9VAC25-580-330 must be performed after notifying the building official but before completion of the permanent closure or a change-in-service.

3. To permanently close a tank, owners and operators must empty and clean it by removing all liquids and accumulated sludges. When the owner or operator suspects that the residual sludges are hazardous in nature the Department of Environmental Quality regulations shall be followed to facilitate the proper treatment, storage, manifesting, transport, and disposal. All tanks taken out of service permanently must ~~also be either~~ removed from the ground ~~or~~ filled with an inert solid material, or closed in place in a manner approved by the board.

4. Continued use of an UST system to store a nonregulated substance is considered a change-in-service. Before a change-in-service, owners and operators must empty and clean the tank by removing all liquid and accumulated sludge and conduct a site assessment in accordance with 9VAC25-580-330.

NOTE: The following cleaning and closure procedures may be used to comply with this section:

- a. American Petroleum Institute Recommended Practice RP 1604, "~~Removal and Disposal Closure~~ of Used Underground Petroleum Storage Tanks";
- b. American Petroleum Institute ~~Publication Standard~~ 2015, "Safe Entry and Cleaning of Petroleum Storage Tanks, Planning and Managing Tank Entry from Decommissioning through Recommissioning";
- c. American Petroleum Institute Recommended Practice 2016, Guidelines and Procedures for Entering and Cleaning Petroleum Storage Tanks;
- d. American Petroleum Institute Recommended Practice RP 1631, "Interior Lining and Periodic Inspection of Underground Storage Tanks," may be used as guidance for compliance with this section; ~~and~~
- e. National Fire Protection Association Standard 326, Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair; and
- ~~e.~~ f. The National Institute for Occupational Safety and Health Publication 80-106, "Criteria for a Recommended Standard \*\*\* Working in Confined Space" may be used as guidance for conducting safe closure procedures at some hazardous substance tanks.

**9VAC25-580-330. Assessing the site at closure or change-in-service.**

A. Before permanent closure or a change-in-service is completed, owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site. In selecting sample type or types (soil or water) and sample location or locations, and measurement methods, owners and operators must consider the method of closure, the nature of the stored substance, the type of backfill, the depth to ~~ground water~~, groundwater and other factors appropriate for identifying the presence of a release. Samples shall be tested according to established EPA analytical methods or methods approved by the board. Where the suspected release is a petroleum product, the samples shall be analyzed for total petroleum hydrocarbons (TPH). The requirements of this section are satisfied if one of the external release detection methods allowed in ~~subsections~~ subdivisions 5 and 6 of 9VAC25-580-160 is operating in accordance with the requirements in 9VAC25-580-160 at the time of closure, and indicates no release has occurred.

B. In all cases where a sample or samples are analyzed, the owner and operator shall submit, along with the amended UST notification form as required in subsection 1 of 9VAC25-580-320, a copy of the laboratory results (including a statement as to the test method used), a description of the area sampled, and a site map depicting tanks, piping, and sample location or locations.

C. If contaminated soils, contaminated ~~ground water~~, groundwater or free product as a liquid or vapor is discovered

under subsection A of this section, or by any other manner, owners and operators must begin corrective action in accordance with Part VI of this chapter.

Part IX  
Delivery Prohibition

**9VAC25-580-370. Requirements for delivery prohibition.**

A. No person shall deliver to, deposit into, or accept a petroleum product or other regulated substance into an underground storage tank that has been identified under subdivision G 2 of this section by the board to be ineligible for such delivery, deposit, or acceptance. Unless authorized in writing by the board, no person shall alter, deface, remove, or attempt to remove a tag that prohibits delivery, deposit, or acceptance of a petroleum product or other regulated substance to an underground storage tank.

B. When an inspection or other information provides reason to believe one or more of the following violations exists, the board shall initiate a proceeding in accordance with subsection D of this section:

- 1. Spill prevention equipment is not installed on the UST system properly as required by 9VAC25-580-50 or 9VAC25-580-60 or is disabled;
- 2. Overfill protection equipment is not installed on the UST system properly as required by 9VAC25-580-50 or 9VAC25-580-60 or is disabled;
- 3. Release detection equipment is not installed on the UST system properly or is disabled or a release detection method is not being performed as required by 9VAC25-580-50 or 9VAC25-580-60;
- 4. Corrosion protection equipment is not installed on the UST system properly as required by 9VAC25-580-50 or 9VAC25-580-60 or is disabled;
- 5. Secondary containment is not installed on the UST system properly as required by 9VAC25-580-50, 9VAC25-580-60, or 9VAC25-580-150 or is disabled; or
- 6. The board has reason to believe that an UST system is leaking and the owner or operator has failed to initiate and complete the investigation and confirmation requirements of 9VAC25-580-190 through 9VAC25-580-200, and 9VAC25-580-210.

C. For purposes of subsection B of this section, spill prevention, overfill prevention, corrosion protection, release detection, or secondary containment equipment that is not verifiable as installed is not installed.

D. The board shall provide written notice to the owner and operator pursuant to subdivision G 1 of this section that it will conduct an informal fact finding pursuant to § 2.2-4019 of the Code of Virginia to determine whether the underground storage ~~tank(s)~~ tank shall be ineligible for delivery, deposit, or acceptance of a petroleum product or other regulated substance. The fact finding shall be scheduled as soon as practicable after the notice, and within 10 business days in

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any event. Upon a finding to impose delivery prohibition, the board shall affix a tag to the fill pipe of the underground storage ~~tank(s)~~ tank prohibiting delivery, deposit, or acceptance of a petroleum product or other regulated substance.

E. When the board issues a notice of alleged violation based on an inspection or other information that provides reason to believe a UST system is not in compliance with the requirements of Part II (9VAC25-580-50 et seq.), III (9VAC25-580-80 et seq.), ~~or~~ IV (9VAC25-580-130 et seq.), or X (9VAC25-580-380 et seq.) of this chapter not listed in subsection B of this section, the requirements of 9VAC25-580-240 through 9VAC25-580-280, or the requirements of 9VAC25-590 (Petroleum Underground Storage Tank Financial Responsibility Requirements), and the owner or operator fails to comply with the notice of alleged violation within the time prescribed by the board, the board may proceed in accordance with subsection D of this section.

F. The board may classify all underground storage tanks containing petroleum or any other regulated substance at a facility as ineligible for delivery, deposit, or acceptance of a petroleum product or other regulated substance if one or more underground storage tanks at the facility has been classified as ineligible for more than 90 days and the ineligible underground storage ~~tank(s)~~ tank has neither been closed in accordance with 9VAC25-580-310 or 9VAC25-580-320 nor returned to compliance. The board shall provide written notice to the owner and operator pursuant to subdivision G 1 of this section that it will conduct an informal fact finding pursuant to § 2.2-4019 of the Code of Virginia to determine whether all the underground storage tanks shall be ineligible for delivery, deposit, or acceptance of a petroleum product or other regulated substance. The fact finding shall be scheduled as soon as practicable after the notice, and within 10 business days in any event.

G. Notice.

1. The board shall provide written notice of an informal fact finding to consider delivery prohibition to the owner and operator. The notice shall meet the requirements of § 2.2-4019 of the Code of Virginia. The notice shall further advise the owner and operator of the possibility of a special order pursuant to subsection I of this section.

2. The presence of the delivery prohibition tag on the fill pipe of an ineligible underground storage tank shall be sufficient notice to any person, including the owner, the operator, and product deliverers, that the underground storage tank is ineligible for delivery or deposit. The board may use other methods in addition to the delivery prohibition tag to provide notice to product deliverers.

H. An owner or operator shall notify the board in writing once an ineligible underground storage tank has been returned to compliance and provide a written report detailing all actions that have been taken to return the UST system to compliance, as well as supporting evidence such as test

reports, invoices, receipts, inventory records, etc. As soon as practicable after confirming that the underground storage tank is in compliance with the requirements of this chapter or 9VAC25-590, or both, but in no event later than two business days, the board shall remove or authorize the owner or operator, in writing, to remove the delivery prohibition tag.

I. If the board determines that a violation exists that warrants the imposition of delivery prohibition, the board may further consider whether the threat posed by the violation is outweighed by the need for fuel from the underground storage ~~tank(s)~~ tank in question to meet an emergency situation or the need for availability of or access to motor fuel in any rural and remote area. If the board finds that such a condition outweighs the immediate risk of the violation, the board may defer imposition of delivery prohibition for up to 180 days. In every such case the director shall consider (i) issuing a special order under the authority of subdivision ~~40~~ 9 of § 10.1-1186 of the Code of Virginia prescribing a prompt schedule for abating the violation and (ii) imposing a civil penalty.

J. The board may temporarily authorize an owner or operator to accept delivery into an ineligible underground storage ~~tank(s)~~ tank if such activity is necessary to test or calibrate the underground storage ~~tank(s)~~ tank or dispenser system.

K. Nothing in this section shall prevent the board or the director from exercising any other enforcement authority including, without limitation, their authority to issue emergency orders and their authority to seek injunctive relief.

**APPENDIX I. VIRGINIA UNDERGROUND STORAGE TANK NOTIFICATION FORMS. (Repealed.)**

~~Notification for Underground Storage Tanks, EPA Form (50 FR 46602).~~

<p><u>Editor's Note:</u> The Notification for Underground Storage Tanks (USTs), Virginia DEQ Water Form 7530-2 is stricken.</p>
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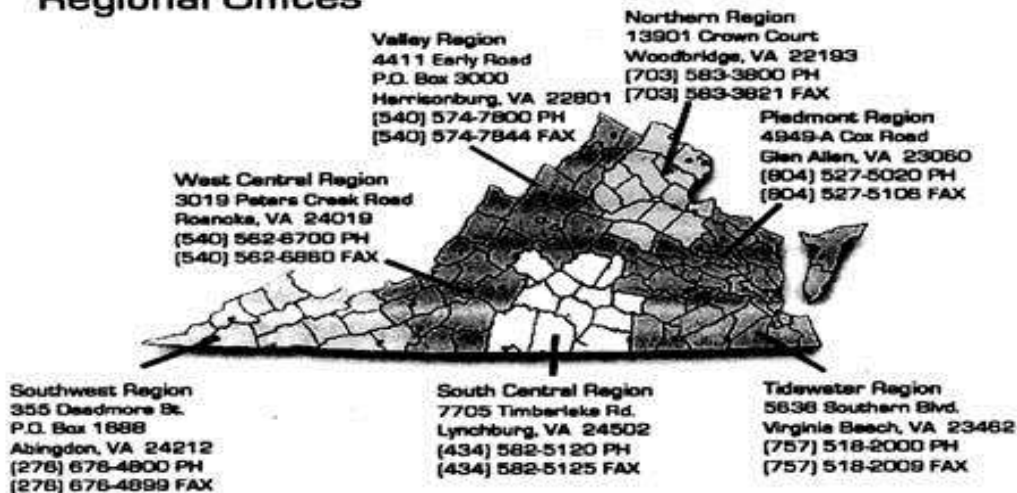
<div style="background-color: black; color: white; padding: 5px; font-weight: bold; font-size: 1.2em;">                     Notification for Underground Storage Tanks (USTs)                 </div> <p style="font-size: 0.8em; margin-top: 5px;">                     Virginia DEQ Water Form 7530-2                      (See reverse for mailing instructions)                 </p>	<b>STATE USE ONLY</b>												
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr><td style="width: 50%;">ID Number</td><td style="width: 50%;"></td></tr> <tr><td>Date Received</td><td></td></tr> <tr><td>Date Entered</td><td></td></tr> <tr><td>Entered By</td><td></td></tr> <tr><td>Comments</td><td></td></tr> </table>		ID Number		Date Received		Date Entered		Entered By		Comments			
ID Number													
Date Received													
Date Entered													
Entered By													
Comments													
<b>PART I: PURPOSE OF NOTIFICATION</b>													
<p>✓ <b>Check all that apply:</b></p> <table style="width: 100%;"> <tr> <td><input type="checkbox"/> New (not previously registered) facility</td> <td><input type="checkbox"/> Temporary closure</td> <td><input type="checkbox"/> Change in tank contents</td> </tr> <tr> <td><input type="checkbox"/> New tank(s) at previously registered facility</td> <td><input type="checkbox"/> Tank removal or closure</td> <td><input type="checkbox"/> New owner</td> </tr> <tr> <td><input type="checkbox"/> Change in tanks (e.g., upgrade)</td> <td><input type="checkbox"/> Piping removal or closure</td> <td><input type="checkbox"/> Change in owner address</td> </tr> <tr> <td><input type="checkbox"/> Change in piping (e.g., upgrade)</td> <td colspan="2"><input type="checkbox"/> Other (specify):</td> </tr> </table>		<input type="checkbox"/> New (not previously registered) facility	<input type="checkbox"/> Temporary closure	<input type="checkbox"/> Change in tank contents	<input type="checkbox"/> New tank(s) at previously registered facility	<input type="checkbox"/> Tank removal or closure	<input type="checkbox"/> New owner	<input type="checkbox"/> Change in tanks (e.g., upgrade)	<input type="checkbox"/> Piping removal or closure	<input type="checkbox"/> Change in owner address	<input type="checkbox"/> Change in piping (e.g., upgrade)	<input type="checkbox"/> Other (specify):	
<input type="checkbox"/> New (not previously registered) facility	<input type="checkbox"/> Temporary closure	<input type="checkbox"/> Change in tank contents											
<input type="checkbox"/> New tank(s) at previously registered facility	<input type="checkbox"/> Tank removal or closure	<input type="checkbox"/> New owner											
<input type="checkbox"/> Change in tanks (e.g., upgrade)	<input type="checkbox"/> Piping removal or closure	<input type="checkbox"/> Change in owner address											
<input type="checkbox"/> Change in piping (e.g., upgrade)	<input type="checkbox"/> Other (specify):												
<b>PART II: OWNERSHIP OF TANKS</b>	<b>PART III: LOCATION OF TANKS</b>												
A. Owner Name	A. Facility Name												
B. Owner Address	B. Facility Street Address (P.O. Box not acceptable)												
C. City, State, Zip	C. City, Zip												
D. Name of Contact Person	D. County or Municipality where Facility is Located												
E. Title of Contact Person	E. Name of Contact Person												
F. Phone Number (     ) (     )	F. Title of Contact Person												
G. E-mail Address	G. Phone Number (     ) (     )												
H. Name of Previous Owner	H. E-mail Address												
<b>PART IV: TYPE OF OWNER</b>	<b>PART V: TYPE OF FACILITY</b>												
<input type="checkbox"/> Federal government <input type="checkbox"/> Commercial <input type="checkbox"/> State government <input type="checkbox"/> Private <input type="checkbox"/> Local government	<input type="checkbox"/> Retail gas station <input type="checkbox"/> Petroleum distributor <input type="checkbox"/> Local government <input type="checkbox"/> Federal non-military <input type="checkbox"/> Federal military <input type="checkbox"/> State government <input type="checkbox"/> Commercial (non-resale) <input type="checkbox"/> Residence <input type="checkbox"/> Industrial <input type="checkbox"/> Farm <input type="checkbox"/> Other _____												
<b>PART VI: FINANCIAL RESPONSIBILITY</b>													
The tank owner has met the financial responsibility requirements contained in 9 VAC 25-590-10 et seq. using the following methods/mechanisms													
<table style="width: 100%;"> <tr> <td><input type="checkbox"/> Self insurance</td> <td><input type="checkbox"/> Insurance</td> <td><input type="checkbox"/> Letter of Credit</td> <td><input type="checkbox"/> Virginia Petroleum Storage Tank Fund</td> </tr> <tr> <td><input type="checkbox"/> Guarantee</td> <td><input type="checkbox"/> Surety Bond</td> <td><input type="checkbox"/> Trust Fund</td> <td></td> </tr> </table>		<input type="checkbox"/> Self insurance	<input type="checkbox"/> Insurance	<input type="checkbox"/> Letter of Credit	<input type="checkbox"/> Virginia Petroleum Storage Tank Fund	<input type="checkbox"/> Guarantee	<input type="checkbox"/> Surety Bond	<input type="checkbox"/> Trust Fund					
<input type="checkbox"/> Self insurance	<input type="checkbox"/> Insurance	<input type="checkbox"/> Letter of Credit	<input type="checkbox"/> Virginia Petroleum Storage Tank Fund										
<input type="checkbox"/> Guarantee	<input type="checkbox"/> Surety Bond	<input type="checkbox"/> Trust Fund											
<b>PART VII: OWNER CERTIFICATION</b>													
I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I understand that the owner of the underground storage tanks hereby registered is responsible for compliance with the requirements of Virginia Regulations 9 VAC 25-580-10 et seq. and federal regulation 40 CFR Part 280, among other requirements. I warrant and represent that I am the owner or that I have the authority to sign this certification on behalf of the owner. I understand that this notification form is sufficient evidence to establish ownership of tanks subject to 9 VAC 25-580-10 et seq.													
Name and Title (Type or Print)	Signature												
	Date												
<b>PART VIII: INSTALLER CERTIFICATION</b>													
I certify that the installation of this tank was performed in accordance with all federal, state and local installation requirements. I warrant and represent that I am the installer or that I have the authority to sign this certification on behalf of the installer.													
Name and Title (Type or Print)	Signature												
	Date												
Company Name	Address												
	Telephone Number												

**PART IX: TANK DESCRIPTION FOR NEW INSTALLATIONS AND AMENDMENTS**

<b>Owner Tank Identification Number</b>										
<b>DEQ Tank Identification Number</b>										
<b>Tank Status</b>	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment	<input type="checkbox"/> New Tank <input type="checkbox"/> Amendment
<b>Date of Installation (MM/DD/YYYY)</b>										
<b>Date of Amendment (MM/DD/YYYY)</b>										
<b>Tank Capacity (Gallons)</b>										
<b>Substance stored (if hazardous, include CERCLA name and/or CAS number)</b>										
<b>Material of Construction (√ all that apply)</b>	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping
Fiberglass Reinforced Plastic	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Coated and Cathodically Protected/STI-P3®	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Double Walled	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Impressed Current System Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Composite (Steel Clad with Fiberglass)/ACT 100®	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lined Interior	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Polyethylene Tank Jacket	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Concrete	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Excavation Liner	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Asphalt Coated or Bare Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Secondary Containment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Polyflexible piping	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Galvanized Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other (specify)										
Has tank/piping been repaired?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Piping Type</b>	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping
Safe Suction (No Check Valve at Tank)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
U.S. Suction (Check Valve at Tank)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Pressure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Gravity Fed	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Release Detection</b>	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping
Manual Tank Gauging	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tightness Testing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Inventory Control	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Automatic Tank Gauging	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vapor Monitoring	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Groundwater Monitoring	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Interstitial Monitoring-Double Walled	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Interstitial Monitoring-Secondary Containment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Automatic Line Leak Detectors	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Statistical Inventory Reconciliation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other (specify)										
<b>Spill Containment &amp; Overfill Prevention</b>	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping
Spill Containment/Bucket	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Overfill Automatic Shutoff	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Overfill Alarm	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Overfill Ball Float Valve	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<b>PART X: TANK CLOSURE, REMOVAL OR CHANGE IN SERVICE</b>										
<b>Owner Tank Identification Number</b> (assigned or used by owner)										
<b>DEQ Tank Identification Number</b> (assigned by DEQ)										
<b>Tank and Piping Status</b>	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping
Removal	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Closure in Place	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Filled with Inert Material	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Describe Inert Material										
Temporary Closure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Change in Service	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Date of Installation (MM/DD/YYYY)</b>										
<b>Tank Capacity (Gallons)</b>										
<b>Substance Stored</b> (if hazardous, include CERCLA name and/or CAS number)										
<b>Material of Construction</b> (√ all that apply)	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping	Tank	Piping
Fiberglass Reinforced Plastic	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Coated and Cathodically Protected/ST1-P3®	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Double Walled	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Impressed Current System Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Composite (Steel Clad with Fiberglass)/ACT 100®	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lined Interior	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Polyethylene Tank Jacket	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Concrete	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Excavation Liner	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Asphalt Coated or Bare Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Secondary Containment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Polyflexible Piping	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Galvanized Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other (specify)										
Unknown	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Date Last Used (MM/DD/YYYY)</b>										
<b>Date Closed (MM/DD/YYYY)</b>										
<b>Closure Assessment Completed</b> (Please submit site map, soil sampling results, chain of custody for all samples, copy of building permit, and disposal manifest with this form).	<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No	
<b>Evidence of a Leak Detected</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No	

## Virginia Department of Environmental Quality Regional Offices



**Mail notifications to the DEQ Regional Office serving the city or county where the USTs are located.**

Regional Offices	Counties and Cities
<b>Northern Regional Office</b>	<p><b>Counties</b> Arlington, Caroline, Calpeper, Fairfax, Fauquier, King George, Loudoun, Madison, Orange, Prince William, Rappahannock, Spotsylvania, Stafford, Louisa</p> <p><b>Cities</b> Alexandria, Falls Church, Fairfax, Fredericksburg, Manassas, Manassas Park</p>
<b>Piedmont Regional Office</b>	<p><b>Counties</b> Amelia, Brunswick, Charles City, Chesterfield, Dinwiddie, Essex, Gloucester, Goochland, Greensville, Hanover, Henrico, King and Queen, King William, Lancaster, Mathews, Middlesex, New Kent, Northumberland, Powhatan, Prince George, Richmond, Surry, Sussex, Westmoreland</p> <p><b>Cities</b> Colonial Heights, Emporia, Hopewell, Petersburg, Richmond</p>
<b>South Central Regional Office</b>	<p><b>Counties</b> Amherst, Appomattox, Buckingham, Campbell, Charlotte, Cumberland, Halifax, Lunenburg, Mecklenburg, Nottoway, Prince Edward, Pittsylvania</p> <p><b>Cities</b> Danville, Lynchburg</p>
<b>Valley Regional Office</b>	<p><b>Counties</b> Albemarle, Augusta, Bath, Clarke, Fluvanna, Frederick, Greene, Highland, Nelson, Page, Rockbridge, Rockingham, Shenandoah, Warren</p> <p><b>Cities</b> Buena Vista, Charlottesville, Harrisonburg, Lexington, Staunton, Waynesboro, Winchester</p>
<b>Southwest Regional Office</b>	<p><b>Counties</b> Bland, Buchanan, Carroll, Dickenson, Grayson, Lee, Russell, Scott, Smyth, Tazewell, Washington, Wise, Wythe</p> <p><b>Cities</b> Bristol, Galax, Norton</p>
<b>West Central Regional Office</b>	<p><b>Counties</b> Alleghany, Bedford, Botetourt, Craig, Floyd, Franklin, Giles, Henry, Montgomery, Patrick, Pulaski, Roanoke, Bedford</p> <p><b>Cities</b> Clifton Forge, Covington, Martinsville, Radford, Roanoke, Salem</p>
<b>Tidewater Regional Office</b>	<p><b>Counties</b> Accomack, Isle of Wight, James City, Northampton, Southampton, York</p> <p><b>Cities</b> Chesapeake, Franklin, Hampton, Newport News, Norfolk, Portsmouth, Poquoson, Suffolk, Virginia Beach, Williamsburg</p>



APPENDIX II. STATEMENT FOR SHIPPING TICKETS AND INVOICES. (Repealed.)

A Federal law (the Resource Conservation and Recovery Act (RCRA), as amended (Pub.L. 98-616)) requires owners of certain underground storage tanks to notify designated state or local agencies by May 8, 1986, of the existence of their tanks. Notifications for tanks brought into use after May 8, 1986, must be made within 30 days. Consult EPA's regulations, issued on November 8, 1985, (40 CFR Part 280) to determine if you are affected by this law.

Part X

UST Systems with Field-Constructed Tanks and Airport Hydrant Fuel Distribution Systems

**9VAC25-580-380. General requirements.**

A. Implementation of requirements. Owners and operators must comply with the requirements of this part for UST systems with field-constructed tanks and airport hydrant systems as follows:

1. For UST systems installed before (insert effective date of amendment) the requirements are effective according to the following schedule:

<u>Requirement</u>	<u>Effective Date</u>
<u>Upgrading UST systems; general operating requirements; and operator training</u>	<u>(insert date three years after effective date of amendment)</u>
<u>Release detection</u>	<u>(insert date three years after effective date of amendment)</u>
<u>Release reporting, response, and investigation; closure; financial responsibility and notification (except as provided in subsection B of this section)</u>	<u>(insert effective date of amendment)</u>

2. For UST systems installed on or after (insert effective date of amendment), the requirements apply at installation.

B. Not later than (insert date three years after effective date of amendment), all owners of previously deferred UST systems must submit a one-time notice of tank system existence to the board, using the UST Notification Form. Owners and operators of UST systems in use as of (insert effective date of amendment) must demonstrate financial responsibility at the time of submission of the notification form.

C. Except as provided in 9VAC25-580-390, owners and operators must comply with the requirements of Parts I (9VAC25-580-10 et seq.) through VII (9VAC25-580-310 et seq.) and IX (9VAC25-580-370 et seq.) of this chapter and 9VAC25-590.

D. In addition to the codes of practice listed in 9VAC25-580-50, owners and operators may use military construction criteria, such as Unified Facilities Criteria (UFC) 3-460-01, Petroleum Fuel Facilities, when designing, constructing, and installing airport hydrant systems and UST systems with field-constructed tanks.

**9VAC25-580-390. Additions, exceptions, and alternatives for UST systems with field-constructed tanks and airport hydrant systems.**

A. Exception to piping secondary containment requirements. Owners and operators may use single walled piping when installing or replacing piping associated with UST systems with field-constructed tanks greater than 50,000 gallons and piping associated with airport hydrant systems. Piping associated with UST systems with field-constructed tanks less than or equal to 50,000 gallons not part of an airport hydrant system must meet the secondary containment requirement when installed or replaced.

B. Upgrade requirements. Not later than (insert date three years after effective date of amendment), airport hydrant systems and UST systems with field-constructed tanks where installation commenced before (insert effective date of amendment) must meet the following requirements or be permanently closed pursuant to Part VII (9VAC25-580-310 et seq.) of this chapter.

1. Corrosion protection. UST system components in contact with the ground that routinely contain regulated substances must meet one of the following:

a. Except as provided in subsection A of this section, the new UST system performance standards for tanks at subdivision 1 of 9VAC25-580-50 and for piping at subdivision 2 at 9VAC25-580-50; or

b. Be constructed of metal and cathodically protected according to a code of practice developed by a nationally recognized association or independent testing laboratory and meets the following:

(1) Cathodic protection must meet the requirements of subdivisions 1 b (2), (3), and (4) of 9VAC25-580-50 for tanks and subdivisions 2 b (2), (3), and (4) of 9VAC25-580-50 for piping.

(2) Tanks older than 10 years without cathodic protection must be assessed to ensure the tank is structurally sound and free of corrosion holes prior to adding cathodic protection. The assessment must be by internal inspection or another method determined by the board to adequately assess the tank for structural soundness and corrosion holes.

Note: The following codes of practice may be used to comply with subsection B of this section:

(a) NACE International Standard Practice SP0285, External Control of Underground Storage Tank Systems by Cathodic Protection;



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(b) NACE International Standard Practice SP0169, Control of External Corrosion on Underground or Submerged Metallic Piping Systems;

(c) National Leak Prevention Association Standard 631, Chapter C, Internal Inspection of Steel Tanks for Retrofit of Cathodic Protection; or

(d) American Society for Testing and Materials Standard G158, Standard Guide for Three Methods of Assessing Buried Steel Tanks.

2. Spill and overflow prevention equipment. To prevent spilling and overflowing associated with product transfer to the UST system, all UST systems with field-constructed tanks and airport hydrant systems must comply with new UST system spill and overflow prevention equipment requirements specified in subdivision 3 of 9VAC25-580-50.

C. Walkthrough inspections. In addition to the walkthrough inspection requirements in 9VCA25-580-85, owners and operators must inspect the following additional areas for airport hydrant systems at least once every 30 days if confined space entry according to the Occupational Safety and Health Administration (see 29 CFR Part 1910) is not required or at least annually if confined space entry is required and keep documentation of the inspection according to 9VAC25-580-85 B.

1. Hydrant pits – visually check for any damage, remove any liquid or debris, and check for any leaks; and

2. Hydrant piping vaults – check for any hydrant piping leaks.

D. Release detection. Owners and operators of UST systems with field-constructed tanks and airport hydrant systems must begin meeting the release detection requirements described in this part not later than (insert date three years after effective date of amendment).

1. Methods of release detection for field-constructed tanks and airport hydrant systems. Owners and operators of shop fabricated USTs that are part of airport hydrant systems and field-constructed tanks with a capacity less than or equal to 50,000 gallons must meet the release detection requirements in Part IV (9VAC25-580-130 et seq.) of this chapter. Owners and operators of field-constructed tanks with a capacity greater than 50,000 gallons must meet either the requirements in Part IV of this chapter (except subdivisions 5 and 6 of 9VAC25-580-160 must be combined with inventory control as stated in this subdivision) or use one or a combination of the following alternative methods of release detection:

a. Conduct an annual tank tightness test that can detect a 0.5 gallon per hour leak rate;

b. Use an automatic tank gauging system to perform release detection at least every 30 days that can detect a leak rate less than or equal to one gallon per hour. This method must be combined with a tank tightness test that

can detect a 0.2 gallon per hour leak rate performed at least every three years;

c. Use an automatic tank gauging system to perform release detection at least every 30 days that can detect a leak rate less than or equal to two gallons per hour. This method must be combined with a tank tightness test that can detect a 0.2 gallon per hour leak rate performed at least every two years;

d. Perform vapor monitoring (conducted in accordance with subdivision 5 of 9VAC25-580-160 for a tracer compound placed in the tank system) capable of detecting a 0.1 gallon per hour leak rate at least every two years;

e. Perform inventory control (conducted in accordance with Department of Defense Directive 4140.25, ATA Airport Fuel Facility Operations and Maintenance Guidance Manual, or equivalent procedures) at least every 30 days that can detect a leak equal to or less than 0.5% of flow-through; and

(1) Perform a tank tightness test that can detect a 0.5 gallon per hour leak rate at least every two years; or

(2) Perform vapor monitoring or groundwater monitoring (conducted in accordance with subdivision 5 or 6 of 9VAC25-580-160, respectively, for the stored regulated substance) at least every 30 days; or

f. Another method approved by the board if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in subdivisions D 1 a through D 1 e of this section. In comparing methods, the board shall consider the size of release that the method can detect and the frequency and reliability of detection.

2. Methods of release detection for piping. Owners and operators of underground piping associated with field-constructed tanks less than or equal to 50,000 gallons must meet the release detection requirements in Part IV of this chapter. Owners and operators of underground piping associated with airport hydrant systems and field-constructed tanks greater than 50,000 gallons must follow either the requirements in Part IV (except subdivisions 5 and 6 of 9VAC25-580-160 must be combined with inventory control as stated in this subdivision) or use one or a combination of the following alternative methods of release detection:

a. (1) Perform a semiannual or annual line tightness test at or above the piping operating pressure in accordance with the following table:

<u>Maximum Leak Detection Rate Per Test Section Volume</u>		
<u>Test Section Volume (Gallons)</u>	<u>Semiannual Test - Leak Detection</u>	<u>Annual Test - Leak Detection</u>

	<u>Rate Not To Exceed (Gallons Per Hour)</u>	<u>Rate Not To Exceed (Gallons Per Hour)</u>
<u>&lt; 50,000</u>	<u>1.0</u>	<u>0.5</u>
<u>&gt; 50,000 to &lt; 75,000</u>	<u>1.5</u>	<u>0.75</u>
<u>&gt; 75,000 to &lt; 100,000</u>	<u>2.0</u>	<u>1.0</u>
<u>≥ 100,000</u>	<u>3.0</u>	<u>1.5</u>

(2) Piping segment volumes equal to or greater than 100,000 gallons not capable of meeting the maximum 3.0 gallons per hour leak rate for the semiannual test may be tested at a leak rate up to 6.0 gallons per hour according to the following schedule:

<u>Phase in for Piping Segments ≥ 100,000 Gallons in Volume</u>	
<u>First test</u>	<u>Not later than (insert date three years after effective date of amendment) (may use up to 6.0 gph leak rate)</u>
<u>Second test</u>	<u>Between (insert date three years after effective date of rule) and (insert date six years after effective date of amendment) (may use up to 6.0 gph leak rate)</u>
<u>Third test</u>	<u>Between (insert date six years after effective date of rule) and (insert date seven years after effective date of amendment) (must use 3.0 gph for leak rate)</u>
<u>Subsequent tests</u>	<u>After (insert date seven years after effective date of amendment), begin using semiannual or annual line testing according to the Maximum Leak Detection Rate Per Test Section Volume table above</u>

b. Perform vapor monitoring (conducted in accordance with subdivision 5 of 9VAC25-580-160 for a tracer compound placed in the tank system) capable of detecting a 0.1 gallon per hour leak rate at least every two years;

c. Perform inventory control (conducted in accordance with Department of Defense Directive 4140.25, ATA Airport Fuel Facility Operations and Maintenance Guidance Manual, or equivalent procedures) at least every 30 days that can detect a leak equal to or less than 0.5% of flow-through; and

(1) Perform a line tightness test (conducted in accordance with subdivision 2 a of this subsection using the leak rates for the semiannual test) at least every two years; or

(2) Perform vapor monitoring or groundwater monitoring (conducted in accordance with subdivision 5 or 6 of 9VAC25-580-160, respectively, for the stored regulated substance) at least every 30 days; or

d. Another method approved by the board if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in subdivisions D 2 a, D 2 b, and D 2 c of this section. In comparing methods, the board shall consider the size of release that the method can detect and the frequency and reliability of detection.

3. Recordkeeping for release detection. Owners and operators must maintain release detection records according to the recordkeeping requirements in 9VAC25-580-180.

E. Applicability of closure requirements to previously closed UST systems. When directed by the board, the owner and operator of an UST system with field-constructed tanks or airport hydrant system permanently closed before (effective date of rule) must assess the excavation zone and close the UST system in accordance with Part VII of this chapter if releases from the UST may, in the judgment of the board, pose a current or potential threat to human health and the environment.

**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, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

FORMS (9VAC25-580)

Notification for Underground Storage Tanks (USTs), Virginia DEQ Water Form 7530-2 (rev. 01-03); 1/2003)

Notification Form, EPA Form (50FR-46602); 7530-1 (rev. 6/2015), 80 CFR 41670

~~DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-580)~~

~~"Standard for Glass-Fiber Reinforced Plastic Underground Storage Tanks for Petroleum Products," Underwriters Laboratories Standard 1316, Underwriters Laboratories.~~

~~"Standard for Reinforced Plastic Underground Tanks for Petroleum Products," Underwriters Laboratories of Canada, CAN4-S615-M83.~~

~~"Standard Specification for Glass-Fiber Reinforced Polyester Underground Petroleum Storage Tanks," American Society of Testing and Materials Standard D4021-86.~~

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"Specification for STI P3 System of External Corrosion Protection of Underground Steel Storage Tanks," Steel Tank Institute.

"Corrosion Protection System for Underground Storage Tanks," Underwriters Laboratories, Standard 1746.

"Standard for Steel Underground Tanks for Flammable and Combustible Liquids," Underwriters Laboratories of Canada, CAN4 S603 M85.

"Standard for Galvanic Corrosion Protection Systems for Underground Tanks for Flammable Combustible Liquids," Underwriters Laboratories of Canada, CAN4 G03.1 M88.

"Isolating Bushings for Steel Underground Tanks Protected with Coatings and Galvanic Systems," Underwriters Laboratories of Canada, CAN4 S641 M84.

"Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems," National Association of Corrosion Engineers, Standard RP 02 85.

"Standard for Steel Underground Tanks for Flammable and Combustible Liquids," Underwriters Laboratories, Standard 58.

"Specification for the Fabrication of FRP Clad Underground Storage Tank," Association for Composite Tanks, ACT 100.

"UL Listed Non-Metal Pipe," Underwriters Laboratories, Subject 971.

"Pipe Connectors for Flammable and Combustible and LP Gas," Underwriters Laboratories, Standard 567.

"Glass Fiber Reinforced Plastic Pipe and Fittings for Flammable Liquids," Underwriters Laboratories of Canada, Guide ULC 107.

"Flexible Underground Hose Connectors," Underwriters Laboratories of Canada, Standard CAN4 S633 M81.

"Flammable and Combustible Liquids Code," National Fire Protection Association, Standard 30.

"Installation of Underground Petroleum Storage Systems," American Petroleum Institute, Publication 1632.

"Control of External Corrosion on Submerged Metallic Piping Systems," National Association of Corrosion Engineers, Standard RP 01 69.

"Installation of Underground Petroleum Storage System," American Petroleum Institute, Publication 1615.

"Recommended Practice for Bulk Liquid Stock Control at Retail Outlets," American Petroleum Institute Publication 1621.

National Fire Protection Association Publication 385.

"Flammable and Combustible Liquids Code," National Fire Protection Association Standard 30.

"Storing and Handling Ethanol and Gasoline—Ethanol Blends at Distribution Terminals and Service Stations," American Petroleum Institute Publication 1626.

"Storage and Handling of Gasoline—Methanol/Cosolvent Blends at Distribution Terminals and Service Stations," American Petroleum Institute Publication 1627.

"Repairing Crude Oil, Liquefied Petroleum Gas and Product Pipelines," American Petroleum Institute Publication 2200.

"Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks," American Petroleum Institute Publication 1631.

"Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection," National Leak Prevention Association Standard 631.

"Recommended Practices for Installation of Underground Liquid Storage Systems," Petroleum Equipment Institute, Publication RP100.

"Petroleum Refinery Piping," American National Standards Institute, Standard B31.3.

"Liquid Petroleum Transportation Piping System," American National Standards Institute, Standard B31.4.

NFPA 329.

"Standard for Dual Wall Underground Storage Tanks," Steel Tank Institute.

"Removal and Disposal of Used Underground Petroleum Storage Tanks," American Petroleum Institute Recommended Practice 1604.

"Cleaning Petroleum Storage Tanks," American Petroleum Institute, Publication 2015.

"Criteria for a Recommended Standard—Working in Confined Space," National Institute for Occupational Safety and Health.

## 9VAC25-590-10. Definitions.

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

"Accidental release" means any sudden or nonsudden release of petroleum arising from operating an underground storage tank that results in a need for corrective action or compensation for bodily injury or property damage, or both, neither expected nor intended by the tank owner or operator.

"Annual aggregate" means the maximum financial responsibility requirement that an owner or operator is required to demonstrate annually.

"Board" means the State Water Control Board.

"Bodily injury" means the death or injury of any person incident to an accidental release from a petroleum underground storage tank; but not including any death, disablement, or injuries covered by workers' compensation, disability benefits or unemployment compensation law or other similar law. Bodily injury may include payment of medical, hospital, surgical, and funeral expenses arising out of the death or injury of any person. This term shall not

include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.

"Chief financial officer" in the case of local government owners and operators, means the individual with the overall authority and responsibility for the collection, disbursement, and use of funds by the local government.

"Controlling interest" means direct ownership of at least 50% of the voting stock of another entity.

"Corrective action" means all actions necessary to abate, contain and cleanup a release from an underground storage tank to mitigate the public health or environmental threat from such releases and to rehabilitate state waters in accordance with Parts V (9VAC25-580-190 et seq.) and VI (9VAC25-580-230 et seq.) of 9VAC25 Chapter 580, Underground Storage Tanks: Technical Standards and Corrective Action Requirements. The term does not include those actions normally associated with closure or change in service as set out in Part VII (9VAC25-580-320 et seq.) of 9VAC25 Chapter 580 or the replacement of an underground storage tank.

"Facility" means any development or installation within the Commonwealth that deals in, stores or handles oil, and includes a pipeline.

"Financial reporting year" means the latest consecutive 12-month period for which any of the following reports used to support a financial test is prepared: (i) a 10 K report submitted to the U.S. Securities and Exchange Commission (SEC); (ii) an annual report of tangible net worth submitted to Dun and Bradstreet; (iii) annual reports submitted to the Energy Information Administration or the Rural Utilities Service; or (iv) a year-end financial statement authorized under 9VAC25-590-60 B or C of this chapter. "Financial reporting year" may thus comprise a fiscal or calendar year period.

"Gallons of petroleum pumped" means either the amount pumped into or the amount pumped out of a petroleum underground storage tank.

"Group self-insurance pool" or "pool" means a pool organized by two or more owners and/or operators of underground storage tanks for the purpose of forming a group self-insurance pool in order to demonstrate financial responsibility as required by § 62.1-44.34:12 of the Code of Virginia.

"Legal defense cost" means any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought (i) by the federal government or the board to require corrective action or to recover the costs of corrective action, or to collect civil penalties under federal or state law or to assert any claim on behalf of the Virginia Petroleum Storage Tank Fund; (ii) by or on behalf of a third party for bodily injury or property

damage caused by an accidental release; or (iii) by any person to enforce the terms of a financial assurance mechanism.

"Local government" means a municipality, county, town, commission, separately chartered and operated special district, school board, political subdivision of a state, or other special purpose government which provides essential services.

"Member" means an owner or operator of an underground storage tank who has entered into a member agreement and thereby becomes a member of a group self-insurance pool.

"Member agreement" means the written agreement executed between each member and the pool, which sets forth the conditions of membership in the pool, the obligations, if any, of each member to the other members, and the terms, coverages, limits, and deductibles of the pool plan.

"Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank.

NOTE: This definition is intended to assist in the understanding of this chapter and is not intended either to limit the meaning of "occurrence" in a way that conflicts with standard insurance usage or to prevent the use of other standard insurance terms in place of "occurrence."

"Operator" means any person in control of, or having responsibility for, the daily operation of the UST system.

"Owner" means:

1. In the case of an UST system in use on November 8, 1984, or brought into use after that date, any person who owns an UST system used for storage, use, or dispensing of regulated substances; and
2. In the case of any UST system in use before November 8, 1984, but no longer in use on that date, any person who owned such UST immediately before the discontinuation of its use.

The term "owner" shall not include any person, who, without participating in the management of an underground storage tank or being otherwise engaged in petroleum production, refining, and marketing, holds indicia of ownership primarily to protect the holder's security interest in the tank.

"Owner" or "operator," when the owner or operator are separate parties, refers to the person that is obtaining or has obtained financial assurances.

"Person" means an individual, trust, firm, joint stock company, corporation, including a government corporation, partnership, association, any state or agency thereof, municipality, county, town, commission, political subdivision of a state, any interstate body, consortium, joint venture, commercial entity, the government of the United States or any unit or agency thereof.

"Petroleum" means petroleum, including crude oil or any fraction thereof, that is liquid at standard conditions of

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temperature and pressure (60°F and 14.7 pounds per square inch absolute).

"Petroleum marketing facilities" includes all facilities at which petroleum is produced or refined and all facilities from which petroleum is sold or transferred to other petroleum marketers or to the public.

~~"Petroleum marketing firms" means all firms owning petroleum marketing facilities. Firms owning other types of facilities with USTs as well as petroleum marketing facilities are considered to be petroleum marketing firms.~~

"Pool plan" means the plan of self-insurance offered by the pool to its members as specifically designated in the member agreement.

"Property damage" means the loss or destruction of, or damage to, the property of any third party including any loss, damage or expense incident to an accidental release from a petroleum underground storage tank. This term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However, such exclusions for property damage shall not include corrective action associated with releases from tanks which are covered by the policy.

"Provider of financial assurance" means a person that provides financial assurance to an owner or operator of an underground storage tank through one of the mechanisms listed in 9VAC25-590-60 through 9VAC25-590-110 and 9VAC25-590-250, including a guarantor, insurer, group self-insurance pool, surety, issuer of a letter of credit or certificate of deposit.

"Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an UST into ground water, surface water, or upon lands, subsurface soils or storm drain systems.

~~"Responsible person" means any person who is an owner or operator of an underground storage tank at the time the release is reported to the board.~~

"Substantial business relationship" means the extent of a business relationship necessary under Virginia law to make a guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from and depends on existing economic transactions between the guarantor and the owner or operator.

"Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as goodwill and rights to patents or royalties. For purposes of this definition, "assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity as a result of past transactions.

"Termination" under Appendix III and Appendix IV means only those changes that could result in a gap in coverage as

where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy.

"Underground storage tank" or "UST" means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10% or more beneath the surface of the ground. This term does not include any:

1. Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;
2. Tank used for storing heating oil for consumption on the premises where stored;
3. Septic tank;
4. Pipeline facility (including gathering lines) regulated under:
  - a. The Natural Gas Pipeline Safety Act of 1968 (49 USC App. 1671, et seq.),
  - b. The Hazardous Liquid Pipeline Safety Act of 1979 (49 USC App. 2001, et seq.), or
  - c. Which is an intrastate pipeline facility regulated under state laws comparable to the provisions of the law referred to in subdivision 4 a or 4 b of this definition;
5. Surface impoundment, pit, pond, or lagoon;
6. Stormwater or wastewater collection system;
7. Flow-through process tank;
8. Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or
9. Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

The term "underground storage tank" or "UST" does not include any pipes connected to any tank which is described in subdivisions 1 through 9 of this definition.

"UST system" or "tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

"9VAC25-580" means the Underground Storage Tanks: Technical Standards and Corrective Action Requirements regulation promulgated by the board.

## **9VAC25-590-15. 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, 2016.

**9VAC25-590-20. Applicability.**

A. This chapter applies to owners and operators of all petroleum UST systems regulated under 9VAC25-580, except as otherwise provided in this section and 9VAC25-590-210.

B. Owners and operators of petroleum UST systems are subject to these requirements ~~if they are in operation on or after the date for compliance established in accordance with 9VAC25-590-30.~~

C. State and federal government entities whose debts and liabilities are the debts and liabilities of the Commonwealth of Virginia or the United States have the requisite financial strength and stability to fulfill their financial assurance requirements and are relieved of the requirements to further demonstrate an ability to provide financial responsibility under this chapter.

D. The requirements of this chapter do not apply to owners and operators of any UST system described in 9VAC25-580-20 B ~~or C, 9VAC25-580-20 C 1, C 3, or C 4.~~

E. If the owner and operator of a petroleum underground storage tank are separate persons, only one person is required to demonstrate financial responsibility; however, both parties are liable in event of noncompliance.

**9VAC25-590-30. Compliance dates.**

Owners of petroleum underground storage tanks ~~are required to must~~ comply with the requirements of this chapter ~~by the following dates: Previously deferred UST systems must comply with the requirements of this chapter according to the schedule in 9VAC25-580-380.~~

- ~~1. All petroleum marketing firms owning 1,000 or more USTs and all other UST owners that report a tangible net worth of \$20 million or more to the U.S. Securities and Exchange Commission (SEC), Dun and Bradstreet, the Energy Information Administration, or the Rural Utilities Service: January 24, 1989; except that compliance for owners and operators using the mechanisms specified in 9VAC25-590-70 or 9VAC25-590-90 is required by July 24, 1989.~~
- ~~2. All petroleum marketing firms owning 100-999 USTs: October 26, 1989;~~
- ~~3. All petroleum marketing firms owning 13-99 USTs at more than one facility: April 26, 1991;~~
- ~~4. All petroleum UST owners not described in subdivision 1, 2, or 3 of this section, excluding local government entities: December 31, 1993;~~
- ~~5. All local government entities (including Indian tribes) not included in subdivision 6 of this section: February 18, 1994; or~~
- ~~6. Indian tribes that own USTs on Indian lands which meet the applicable technical requirements of 9VAC25-580: December 31, 1998.~~

**9VAC25-590-40. Amount and scope of financial responsibility requirement.**

A. Owners or operators of petroleum underground storage tanks shall demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks at least in the following per-occurrence amounts:

1. For owners or operators of petroleum underground storage tanks that are located at petroleum marketing facilities, or that handle an average of more than 10,000 gallons of petroleum per month based on annual throughput for the previous calendar year; \$1 million.
2. For all other owners or operators of petroleum underground storage tanks; \$500,000.

B. Owners and operators of petroleum underground storage tanks shall demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following annual aggregate amounts:

1. For owners and operators of 1 to 100 petroleum underground storage tanks, \$1 million; and
2. For owners and operators of 101 or more petroleum underground storage tanks, \$2 million.

C. Owners and operators of petroleum underground storage tanks may use the Virginia Petroleum Storage Tank Fund in combination with one or more of the mechanisms specified in 9VAC25-590-60 through 9VAC25-590-110 and 9VAC25-590-250 to satisfy the financial responsibility as required by this section. The fund may be used to demonstrate financial responsibility for the owner or operator in excess of the amounts specified in 9VAC25-590-210 C 1 up to the per occurrence and annual aggregate requirements specified in this section for both taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases from petroleum underground storage tanks.

D. Owners and operators who demonstrate financial responsibility shall maintain copies of those records on which the determination is based. The following documents may be used for purposes of demonstrating financial responsibility by owners or operators to support a financial responsibility requirement determination:

1. Copies of invoices from petroleum suppliers which indicate the gallons of petroleum pumped into all underground storage tanks on an annual basis.
2. Copies of disposal or recycling receipts which indicate the gallons of petroleum pumped out of all underground storage tanks on an annual basis.
3. Letters from petroleum suppliers or disposal or recycling firms on the supplier's, disposer's or recycler's letterhead, which are signed by the appropriate financial officer and

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which indicate the gallons of petroleum pumped into or out of all of the owner's or operator's underground storage tanks on an annual basis.

4. Any other form of documentation which the board may deem to be acceptable evidence to support the financial responsibility requirement determination.

E. For the purposes of this section, "a petroleum underground storage tank" means a single containment unit and does not mean combinations of single containment units.

F. If the owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for: (i) taking corrective action; (ii) compensating third parties for bodily injury and property damage caused by sudden accidental releases; or (iii) compensating third parties for bodily injury and property damage caused by nonsudden accidental releases, the amount of assurance provided by each mechanism or combination of mechanisms shall be in the full amount specified in ~~subsection~~ subsections A and B of this section.

G. If an owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for different petroleum underground storage tanks, the annual aggregate required for each mechanism shall be the amount specified in subsection B of this section.

H. If assurance is being demonstrated by a combination of mechanisms, the owner or operator shall demonstrate financial responsibility in the appropriate amount of annual aggregate assurance specified in subsection B of this section, by the first-occurring effective date anniversary of any one of the mechanisms combined (other than a financial test or guarantee) to provide assurance.

I. The amounts of assurance required under this section exclude legal defense costs.

J. The required per-occurrence and annual aggregate coverage amounts do not in any way limit the liability of the owner or operator.

## **9VAC25-590-60. Financial test of self-insurance.**

A. An owner or operator and/or guarantor, may satisfy the requirements of 9VAC25-590-40 by passing a financial test as specified in this section. To pass the financial test of self-insurance, the owner or operator and/or guarantor shall meet the requirements of subsection B or C and subsection D of this section based on year-end financial statements for the latest completed financial reporting year.

B. 1. The owner or operator and/or guarantor shall have a tangible net worth at least equal to the total of:

a. The applicable aggregate financial responsibility amount required by 9VAC25-590-40 B for which a financial test is used to demonstrate financial responsibility, except as provided in 9VAC25-590-210; and

b. The aggregate aboveground storage tank financial responsibility amount required under 9VAC25-640, for which a financial test is used to demonstrate financial responsibility.

2. In addition to the requirements set forth in subdivision 1 of this subsection, the owner or operator and/or guarantor shall also have a tangible net worth of at least 10 times:

a. The sum of the corrective action cost estimates, the current closure and postclosure care cost estimates, and amount of liability coverage for which a financial test for self-insurance is used in each state of business operations to demonstrate financial responsibility to the EPA under 40 CFR §§ 264.101(b), 264.143, 264.145, 265.143, 265.145, 264.147, and 265.147 (~~1997~~), to another state implementing agency under a state program authorized by EPA under 40 CFR Part 271 (~~1997~~) or the Virginia Waste Management Board under 40 CFR 264.143, 264.145 and 264.147 (as incorporated by reference in 9VAC20-60-264) and 40 CFR 265.143, 265.145 and 265.147 (as incorporated by reference in 9VAC20-60-265) of the Virginia Hazardous Waste Management Regulations; and

b. The sum of current plugging and abandonment cost estimates for which a financial test for self-insurance is used in each state of business operations to demonstrate financial responsibility to EPA under 40 CFR 144.63 (~~1997~~) or to a state implementing agency under a state program authorized by EPA under 40 CFR Part 145 (~~1997~~) (Underground Injection Control Program).

3. The owner or operator, and/or guarantor shall comply with either subdivision a or b below of this subdivision:

a. (1) The financial reporting year-end financial statements of the owner or operator and/or guarantor shall be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination; and

(2) The financial reporting year-end financial statements of the owner or operator and/or guarantor cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

b. (1) (a) File financial statements annually with the U.S. Securities and Exchange Commission, the Energy Information Administration, or the Rural Utilities Service; or

(b) Report annually the tangible net worth of the owner or operator and/or guarantor to Dun and Bradstreet, and Dun and Bradstreet shall have assigned a financial strength rating which at least equals the amount of financial responsibility required by the owner or operator under subdivisions 1 and 2 of this subsection. Relevant Dun and Bradstreet ratings are as follows (current Dun and Bradstreet ratings will be used for demonstration

requirements which exceed the annual aggregate amounts listed below):

Annual Aggregate Requirement	Dun and Bradstreet Rating
\$20,000	EE (\$20,000 to \$34,999)
\$40,000	DC (\$50,000 to \$74,999)
\$80,000	CB (\$125,000 to \$199,999)
\$150,000	BB (\$200,000 to \$299,999)
\$200,000	BB (\$200,000 to \$299,999)
\$300,000	BA (\$300,000 to \$499,999)
\$500,000	1A (\$500,000 to \$749,999)
\$750,000	2A (\$750,000 to \$999,999)
\$1,000,000	3A (\$1,000,000 to 9,999,999); and

(2) The financial reporting year-end financial statements of the owner or operator and/or guarantor, if, independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

4. The owner or operator and/or guarantor shall have a letter signed by the chief financial officer worded identically as specified in Appendix I/Alternative I or Appendix XI.

C. 1. The owner or operator and/or guarantor shall have a tangible net worth at least equal to the total of:

- a. The applicable aggregate amount required by 9VAC25-590-40 B for which a financial test is used to demonstrate financial responsibility, except as provided in 9VAC25-590-210; and
- b. The aggregate aboveground storage tank financial responsibility amount required under 9VAC25-640 for which a financial test is used to demonstrate financial responsibility.

2. In addition to the requirements set forth in subdivision 1 of this subsection, the owner or operator and/or guarantor shall also have a tangible net worth of at least six times:

- a. The financial test requirements for self insurance of the corrective action cost estimates, the current closure and post-closure care cost estimates, and amount of liability coverage in each state of business operations to the EPA under 40 CFR 264.101(b), 264.143, 264.145, 265.143, 265.145, 264.147, and 265.147 (1997), to another state

implementing agency under a state program authorized by EPA under 40 CFR Part 271 (1997) or the Virginia Waste Management Board under 40 CFR 264.143, 264.145 and 264.147 (as incorporated by reference in 9VAC20-60-264) and 40 CFR 265.143, 265.145, and 265.147 (as incorporated by reference in 9VAC20-60-265) of the Virginia Hazardous Waste Management Regulations; and

b. The financial test requirements for self-insurance of current plugging and abandonment cost estimates in each state of business operations to EPA under 40 CFR 144.63 (1997) or to a state implementing agency under a state program authorized by EPA under 40 CFR Part 145 (1997) (Underground Injection Control Program).

3. The financial reporting year-end financial statements of the owner or operator and/or guarantor shall be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination.

4. The financial reporting year-end financial statements of the owner or operator and/or guarantor cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

5. If the financial statements of the owner or operator and/or guarantor are not submitted annually to the U.S. Securities and Exchange Commission, the Energy Information Administration or the Rural Utilities Service, the owner or operator and/or guarantor shall obtain a special report by an independent certified public accountant stating that:

a. The accountant has compared the data that the letter from the chief financial officer specified as having been derived from the latest financial reporting year-end financial statements of the owner or operator and/or guarantor with the amounts in such financial statements; and

b. In connection with that comparison, no matters came to the accountant's attention which caused him to believe that the specified data should be adjusted.

6. The owner or operator and/or guarantor shall have a letter signed by the chief financial officer, worded identically as specified in Appendix I/Alternative II or Appendix XI.

D. To meet the financial demonstration test under subsection B or C of this section, the chief financial officer of the owner or operator and/or guarantor shall sign, within 120 days of the close of each financial reporting year, as defined by the 12-month period for which financial statements used to support the financial test are prepared, a letter worded identically as specified in Appendix I with the appropriate alternative or Appendix XI, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted.

E. If an owner or operator using the financial test to provide financial assurance finds that he no longer meets the



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requirements of the financial test based on the financial reporting year-end financial statements, the owner or operator shall obtain alternative coverage within 150 days of the end of the year for which financial statements have been prepared.

F. The board may require reports of financial condition at any time from the owner or operator and/or guarantor. If the board finds, on the basis of such reports or other information, that the owner or operator and/or guarantor no longer meets the financial test requirements of subsection B or C and subsection D of this section, the owner or operator shall obtain alternate coverage within 30 days after notification of such finding.

G. If the owner or operator fails to obtain alternate assurance within 150 days of finding that he no longer meets the requirements of the financial test based on the financial reporting year-end financial statements, or within 30 days of notification by the board that he or she no longer meets the requirements of the financial test, the owner or operator shall notify the board of such failure within 10 days.

## **9VAC25-590-160. Recordkeeping.**

A. Owners or operators shall maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under this chapter for an underground storage tank until released from the requirements of this chapter under 9VAC25-590-180. An owner or operator shall maintain such evidence at the underground storage tank site or the owner's or operator's place of work in this Commonwealth. Records maintained off-site shall be made available upon request of the board.

B. Owners or operators shall maintain the following types of evidence of financial responsibility:

1. An owner or operator using an assurance mechanism specified in 9VAC25-590-60 through 9VAC25-590-110 and 9VAC25-590-250 shall maintain a copy of the instrument worded as specified.
2. An owner or operator using a financial test or guarantee, or a local government financial test or a local government guarantee supported by the local government financial test, shall maintain a copy of the chief financial officer's letter based on year-end financial statements for the most recent completed financial reporting year. Such evidence shall be on file no later than 120 days after the close of the financial reporting year.
3. A local government owner or operator using the local government bond rating test under 9VAC25-590-250 shall maintain a copy of its bond rating published within the last 12 months by Moody's or Standard & Poor's.
4. A local government owner or operator using the local government guarantee under 9VAC25-590-250, where the guarantor's demonstration of financial responsibility relies on the bond rating test under 9VAC25-590-250 shall maintain a copy of the guarantor's bond rating published

within the last 12 months by Moody's or Standard & Poor's.

5. An owner or operator using an insurance policy or group self-insurance pool coverage shall maintain a copy of the signed insurance policy or group self-insurance pool plan and membership agreement, with the endorsement or certificate of insurance and any amendments to the agreements.

6. An owner or operator using a local government fund under 9VAC25-590-250 shall maintain the following documents:

- a. A copy of the state constitutional provision or local government statute, charter, ordinance or order dedicating the fund; and
- b. Year-end financial statements for the most recent completed financial reporting year showing the amount in the fund. If the fund is established under ~~40 CFR 280.107(a)(3) (1997)~~ 40 CFR 280.107(c) (as incorporated by reference in 9VAC25-590-250) using incremental funding backed by bonding authority, the financial statements shall show the previous year's balance, the amount of funding during the year, and the closing balance in the fund.

If the fund is established under ~~40 CFR 280.107(a)(3) (1997)~~ 40 CFR 280.107(c) (as incorporated by reference in 9VAC25-590-250) using incremental funding backed by bonding authority, the owner or operator shall also maintain documentation of the required bonding authority, including either the results of a voter referendum (under ~~40 CFR 280.107(a)(3)(i) (1997)~~ 40 CFR 280.107(c)(1)) (as incorporated by reference in 9VAC25-590-250), or attestation by the Virginia Attorney General as specified under ~~40 CFR 280.107(a)(3)(ii) (1997)~~ 40 CFR 280.107(c)(2) (as incorporated by reference in 9VAC25-590-250).

7. A local government owner or operator using the local government guarantee supported by the local government fund shall maintain a copy of the guarantor's year-end financial statements for the most recent completed financial reporting year showing the amount of the fund.

8. a. An owner or operator using an assurance mechanism specified in 9VAC25-590-60 through 9VAC25-590-110, 9VAC25-590-210, or 9VAC25-590-250 shall maintain an updated copy of a certification of financial responsibility worded identically as specified in Appendix IX, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

- b. The owner or operator shall update this certification whenever the financial assurance mechanism or mechanisms used to demonstrate financial responsibility changes.

**9VAC25-590-170. Drawing on financial assurance mechanism.**

A. Except as specified in subsection D of this section, the board ~~may~~ shall require the guarantor, surety, or institution issuing a letter of credit or certificate of deposit to pay to the board an amount up to the limit of funds provided by the financial assurance mechanism if:

1. The owner or operator fails to establish alternate financial assurance within 60 days after receiving notice of cancellation of the guarantee, surety bond, letter of credit, or certificate of deposit; or
2. The conditions of subsection B of this section are satisfied.

B. The board shall deposit the financial assurance funds forfeited pursuant to subsection A of this section into the Virginia Petroleum Storage Tank Fund. The board may use the financial responsibility funds obtained pursuant to subsection A of this section to conduct corrective action or to pay a third party claim when:

1. The board makes a final determination that a release has occurred and immediate or long-term corrective action for the release is needed, and the owner or operator, after appropriate notice and opportunity to comply, has not conducted corrective action as required under Part VI (9VAC25-580-230 et seq.) of 9VAC25-580; or
2. The board has received either:
  - a. Certification from the owner or operator and the third party liability claimant or claimants and from attorneys representing the owner or operator and the third party liability claimant or claimants that a third party liability claim should be paid. The certification shall be worded identically as specified in Appendix X, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted; or
  - b. A valid final court order establishing a judgment against the owner or operator for bodily injury or property damage caused by an accidental release from an underground storage tank covered by financial assurance under this chapter and the board determines that the owner or operator has not satisfied the judgment.

C. If the board determines that the amount of corrective action costs and third party liability claims eligible for payment under subsection B of this section may exceed the obligation of the provider of financial assurance, the first priority for payment shall be corrective action costs necessary to protect human health and the environment. The board shall direct payment of the financial responsibility funds for third party liability claims in the order in which the board receives certifications under subdivision B 2 a of this section and valid court orders under subdivision B 2 b of this section.

D. A local government acting as guarantor under 40 CFR 280.106(e) ~~(1997)~~ (as incorporated by reference in 9VAC25-590-250), the local government guarantee without standby

trust, shall make payments as directed by the board under the circumstances described in subsection A, B or C of this section.

**9VAC25-590-180. Release from the requirements.**

An owner or operator is no longer required to maintain financial responsibility under this chapter for an underground storage tank after the tank has been ~~properly~~ permanently closed or ~~undergoes~~ a change-in-service ~~to an unregulated use~~ properly completed or, if corrective action is required, after corrective action has been completed and the tank has been ~~properly~~ permanently closed or undergoes a change-in-service as required by Part VII (9VAC25-580-320 et seq.) of ~~9VAC25 Chapter 580~~ 9VAC25-580.

**9VAC25-590-190. Bankruptcy or other incapacity of owner, operator or provider of financial assurance.**

A. Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming an owner or operator as debtor, the owner or operator shall notify the board by certified mail of such commencement and submit the appropriate forms listed in 9VAC25-590-160 B documenting current financial responsibility.

B. Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a guarantor providing financial assurance as debtor, such guarantor shall notify the owner or operator and the board by certified mail of such commencement as required under the terms of the guarantee specified in 9VAC25-590-70.

C. Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a local government owner or operator as debtor, the local government owner or operator shall notify the board by certified mail of such commencement and submit the appropriate forms listed in 9VAC25-590-160 B documenting current financial responsibility.

D. Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a guarantor providing a local government financial assurance as debtor, such guarantor shall notify the local government owner or operator and the board by certified mail of such commencement as required under the terms of the guarantee specified in 40 CFR 280.106 ~~(1997)~~ (as incorporated by reference in 9VAC25-590-250).

E. An owner or operator that obtains financial assurance by a mechanism other than the financial test of self-insurance will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of the provider of financial assurance to issue a guarantee, insurance policy, group self-insurance pool plan, surety bond, letter of credit, or certificate of deposit. The owner or operator shall obtain alternate financial assurance as

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specified in this regulation within 30 days after receiving notice of such an event. If the owner or operator does not obtain alternate coverage within 30 days after such notification, he shall immediately notify the board in writing.

F. Within 30 days after receipt of written notification that the Virginia Petroleum Storage Tank Fund has become incapable of covering assured corrective action or third party compensation costs, the owner or operator shall obtain alternate financial assurance in accordance with 9VAC25-590-40.

## **9VAC25-590-240. Lender liability.**

The U.S. Environmental Protection Agency regulations on lender liability contained in the Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks (UST) (40 CFR 280.200 through 280.230 (~~1997~~)) are incorporated by reference into this chapter as amended by the word or phrase substitutions given in 9VAC25-590-260.

## **9VAC25-590-250. Local government financial responsibility demonstration.**

A. Except as otherwise provided, the U.S. Environmental Protection Agency regulations on local government financial responsibility demonstration contained in the Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks (UST) (40 CFR 280.104 through 280.107 (~~1997~~)) are incorporated by reference into this chapter as amended by the word or phrase substitutions given in 9VAC25-590-260.

B. A local government demonstrating financial responsibility pursuant to 40 CFR 280.106 shall demonstrate using the guarantee arrangement entitled "Local Government Guarantee Without Standby Trust Made by a Local Government."

## **9VAC25-590-260. ~~Word or phrase substitutions~~ Modifications to language incorporated by reference.**

In 9VAC25-590-240 and 9VAC25-590-250, the following substitutions apply:

1. All terms which are defined in 9VAC25-590-10 shall be given the definition contained in 9VAC25-590-10;
2. a. Director of the Department of Environmental Quality for director of the implementing agency;
- b. Department of Environmental Quality for the implementing agency;
- c. UST preventative and operating requirements under 9VAC25-580 for UST technical standards;
- d. 9VAC25-580 and 9VAC25-590 for 40 CFR Part 280 (~~1997~~);
- e. 9VAC25-580-230 through 9VAC25-580-300 for 40 CFR Part 280, Subpart F (~~1997~~);
- f. 9VAC25-590 for 40 CFR Part 280, Subpart H (~~1997~~);
- g. 9VAC25-580-50 for 40 CFR 280.20;

h. 9VAC25-580-60 for 40 CFR 280.21;

i. ~~9VAC25-580-70 for 40 CFR 280.22 (1997)~~ 9VAC25-580-90 for 40 CFR 280.31;

j. ~~9VAC25-580-90 for 40 CFR 280.31~~ 9VAC25-580-190 for 40 CFR 280.50;

k. 9VAC25-580-200 through 9VAC25-580-300 for 40 CFR 280.51 through 280.67;

l. 9VAC25-580-310 for 40 CFR 280.70;

m. 9VAC25-580-320 through 9VAC25-580-350 for 40 CFR 280.71 through 280.74;

n. 9VAC25-580-330 for 40 CFR 280.72;

o. ~~9VAC25-590-20~~ 9VAC25-590-10 through 9VAC25-590-160 for 40 CFR 280.90 through 280.111;

p. 9VAC25-590-40 for 40 CFR 280.93;

q. 9VAC25-590-170 for 40 CFR 280.112 (~~1997~~); and

r. 9VAC25-590-190 for 40 CFR 280.114.

## APPENDIX I. LETTER FROM CHIEF FINANCIAL OFFICER.

NOTE: The instructions in brackets are to be replaced by the relevant information and the brackets deleted.

[NOTE: Owners or operators demonstrating financial responsibility using the financial test who do not also own or operate hazardous waste facilities or underground injection wells are eligible to use Appendix XI (Letter from Chief Financial Officer—Short Form) instead of Appendix I.]

I am the chief financial officer of [insert name and address of the owner or operator or guarantor]. This letter is in support of the use of [insert "the financial test of self-insurance," and/or "Guarantee"] to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert "sudden accidental releases" and/or "nonsudden accidental releases" or "accidental releases"] in the amount of at least [insert dollar amount] corrective action per occurrence and [insert dollar amount] third party liability per occurrence and [insert dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test by this [insert "owner or operator," and/or "guarantor"]: [List for each facility the name and address of the facility where tanks assured by this financial test are located, and whether tanks are assured by this financial test. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to 9VAC25-580-70 (Underground Storage Tanks; Technical Standards and Corrective Action Requirements)].

A [insert "financial test," and/or "guarantee"] is also used by this [insert "owner or operator" or "guarantor"] to

demonstrate evidence of financial responsibility in the following amounts under other EPA regulations or state programs authorized by EPA under 40 CFR Parts 271 and 145 (~~1997~~):

EPA Regulation for each state of business operations (specify state):

	Amount
Closure (Sections 264.143 and 265.143)	\$ _____
Post Closure Care (Sections 264.145 and 265.145)	\$ _____
Liability Coverage (Sections 264.147 and 265.147)	\$ _____
Corrective Action (Section 264.101(b))	\$ _____
Plugging and Abandonment (Section 144.63)	\$ _____
Other State Programs (specify state):	
Closure	\$ _____
Post-Closure Care	\$ _____
Liability Coverage	\$ _____
Corrective Action	\$ _____
Plugging and Abandonment	\$ _____
Virginia Hazardous Waste Management Regulations:	
Closure (9VAC20-60-264 and 9VAC20-60-265 C)	\$ _____
Post-Closure Care (9VAC20-60-264 and 9VAC20-60-265)	\$ _____
Liability Coverage (9VAC20-60-264 and 9VAC20-60-265)	\$ _____
Corrective Action (9VAC20-60-264)	\$ _____
Plugging and Abandonment (40 CFR Section 144.63) ( <del>1997</del> )	\$ _____
<b>TOTAL</b>	<b>\$ _____</b>

This [insert "owner or operator," or "guarantor"] has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on his financial statements for the latest completed fiscal year.

[Fill in the information for Alternative I if the criteria of 9VAC25-590-60 B are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of 9VAC25-590-60 C are being used to demonstrate compliance with the financial test requirements.]

ALTERNATIVE I

1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee.....\$ \_\_\_\_\_
2. Amount of annual aboveground storage tank (AST) aggregate coverage being assured by a financial test and/or guarantee pursuant to 9VAC25-640.....\$ \_\_\_\_\_
3. Total UST/AST financial responsibility obligations assured by a financial test and/or guarantee (sum of lines 1 and 2).....\$ \_\_\_\_\_
4. Amount of corrective action, closure and post-closure care costs, liability coverage, [and] plugging and abandonment costs covered by a financial test, and/or guarantee under other EPA regulations or state programs authorized by EPA under 40 CFR Part 145 or 271 (~~1997~~).....\$ \_\_\_\_\_
5. Sum of lines 3 and 4.....\$ \_\_\_\_\_
6. Total tangible assets.....\$ \_\_\_\_\_
7. Total liabilities [if any of the amount reported on line 5 is included in total liabilities, you may deduct that amount from this line or add that amount to line 8].....\$ \_\_\_\_\_
8. Tangible net worth [subtract line 7 from line 6].....\$ \_\_\_\_\_
9. Is line 8 at least equal to line 3 above? Yes.... No....
10. Is line 8 at least equal to the sum of line 3 plus 10 times line 4? Yes.... No....
11. Have financial statements for the latest financial reporting year been filed with the Securities and Exchange Commission? Yes.... No....
12. Have financial statements for the latest financial reporting year been filed with the Energy Information Administration? Yes.... No....
13. Have financial statements for the latest financial reporting year been filed with the Rural Utilities Service? Yes.... No....
14. Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating at least equal to the total amount of annual aggregate coverage being assured as entered on line 5, according to the table below?

Annual Aggregate Requirement	Dun and Bradstreet Rating
\$20,000	EE (\$20,000 to \$34,999)
\$40,000	DC (\$50,000 to \$74,999)
\$80,000	CB (\$125,000 to \$199,999)

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\$150,000	BB (\$200,000 to \$299,999)
\$200,000	BB (\$200,000 to \$299,999)
\$300,000	BA (\$300,000 to \$499,999)
\$500,000	1A (\$500,000 to \$749,999)
\$750,000	2A (\$750,000 to \$999,999)
\$1,000,000	3A (\$1,000,000 to 9,999,999)

[Answer "Yes" only if both criteria have been met.]  
Yes.... No....

15. If you did not answer yes to one of lines 11 through 14, please attach a report from an independent-certified public accountant certifying that there are no material differences between the data reported in lines 6 through 10 above and the financial statements for the latest financial reporting year.

## ALTERNATIVE II

1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee.
2. Amount of annual aboveground storage tank (AST) aggregate coverage being assured by a financial test and/or guarantee pursuant to 9VAC25-640.....\$\_\_\_\_\_
3. Total UST/AST financial responsibility obligations assured by a financial test and/or guarantee (sum of lines 1 and 2).....\$\_\_\_\_\_
4. Amount of corrective action closure and post-closure care costs, liability coverage, [and] plugging and abandonment costs covered by a financial test, and/or guarantee under other EPA regulations or state programs authorized by EPA under 40 CFR Parts 271 or 145.....\$\_\_\_\_\_
5. Sum of lines 3 and 4.....\$\_\_\_\_\_
6. Total tangible assets.....\$\_\_\_\_\_
7. Total liabilities [if any of the amount reported on line 5 is included in total liabilities, you may deduct that amount from this line or add that amount to line 8].....\$\_\_\_\_\_
8. Tangible net worth [subtract line 7 from line 6].....\$\_\_\_\_\_
9. Total assets in the U.S. [required only if less than 90% of assets are located in the U.S.].....\$\_\_\_\_\_
10. Is line 8 at least equal to line 3 above? Yes\_\_\_ No\_\_\_
11. Is line 8 at least equal to the sum of line 3 plus 6 times the sum of line 4? Yes\_\_\_ No\_\_\_

12. Are at least 90% of assets located in the U.S.? [If "No," complete line 13.] Yes\_\_\_ No\_\_\_

13. Is line 9 at least equal to the sum of line 1 3 plus 6 times the sum of line 4? Yes\_\_\_ No\_\_\_

[Fill in either lines 14-17 or lines 18-20:]

14. Current assets.....\$\_\_\_\_\_

15. Current liabilities.....\$\_\_\_\_\_

16. Net working capital subtract line 15 from line 14.....\$\_\_\_\_\_

17. Is line 16 at least equal to the sum of line 3 plus 6 times the sum of line 4? Yes\_\_\_ No\_\_\_

18. Current bond rating of most recent bond issue?\_\_\_\_\_

19. Name of rating service\_\_\_\_\_

20. Date of maturity of bond\_\_\_\_\_

21. Have financial statements for the latest financial reporting year been filed with the SEC, the Energy Information Administration, or the Rural Utilities Service? Yes\_\_\_ No\_\_\_

[If "no," please attach a report from an independent certified public accountant certifying that there are no material differences between the data reported in lines 6-20 above and the financial statements for the latest financial reporting year.]

[For Alternatives I and II complete the certification with this statement.]

I hereby certify that the wording of this letter is identical to the wording specified in Appendix I of ~~this chapter~~ 9VAC25-590 as such regulations were constituted on the date shown immediately below.

[Signature]

[Name]

[Title]

[Date]

## APPENDIX II. GUARANTEE.

[NOTE: The instructions in brackets are to be replaced by the relevant information and the brackets deleted.]

Guarantee made this [date] by [name of guaranteeing entity], a business entity organized under the laws of the state of [insert name of state], herein referred to as guarantor, to the State Water Control Board of the Commonwealth of Virginia and to any and all third parties, and obligees, on behalf of [owner or operator] of [business address].

Recitals.

(1) Guarantor meets or exceeds the financial test criteria of 9VAC25-590-60 B or C and D of Virginia Petroleum Underground Storage Tank Financial Responsibility Requirements, 9VAC25-590, and agrees to comply with the requirements for guarantors as specified in 9VAC25-590-70 B.

(2) [Owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 9VAC25-580-70 (Underground Storage Tanks: Technical Standards and Corrective Action Requirements), and the name and address of the facility]. This guarantee satisfies this chapter's requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" [if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank(s) in the amount of [insert dollar amount] corrective action per occurrence, [insert dollar amount] third party liability per occurrence, and [insert dollar amount] annual aggregate.

(3) [Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner or operator); "On behalf of our affiliate" (if guarantor is a related firm of the owner or operator); or "Incident to our business relationship with" (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner or operator)] [owner or operator], guarantor guarantees to the State Water Control Board and to any and all third parties that:

In the event that [owner or operator] fails to provide alternate coverage within 60 days after receipt of a notice of cancellation of this guarantee and the State Water Control Board has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the State Water Control Board, shall pay the funds to the State Water Control Board in accordance with the provisions of 9VAC25-590-170, in an amount not to exceed the coverage limits specified above.

In the event that the State Water Control Board determines that [owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with 9VAC25-580-230 through 9VAC25-580-300 (Underground Storage Tanks: Technical Standards and Corrective Action Requirements), the guarantor upon written instructions from the State Water Control Board shall pay the funds to the State Water Control Board in accordance with the provisions of 9VAC25-590-170, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the State Water Control Board, shall pay the funds to the State Water Control Board in accordance with the provisions of 9VAC25-590-170 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

(4) Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of 9VAC25-590-60 B or C and D, guarantor shall send within 120 days of such failure, by certified mail, notice to [owner or operator] and the State Water Control Board. The guarantee will terminate 120 days from the date of receipt of the notice by [owner or operator] and the State Water Control Board, as evidenced by the return receipts.

(5) Guarantor agrees to notify [owner or operator] and the State Water Control Board by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

(6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to 9VAC25-580 and 9VAC25-590.

(7) Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] ~~shall~~ must comply with the applicable financial responsibility requirements of 9VAC25-590 for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator] and the State Water Control Board, such cancellation to become effective no earlier than 120 days after receipt of such notice by [owner or operator] and the State Water Control Board, as evidenced by the return receipt.

(8) The guarantor's obligation does not apply to any of the following:

(a) Any obligation of [insert owner or operator] under a workers compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied

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by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily damage or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 9VAC25-590-40.

(9) Guarantor expressly waives notice of acceptance of this guarantee by the State Water Control Board, by any or all third parties, or by [owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in Appendix II of 9VAC25-590 as such regulations were constituted on the effective date shown immediately below.

Effective date:

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary:

## APPENDIX V. PAYMENT AND PERFORMANCE BOND.

[NOTE: The instructions in brackets are to be replaced by the relevant information and the brackets deleted.]

Date bond executed:

Period of coverage:

Principal: [legal name and business address of owner or operator.]

Type of organization: [insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation (if applicable):

Surety(ies): [name(s) and business address(es)]

Scope of coverage: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 9VAC25-580-70 (Underground Storage Tanks: Technical Standards and Corrective Action Requirements), and the name and address of the facility. List the coverage guaranteed by the bond: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" "arising from operating the underground storage tank"].

Penal sums of bond:

Corrective Action (per occurrence) \$.....

Third Party Liability (per occurrence) \$.....

Annual aggregate \$.....

Surety's bond number:

Know all Persons by These Presents, that we, the principal and Surety(ies), hereto are firmly bound to the State Water Control Board of the Commonwealth of Virginia, in the above penal sums for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under § 62.1-44.34:8 through 62.1-44.34:12 of the Code of Virginia, Subtitle I of the ~~Resource Conservation and Recovery Act (RCRA) Solid Waste Disposal Act of 1976~~, as amended, and under the Virginia Petroleum Underground Storage Tank Financial Requirements Regulation (9VAC25-590), to provide financial assurance for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases";] [if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tanks identified above;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully ["take corrective action, in accordance with Part VI of 9VAC25-580-230 through 9VAC25-580-300. (Underground Storage Tanks: Technical Standards and Corrective Action Requirements) and the State Water Control Board's instructions for," and/or "compensate injured third parties for bodily injury and property damage caused by" either "sudden" and/or "nonsudden" or "sudden and nonsudden"] accidental releases arising from operating the tank(s) identified above, or if the Principal shall provide alternate financial assurance, as specified in 9VAC25-590, within 120 days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

Such obligation does not apply to any of the following:

- (a) Any obligation of [insert owner or operator] under a workers compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];
- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 9VAC25-590-40.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the State Water Control Board that the Principal has failed to ["take corrective action, in accordance with Part VI of 9VAC25-580-230 through 25-580-300 and the State Water Control Board's instructions," and/or "compensate injured third parties"] as guaranteed by this bond, the Surety(ies) shall either perform ["corrective action in, accordance with 9VAC25-580 and the board's instructions," and/or "third party liability compensation"] or pay the funds in an amount up to the annual aggregate penal sum to the State Water Control Board as directed by the State Water Control Board under 9VAC25-590-170. The State Water Control Board in its sole discretion may elect to require the surety to pay the funds or to take corrective action and compensate third parties or any combination up to the annual aggregate penal sum.

Upon notification by the State Water Control Board that the Principal has failed to provide alternate financial assurance within 60 days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that the State Water Control Board has determined or suspects that a release has occurred, the Surety(ies) shall pay the funds in an amount not exceeding the annual aggregate penal sum to the State Water Control Board as directed by the State Water Control Board under 9VAC25-590-170.

The Surety(ies) submit to the jurisdiction of the Circuit Court of the City of Richmond to adjudicate any claim against it(them) by the State Water Control Board and waive any objection to venue in that court. Interest shall accrue at the judgment rate of interest on the amount due beginning seven days after the date of notification by the State Water Control Board. In the event the State Water Control Board shall institute legal action to compel performance by the Surety under this agreement, the Surety shall be liable for all costs and legal fees incurred by the board to enforce this agreement.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond. The Surety(ies) hereby agree(s) that it(they) has been notified of all material facts regarding this contract of suretyship and waive(s) any defense founded in concealment of material facts. The Surety(ies) represents that

the person executing this agreement has full authority to execute the agreement. Surety(ies) hereby waive(s) any right to notice of breach or default of the Principal. The State Water Control Board may enforce this agreement against the Surety(ies) without bringing suit against the principal. The State Water Control Board shall not be required to exhaust the assets of the Principal before demanding performance or funding of the trust fund by the Surety. No lawful act of the State Water Control Board, including without limitation any extension of time to the Principal, shall serve to release any surety, whether or not that act may be construed to alter or vary this agreement. Release of one co-surety shall not act as the release of another. This agreement shall be construed to effect its purpose to provide remedial action for petroleum releases and to provide compensation for third parties injured by such releases.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the principal and the State Water Control Board, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the principal and the State Water Control Board, as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Whereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in Appendix V of 9VAC25-590 as such regulations were constituted on the date this bond was executed.

PRINCIPAL

- [Signature(s)]
[Name(s)]
[Title(s)]
[Corporate seal]

CORPORATE SURETY(IES)

- [Name and address]
State of Incorporation:
Liability limit.....\$...
[Signature(s)]
[Name(s) and title(s)]



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[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for surety above.]

Bond premium:.....\$...

## APPENDIX VI. IRREVOCABLE STANDBY LETTER OF CREDIT.

[NOTE: The instructions in brackets are to be replaced by the relevant information and the brackets deleted.]

[Name and address of issuing institution]

[Name and address of the Executive Director of the State Water Control Board of the Commonwealth of Virginia and Director(s) of other state implementing agency(ies)]

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No.... in your favor, at the request and for the account of [owner or operator name] of [address] up to the aggregate amount of in words U.S. dollars (\$[insert dollar amount]), available upon presentation [insert, if more than one director of a state implementing agency is a beneficiary, "by any one of you"] of

(1) your sight draft, bearing reference to this letter of credit, No... and

(2) your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations issued under authority of 62.1-44.34:8 through 62.1-44.34:12 of the Code of Virginia and Subtitle I of the ~~Resource Conservation and Recovery~~ Solid Waste Disposal Act of 1976, as amended."

This letter of credit may be drawn on to cover [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the underground storage tank(s) identified below in the amount of in words \$[insert dollar amount] corrective action per occurrence, [in words] \$[insert dollar amount] third party liability per occurrence, and [in words] \$[insert dollar amount] annual aggregate:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 9VAC25-580-70 (Underground Storage Tanks: Technical Standards and Corrective Action Requirements), and the name and address of the facility.]

The letter of credit may not be drawn on to cover any of the following:

(a) Any obligation, of [insert owner or operator] under a workers compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 9VAC25-590-40 (Virginia Petroleum Underground Storage Tank Financial Responsibility Requirements).

This letter of credit is effective as of [date] and shall expire on [date], but such expiration date shall be automatically extended for a period of [at least the length of the original term] on [expiration date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify [owner or operator] and the State Water Control Board by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event that [owner or operator] and the State Water Control Board are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by [owner or operator] and the State Water Control Board, as shown on the signed return receipts.

Partial draws are permitted under this Irrevocable Standby Letter of Credit.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall pay to you the amount of the draft promptly and directly in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in Appendix VI of 9VAC25-590 as such regulations were constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution]

[Date]

This credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published and copyrighted by the International Chamber of Commerce," or "the Uniform Commercial Code"].

## APPENDIX VII. TRUST AGREEMENT.

[NOTE: The instructions in brackets are to be replaced by the relevant information and the brackets deleted.]

Trust agreement, the "Agreement," entered into as of [date] by and between [name of the owner or operator], a [name of state] [insert "corporation," "partnership," "association," or "proprietorship"], the "Grantor," and [name of corporate trustee], [insert "Incorporated in the state of.... " or "a national bank"], the "Trustee."

Whereas, the State Water Control Board of the Commonwealth of Virginia has established certain regulations applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed for corrective action and third party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached Schedule A lists the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located that are covered by the trust agreement.

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee;

Now, therefore, the Grantor and the Trustee agree as follows:

#### Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

(c) "9VAC25-590" is the Petroleum Underground Storage Tank Financial Requirements Regulation promulgated by the State Water Control Board for the Commonwealth of Virginia.

#### Section 2. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of the State Water Control Board of the Commonwealth of Virginia. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. Payments made by the provider of financial assurance pursuant to the State Water Control Board's instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the State Water Control Board.

Section 3. Payment for ["Corrective Action" and/or "Third Party Liability Claims"].

The Trustee shall make payments from the Fund as the State Water Control Board shall direct, in writing, to provide for the payment of the costs of [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage] caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" arising from operating the tanks covered by this Agreement.

The Fund may not be drawn upon to cover any of the following:

(a) Any obligation of [insert owner or operator] under a workers compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 9VAC25-590-40.

The Trustee shall reimburse the Grantor, or other persons as specified by the State Water Control Board, from the Fund for corrective action expenditures and/or third party liability claims in such amounts as the State Water Control Board shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the State Water Control Board specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined here.

#### Section 4. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

#### Section 5. Trustee Management.

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such

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matters, would use in the conduct of an enterprise of a like character and with like aims, except that:

- (i) Securities or other obligations of the Grantor, or any other owner or operator of the tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 USC § 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;
- (ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and
- (iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

## Section 6. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 USC § 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

## Section 7. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;
- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other

securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

## Section 8. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

## Section 9. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

## Section 10. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

## Section 11. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the

acts contemplated by this Section shall be paid as provided in Section 9 8.

Section 12. Instructions to the Trustee.

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule B or such other designees as the Grantor may designate by amendment to Schedule B. The trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests and instructions by the State Water Control Board to the Trustee shall be in writing, signed by the Executive Director of the State Water Control Board, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the State Water Control Board hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the State Water Control Board, except as provided for herein.

Section 13. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and the State Water Control Board if the Grantor ceases to exist.

Section 14. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement as provided in Section 44 13, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the State Water Control Board, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 15. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the State Water Control Board issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 16. Choice of Law.

This Agreement shall be administered, construed, and enforced according to the laws of the Commonwealth of Virginia, or the Comptroller of the Currency in the case of National Association banks.

Section 17. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in Appendix VII of 9VAC25-590 as such regulations were constituted on the date written above.

[Signature of Grantor]

[Name of the Grantor]

[Title]

Attest:

[Signature of Trustee]

[Name of the Trustee]

[Title]

[Seal]

[Signature of Witness]

[Name of Witness]

[Title]

[Seal]

APPENDIX XI. LETTER FROM CHIEF FINANCIAL OFFICER (SHORT FORM).

[Note: This Appendix may only be used by owners or operators who do not own or operate hazardous waste facilities, or underground injection control wells.]

[Note: The instructions in brackets are to be replaced by the relevant information and the brackets deleted.]

I am the chief financial officer of [insert: name and address of the owner or operator or guarantor]. This letter is in support of the use of [insert "the financial test of self-insurance," and/or "Guarantee"] to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert "sudden accidental releases" ~~and/or~~ or "nonsudden accidental releases" or "accidental releases"] in the amount of at least \$[insert dollar amount] corrective action per occurrence, \$[insert dollar amount] third party liability per occurrence, and \$[insert dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test by this [insert: "owner or operator," and/or "guarantor"]: [List for each facility the name and address of the facility where tanks assured by this financial test are located, and whether tanks are assured by this financial test. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this

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facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to 9VAC25-580-70 (Underground Storage Tanks: Technical Standards and Corrective Action Requirements)].

I am not required to demonstrate evidence of financial responsibility for any other EPA regulation or state programs authorized by EPA.

This [insert: "owner or operator," or "guarantor"] has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on the financial statements for the latest completed financial reporting year.

[Fill in the information below to demonstrate compliance with the financial test requirements.]

1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee...\$\_\_\_\_\_
2. Amount of annual aboveground storage tank (AST) aggregate coverage being assured by a financial test and/or guarantee...\$\_\_\_\_\_
3. Total UST/AST financial responsibility obligations assured by a financial test and/or guarantee (sum of lines 1 and 2)...\$\_\_\_\_\_
4. Total tangible assets...\$\_\_\_\_\_
5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line or add that amount to line 6]...\$\_\_\_\_\_
6. Tangible net worth [subtract line 5 from line 4]...\$\_\_\_\_\_
7. Is line 4 at least equal to line 3 above? Yes... No...
8. Have financial statements for the latest financial reporting year been filed with the Securities and Exchange Commission? Yes... No...
9. Have financial statements for the latest financial reporting year been filed with the Energy Information Administration? Yes... No...
10. Have financial statements for the latest financial reporting year been filed with the Rural Utilities Service? Yes... No...
11. Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating at least equal to the amount of annual UST aggregate coverage being assured according to the table below?

Annual Aggregate Requirement	Dun and Bradstreet Rating
\$20,000	EE (\$20,000 to \$34,999)
\$40,000	DC (\$50,000 to \$74,999)

\$80,000	CB (\$125,000 to \$199,999)
\$150,000	BB (\$200,000 to \$299,999)
\$200,000	BB (\$200,000 to \$299,999)
\$300,000	BA (\$300,000 to \$499,999)
\$500,000	1A (\$500,000 to \$749,999)
\$750,000	2A (\$750,000 to \$999,999)
\$1,000,000	3A (\$1,000,000 to \$9,999,999)

[Answer "Yes" only if BOTH criteria have been met.] Yes... No...

12. If you did not answer yes to one of lines 8 through 11, please attach a report from a certified public accountant certifying that there are no material differences between the data reported in lines 4 through 7 above and the financial statements for the latest financial reporting year.

I hereby certify that the wording of this letter is identical to the wording specified in Appendix XI of this chapter as such regulations were constituted on the date shown immediately below.

[Signature]  
[Name]  
[Title]  
[Date]

V.A.R. Doc. No. R18-4454; Filed August 3, 2017, 9:45 a.m.



## TITLE 12. HEALTH

### STATE BOARD OF HEALTH

#### Fast-Track Regulation

**Title of Regulation: 12VAC5-221. Regulations Governing Cooperative Agreements (adding 12VAC5-221-10 through 12VAC5-221-150).**

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

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

**Public Comment Deadline: October 4, 2017.**

**Effective Date: October 20, 2017.**

**Agency Contact: Erik Bodin, Director, Office of Licensure and Certification, Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2109, or email erik.bodin@vdh.virginia.gov.**

**Basis:** The regulation is promulgated under the authority of Chapter 741 of the 2015 Acts of Assembly and § 32.1-12 of the Code of Virginia. Chapter 741 contains an enactment clause that mandates the State Board of Health to promulgate regulations to implement the provisions of the act and requires those regulations contain, at a minimum, provisions regarding (i) the review of applications for proposed cooperative agreements, (ii) the process by which applications for proposed cooperative agreements shall be approved or denied, (iii) post-approval monitoring, and (iv) a schedule establishing the amount of the annual fee that the Commissioner of Health is authorized to assess from the parties to a cooperative agreement. Section 32.1-12 of the Code of Virginia authorizes the State Board of Health to make, adopt, promulgate, and enforce such regulations and provide for reasonable variances and exemptions therefrom as may be necessary to carry out the provisions of Title 32.1 of the Code of Virginia and other laws of the Commonwealth administered by it, the commissioner, or the Department of Health.

**Purpose:** In order to address the unique health care challenges that exist in the Southwest Virginia region, the General Assembly through Chapter 741 has authorized the commissioner to approve cooperative agreements that are beneficial to individuals served by the Southwest Virginia Health Authority and to actively supervise cooperative agreements to ensure compliance with the provisions that have been approved. The intent of this regulatory action is to promote and protect the health and safety of individuals within the Southwest Virginia Health Authority's geographic area by ensuring any cooperative agreements entered into by hospitals foster improvements in the quality of health care, moderate increases in health care cost, improve access to needed health care services, and promote improvements in population health status in the Southwest Virginia Health Authority's geographic area.

**Rationale for Using Fast-Track Rulemaking Process:** Chapter 741 mandates the State Board of Health to promulgate regulations that, at a minimum, address the review of applications for proposed cooperative agreements, the process by which applicants for proposed cooperative agreements shall be approved or denied, post-approval monitoring, and a fee schedule establishing the amount of the annual fee per cooperative agreement. The emergency regulations that were promulgated have been used since 2016. Furthermore, § 15.2-5384.1 of the Code of Virginia is very specific in regards to the review of cooperative agreements, with the regulatory language closely tracking the statutory requirements. Therefore, the Virginia Department of Health believes the proposed regulation will be noncontroversial, allowing use of the fast-track rulemaking process.

**Substance:**

12VAC5-221-10. Purpose. This section lays out the purpose of the regulatory chapter which is derived from Chapter 741

of the 2015 Acts of Assembly and Chapter 53.1 (§ 15.2-5368 et seq.) of Title 15.2 of the Code of Virginia.

12VAC5-221-20. Definitions. This section defines key terms used within the regulatory chapter.

12VAC5-221-30. Separate applications. This section requires that each cooperative agreement entered into requires its own letter authorizing cooperative agreement. The section states that amendments to existing cooperative agreements require submission of a new application.

12VAC5-221-40. Application. This section specifies the process for applying for a letter authorizing cooperative agreement. The section states that applications shall be submitted simultaneously to the authority, commissioner, and the Office of the Attorney General. The section also lays out the method for submitting information considered to be confidential.

12VAC5-221-50. Fee schedule. This section lays out the method for submitting application fees, establishes the application fee, method for the department to refund the applicant should it be necessary and establishes that the department may charge additional fees beyond the application fee should the cost to the department be greater than the application fee.

12VAC5-221-60. Public hearing. This section lays out the requirements of the public hearing required by § 15.2-5384.1 D of the Code of Virginia. This section states that the public hearing shall be held by the authority in conjunction with the Virginia Department of Health, shall be open to the public, and shall be recorded by the Virginia Department of Health.

12VAC5-221-70. Commissioner's request for information. This section lays out that information the commissioner shall request from an applicant provided that information is not already included within the application. The commissioner is permitted to request further information not specified by regulation.

12VAC5-221-80. Commissioner's review. This section lays out the process the commissioner shall follow when reviewing an application for a letter authorizing cooperative agreement. The commissioner shall consult with the Attorney General's Office and other affected agencies of the Commonwealth and may consult with the Federal Trade Commission and other affected jurisdictions. This section specifies what materials the commissioner shall consider, when the commissioner shall issue a decision, and the circumstances under which the commissioner shall approve an application.

12VAC5-221-90. Action on an application. This section provides the framework for the commissioner's decision including the timeframe a decision will be rendered, as required by § 15.2-5384.1 F of the Code of Virginia, and laying out potential conditions which may be placed on a letter authorizing cooperative agreement.

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12VAC5-221-100. Ongoing and active supervision. This section lays out the process for ongoing monitoring should a letter authorizing cooperative agreement be issued, including ongoing reporting to the department. Further, the section lays out how the department will evaluate continued reporting to determine if the letter holder is complying with the terms of the letter authorizing cooperative agreement including conditions. That process includes the creation of qualitative measures. The qualitative measures will be created using the technical advisory panel established in 12VAC5-221-120. This section permits the Virginia Department of Health to make onsite inspections if necessary and requires an investigation of any complaints regarding noncompliance with the cooperative agreement or the letter authorizing cooperative agreement. The regulation also provides for other methods of monitoring provided the commissioner and the department provide advance notice to the parties.

12VAC5-221-110. Annual reporting. This section details the requirements of the annual report each letter holder is required to submit. This section lays out the fee due to be submitted with the annual report.

12VAC5-221-120. Technical advisory panel. This section states that the commissioner shall appoint a technical advisory panel, which will provide recommendations to the commissioner regarding the creation of qualitative measures that will be used to track the benefits of a cooperative agreement. The section further lays out the requirements of the membership of the technical advisory panel, when it shall meet, and the metrics it shall identify.

12VAC5-221-130. Enforcement procedures. This section lays out the procedures that the commissioner is to follow should there be reason to believe that a cooperative agreement no longer meets the requirements of the Code of Virginia. The section also lays out the circumstances in which the commissioner may revoke a letter authorizing cooperative agreement.

12VAC5-221-140. Voluntary termination of cooperative agreement. This section states that letter holder shall file notice with the department should they terminate a cooperative agreement and return the letter authorizing cooperative agreement.

12VAC5-221-150. Official records. This section clarifies that the commissioner and the department shall maintain all cooperative agreements, all records collected pursuant to the regulatory chapter, and all annual reports as official records. The section also states which records shall be available on the department's website.

Issues: The primary advantages to the public, the agency, and the Commonwealth are in meeting the stated policy of the Commonwealth as included in § 15.2-5384.1 of the Code of Virginia "to encourage cooperative, collaborative, and integrative arrangements, including mergers and acquisitions among hospitals, health centers, or health providers who might otherwise be competitors. To the extent such

cooperative agreements, or the planning and negotiations that precede such cooperative agreements, might be anticompetitive within the meaning and intent of state and federal antitrust laws, the intent of the Commonwealth with respect to each participating locality is to supplant competition with a regulatory program to permit cooperative agreements that are beneficial to citizens served by the Authority, and to invest in the Commissioner the authority to approve cooperative agreements recommended by the Authority and the duty of active supervision to ensure compliance with the provisions of the cooperative agreements that have been approved." The proposed regulatory action poses no disadvantage 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 741 of the 2015 Acts of the Assembly,<sup>1</sup> the State Board of Health (Board) proposes to promulgate a regulation that will govern any mergers between hospitals/hospital systems in Southwest Virginia that are approved under the Virginia Cooperative Agreements Act. Specifically, the Board proposes to set definitions and a fee schedule. The Board also proposes to outline procedures for the Commissioner's requests for information, the Commissioner's review of applications and ongoing monitoring of, and annual reporting for, approved cooperative agreements. This regulation will replace an emergency regulation that went into effect January 18, 2016, and that expires January 16, 2018.

Result of Analysis. Costs likely outweigh benefits for this proposed regulatory action.

Estimated Economic Impact. In 2015, the General Assembly passed the Cooperative Agreements Act (the Act) which amended the authorizing legislation for the Southwest Virginia Health Authority. The Act authorizes the Southwest Virginia Health Authority to receive and review applications for cooperative agreement for mergers between hospitals, hospital centers or health care providers who would otherwise be competitors in the market place. The Act also sets out criteria for assessment of such applications. By statute, both the Southwest Virginia Health Authority and, later in the process, the Commissioner of the Virginia Department of Health (VDH), must consider whether a proposed cooperative agreement will result in:

"a. Enhancement of the quality of hospital and hospital-related care, including mental health services and treatment of substance abuse, provided to citizens served by the Authority, resulting in improved patient satisfaction;

b. Enhancement of population health status consistent with the regional health goals established by the Authority;

c. Preservation of hospital facilities in geographical proximity to the communities traditionally served by those facilities to ensure access to care;

- d. Gains in the cost-efficiency of services provided by the hospitals involved;
- e. Improvements in the utilization of hospital resources and equipment;
- f. Avoidance of duplication of hospital resources;
- g. Participation in the state Medicaid program; and
- h. Total cost of care."

The Southwest Virginia Health Authority and, later in the process, the Commissioner must also evaluate any disadvantages attributable to any reduction in competition likely to result from any proposed cooperative agreement. Pursuant to the Act, these entities must assess factors that include, but are not limited to:

- a. The extent of any likely adverse impact of the proposed cooperative agreement on the ability of health maintenance organizations, preferred provider organizations, managed health care organizations, or other health care payors to negotiate reasonable payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers;
- b. The extent of any reduction in competition among physicians, allied health professionals, other health care providers, or other persons furnishing goods or services to, or in competition with, hospitals that is likely to result directly or indirectly from the proposed cooperative agreement;
- c. The extent of any likely adverse impact on patients in the quality, availability, and price of health care services; and
- d. The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition likely to result from the proposed cooperative agreement.

The Act authorizes the Southwest Virginia Health Authority to recommend approval of proposed cooperative agreements to the Commissioner only if "it determines that the benefits likely to result from the proposed cooperative agreement outweigh the disadvantages likely to result from a reduction in competition from the proposed cooperative agreement." According to the Act, upon receipt of the Southwest Virginia Health Authority's recommendation, the Commissioner may request additional information from applicant parties that he deems necessary to assess whether the benefits of a merger will outweigh its costs. The Commissioner of VDH has 45 days after receipt of the Southwest Virginia Health Authority's recommendation to approve or reject an application for cooperative agreement, but that approval window may be extended an additional 15 days if the Commissioner requests additional information from the applicants. That 15 days starts once all requested information is received and the application is deemed complete. If an application is approved, the Act requires the Commissioner to provide ongoing supervision of the cooperative agreement to ensure compliance and allows the Commissioner to revoke

the cooperative agreement if, at any time in the future, it no longer meets the requirements of the Act. The Act also allows any party to a cooperative agreement to terminate participation in the agreement but requires that party to file a notice of termination with the Commissioner within 30 days after termination.

The Act allows both the Southwest Virginia Health Authority and VDH to charge fees for their costs of evaluating applications; the act specifies that the Southwest Virginia Health Authority may not charge more than \$50,000 and VDH may not charge more than \$75,000. Additionally, VDH may charge ongoing, annual fees not to exceed \$75,000 for their ongoing supervision.

The Act explicitly states that: "(a)activities conducted pursuant to cooperative agreements approved and supervised by the Commissioner are immunized from challenge or scrutiny under the Commonwealth's antitrust laws. It is the intention of the General Assembly that this chapter shall also immunize cooperative agreements approved and supervised by the Commissioner from challenge or scrutiny under federal antitrust law." While the Act will apply to any cooperative agreement applications received in the future, it was specifically written to allow consideration of a proposed merger between Wellmont Health System and Mountain State Health Alliance, which, between them, own and operate 11 hospitals in southwestern Virginia and northeastern Tennessee.

Pursuant to the Act, the Board promulgated an emergency regulation that became effective January 18, 2016, and now proposes this regulation to replace the emergency regulation which will expire January 16, 2018. Both the emergency regulation, and this replacement regulation, enumerate the statutory factors to be considered during application evaluation, and set fees for both evaluation of an application and for ongoing supervision of any approved cooperative agreements. In addition to including requirements in the Act, the Board at its discretion proposes to include regulatory language that states what additional information the Commissioner may request from applicants for cooperative agreements. This discretionary language seems to be geared towards allowing the Commissioner to get more specific information about the commitments made by the parties in their applications as well as more specific demographic information. Under this language, the Commissioner may, for instance, request specific health care workforce information to help assess the impact of any merger on that workforce. To the extent that this proposed regulatory language gives greater certainty to applicants as to what information they might be expected to provide, it will likely be beneficial.

Applicants are required to pay \$50,000 for initial application with provision for a refund if application evaluation does not cost \$50,000 and provision for additional fees to be assessed (up to a \$75,000 total) if costs exceed \$50,000. Parties to any approved cooperative agreements will also be subject to an



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annual fee of \$20,000 due when their annual report must be filed with the provision that additional fees up to a \$75,000 total may be charged if VDH's costs exceed \$20,000. Board staff reports that VDH's cost thus far for evaluating the application currently before them exceed \$87,000 and further report that, if the application is approved, they expect VDH's annual costs for supervision to exceed \$75,000 each year. Given this, it is likely that, at least for these applicants, fee costs for application and for ongoing supervision will be \$75,000.

In addition to the fees assessed by VDH, various parties have incurred, or will likely incur, various other costs. The parties to the current application likely have incurred quite large costs for lawyers and consultants to help them prepare their applications and guide them through the application process. These parties likely have also incurred costs for searching out, preparing and providing additional information to both the Southwest Virginia Health Authority and the Commissioner. Additionally, VDH has already incurred costs in excess of the fees they are allowed to recover for application evaluation and anticipate incurring costs in excess of allowable fees for ongoing supervision if the current application is approved. Health care consumers are likely to incur additional costs for health care services, and may also have fewer health care services available to them in the future as the health care systems consolidate and eliminate duplicative services, if the application is approved. Health insurance carriers and businesses in southwestern Virginia that self-insure for health care are likely to experience a loss in bargaining power, and a concomitant increase in fees for services, if the application is approved. Competitors to these two health care systems may also incur costs if the merger is approved (details of possible costs are laid out in the Effects on the Use and Value of Private Property section below).

Finally, both the parties to the current application and the Commonwealth are likely to incur very large costs for defending the proposed merger against anti-trust litigation if the cooperative agreement is approved. Although it was the intention of the General Assembly to immunize parties to cooperative agreements from federal anti-trust scrutiny, the Federal Trade Commission (FTC) has registered strong objections to approval of the cooperative agreement.<sup>2</sup> Their objections send a strong signal that it is likely they will pursue anti-trust litigation if the merger is approved. Any future applications approved under this proposed regulation may also be subject to costs associated with federal anti-trust litigation if the FTC reaches an opposing opinion to the Southwest Virginia Health Authority, as they have in this case, as to whether the benefits of a merger outweigh its costs under the factors set forth in the Act.

All of these costs would be weighed against any benefits that might accrue on account of cooperative agreements. For instance, Wellmont Health System and Mountain States Health Alliance assert that they will commit \$140 million over ten years "pursuing specialty services" such as addiction

recovery services and mobile health crisis management teams.<sup>3</sup> Even in cases where benefits might outweigh costs under strict consideration of the factors laid out in the Cooperative Agreement Act, those benefits would likely not be large enough to outweigh all costs laid out above.

**Businesses and Entities Affected.** Board staff reports that this regulation, and its authorizing legislation, will likely affect Wellmont Health System and Mountain State Health Alliance as well as any competitors to these two health care systems. Health care consumers within localities served by the Southwest Virginia Health Authority and health insurance carriers that serve that area will also likely be affected. Businesses, particularly businesses that self-insure, and Medicaid and Medicare payers (the state and federal governments) may also be affected. The Virginia Department of Health will also be affected. Board staff reports that approximately 258,000 health care consumers, 3,253 physicians, 11 hospitals and at least eight health insurance carriers will be affected.

**Localities Particularly Affected.** Localities within the Southwest Virginia Health Authority will be particularly affected by this proposed regulation. These localities include the Counties of Lee, Scott, Wise, Buchanan, Dickerson, Russell, Tazewell, Smyth and Washington as well as the cities of Norton and Bristol.

**Projected Impact on Employment.** Cooperative agreements approved under this proposed regulation may lead to current health care services in southwestern Virginia being consolidated with duplicative services being eliminated to lower costs. To the extent that this happens, there will likely be fewer jobs available within the consolidated businesses

**Effects on the Use and Value of Private Property.** These proposed regulatory changes may affect the use and value of any hospitals that may be awarded cooperative agreements as well as their competitors. Current applicants for cooperative agreements anticipate that their proposed merger will increase their available revenues. If they are correct, the value of these businesses would increase.

The effects of the merger proposed by current applicants on competitors to those applicants would likely be dictated by the actions of the applicants. The FTC estimates that the applicants would control over 70% of the health care marketplace in southwestern Virginia post-merger. Such a market position would give the merged company tremendous control over prices in the marketplace... they would likely be price makers at that point. Given this, if the merged company values increasing market share over short and intermediate term profits,<sup>4</sup> they may lower their prices temporarily to drive competitors out of the market place. If, on the other hand, the merged company prefers to increase profits immediately, their competitors may benefit from also being able to charge more for any given service because the "market" price has been driven up by the merged company.

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

Small Businesses:

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

Costs and Other Effects. Small businesses in the categories of affected entities listed above may incur costs if any cooperative agreements are approved via the criteria set forth in this proposed regulation and its authorizing legislation. Health insurance carriers and self-insured businesses may also experience a loss in bargaining power, and corresponding increases in health care costs, due to increased market share concentration that decreases competition.

Alternative Method that Minimizes Adverse Impact. Within the parameters of Chapter 741, there are likely no alternative methods that would reduce adverse impacts for small businesses.

Adverse Impacts:

Businesses. Businesses that apply for approval of cooperative agreements will incur fees not exceeding \$75,000 for initial review of their cooperative agreement applications and would likely incur annual fees of \$75,000 per year that would defray the costs of state supervision and annual review if their applications are approved. These applying businesses will also likely incur significant other costs associated with the application process. These costs will likely include lawyer and consultant fees as well as copying and other costs associated with supplying the Commissioner of VDH with supplemental information that may be requested under the rules of this proposed regulation.

Other businesses in southwestern Virginia, especially health insurance carriers and businesses that self-insure for health care, may incur higher health care costs associated with decreased bargaining power in a health care market with less competition if cooperative agreements are approved.

Localities. Localities in the Commonwealth that are in the affected geographical area will likely incur the same increased health costs as other health care consumers.

Other Entities. Health care consumers in Southwestern Virginia will likely see increased prices for health care if cooperative agreements that limit market competition are approved under this proposed regulation. VDH will likely incur costs for reviewing cooperative agreements, and for supervising them if they are approved, that exceed the \$75,000 that they are allowed to charge applicants and holders of cooperative agreements. If the cooperative agreement application between Wellmont Health System and Mountain States Health Alliance is approved, and the FTC brings an anti-trust suit because of the merger, the

Commonwealth would likely incur large costs for defending that approval in court.

<sup>1</sup> <http://leg1.state.va.us/cgi-bin/legp504.exe?151+ful+CHAP0741>

<sup>2</sup> The FTC's initial comment can be found on its website here: [https://www.ftc.gov/system/files/documents/advocacy\\_documents/submission-ftc-staff-southwest-virginia-health-authority-virginia-department-health-regarding/160930wellmontswvastaffcomment.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/submission-ftc-staff-southwest-virginia-health-authority-virginia-department-health-regarding/160930wellmontswvastaffcomment.pdf) and the a supplementary comment can be found on VDH's website here: <http://www.vdh.virginia.gov/content/uploads/sites/96/2016/11/FTC-Staff-Supplemental-Submission-to-Virginia-1-13-17.pdf>.

<sup>3</sup> The parties report that these potential investments would not be possible without the merger. Given that additional cost savings under the merger that would allow these investments would likely have to result from consolidation and elimination of duplicative services, it is likely that the benefits of these proposed investments would likely be offset by costs incurred by health care consumers on account of services being eliminated. Board staff reports that the parties have committed to not cutting services for five years if their application is approved.

<sup>4</sup> DPB recognizes that the applicants are nonprofit entities. The term "profit" in this use has the normal economic meaning of revenues minus costs.

Agency's Response to Economic Impact Analysis: The economic impact analysis prepared by the Virginia Department of Planning and Budget for the permanent regulations replacing the emergency regulations for Regulations Governing Cooperative Agreements, 12VAC5-221, (Regulations) reported an adverse impact resulting from the Regulations. The adverse impact, stated as "those benefits would likely not be large enough to outweigh all costs laid out above" (Economic Impact Analysis, page 6), addresses the impact of an approval of a request for a letter authorizing a cooperative agreement provided for in the Regulations and the Code of Virginia. However, the adverse impact described is not a result of the application of the Regulations, which generally mirror the Code of Virginia enabling language, to the review of such a request. Any adverse economic impact likely to result from an approved request for a cooperative agreement is a consideration of the review of the request and would be unique to the request and not a result of the application of the Regulations. The likely impact of the cooperative agreement is a factor in the State Health Commissioner's decision to approve or deny the request.

Summary:

*The regulation is promulgated pursuant to Chapter 741 of the 2015 Acts of the Assembly and governs any mergers between hospitals and hospital systems in Southwest Virginia that are approved under the Virginia Cooperative Agreements Act. The regulation sets definitions and a fee schedule and outlines procedures for the State Health Commissioner's (i) requests for information, (ii) review of applications, and (iii) ongoing monitoring of, and annual reporting for, approved cooperative agreements. This regulation replaces emergency regulations that are currently in effect.*

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# Regulations

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## CHAPTER 221 REGULATIONS GOVERNING COOPERATIVE AGREEMENTS

### **12VAC5-221-10. Definitions.**

"Applicant" means a party to a proposed cooperative agreement who submits an application to the authority pursuant to § 15.2-5384.1 of the Code of Virginia.

"Application" means the written materials submitted by applicants to the authority and the department in accordance with § 15.2-5384.1 of the Code of Virginia.

"Attorney General" means the Attorney General for the Commonwealth of Virginia.

"Authority" means the political subdivision organized and operated pursuant to Chapter 53.1 (§ 15.2-5368 et seq.) of Title 15.2 of the Code of Virginia, or if such authority is abolished, the board, body, authority, department, or officer succeeding to the principal functions thereof or to whom the powers given by Chapter 53.1 of Title 15.2 of the Code of Virginia are given by law.

"Commissioner" means the State Health Commissioner.

"Cooperative agreement" means an agreement among two or more hospitals for the sharing, allocation, consolidation by merger or other combination of assets, or referral of patients, personnel, instructional programs, support services, and facilities or medical, diagnostic, or laboratory facilities or procedures or other services traditionally offered by hospitals.

"Day" or "days" means calendar days.

"Department" means the Virginia Department of Health.

"Hospital" includes any health center and health provider under common ownership with the hospital and means any and all providers of dental, medical, and mental health services, including all related facilities and approaches thereto and appurtenances thereof. Dental, medical, and mental health facilities includes any and all facilities suitable for providing hospital, dental, medical, and mental health care, including any and all structures, buildings, improvements, additions, extensions, replacements, appurtenances, lands, rights in lands, franchises, machinery, equipment, furnishing, landscaping, approaches, roadways, and other facilities necessary or desirable in connection therewith or incidental thereto (including hospitals; nursing homes; assisted living facilities; continuing care facilities; self-care facilities; mental health facilities; wellness and health maintenance centers; medical office facilities; clinics; outpatient surgical centers; alcohol, substance abuse, and drug treatment centers; dental care clinics; laboratories; research facilities; sanitariums; hospices; facilities for the residence or care of the elderly, the handicapped, or the chronically ill; residential facilities for nurses, interns, and physicians; and any other kind of facility for the diagnosis, treatment, rehabilitation, prevention, or palliation of any human illness, injury, disorder, or disability) together with all related and supporting facilities and equipment necessary and desirable in connection therewith or

incidental thereto, or equipment alone, including kitchen, laundry, laboratory, wellness, pharmaceutical, administrative, communications, computer and recreational facilities and equipment, storage space, mobile medical facilities, vehicles, and other equipment necessary or desirable for the transportation of medical equipment or the transportation of patients. Dental, medical, and mental health facilities also includes facilities for graduate-level instruction in medicine or dentistry and clinics appurtenant thereto offering free or reduced rate dental, medical, or mental health services to the public.

"Letter authorizing cooperative agreement" means a document that is issued by the commissioner approving a cooperative agreement.

"Measure" means some number of factors or benchmarks, which may be binary, a range, or continuous factors.

"Participating locality" means any county or city in the LENOWISCO or Cumberland Plateau Planning District Commissions and the Counties of Smyth and Washington and the City of Bristol with respect to which an authority may be organized and in which it is contemplated that the authority will function.

"Party" means a hospital entering into a cooperative agreement.

"Plan of separation" means the written proposal submitted with an application to return the parties to a preconsolidation state, which includes a plan for separation of any combined assets, offering, provision, operation, planning, funding, pricing, contracting, utilization review or management of health services or any combined sharing, allocation, or referral of patients, personnel, employee benefits, instructional programs, support services and facilities or medical, diagnostic or laboratory facilities or procedures or other services traditionally offered by hospitals, including any parent or subsidiary at the time the consolidation occurs or thereafter.

"Primary service area" or "PSA" means the geographic area from which a hospital draws 75% of its patients as measured by the residential zip code of each patient.

"Secondary service area" or "SSA" means the geographic area from which a hospital draws an additional 15% of its patients, as measured by the residential zip code of each patient.

### **12VAC5-221-20. Separate applications.**

A party shall submit an application for a letter authorizing cooperative agreement for each cooperative agreement the party is applying to enter into. This provision applies even in the event that the parties have an existing letter authorizing cooperative agreement issued by the commissioner. An amendment to a cooperative agreement shall require submission of a new application.

**12VAC5-221-30. Application.**

A. Parties within any participating locality may submit an application for a letter authorizing cooperative agreement to the authority. Information regarding the requirements of an application for a letter authorizing cooperative agreement submitted to the authority should be obtained through the authority.

B. At the time of submission to the authority, parties shall simultaneously submit a copy of the application to the commissioner and the Attorney General.

C. If the authority requires the applicant to submit additional information before determining that the application is complete, the parties shall simultaneously submit a copy of the additional information to the authority, the commissioner, and the Attorney General.

D. If the applicants believe the materials submitted contain proprietary information that is required to remain confidential, such information must be clearly identified and the applicants shall submit duplicate applications, one with full information for the commissioner's use and one redacted application available for release to the public. Proprietary information that is clearly identified by the applicants will be kept confidential by the department pursuant to subdivision 3 of § 2.2-3705.6 of the Code of Virginia.

**12VAC5-221-40. Fee schedule.**

A. Fees shall be remitted only by certified check, cashier's check, bank money order, or other methods approved by the department. Fees shall be made payable to the department.

B. The application fee shall be \$50,000 and shall be due to the department upon its receipt of a recommendation for approval from the authority.

C. If the commissioner should determine after review of the application that the actual cost incurred by the department is less than \$50,000, the applicant shall be reimbursed the amount that is greater than the actual cost. If the commissioner should determine that the actual cost incurred by the department is greater than \$50,000, the applicant shall pay any additional amounts due as instructed by the department. The application fee shall not exceed \$75,000.

**12VAC5-221-50. Public hearing.**

A. The authority shall, in conjunction with the commissioner, schedule a public hearing for each completed application submitted. The hearing shall be held no later than 45 days after the receipt of a complete application by the authority.

B. The authority will publish and issue notice of the hearing in accordance with subsection C of § 15.2-5384.1 of the Code of Virginia.

C. The public hearing shall be open to the public in accordance with the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

D. The public hearing shall be recorded by the Virginia Department of Health.

**12VAC5-221-60. Public comment to the commissioner.**

The public may submit written comments regarding the application to the commissioner. To ensure consideration by the commissioner, written comments must be received no later than 14 days after the authority adopts its recommendation on the application.

**12VAC5-221-70. Commissioner's request for information.**

A. Upon receipt of the authority's recommendation for approval, the commissioner and department may request supplemental information from the applicants.

B. To the extent the information is not present within the application, the commissioner shall request the following information:

1. A report or reports used for public information and education about the proposed cooperative agreement prior to the parties' submission of the application. The applicants shall document the efforts used to disseminate the report or reports. The report or reports shall include:

a. A description of the proposed primary service area (PSA) and secondary service areas (SSA) and the services and facilities to be included in the cooperative agreement;

b. A description of how health services will change if the letter authorizing cooperative agreement is issued;

c. A description of improvements in patient access to health care including prevention services for all categories of payers and advantages patients will experience across the entire service area regarding costs, availability, and accessibility upon implementation of the cooperative agreement or findings from studies conducted by hospitals and other external entities, including health economists, and clinical services and population health experts, that describe how implementation of the proposed cooperative agreement will be effective with respect to resource allocation implications; efficient with respect to fostering cost containment, including eliminating duplicative services; and equitable with respect to maintaining quality and competition in health services within the service area and assuring patient access to and choice of insurers and providers within the health care system;

d. A description of any plans by the parties regarding existing or planned facilities that will impact access for patients to the services currently offered by the parties at their respective facilities, including expansions, closures, reductions in capacity, consolidation, and reduction or elimination of any services;

e. A description of the findings from community or population health assessments for the service areas regarding major health issues, trends, and health disparities, including comparisons to measures for the

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state and similar regional areas, and a description of how the health of the population will change if the letter authorizing cooperative agreement is issued; and

f. A description of the impact on the health professions workforce, including long-term employment, wage levels, retirement, benefits, recruitment, and retention of health professionals.

2. A record of community stakeholder and consumer views of the proposed cooperative agreement collected through a public participatory process including meetings and correspondence. Transcripts or minutes of any meetings held during the public participatory process shall be included in the report.

3. A summary of the nature of the proposed cooperative agreement between the parties.

4. A signed copy of the cooperative agreement and a copy of the following:

a. A description of any consideration passing to any party, individual, or entity under the cooperative agreement, including the amount, nature, source, and recipient;

b. A detailed description of any merger, lease, operating or management contract, change of control or other acquisition or change, direct or indirect, in ownership of any party or of the assets of any party to the cooperative agreement;

c. A list of all services and products and of all hospitals and other service locations that are a subject of the cooperative agreement, including those not located or provided within the boundaries of the Commonwealth of Virginia, and including hospitals or other inpatient facilities, insurance products, physician practices, pharmacies, accountable care organizations, psychiatric facilities, nursing homes, physical therapy and rehabilitation units, home care agencies, wellness centers or services, surgical centers or services, dialysis centers or services, cancer centers or services, imaging centers or services, support services, and any other product, facility, or service; and

d. A description of each party's contribution of capital, equipment, labor, services, or other contribution of value to the transaction.

5. A detailed description of the current and proposed PSA and SSA for the parties, including the PSA and SSA of each party's hospitals, not limited to the boundaries of the Commonwealth of Virginia. If the proposed PSA and SSA differ from the service areas where the parties have conducted business over the five years preceding the application, a description of how and why the proposed PSA or SSA differs and why changes are proposed.

6. A description of the prior history of dealings between the parties for the last five years, including their relationship as competitors and any prior joint ventures,

affiliations, or other collaborative agreements between the parties.

7. Documents sufficient to show the financial performance of each party to the transaction for each of the preceding five fiscal years, including tax returns, debt, bond rating, and debt service; and copies of offering materials, subsequent filings such as continuing disclosure agreements and material event disclosures, and financial statements prepared by external certified public accountants, including management reports.

8. A copy of the current annual budget and budgets for the last five years for each party to the cooperative agreement. The budgets shall be in sufficient detail so as to determine the fiscal impact of the cooperative agreement on each party. The budgets shall be prepared in conformity with generally accepted accounting principles and all assumptions used shall be documented.

9. Projected budgets, including projected costs, revenues, profit margins, and operating ratios, of each party for each year for a period of five years after a letter authorizing cooperative agreement is issued. The budgets shall be prepared in conformity with generally accepted accounting principles and all assumptions used shall be documented.

10. A detailed explanation of the projected effects, including expected change in volume, price, and revenue as a result of the cooperative agreement, including:

a. Identification of all insurance contracts and payer agreements in place at the time of the application and a description of pending or anticipated changes that would require or enable the parties to amend their current insurance and payer agreements;

b. A description of how pricing for provider insurance contracts are calculated and the financial advantages accruing to insurers, insured consumers, and the parties to the cooperative agreement if the letter authorizing cooperative agreement is issued, including changes in percentage of risk-bearing contracts; and

c. Identification of existing and future business plans, reports, studies, or other documents of each party that:

(1) Discuss each party's projected performance in the market, business strategies, capital investment plans, competitive analyses, and financial projections, including any documents prepared in anticipation of the cooperative agreement; and

(2) Identify plans that will be altered, eliminated, or combined under the cooperative agreement.

11. A copy of the following policies under the proposed cooperative agreement:

a. A policy that assures no restrictions to Medicare or Medicaid patients;

b. Policies for free or reduced fee care for the uninsured and indigent;

- c. Policies for bad debt write-off; and
  - d. Policies that require the parties to the cooperative agreement to maintain or exceed the existing level of charitable programs and services.
12. A description of the plan to systematically integrate health care and preventive health services among the parties to the cooperative agreement in the proposed geographic service area that addresses the following:
- a. A streamlined management structure, including a description of a single board of directors, centralized leadership, and operating structure;
  - b. Alignment of the care delivery decisions of the system with the interests of the community;
  - c. Clinical standardization;
  - d. Alignment of the cultural identities of the parties to the cooperative agreement;
  - e. Any planned expansions, closures, reductions in capacity, consolidation, and reduction or elimination of any services;
  - f. Any plan for integration regarding health professions workforce development and the recruitment and retention of health professionals; and
  - g. Any plan for implementation of innovative or value-based payment models.
13. A description of the plan, including economic metrics, that details anticipated efficiencies in operating costs and shared services that can be gained only through the cooperative agreement, including:
- a. Proposed use of any cost saving to reduce prices borne by insurers and consumers;
  - b. Proposed use of cost savings to fund low-cost or no-cost services designed to achieve long-term population health improvements; and
  - c. Other proposed uses of savings to benefit advancement of health and quality of care and outcomes.
14. A description of the market and the competitive dynamics for health care services in the parties' respective service areas, including at a minimum:
- a. The identity of any nonparty hospital located in the PSA and SSA and any nonparty hospital outside of the PSA and SSA that also serves patients in the parties' PSA and SSA;
  - b. Estimates of the share of hospital services furnished by each of the parties and any nonparty hospitals;
  - c. Identification of whether any services or products of the proposed cooperative agreement are currently being offered or capable of being offered by any nonparty hospitals in the PSA and SSA and a description of how the proposed cooperative agreement will not exclude such nonparty hospitals from continued competitive and independent operation in the PSA and SSA;
  - d. A listing of the physicians employed by or under contract with each of the parties' hospitals in the PSA and SSA, including their specialties and office locations;
  - e. The identity of any potential entrants in the parties' PSA and SSA and the basis for any belief that such entry is likely within the two calendar years immediately following the date of the letter authorizing cooperative agreement is issued by the department; and
  - f. A list of each party's top 10 commercial insurance payers by revenue within the PSA and SSA.
15. A detailed description of each of the benefits that the parties propose will be achieved through the cooperative agreement. For each benefit include:
- a. A description specifically describing how the parties intend to achieve the benefit;
  - b. A description of what the parties have done in the past with respect to achieving or attempting to achieve the benefits independently or through collaboration and how this may change if the cooperative agreement is granted;
  - c. An explanation of why the benefit can only be achieved through a cooperative agreement and not through other less restrictive arrangements; and
  - d. A description of how the parties propose that the commissioner measure and monitor achievement of the proposed benefit, including:
    - (1) Proposed measures and suggested baseline values with rationale for each measure to be considered by the commissioner in developing a plan to monitor achievement of the benefit;
    - (2) The current and projected levels and the trajectory for each measure that would be achieved over the next five years under the cooperative agreement;
    - (3) The projected levels for each measure in five years in the absence of the cooperative agreement; and
    - (4) A plan for how the requisite data for assessing the benefit will be obtained.
16. A description of any potential adverse impact of the proposed cooperative agreement on (i) population health or (ii) quality, availability, cost, or price of health care services to patients or payers.
17. A description of any commitments the parties are willing to make to address any potential adverse impacts resulting from the cooperative agreement. Each such commitment shall at a minimum include:
- a. The parties' proposed benchmarks and metrics to measure achievement of the proposed commitments;
  - b. The parties' proposed plan to obtain and analyze data to evaluate the extent to which the commitments have been met, including how data shall be obtained from entities other than the parties; and

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c. The parties' proposed consequences if they do not meet a commitment.

18. A plan of separation. The parties shall provide an independent opinion from a qualified organization verifying the plan of separation can be operationally implemented without undue disruption to essential health services provided by the parties.

19. A statement regarding the requirements for any certificate or certificates of public need resulting from the cooperative agreement.

20. A detailed description of the total cost to the parties resulting from the application for the cooperative agreement. Cost estimates should include costs for consultant, legal, and professional services; capital costs; financing costs; and management costs. The description should identify costs associated with the implementation of the cooperative agreement, including documentation of the availability of necessary funds. The description should identify which costs will be borne by each party.

21. An explanation of the reasons for the exclusion of any information set forth in this section. If the parties exclude an item because it is not applicable to the proposed cooperative agreement, an explanation of why the item is not applicable shall be provided.

22. A timetable for implementing all components of the proposed cooperative agreement and contact information for the person or persons authorized to receive notices, reports, and communications with respect to the letter authorizing cooperative agreement.

23. Records, reports, and documentation to support the information submitted pursuant to this section, including any additional supplemental information requested by the commissioner.

C. All supplemental information submitted to the commissioner shall be accompanied by a verified statement signed by the chairperson of the board of directors and chief executive officer of each party; or if one or more party is an individual, signed by the individual attesting to the accuracy and completeness of the enclosed information.

## **12VAC5-221-80. Commissioner's review.**

A. The commissioner shall consult with the Attorney General when reviewing an application.

B. The commissioner may consult with the Federal Trade Commission when reviewing an application.

C. The commissioner may consult and coordinate with other affected jurisdictions when reviewing an application.

D. The commissioner shall consult with all other affected agencies of the Commonwealth when reviewing an application.

E. The commissioner in his review shall examine the record developed by the authority, the authority's recommendation for approval, and any additional information received from

the parties. In addition, the commissioner may consider any other data, information, or advice available to him.

F. The commissioner shall not render a decision on the application until all supplemental information requested has been received.

G. The commissioner shall consider the following factors when conducting a review of an application:

### 1. Advantages.

a. Enhancement of the quality of hospital and hospital-related care, including mental health services and treatment of substance abuse, provided to citizens served by the authority, resulting in improved patient satisfaction;

b. Enhancement of population health status consistent with the regional health goals established by the authority;

c. Preservation of hospital facilities in geographical proximity to the communities traditionally served by those facilities to ensure access to care;

d. Gains in the cost-efficiency of services provided by the hospitals involved;

e. Improvements in the utilization of hospital resources and equipment;

f. Avoidance of duplication of hospital resources;

g. Participation in the state Medicaid program; and

h. Total cost of care.

### 2. Disadvantages.

a. The extent of any likely adverse impact of the proposed cooperative agreement on the ability of health maintenance organizations, preferred provider organizations, managed health care organizations, or other health care payers to negotiate reasonable payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers;

b. The extent of any reduction in competition among physicians, allied health care professionals, other health care providers, or other persons furnishing goods or services to, or in competition with, hospitals that is likely to result directly or indirectly from the proposed cooperative agreement;

c. The extent of any likely adverse impact on patients in the quality, availability, and price of health care services; and

d. The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition likely to result from the proposed cooperative agreement.

H. The commissioner shall approve the application if he finds by a preponderance of the evidence that the benefits likely to result from the proposed cooperative agreement outweigh the disadvantages likely to result from a reduction in competition from the proposed cooperative agreement.

I. In the selection and application of the measures for reviewing the proposed benefits of the cooperative agreement, as well as during the monitoring and active supervision of any approved cooperative agreement, the commissioner shall:

1. Draw from consensus health and health care metrics, such as those being developed pursuant to the Virginia state innovation model development initiative and state population health improvement plan, to ensure the validity and consistency of the measure;
2. Use historical actual experience in the region to establish baseline performance and evaluate progress over time;
3. Consider recommendations on the measures and goals from the technical advisory panel appointed pursuant to 12VAC5-221-120; and
4. Allow for flexibility, to the extent quantifiable goals or targets are specified, should environmental factors that are outside the control of the parties change significantly.

**12VAC5-221-90. Action on an application.**

A. The commissioner shall issue his decision in writing within 45 days of receipt of the authority's recommendation. However, if the commissioner has requested supplemental information from the applicants, the commissioner shall have 15 days, following receipt of the supplemental information, to issue a decision.

B. At the request of the applicants, the commissioner may delay issue of his decision to provide additional time to review the record.

C. The commissioner may condition approval of the letter authorizing cooperative agreement upon the applicants' commitment to achieving the improvements in population health, access to health care services, quality, and cost efficiencies identified by the applicants in support of their application. Such conditions may include:

1. A cap on the negotiated case-mix adjusted revenue per discharge by payer by product. The method for calculating such a case-mix shall be published on the Virginia Department of Health's Office of Licensure and Certification's website in a guidance document. The department may rely on third-party auditors to assist in determining the method for determining such caps, such caps' levels, and a plan for monitoring compliance;
2. A commitment to return a portion of the cost savings and efficiencies gained through the cooperative agreement to residents in the participating localities through specific proposed mechanisms;

3. An agreement that the parties shall not prevent or discourage health plans from directing or incentivizing patients to choose certain providers; the parties shall not have any contractual clauses or provisions that prevent health plans from directing or incentivizing patients;

4. An agreement that the parties shall not engage in the tying of sales of the health system's services with the health plan's purchase of other services from the health system;

5. An agreement that the parties shall not restrict a health plan's ability to make available to its health plan enrollees cost, quality, efficiency, and performance information to aid enrollees in evaluating and selecting providers in the health plan; and

6. A commitment that the parties shall not refuse to include certain provisions in contracts with health plans that have been utilized in health plan contracts in other parts of the Commonwealth in order to promote value-based health care, including bundled payments, pay for performance, utilization management, and other processes that reward improvements in quality and efficiency.

D. The commissioner's decision to approve or deny an application shall constitute a case decision pursuant to the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

**12VAC5-221-100. Ongoing and active supervision.**

A. The commissioner shall maintain active and continuing supervision of the parties in accordance with the terms under this section and to ensure compliance with the cooperative agreement and the letter authorizing cooperative agreement.

B. Any party who receives a letter authorizing cooperative agreement shall submit any additional information that is requested by the department to establish benchmarks for ongoing monitoring and supervision. The department's request may include (i) information on patient satisfaction, (ii) information on employee satisfaction, (iii) a charge master, (iv) information reflecting the contracted rates negotiated with nonphysician providers, (v) information reflecting the noncontracted rates negotiated with allied health professionals, and (vi) information reflecting the noncontracted rates negotiated with other providers.

C. The department shall establish quantitative measures that will be used to evaluate the proposed and continuing benefits of the cooperative agreement.

1. The quantitative measures shall include measures of the cognizable benefits from the cooperative agreement in at least the following categories:

- a. Population health;
- b. Access to health services;
- c. Economic;
- d. Patient safety;
- e. Patient satisfaction; and



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f. Other cognizable benefits.

2. Each category may be comprised of measures for subcategories.

3. The technical advisory panel and the parties to the cooperative agreement may make recommendations for the creation and evaluation of quantitative measures, but the department shall have the exclusive authority to add, modify, accept, or reject recommendations when creating or interpreting the quantitative measures.

D. A department representative may make periodic unannounced onsite inspections of the parties' facilities as necessary. If the department finds, after inspection, noncompliance with any provision of this chapter, any applicable state regulations, or the elements of the cooperative agreement or the letter authorizing cooperative agreement, the commissioner shall begin enforcement procedures in accordance with 12VAC5-221-130.

E. The parties shall make available to the department representative requested records and shall allow access to interview the agents, employees, contractors, and any other person under control, direction, or supervision of the parties.

F. Complaints received by the department with regard to noncompliance with the cooperative agreement or the letter authorizing cooperative agreement shall be investigated. When the investigation is complete, the parties and the complainant, if known, shall be notified of the findings of the investigation.

G. The commissioner may develop other mechanisms of monitoring the parties to determine compliance with the cooperative agreement and whether compliance continues to meet the requirements of § 15.2-5384.1 of the Code of Virginia. The commissioner may modify the mechanisms of monitoring the parties upon notice to the parties.

## **12VAC5-221-110. Annual reporting.**

A. The parties shall report annually to the commissioner on the extent of the benefits realized and compliance with any terms and conditions placed on their letter authorizing cooperative agreement. The report shall:

1. Describe the activities conducted pursuant to the cooperative agreement;
2. Include any actions taken in furtherance of commitments made by the parties or terms imposed by the commissioner as a condition for approval of the cooperative agreement;
3. Include information related to changes in price, cost, quality, access to care, and population health improvement;
4. Include actual costs, revenues, profit margins, and operating costs;
5. Include a charge master;
6. Include information reflecting the contracted rates negotiated with nonphysician providers, allied health professionals, and others;

7. Include any measures requested by the department based on the recommendations of the technical advisory panel appointed pursuant to 12VAC5-221-120; and

8. Include the current status of the quantitative measures established under subsection C of 12VAC5-221-100 and the information requested by the department for benchmarks established in subsection B of 12VAC5-221-100.

B. The parties shall be required to update the parties' plan of separation annually and submit the updated plan of separation to the department. The parties shall provide an independent opinion from a qualified organization that states the plan of separation may be operationally implemented without undue disruption to essential health services provided by the parties.

C. The commissioner may require the parties to supplement the annual report with additional information to the extent necessary to ensure compliance with the cooperative agreement and the letter authorizing cooperative agreement.

D. All annual reports submitted pursuant to this section shall be certified audited by a third-party auditor.

E. The fee due with the filing of the annual report shall be \$20,000. If the commissioner should determine that the actual cost incurred by the department is greater than \$20,000, the parties shall pay any additional amounts due as instructed by the department. The annual filing fee shall not exceed \$75,000.

F. The commissioner shall issue a written decision and the basis for the decision on an annual basis as to whether the benefits of the cooperative agreement continue to outweigh the disadvantages attributable to a reduction in competition that have resulted from the cooperative agreement.

## **12VAC5-221-120. Technical advisory panel.**

A. The commissioner shall appoint a technical advisory panel to provide (i) initial recommendations to the commissioner as to the quality, cost, and access measures and benchmarks to be considered to objectively track the benefits and disadvantages of a cooperative agreement and (ii) ongoing input to the commissioner on the evolution of these and other new measures and the progress of the parties with respect to achievement of commitments with respect to these measures.

B. The technical advisory panel shall consist of:

1. A representative of the Commissioner of Health who shall serve as chair of the panel;
2. The chief medical or quality officer or officers of the parties;
3. A chief medical or quality officer of a hospital or health system from other state market areas with no affiliation with the parties;
4. A chief medical or quality officer of a health plan that has subscribers in the affected area;

- 5. Experts in the area of health quality measurement and performance;
- 6. A consumer and employer representative from the affected area;
- 7. A representative from the Bureau of Insurance of the State Corporation Commission;
- 8. The chief financial officer or officers of the parties;
- 9. A chief financial officer of a hospital or health system from other state market areas with no affiliation with the parties; and
- 10. A chief financial officer of a health plan that has subscribers in the affected area.

C. The technical advisory panel shall meet at least on an annual basis.

D. The technical advisory panel shall identify evidence-based cost, quality, and access measures in areas, including population health, patient safety, health outcomes, patient satisfaction, access to care, and any other areas identified by the panel. The panel shall also make recommendations regarding how to best report performance on quality metrics.

E. The technical advisory panel meetings shall be staffed by the Virginia Department of Health Office of Licensure and Certification.

**12VAC5-221-130. Enforcement procedures.**

A. If the commissioner has reason to believe that compliance with a cooperative agreement no longer meets the requirements of § 15.2-5384.1 of the Code of Virginia or this chapter, the commissioner shall initiate a proceeding to determine whether compliance with the cooperative agreement no longer meets the requirements of § 15.2-5384.1 of the Code of Virginia or this chapter.

B. In the course of such a proceeding, the commissioner is authorized to seek reasonable modifications to a letter authorizing cooperative agreement. Such modifications shall be with the consent of the parties.

C. The commissioner may revoke a letter authorizing cooperative agreement upon a finding that:

- 1. The parties are not complying with the terms or conditions of the cooperative agreement or the letter authorizing cooperative agreement;
- 2. The cooperative agreement is not in substantial compliance with the terms of the parties' application or the letter authorizing cooperative agreement;
- 3. The benefits resulting from the cooperative agreement no longer outweigh the disadvantages attributable to the reduction in competition resulting from the cooperative agreement;
- 4. The commissioner's approval was obtained as a result of intentional material misrepresentation to the commissioner or as the result of coercion, threats, or intimidation toward any party to the cooperative agreement; or

5. The parties have failed to pay any fee required by the department or the authority.

D. The proceeding initiated by the commissioner under this section, and any judicial review thereof, shall be held in accordance with and governed by the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

**12VAC5-221-140. Voluntary termination of cooperative agreement.**

A. Any party shall file notice with the department within 30 days after terminating its participation in a cooperative agreement. The notice shall be sent in writing to the attention of the director of the department's Office of Licensure and Certification.

B. In the event of a termination of a cooperative agreement, the parties shall return the letter authorizing cooperative agreement to the department's Office of Licensure and Certification.

**12VAC5-221-150. Official records.**

A. The commissioner shall maintain on file all cooperative agreements that the commissioner has approved.

B. All records collected pursuant to this chapter shall be maintained in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) and the Library of Virginia's record management program (§ 42.1-85 of the Code of Virginia).

C. All approved cooperative agreements and letters authorizing cooperative agreement shall be published on the Virginia Department of Health Office of Licensure and Certification website.

D. All reports collected pursuant to 12VAC5-221-110 shall be published on the Virginia Department of Health Office of Licensure and Certification website.

E. The commissioner shall make public his annual determination of compliance with a letter authorizing the cooperative agreement.

VA.R. Doc. No. R16-4430; Filed August 9, 2017, 5:19 p.m.

**DEPARTMENT OF MEDICAL ASSISTANCE SERVICES**

**Final Regulation**

**REGISTRAR'S NOTICE:** The following regulatory action is exempt from Article 2 of the Administrative Process Act in accordance with §§ 2.2-4006 A 3, which excludes regulations that consist only of changes in style or form or corrections of technical errors, and 2.2-4006 A 4 c of the Code of Virginia, which excludes regulations that are necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation. The Department of Medical Assistance Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

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# Regulations

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**Title of Regulation:** 12VAC30-10. State Plan under Title XIX of the Social Security Act Medical Assistance Program; General Provisions (amending 12VAC30-10-240, 12VAC30-10-430, 12VAC30-10-520, 12VAC30-10-670, 12VAC30-10-751, 12VAC30-10-810).

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

**Effective Date:** October 19, 2017.

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

**Summary:**

*The amendments update nursing facility requirements for Medicaid participation to align with federal Centers for Medicare and Medicaid Services (CMS) requirements to include (i) correcting outdated Code of Federal Regulations citations, (ii) correcting outdated federal agency references, (iii) correcting other outdated terminology, and (iv) updating the name of the resident assessment instrument designated by CMS to be used by nursing facilities.*

**12VAC30-10-240. Amount, duration, and scope of services: Payment for nursing facility services.**

The ~~State~~ state includes in nursing facility services at least the items and services specified in 42 CFR ~~483.10(e)(8)(i)~~ 483.10(f)(11).

**12VAC30-10-430. Medicaid quality control.**

A. A system of quality control is implemented in accordance with 42 CFR 431, Subpart P.

B. The ~~State~~ state does not operate a claims processing assessment system that meets the requirements of ~~431.800(e), (g), (h), (j) and (k)~~ 42 CFR 431.808, 42 CFR 431.818, 42 CFR 431.830, 42 CFR 431.832, 42 CFR 431.834, and 42 CFR 431.836. The ~~State~~ state has an approved Medicaid Management Information System (MMIS).

**12VAC30-10-520. Required provider agreement.**

With respect to agreements between the Medicaid agency and each provider furnishing services under the plan:

A. For all providers, the requirements of 42 CFR 431.107 and Subparts A and B of 42 CFR Part 442, ~~Subparts A and B~~ (if applicable) are met.

B. For providers of NF services, the requirements of Subpart B of 42 CFR Part 483, ~~Subpart B~~, and § 1919 of the Act are also met. ~~(\*plus additional in addition to the requirements described below)~~ in subsections C, D, and E of this subsection.

C. For providers of ~~ICF/MR~~ ICF/IID services, the requirements of participation in Subpart I of 42 CFR Part 483, ~~Subpart D~~ are also met.

D. Ambulatory prenatal care is not provided to pregnant women during a presumptive eligibility period.

E. For each provider receiving funds under the plan, all the requirements for advance directives of § 1902(w) are met:

1. Hospitals, nursing facilities, providers of home health care or personal care services, hospice programs, health maintenance organizations and health insuring organizations are required to do the following:

a. Maintain written policies and procedures with respect to all adult individuals receiving medical care by or through the provider or organization about their rights under state law to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives;

b. Provide written information to all adult individuals on their policies concerning implementation of such rights;

c. Document in the individual's medical records whether or not the individual has executed an advance directive;

d. ~~Not condition the provision of care or otherwise to~~ discriminate against an individual based on whether or not the individual has executed an advance directive including the provision of care;

e. Ensure compliance with requirements of state law (whether statutory or recognized by the courts) concerning advance directives; and

f. Provide (individually or with others) for education for staff and the community on issues concerning advance directives.

2. Providers will furnish the written information described in subdivision ~~E~~ 1 a of this ~~section~~ subsection to all adult individuals at the time specified ~~below~~ in this subdivision:

a. Hospitals at the time an individual is admitted as an inpatient;

b. Nursing facilities when the individual is admitted as a resident;

c. Providers of home health ~~care~~ or personal care services before the individual comes under the care of the provider;

d. Hospice program at the time of initial receipt of hospice care by the individual from the program; and

e. Health maintenance organizations at the time of enrollment of the individual with the organization.

3. 12VAC30-20-240 describes law of the state (whether statutory or as recognized by the courts of the state) concerning advance directives.

As a condition of participation in the Virginia Medical Assistance Program all nursing ~~homes~~ facilities must agree that when ~~a patient~~ an individual is discharged to a hospital, the nursing ~~home~~ facility from which the ~~patient~~ individual is discharged shall ensure that the ~~patient~~ individual shall be

given an opportunity to be readmitted to the facility at the time of the next available vacancy.

The only acceptable reasons for failure to readmit a specific ~~patient individual~~ who has been discharged to a hospital shall be the ~~patient individual~~ is certified for a level of care not provided by the facility, the ~~patient individual~~ is judged by a physician to be a danger to himself or others, or the ~~patient individual~~, who at the time of readmission has an outstanding payment to the nursing ~~home facility~~ for which he is responsible in accordance with Medicaid regulations.

F. The Department of Medical Assistance Services (DMAS) shall conduct provider screening according to the requirements of Subpart E of 42 CFR Part 455. DMAS shall terminate or deny enrollment to any provider in accordance with the requirements of 42 CFR 455.416.

**12VAC30-10-670. Appeals process.**

A. The Medicaid agency has established appeals procedures for NFs as specified in 42 CFR 431.153 and 431.154.

B. The ~~State state~~ provides an appeals system that meets the requirements of ~~Subpart E of 42 CFR Part 431 Subpart E, 42 CFR 483.12 483.15, and Subpart E of 42 CFR Part 483 Subpart E, and 12VAC30-110-10 through 12VAC30-110-370~~ for residents who wish to appeal a notice of intent to transfer or discharge from a NF and for individuals adversely affected by the preadmission ~~and screening or~~ annual resident review requirements of ~~Subpart C of 42 CFR Part 483 Subpart 81.~~

**12VAC30-10-751. Enforcement of compliance for nursing facilities.**

A. The Commonwealth shall comply with the Medicaid Program requirements of ~~42 CFR 488.300 et seq. Subpart E of 42 CFR Part 488.~~

B. Notification of enforcement remedies. When taking an enforcement action against a nonstate operated nursing facility, the state provides notification in accordance with 42 CFR 488.402(f).

1. The notice (except for civil money penalties and state monitoring) specifies:
  - a. The nature of noncompliance;
  - b. Which remedy is imposed;
  - c. The effective date of the remedy; and
  - d. The right to appeal the determination leading to the remedy.
2. The notice for civil money penalties is in writing and contains the information specified in 42 CFR 488.434 and 42 CFR 488.440.
3. Except for civil money penalties and state monitoring, notice is given at least two calendar days before the effective date of the enforcement remedy for immediate jeopardy situations and at least 15 calendar days before the effective date of the enforcement remedy when immediate jeopardy does not exist. The two-day and 15-day notice periods begin when the facility receives the notice, but, in

no event will the effective date of the enforcement action be later than 20 calendar days after the notice is sent. (42 CFR 488.402(f)(3),(4), and (5))

4. Notification of termination is given to the facility and to the public at least two calendar days before the remedy's effective date if the noncompliance constitutes immediate jeopardy and at least 15 calendar days before the remedy's effective date if the noncompliance does not constitute immediate jeopardy. The state must terminate the provider agreement of a nursing facility in accordance with procedures in 42 CFR Parts 431 and 442. (42 CFR 488.456(c) and (d)).

C. Factors to be considered in selecting remedies. In determining the seriousness of deficiencies, the state considers the factors specified in 42 CFR 488.404(b)(1) and (2).

D. Application of remedies.

1. If there is immediate jeopardy to resident health or safety, the state terminates the nursing facility's provider agreement within 23 calendar days from the date of the last survey or immediately imposes temporary management to remove the threat within 23 days. (42 CFR 488.410)

2. The state imposes the denial of payment (or its approved alternative) with respect to any newly admitted individual ~~admitted~~ to a nursing facility that has not come into substantial compliance within three months after the last day of the survey. (42 CFR 488.417(b)(1) and § 1919(h)(2)(C) of the Act)

3. The state imposes the denial of payment for new admissions remedy as specified in 42 CFR 488.417 (or its approved alternative) and a state monitor as specified at 42 CFR 488.422, when a facility has been found to have provided substandard quality of care on the last three consecutive standard surveys. (42 CFR 488.414 and § 1919(h)(2)(D) of the Act)

4. The state follows the criteria specified at 42 CFR 488.408(c)(2), (d)(2), and (e)(2) when it imposes remedies in place of or in addition to termination. (42 CFR 488.408(b) and § 1919(h)(2)(A) of the Act)

5. When immediate jeopardy does not exist, the state terminates a nursing facility's provider agreement no later than six months from the finding of noncompliance if the conditions of 42 CFR 488.412(a) are not met.

E. Available remedies. The state has established the remedies defined in 42 CFR 488.406(b).

- ~~1. Termination;~~
- ~~2. Temporary management;~~
- ~~3. Denial of payment for new admissions;~~
- ~~4. Civil money penalties;~~
- ~~5. Transfer of residents; transfer of residents with closure of facility; and~~

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~~6. State monitoring.~~ 12VAC30-20-251 through 12VAC30-20-259 describe the criteria for applying the ~~above~~ remedies, plan of correction, nursing facility appeals, and repeated substandard quality of care.

F. In the event that the Commonwealth and ~~HCFA~~ CMS disagree on findings of noncompliance or application of remedies in a nonstate operated nursing facility or a dually participating facility when there is no immediate jeopardy, such disagreement shall be resolved in accordance with the provisions of 42 CFR 488.452~~(1995)~~.

G. The Commonwealth shall have the authority to apply one or more remedies for each deficiency constituting noncompliance or for all deficiencies constituting noncompliance.

H. As set forth by ~~42 CFR 488.454(d)~~ 42 CFR 488.454, remedies shall terminate on the date that ~~HCFA~~ CMS or the Commonwealth can verify as the date that substantial compliance was achieved and the facility has demonstrated that it could maintain substantial compliance once the facility supplies documentation acceptable to ~~HCFA~~ CMS or the Commonwealth that it was in substantial compliance and was capable of remaining in compliance.

## **12VAC30-10-810. Resident assessment for nursing facilities.**

A. The state specifies the instrument to be used by nursing facilities for conducting a comprehensive, accurate, standardized, reproducible assessment of each resident's functional capacity as required in § 1919(b)(3)(A) of the Act.

B. The state is using the resident assessment instrument designated by ~~the Health Care Financing Administration. See Transmittal #241 of the State Operations Manual (§ 1919(e)(5)(A))~~ CMS (Appendix R "Resident Assessment Instrument for Long-Term Care Facilities" of the CMS State Operations Manual).

VA.R. Doc. No. R18-5109; Filed August 16, 2017, 11:34 a.m.

### **Proposed Regulation**

Title of Regulation: **12VAC30-60. Standards Established and Methods Used to Assure High Quality Care (amending 12VAC30-60-303, 12VAC30-60-310; adding 12VAC30-60-301, 12VAC30-60-302, 12VAC30-60-304, 12VAC30-60-305, 12VAC30-60-306, 12VAC30-60-308, 12VAC30-60-313, 12VAC30-60-315; repealing 12VAC30-60-300, 12VAC30-60-307, 12VAC30-60-312).**

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: November 3, 2017.

Agency Contact: Emily McClellan, Regulatory Supervisor, Department of Medical Assistance Services, Policy Division, 600 East Broad Street, Suite 1300, Richmond, VA 23219,

telephone (804) 371-4300, FAX (804) 786-1680, or email [emily.mcclellan@dmas.virginia.gov](mailto:emily.mcclellan@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.

The 2016 Acts of the Assembly, Chapter 780, Item 306 PPP directs DMAS to contract out community-based screenings for children, track and monitor all requests for screenings that have not been completed within 30 days of an individual's request, establish reimbursement and tracking mechanisms, and promulgate regulations to implement these provisions.

Purpose: In responding to the legislative mandate of the General Assembly, the purpose of the planned regulatory action is to define terms and establish regulatory requirements for (i) accepting screening requests; (ii) managing the screening process; (iii) submitting findings from screenings completed to the agency's electronic preadmission screening (ePAS) system by community and hospital preadmission screening (PAS) teams and contractors performing these activities; and (iv) establishing training requirements and competency assessment standards applicable to local agency screening staff.

#### Substance:

Current policy. The screening policy that was in place before the emergency regulation took effect contained the requirements for Medicaid-funded long-term services supports, including home-based and community-based services (HCBS) waivers, the Program of All-Inclusive Care for the Elderly (PACE), and nursing facility services. The policy also includes the three criteria for an individual's receipt of these services: (i) functional capacity (degree of assistance an individual needs to perform activities of daily living); (ii) medical or nursing needs; and (iii) the individual's risk of nursing facility placement in the absence of home and community based services.

12VAC30-60-303 lists the specific functional criteria that are used to evaluate the extent to which each individual can perform each of the activities of daily living (ADLs), such as feeding, bathing, toileting, transferring, etc., and what type of assistance the individual needs to perform each ADL safely. These functional criteria, reflected in the Uniform Assessment Instrument (UAI) form, are not changing in this regulatory action, and the use of the UAI for this purpose remains the same. The changes that are being made to this section are editorial and technical in nature (such as substituting the acronym ADL for Activities of Daily Living and renumbering the individual items under subsection B).

Specific instructions and reporting requirements were also provided for nursing facilities once an individual had chosen and was admitted into the facility. These are also not changing.

Issues. Since the inception of the preadmission screening process in the early 1980s, the number of screenings performed in communities by local department of social services (LDSS) and local health department (LHD) teams and in hospitals by hospital staff has grown to approximately 20,000 screenings per year. In state fiscal year 2016, 350 providers performed 22,901 screenings. Of the 350 providers, 120 were local department of social services offices that do not get paid directly through fee for service claims; 117 were local health department clinics; and the rest were mainly hospitals. Payments for screenings through fee for service claims were \$2,282,345 total funds, of which 75%, or \$1,711,759, were federal funds. The Centers for Medicare and Medicaid Services uses a 90% federal matching rate for such screenings.

Anecdotal reports of long waits for community screenings and the corresponding delays of critical Medicaid-funded long-term services and supports (LTSS), subsequently resulted in passage of House Bill 702 (2014 Session). HB 702 required DMAS to contract with public or private entities to perform screenings in jurisdictions where the community-based preadmission screening teams have been unable to complete screenings of individuals within 30 days of such individuals' requests for a screening. No appropriation accompanied this directive.

On April 15, 2014, the Virginia Department of Health and the Department for Aging and Rehabilitative Services conducted a point-in-time manual data collection initiative from each LDSS and LHD. DMAS coordinated the data analysis. The purposes of the data collection were to (i) determine the number of community-based screenings taking longer than 30 days to complete and (ii) identify jurisdictions that were able to meet the 30-day timeframe and those unable to achieve the timeframe. DMAS' trend analysis indicated that:

1. Backlogs in community-based screenings reported by LDSS and LHDs were not always congruent across the two agencies;
2. Some reports from localities on community-based screening backlogs showed no corresponding increases in the number of screening requests over time; and
3. Some localities having significant increases in the number of community-based screening requests were able to meet the 30-day completion requirement as specified in HB 702 even with the increasing volume.

In addition to the data collection for the community-based screenings, hospitals performing screenings for inpatients (adults and children) may not be completing needed screenings prior to patient discharges. During the hospital discharge process, an inpatient is screened for the most complex care required to meet the inpatient's post-discharge

needs. DMAS' data reveals that when a screening is performed by a hospital, the resulting recommendation 88% of the time is that an individual utilize nursing facility services rather than receiving supports at home.

Medicare funds up to 100 days of skilled nursing facility (SNF) or rehabilitative care, resulting frequently in discharges of individuals who still have unmet care needs subsequent to their nursing facility or rehabilitation stay. Medicare funding is not available for community-based long-term care services that are covered by Medicaid. When the individual has been admitted, without a prior screening, to either a Medicare-funded skilled nursing facility or rehabilitation facility and, upon completion of the ordered rehabilitation or exhaustion of the 100 days of Medicare benefit, is then subsequently discharged to his home, the individual must immediately request a preadmission screening from a community team, thus delaying essential LTSS. Depending on (i) the individual's capabilities; (ii) his available community support system, if any; and (iii) the community screening team's pending screening requests, such individuals may experience endangerment of their health, safety, and welfare due to delays in needed LTSS.

For both community and hospital based screenings, staff resources are limited. Therefore, efficiency in the screening process is critical to managing the growing workload. The "paper-driven" screening process has proven to be too cumbersome and slow. The form used for the screening process is the Uniform Assessment Instrument (UAI), along with other DMAS forms used for the screening process, including the DMAS-95 MI/MR/RC, DMAS-95 MI/MR/RC Supplement, DMAS-96 (Medicaid Funded LTC Service Authorization), and the DMAS-97 (Individual Choice-Institutional Care or Waiver Services). The previous absence of an automated process to assist community and hospital preadmission screening teams to complete these forms accurately and quickly and to enable tracking of requests for and completions of screenings has significantly barred efficient administration and prompt service delivery. The proposed regulation includes the use of an ePAS system to address this issue.

Before the emergency regulation went into effect, the policy was silent regarding acceptance of requests for screenings, timeframes for completing or referring requests to a contractor, and tracking mechanisms for statewide consistency in the assurance of quality services and to ensure health, safety, and welfare for individuals requesting Medicaid-funded LTSS. Also absent from that policy were definitions and requirements to standardize and regulate community-based and hospital PAS teams when accepting requests for screenings, managing those requests within the established time period, and reporting the outcomes of the screenings once individuals receive screenings.

Recommendations. The General Assembly directed DMAS to improve the preadmission screening process for individuals

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who will be eligible for long-term services and supports. This mandate directed DMAS to (i) develop a contract with an entity for the purpose of conducting preadmission screenings for children; (ii) track and monitor all requests for screenings and report on those screenings that are not completed within 30 days of the initial request; (iii) report on the progress of meeting these new requirements; and (iv) promulgate emergency regulations to implement these provisions. The Joint Legislative Audit and Review Commission (JLARC) reported on the Commonwealth's long-term services and supports screening at <http://jlarc.virginia.gov/pdfs/reports/Rpt489.pdf>.

The prior policy related to the requirements for functional eligibility (12VAC30-60-303 B) for Medicaid-funded LTSS is being retained since these standards support the eligibility process for the DMAS home and community based waiver programs (the Elderly or Disabled with Consumer Direction (EDCD) waiver, the Technology Assisted waiver, the Alzheimer's Assisted Living waiver, the Program of All-Inclusive Care for the Elderly (PACE), and nursing facility care.

This proposed regulation repeals the existing nursing facility criteria (12VAC30-60-300) in order to move the criteria to a new location within new section 12VAC30-60-303. To be clear, the functional criteria, based on the Uniform Assessment Instrument (UAI) form, are not changing in this regulatory action, and the use of the UAI for this purpose remains the same. This action simply moves the existing criteria to a new location in the regulatory chapter to improve the readability of the regulation.

The remaining policy that was in effect prior to the emergency regulations, as it appeared in the current Virginia Administrative Code, was incomplete and fragmented as the result of having been created and modified over a number of years. To remedy this, the emergency regulation additions include a Definitions section (12VAC30-60-301) and sections describing the requirement for the request for screenings (12VAC30-60-304), screenings for Medicaid-funded LTSS (12VAC30-60-305), submission of screenings to the ePAS system (12VAC30-60-306), individuals determined to not meet criteria (12VAC30-60-313), and ongoing evaluations for individuals receiving Medicaid-funded LTSS (12VAC30-60-315). These additions remain in this proposed stage regulation.

DMAS is also recommending that a training program (12VAC30-60-310) be developed to be applicable to all screening entities and their staff who will be performing screenings. The training program will provide testing that staff must pass at a standard of 80% in order for the staff to be authorized to conduct screenings. DMAS will be contracting this element via the state proposal process, and the system will be available online to avoid travel time and expenses. A training program was a specific recommendation of JLARC in its report about preadmission screening. These

proposed stage regulations provide for a delayed effective date of the onset of this requirement to permit local agency staff and hospital staff time to fulfill this requirement.

Issues: Section 32.1-330 of the Code of Virginia requires that all individuals who will be eligible for community or institutional long-term services and supports as defined in the State Plan for Medical Assistance be evaluated to determine their need for Medicaid-funded nursing facility services. Also, the Code of Virginia specifically requires DMAS to utilize employees of local departments of social services and local health departments for community screenings and hospitals for inpatient screenings, respectively. While this screening structure, established in the early 1980s, worked effectively for many years, the evolution of Virginia's Medicaid service delivery system has outgrown the original design. Significant challenges have developed that require a change to the Virginia Administrative Code. Some community-based screenings have taken longer than 30 days to complete thereby creating a significant risk to individuals who have been unable to access Medicaid LTSS.

One potential issue may continue to be limited staff resources in community and hospital settings. The proposed regulations clarify requirements of community and hospital preadmission screening teams and include requirements to use the automated ePAS system to enhance work efficiency. The proposed regulations also establish DMAS use of a contractor or contractors and provide a framework for public or private entities to screen children and adults in communities where community preadmission screening teams are unable to complete screenings within 30 days of the initial request date for a screening.

With the onset of required managed care for the majority of Medicaid members, DMAS is also adding that managed care organization care coordinators will have the authority to request screenings for their members.

These strategies have been designed to ensure prompt services to citizens requesting Medicaid-funded LTSS and to protect their health, safety, and welfare.

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

Summary of the Proposed Amendments to Regulation. Pursuant to a legislative mandate, the Department of Medical Assistance Services (DMAS) proposes to incorporate into the regulation preadmission screening policies that are currently followed. DMAS also proposes to establish a new training program for the entities that conduct preadmission screening.

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

Estimated Economic Impact. The existing regulation for nursing facility criteria and preadmission screening (PAS) was first promulgated in 1994 and amended in 2002. The regulation includes the criteria for receiving Medicaid-funded community-based and nursing facility long term services and



supports (LTSS). Item 301 QQQQ.1 of the 2015 Appropriation Act<sup>1</sup> directed DMAS to promulgate emergency regulations to "improve the preadmission screening process for individuals who will be eligible for long-term care services." This proposed action follows the emergency regulation and incorporates the changes already made on a permanent basis.

Before the emergency regulation went into effect, the regulation was silent regarding acceptance of requests for screenings, timeframes for completing or referring requests to a contractor, and tracking mechanisms for statewide consistency in the assurance of quality services and to ensure health, safety, and welfare for individuals requesting Medicaid-funded LTSS. Also absent were definitions and requirements to standardize and regulate community-based and hospital PAS teams when accepting requests for screenings, managing those requests within the established time period, and reporting the outcomes of the screenings once individuals receive screenings.

According to DMAS, the proposed regulation incorporates language on those issues consistent with the practices that have already been followed based on provider service manuals and guidance. Improving the clarity of the requirements in regulation may however help standardize, enforce, and improve the processes used to determine the appropriate type and quantity of services for the recipients.

Additionally, the proposed changes include a new training requirement for screening entities and their staff performing screenings for every three years.<sup>2</sup> The training program will provide testing that staff must pass at a standard of 80% success rate in order for them to be authorized to conduct screenings. The training is expected to take approximately eight hours to complete. DMAS will be contracting this element via the state proposal process and the system will be available online to avoid travel time and expenses. The development of the training module is expected to be accomplished by using approximately \$100,000 in federal grant funds received for that purpose. The main benefit expected is more reliable and accurate eligibility determinations conducted in a timely fashion, which in turn would help eliminate unnecessary long term care expenses and make sure those who need the services get access to them as soon as possible. A training program was a specific recommendation of the Joint Legislative Audit and Review Commission in its report about pre-admission screening.<sup>3</sup> The proposed regulation provides for a delayed effective date of the onset of this training requirement to permit local agency staff and hospital staff time to fulfill this requirement.

**Businesses and Entities Affected.** There are approximately 1,000 individuals working for 120 Local Departments of Social Services, 117 Local Virginia Department of Health Clinics, and 108 hospitals performing screenings. These entities performed 35,866 screenings from May 2015 to August 2016.

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

**Projected Impact on Employment.** The proposed regulation will require training estimated to take about 8 hours. Thus, the demand for labor will increase somewhat. However, the training may increase the efficiency of screening staff reducing the demand for labor to some extent. Improved accuracy of determinations may reduce quantity of services provided unnecessarily and increase the quantity of appropriately provided services affecting the demand for labor in opposite directions.

**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.** There are no small businesses performing preadmission screenings.

**Alternative Method that Minimizes Adverse Impact.** No adverse impact on small businesses is expected.

**Adverse Impacts:**

**Businesses.** Under the proposed amendments, hospitals will be required to have their staff complete the preadmission screening training.

**Localities.** The proposed amendments will not adversely affect localities.

**Other Entities.** The proposed amendments will require staff conducting screenings at Local Departments of Social Services and Local Virginia Department of Health Clinics complete training.

<sup>1</sup> This language is continued in the 2016 and 2017 Appropriation Acts. See Item 306 PPP.2 of the 2016 Appropriation Act and Item 306 PPP.2 of the 2017 Appropriation Act.

<sup>2</sup> While this regulation was undergoing development, Chapter 749 of the 2017 Acts of Assembly added a statutory requirement that screeners be trained and certified.

<sup>3</sup> See <http://jlarc.virginia.gov/pdfs/reports/Rpt489.pdf>

**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:**

*Item 306 PPP of Chapter 780 of the 2016 Acts of Assembly directs the Department of Medical Assistance Services (DMAS) to contract out community-based screenings for children, track and monitor all requests for screenings that*



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have not been completed within 30 days of an individual's request, and establish reimbursement and tracking mechanisms. Emergency regulations in effect since September 1, 2016, were promulgated to implement this legislative mandate. The proposed regulations are intended to supersede emergency regulations currently in effect.

The proposed regulations add requirements for accepting, managing, and completing requests for community and hospital electronic screenings for community-based and nursing facility services preadmission screening (ePAS) system. The proposal establishes the use by DMAS of a contractor or contractors and provides a framework for public or private entities to screen children and adults in communities where community preadmission screening teams are unable to complete screenings within 30 days of the initial request date for a screening. The current requirements for functional eligibility (12VAC30-60-303 B) for long-term services and supports (LTSS) are being retained since these standards support the eligibility process for the DMAS home-based and community-based waiver programs (the Elderly or Disabled with Consumer Direction Waiver, the Technology Assisted Waiver, the Alzheimer's Assisted Living Waiver, the Program of All-Inclusive Care for the Elderly, and nursing facility care).

This proposed action repeals the existing nursing facility criteria (12VAC30-60-300) and moves the criteria to a new location within 12VAC30-60-303. The functional criteria, based on the Uniform Assessment Instrument (UAI) form, are not changing in this regulatory action, and the use of the UAI for this purpose remains the same.

Proposed amendments include adding a definitions section (12VAC30-60-301) and sections describing the requirement for the request for screenings (12VAC30-60-304), screenings for Medicaid-funded LTSS (12VAC30-60-305), submission of screenings (12VAC30-306), ePAS requirements and submissions (12VAC30-60-310), individuals determined to not meet criteria (12VAC30-60-313), and ongoing evaluations for individuals receiving Medicaid-funded LTSS (12VAC30-60-315).

## **12VAC30-60-300. Nursing facility criteria. (Repealed.)**

A. ~~Medicaid funded long term care services may be provided in either a nursing facility or community-based care setting. The criteria for assessing an individual's eligibility for Medicaid payment of nursing facility care consist of two components: (i) functional capacity (the degree of assistance an individual requires to complete activities of daily living) and (ii) medical or nursing needs. The criteria for assessing an individual's eligibility for Medicaid payment of community-based care consist of three components: (i) functional capacity (the degree of assistance an individual requires to complete activities of daily living), (ii) medical or nursing needs and (iii) the individual's risk of nursing facility placement in the absence of community based waiver~~

~~services. In order to qualify for either Medicaid funded nursing facility care or Medicaid funded community based care, the individual must meet the same criteria.~~

B. ~~The preadmission screening process preauthorizes a continuum of long term care services available to an individual under the Virginia Medical Assistance Program. Nursing Facilities' Preadmission Screenings to authorize Medicaid funded long term care are performed by teams composed by agencies contracting with the Department of Medical Assistance Services (DMAS). The authorization for Medicaid funded long term care must be rescinded by the nursing facility or community based care provider or by DMAS at any point that the individual is determined to no longer meet the criteria for Medicaid funded long term care. Medicaid funded long term care services are covered by the program for individuals whose needs meet the criteria established by program regulations. Authorization of appropriate non institutional services shall be evaluated before nursing facility placement is considered.~~

C. ~~Prior to an individual's admission, the nursing facility must review the completed pre admission screening forms to ensure that appropriate nursing facility admission criteria have been documented. The nursing facility is also responsible for documenting, upon admission and on an ongoing basis, that the individual meets and continues to meet nursing facility criteria. For this purpose, the nursing facility will use the Minimum Data Set (MDS). The post admission assessment must be conducted no later than 14 days after the date of admission and promptly after a significant change in the resident's physical or mental condition. If at any time during the course of the resident's stay, it is determined that the resident does not meet nursing facility criteria as defined in the State Plan for Medical Assistance, the nursing facility must initiate discharge of such resident. Nursing facilities must conduct a comprehensive, accurate, standardized, reproducible assessment of each resident's functional capacity and medical and nursing needs.~~

~~The Department of Medical Assistance Services shall conduct surveys of the assessments completed by nursing facilities to determine that services provided to the residents meet nursing facility criteria and that needed services are provided.~~

D. ~~The community based provider is responsible for documenting upon admission and on an ongoing basis that the individual meets the criteria for Medicaid funded long term care.~~

E. ~~The criteria for nursing facility care under the Virginia Medical Assistance Program are contained herein. An individual's need for care must meet these criteria before any authorization for payment by Medicaid will be made for either institutional or non institutional long term care services. The Nursing Home Pre Admission Screening team is responsible for documenting on the state designated assessment instrument that the individual meets the criteria~~

~~for nursing facility or community based waiver services and for authorizing admission to Medicaid-funded long term care. The rating of functional dependencies on the assessment instrument must be based on the individual's ability to function in a community environment, not including any institutionally induced dependence.~~

## **12VAC30-60-301. Definitions.**

The following words and terms as used in 12VAC30-60-302 through 12VAC30-60-315 shall have the following meanings unless the context clearly indicates otherwise:

"Activities of daily living" or "ADLs" means personal care tasks such as bathing, dressing, toileting, transferring, and eating or feeding. An individual's degree of independence in performing these activities is a part of determining appropriate level of care and service needs.

"Adult" means a person age 18 years or older who may need Medicaid-funded long-term services and supports (LTSS) or who becomes eligible to receive Medicaid-funded LTSS.

"Appeal" means the processes used to challenge actions regarding services, benefits, and reimbursement provided by Medicaid pursuant to 12VAC30-110 and Part XII (12VAC30-20-500 et seq.) of 12VAC30-20.

"At risk" means the need for the level of care provided in a hospital, nursing facility, or an intermediate care facility for individuals with intellectual disability (ICF/IID) when there is reasonable indication that the individual is expected to need the services in the near future (that is, one month or less) in the absence of home or community-based services.

"Child" means a person up to the age of 18 years who may need Medicaid-funded LTSS or who becomes eligible to receive Medicaid-funded LTSS.

"Choice" means the individual is provided the option of either home and community-based waiver services or institutional services and supports, including the Program of All-Inclusive Care for the Elderly (PACE), if available and appropriate, after the individual has been determined likely to need LTSS.

"Communication" means all forms of sharing information and includes oral speech and augmented or alternative communication used to express thoughts, needs, wants, and ideas, such as the use of a communication device, interpreter, gestures, and picture or symbol communication boards.

"Community-based services" means community-based waiver services or the Program of All-Inclusive Care for the Elderly (PACE).

"Community-based services provider" means a provider or agency enrolled with Virginia Medicaid to offer services to individuals eligible for home and community-based waivers services or PACE.

"Community-based team" or "CBT" means (i) a registered nurse or nurse practitioner; (ii) a social worker or other assessor designated by DMAS; and (iii) a physician. The

CBT members are employees of, or contracted with, the Virginia Department of Health or the local department of social services.

"DARS" means the Virginia Department for Aging and Rehabilitative Services.

"Day" means calendar day unless specified otherwise.

"DBHDS" means the Virginia Department of Behavioral Health and Developmental Services.

"DMAS" means the Department of Medical Assistance Services.

"DMAS designee" means the public or private entity with an agreement with the Department of Medical Assistance Services to complete preadmission screenings pursuant to § 32.1-330 of the Code of Virginia.

"ePAS" means the DMAS automated system or a DMAS-approved electronic record system for use by all entities contracted by DMAS to perform screenings pursuant to § 32.1-330 of the Code of Virginia.

"Face-to-face" means an in-person meeting with the individual seeking Medicaid-funded LTSS.

"Feasible alternative" means a range of services that can be provided in the community via waiver or PACE, for less than the cost of comparable institutional care, in order to enable an individual to continue living in the community.

"Home and community-based services waiver" or "waiver services" means the range of community services and supports approved by the Centers for Medicare and Medicaid Services (CMS) pursuant to § 1915(c) of the Social Security Act to be offered to individuals as an alternative to institutionalization.

"Hospital team" means persons designated by the hospital who are responsible for conducting and submitting the screening document for inpatients to ePAS.

"Inpatient" means an individual who has a physician's order for admission to an acute care hospital, rehabilitation hospital, or a rehabilitation unit in an acute care hospital and shall not apply to outpatient, patients in observation beds, and patients of the hospital's emergency department.

"Local department of social services" or "LDSS" means the entity established under § 63.2-324 of the Code of Virginia by the governing city or county in the Commonwealth.

"Local health department" or "LHD" means the entity established under § 32.1-31 of the Code of Virginia.

"Long-term services and supports" or "LTSS" means a variety of services that help individuals with health or personal care needs and ADLs over a period of time that can be provided in the home, the community, assisted living facilities, or nursing facilities.

"MCO" or means a health plan selected to participate in the Commonwealth's CCC Plus program and that is a party to a contract with DMAS.

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"Medicaid" means the program set out in the 42 USC § 1396 et seq. and administered by the Department of Medical Assistance Services consistent with Chapter 10 (§ 32.1-323 et seq.) of Title 32.1 of the Code of Virginia.

"Medicare" means the Health Insurance for the Aged and Disabled program as administered by the Centers for Medicare and Medicaid Services pursuant to 42 USC 1395ggg.

"Nursing facility" or "NF" means any nursing home as defined in § 32.1-123 of the Code of Virginia.

"Other assessor designated by DMAS" means an employee of the local department of social services holding the occupational title of family services specialist.

"Preadmission screening" or "screening" means the process to (i) evaluate the functional, nursing, and social support needs of individuals referred for screening for certain long-term care services requiring NF eligibility; (ii) assist individuals in determining what specific services the individual needs; (iii) evaluate whether a service or a combination of existing community services are available to meet the individual's needs; and (iv) provide a list to individuals of appropriate providers for Medicaid-funded nursing facility or home and community-based services for those individuals who meet nursing facility level of care.

"Primary account holder" means the person who performs the initial web registrations for the screening entity and establishes the security needed for accessing ePAS.

"Private pay individual" means individuals who are not eligible for Medicaid or not expected to become eligible for Medicaid for 180 days following admission.

"Program of All-Inclusive Care for the Elderly" or "PACE" means the community-based service pursuant to § 32.1-330.3 of the Code of Virginia.

"Referral for screening" means information obtained from an interested person or other third party having knowledge of an individual who may need Medicaid-funded LTSS and may include, for example, a physician, PACE provider, service provider, family member, or neighbor who is able to provide sufficient information to enable contact with the individual.

"Reimbursement" means the determination that a submitted claim is completed accurately and completely and the service is covered resulting in the payment by DMAS for the services represented on the claims.

"Representative" means a person who is authorized to make decisions on behalf of the individual.

"Request date for screening" or "request date" means the date (i) that an individual, the individual's representative, an adult protective services worker, child protective services worker, or the managed care organization (MCO) care coordinator contacts the screening entity in the jurisdiction where the individual resides asking for assistance with LTSS, or (ii) for hospital inpatients, that a physician orders case management consultation or a hospital's case management

service determines the need for LTSS upon discharge from the hospital.

"Request for screening" means (i) communication from an individual, individual's representative, adult protective services worker, child protective services worker, or managed care organization (MCO) care coordinator, expressing the need for LTSS or (ii) for hospital inpatients, a physician order for case management consultation or case management determination of the need for LTSS upon discharge from a hospital.

"Residence" means, for example, an individual's private home, apartment, assisted living facility, nursing facility, or jail or correctional facility if the individual to be screened is seeking Medicaid-funded LTSS and does not request an alternative screening location as allowed in 12VAC30-60-305 A.

"Screening entity" means the hospital screening team, community-based team, or DMAS designee contracted to perform screenings pursuant to § 32.1-330 of the Code of Virginia.

"Significant change in condition" means a change in an individual's condition that is expected to last longer than 30 days and shall not include (i) short-term changes that resolve with or without intervention; (ii) a short-term illness or episodic event; or (iii) a well-established, predictive, cyclic pattern of clinical signs and symptoms associated with a previously diagnosed condition where an appropriate course of treatment is in progress.

"Submission" means the transmission of the screening findings and receipt of successfully processed results using ePAS.

"Submission date" means the date that the screening entity transmits to DMAS the screening findings using ePAS.

"Uniform Assessment Instrument" or "UAI" means the standardized multidimensional assessment instrument that is completed by the screening entity that assesses an individual's physical health, mental health, and psycho/social and functional abilities to determine if the individual meets the nursing facility level of care.

"VDH" means the Virginia Department of Health.

## **12VAC30-60-302. Access to Medicaid-funded long-term services and supports.**

A. Medicaid-funded long-term services and supports (LTSS) may be provided in either home and community-based or institutional-based settings. To receive LTSS, the individual's condition shall first be evaluated using the designated assessment instrument, the Uniform Assessment Instrument (UAI), and other designated forms. Screening entities shall use the DMAS-designated forms (UAI, DMAS-95, DMAS-96, DMAS-97) and, if selecting nursing facility placement, the DMAS-95 Level I (MI/IDD/RC). If indicated by the DMAS-95 Level I results, the individual shall be referred to

DBHDS for completion of the DMAS-95 Level II (for nursing facility placements only).

1. An individual's need for LTSS shall meet the established criteria (12VAC30-60-303) before any authorization for reimbursement by Medicaid is made for LTSS.

2. Appropriate community-based services shall be evaluated prior to consideration of nursing facility placement.

B. The evaluation shall be the screening as designated in § 32.1-330 of the Code of Virginia, which shall preauthorize a continuum of LTSS covered by Medicaid.

1. Such screenings, using the UAI, shall be conducted by teams of representatives of (i) hospitals for individuals (adults and children) who are inpatients; (ii) local departments of social services and local health departments, known herein as CBTs, for adults residing in the community and who are not inpatients; (iii) a DMAS designee for children residing in the community who are not inpatients; and (iv) a DMAS designee for adults residing in the community who are not inpatients and who cannot be screened by the CBT within 30 days of the request date. All of these entities shall be contracted with DMAS to perform this activity and be reimbursed by DMAS.

2. All screenings shall be comprehensive, accurate, standardized, and reproducible evaluations of individual functional capacities, medical or nursing needs, and risk for institutional placement.

C. Individuals shall not be required to be financially eligible for receipt of Medicaid or have submitted an application for Medicaid in order to be screened for LTSS.

D. Pursuant to § 32.1-330 of the Code of Virginia, individuals shall be screened if they are eligible for Medicaid or are anticipated to become eligible for Medicaid reimbursement of their NF care within six months of NF placement.

E. Special circumstances.

1. Out-of-state hospitals shall not be required to perform a screening for residents of the Commonwealth who are inpatients. If a screening is needed and is requested by either the individual or the individual's representative, individuals shall be screened upon discharge from the out-of-state hospital by the CBT serving the locality in which the individual resides. Screenings shall not be required for individuals who transfer into a nursing facility in the Commonwealth from an out-of-state nursing facility.

2. Veterans and military hospitals located in the Commonwealth that have inpatients who are residents of the Commonwealth shall not be required to perform screenings and may refer, upon discharge, the individual who requests a screening to the CBT serving the locality in which the individual resides. Screenings shall not be

required for individuals who transfer to a nursing facility in the Commonwealth from a veterans or military hospital.

3. State facilities that are licensed by DBHDS shall not be required to perform screenings of individuals who are receiving their services. Individuals shall be referred, upon discharge from such state facilities, to the CBT serving the locality in which the individual lives if the facility anticipates an individual may need a screening.

4. Hospitals shall not be required to initiate screenings for inpatients who are determined by the hospital team to be private pay individuals unless there is a request for a screening as outlined in 12VAC30-60-304 C.

5. Wilson Workforce Rehabilitation Center (WWRC) staff shall perform screenings of the WWRC clients.

6. A screening shall not be required for enrollment in Medicaid hospice services as set out in 12VAC30-60-130 and home health services as set out in 12VAC30-50-160.

G. Failure to comply with DMAS requirements, including competency and training requirements applicable to staff, may result in retraction of Medicaid payments.

### **12VAC30-60-303. Preadmission—screening Screening criteria for Medicaid-funded long-term care services and supports.**

A. Functional dependency alone is shall not be deemed sufficient to demonstrate the need for nursing facility care or placement or authorization for community-based care services. An individual shall be determined to meet the nursing facility criteria when:

1. The individual has both limited functional capacity and medical or nursing needs according to the requirements of this section; or

2. The individual is rated dependent in some functional limitations, but does not meet the functional capacity requirements, and the individual requires the daily direct services or supervision of a licensed nurse that cannot be managed on an outpatient basis (e.g., clinic, physician visits, home health services).

B. An individual shall only be considered to meet the nursing facility criteria when both the functional capacity of the individual and his medical or nursing needs meet the following requirements. Even when an individual meets nursing facility criteria, placement in a noninstitutional setting shall be evaluated before actual nursing facility placement is considered. In order to qualify for Medicaid-funded LTSS, the individual shall meet the following criteria:

1. For Medicaid-funded nursing facility services to be authorized, the screening entity shall document that the individual has both functional and medical or nursing needs. The criteria for screening an individual's eligibility for Medicaid reimbursement of NF services shall consist of two components: (i) functional capacity (the degree of assistance an individual requires to complete ADLs) and (ii) medical or nursing needs. The rating of functional

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dependency on the UAI shall be based on the individual's ability to function in a community environment and exclude all institutionally induced dependencies.

2. In order for Medicaid-funded community-based services to be authorized, an individual shall not be required to be physically admitted to a NF. The criteria for screening an individual's eligibility for Medicaid reimbursement of community-based services shall consist of three components: (i) functional capacity needs (the degree of assistance an individual requires in order to complete ADLs), (ii) medical or nursing needs, and (iii) the individual's risk of NF placement within 30 days in the absence of community-based services.

## 4. C. Functional capacity.

~~a. 1. When documented on a completed state designated preadmission screening assessment instrument a UAI that is completed in a manner consistent with the definitions of activities of daily living (ADLs) and directions provided by DMAS for the rating of those activities, individuals may be considered to meet the functional capacity requirements for nursing facility care when one of the following describes their functional capacity:~~

~~(1) a. Rated dependent in two to four of the Activities of Daily Living ADLs, and also rated semi-dependent or dependent in Behavior Pattern and Orientation, and semi-dependent in Joint Motion or dependent in Medication Administration.~~

~~(2) b. Rated dependent in five to seven of the Activities of Daily Living ADLs, and also rated dependent in Mobility.~~

~~(3) c. Rated semi-dependent in two to seven of the Activities of Daily Living ADLs, and also rated dependent in Mobility and Behavior Pattern and Orientation.~~

~~b. 2. The rating of functional dependencies on the preadmission screening assessment instrument must shall be based on the individual's ability to function in a community environment, not including any institutionally induced dependence. The following abbreviations shall mean: I = independent; d = semi-dependent; D = dependent; MH = mechanical help; HH = human help.~~

~~(1) a. Bathing.~~

~~(a) (1) Without help (I)~~

~~(b) (2) MH only (d)~~

~~(c) (3) HH only (D)~~

~~(d) (4) MH and HH (D)~~

~~(e) (5) Performed by Others (D)~~

~~(2) b. Dressing.~~

~~(a) (1) Without help (I)~~

~~(b) (2) MH only (d)~~

~~(c) (3) HH only (D)~~

~~(d) (4) MH and HH (D)~~

~~(e) (5) Performed by Others (D)~~

~~(f) (6) Is not Performed (D)~~

~~(3) c. Toileting.~~

~~(a) (1) Without help day or night (I)~~

~~(b) (2) MH only (d)~~

~~(c) (3) HH only (D)~~

~~(d) (4) MH and HH (D)~~

~~(e) (5) Performed by Others (D)~~

~~(4) d. Transferring.~~

~~(a) (1) Without help (I)~~

~~(b) (2) MH only (d)~~

~~(c) (3) HH only (D)~~

~~(d) (4) MH and HH (D)~~

~~(e) (5) Performed by Others (D)~~

~~(f) (6) Is not Performed (D)~~

~~(5) e. Bowel Function function.~~

~~(a) (1) Continent (I)~~

~~(b) (2) Incontinent less than weekly (d)~~

~~(c) (3) External/Indwelling Device/Ostomy -- self care (d)~~

~~(d) (4) Incontinent weekly or more (D)~~

~~(e) (5) Ostomy -- not self care (D)~~

~~(6) f. Bladder Function function.~~

~~(a) (1) Continent (I)~~

~~(b) (2) Incontinent less than weekly (d)~~

~~(c) (3) External device/Indwelling Catheter/Ostomy -- self care (d)~~

~~(d) (4) Incontinent weekly or more (D)~~

~~(e) (5) External device -- not self care (D)~~

~~(f) (6) Indwelling catheter -- not self care (D)~~

~~(g) (7) Ostomy -- not self care (D)~~

~~(7) g. Eating/Feeding.~~

~~(a) (1) Without help (I)~~

~~(b) (2) MH only (d)~~

~~(c) (3) HH only (D)~~

~~(d) (4) MH and HH (D)~~

~~(e) (5) Spoon fed (D)~~

~~(f) (6) Syringe or tube fed (D)~~

~~(g) (7) Fed by IV or clysis (D)~~

~~(8) h. Behavior Pattern pattern and Orientation orientation.~~

~~(a) (1) Appropriate or Wandering/Passive less than weekly + Oriented (I)~~

- ~~(b)~~ (2) Appropriate or Wandering/Passive less than weekly + Disoriented -- Some Spheres (I)
- ~~(c)~~ (3) Wandering/Passive Weekly/or more + Oriented (I)
- ~~(d)~~ (4) Appropriate or Wandering/Passive less than weekly + Disoriented -- All Spheres (d)
- ~~(e)~~ (5) Wandering/Passive Weekly/Some or more + Disoriented -- All Spheres (d)
- ~~(f)~~ (6) Abusive/Aggressive/Disruptive less than weekly + Oriented or Disoriented (d)
- ~~(g)~~ (7) Abusive/Aggressive/Disruptive weekly or more + Oriented (d)
- ~~(h)~~ (8) Abusive/Aggressive/Disruptive + Disoriented -- All Spheres (D)
- ~~(i)~~ i. Mobility.
- ~~(a)~~ (1) Goes outside without help (I)
- ~~(b)~~ (2) Goes outside MH only (d)
- ~~(c)~~ (3) Goes outside HH only (D)
- ~~(d)~~ (4) Goes outside MH and HH (D)
- ~~(e)~~ (5) Confined -- moves about (D)
- ~~(f)~~ (6) Confined -- does not move about (D)
- ~~(10)~~ j. Medication Administration administration.
- ~~(a)~~ (1) No medications (I)
- ~~(b)~~ (2) Self administered -- monitored less than weekly (I)
- ~~(c)~~ (3) By lay persons, Administered/Monitored (D)
- ~~(d)~~ (4) By Licensed/Professional nurse Administered/Monitored (D)
- ~~(11)~~ k. Joint Motion motion.
- ~~(a)~~ (1) Within normal limits or instability corrected (I)
- ~~(b)~~ (2) Limited motion (d)
- ~~(c)~~ (3) Instability -- uncorrected or immobile (D)

e. D. Medical or nursing needs. An individual with medical or nursing needs is an individual whose health needs require medical or nursing supervision or care above the level that could be provided through assistance with Activities of Daily Living ADLs, Medication Administration medication administration, and general supervision and is not primarily for the care and treatment of mental diseases. Medical or nursing supervision or care beyond this level is required when any one of the following describes the individual's need for medical or nursing supervision:

- (1) 1. The individual's medical condition requires observation and assessment to assure evaluation of the person's need for modification of treatment or additional medical procedures to prevent destabilization, and the person has demonstrated an inability to self observe or evaluate the need to contact skilled medical professionals;
- (2) 2. Due to the complexity created by the person's multiple, interrelated medical conditions, the potential for

the individual's medical instability is high or medical instability exists; or

(3) 3. The individual requires at least one ongoing medical or nursing service. The following is a nonexclusive list of medical or nursing services that may, but need not necessarily, indicate a need for medical or nursing supervision or care:

- ~~(a)~~ a. Application of aseptic dressings;
- ~~(b)~~ b. Routine catheter care;
- ~~(c)~~ c. Respiratory therapy;
- ~~(d)~~ d. Supervision for adequate nutrition and hydration for individuals who show clinical evidence of malnourishment or dehydration or have recent history of weight loss or inadequate hydration that, if not supervised, would be expected to result in malnourishment or dehydration;
- ~~(e)~~ e. Therapeutic exercise and positioning;
- ~~(f)~~ f. Routine care of colostomy or ileostomy or management of neurogenic bowel and bladder;
- ~~(g)~~ g. Use of physical (e.g., side rails, poseys, locked wards) ~~and/or~~ or chemical restraints, or both;
- ~~(h)~~ h. Routine skin care to prevent pressure ulcers for individuals who are immobile;
- ~~(i)~~ i. Care of small uncomplicated pressure ulcers and local skin rashes;
- ~~(j)~~ j. Management of those with sensory, metabolic, or circulatory impairment with demonstrated clinical evidence of medical instability;
- ~~(k)~~ k. Chemotherapy;
- ~~(l)~~ l. Radiation;
- ~~(m)~~ m. Dialysis;
- ~~(n)~~ n. Suctioning;
- ~~(o)~~ o. Tracheostomy care;
- ~~(p)~~ p. Infusion therapy; or
- ~~(q)~~ q. Oxygen.

~~d. Even when an individual meets nursing facility criteria, provision of services in a noninstitutional setting shall be considered before nursing facility placement is sought.~~

~~C. E.~~ E. When assessing an individual 21 years of age or younger screening a child, the teams who are screening entity who is conducting preadmission screenings screening for long-term care services LTSS shall utilize the electronic Uniform Assessment Instrument (UAI) interpretive guidance as contained referenced in DMAS' Medicaid Memo dated October 3, 2012, entitled "Development of Special Criteria for the Purposes of Pre-Admission Screening," November 22, 2016, entitled "Reissuance of the Pre-Admission Screening (PAS) Provider Manual, Chapter IV," which can be accessed

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on the DMAS website  
at <https://www.virginiamedicaid.dmas.virginia.gov/>.

## **12VAC30-60-304. Requests for screening for adults and children living in the community and adults and children in hospitals.**

A. Screenings for adults living in the community. Screenings for adults who are residing in the community but who are not inpatients shall be completed and submitted (submission date) by the CBT to ePAS within 30 days of the request date for screening.

1. Requests for screenings shall be accepted from either an individual, the individual's representative, an adult protective service worker, or an MCO care coordinator having an interest in the individual. The CBT in the jurisdiction where the individual resides shall conduct such screening. For the screening to be scheduled by the CBT, the individual shall either agree to participate or, if refusing, shall be under order of a court of appropriate jurisdiction to have a screening.

a. The LDSS or LHD in receipt of the request for a screening shall contact the individual or his representative within seven days of the request date for screening to schedule a screening with the individual and any other persons whom the individual selects to attend the screening.

b. When the CBT has not scheduled a screening to occur within 21 days of the request date for screening, and the screening is not anticipated to be complete within 30 days of the request date for screening due to the screening entity's inability to conduct the screening, the LDSS and LHD shall, no later than seven days after the request date for screening, notify DARS and VDH staff designated for technical assistance. After contact with the LDSS and LHD, if DARS and VDH confirm that the screening entity is unable to complete the screening within 30 days of the request date for screening, the designated VDH staff shall refer the CBT and screening request to the DMAS designee for scheduling of a screening and submission of documentation.

2. Referrals for screenings may also be accepted by LDSS or LHD from an interested person having knowledge of an individual who may need LTSS. When the LDSS or LHD receives such a referral, the LDSS or LHD shall obtain sufficient information from the referral source to initiate contact with the individual or his representative to discuss the preadmission screening process. Within seven days of the referral date, the LDSS or LHD shall contact the individual or his representative to determine if the individual is interested in receiving LTSS and would participate in the screening. If the LDSS or LHD is unable to contact the individual or his representative, it shall document the attempt to contact the individual or his representative using the method adopted by the CBT.

a. After contact with the individual or his representative, or if the LDSS or LHD is unable to contact the individual or his representative, the LDSS or LHD shall advise the referring interested person that contact or attempt to contact has been made in response to the referral for screening.

b. Information about the results of the contact shall only be shared with the interested person who made the referral with either the individual's written consent or the written consent of his legal representative who has such authority on behalf of the individual.

B. Screenings for children living in the community. Screenings for children who are residing in the community but who are not inpatients shall be completed and submitted to ePAS (this shall be considered the submission date) within 30 days of the request date for screening.

1. A child who is residing in the community and is not an inpatient shall receive a screening from a DMAS designee. The CBT shall forward requests for such screenings directly to the DMAS designee.

2. The request for screening of a child residing in the community shall initiate from the parent, the entity having legal custody of that child, an emancipated child, an MCO care coordinator, or a child protective service worker having an interest in the child.

3. Referrals for screenings may also be accepted from an interested person having knowledge of a child who may need LTSS. The process, timing, and limitations on the sharing of the results for referrals for screenings for children shall be the same as that set out for adults in subdivision A 2 of this section.

C. Screenings in hospitals for adults and children who are inpatients. Screenings in hospitals shall be completed when an adult or child who is an inpatient may need LTSS upon discharge or when the inpatient, or representative, requests a screening.

1. As a part of the discharge planning process, the hospital team shall complete a screening when:

a. The individual's physician, in collaboration with the individual or the individual's representative if there is one makes a request of the hospital team. If the individual is a child, the screening shall be completed when the individual's physician, in collaboration with the child's parent, the entity having legal custody of the child, or the emancipated child makes a request of the hospital team; or

b. The individual, the individual's representative if there is one, parent, entity having legal custody, or emancipated child requests a consultation with hospital case management.

2. Such individual shall receive a screening conducted by the hospital team regardless of the primary payer source (e.g., Medicare, health maintenance organization) and

whether or not they are eligible for Medicaid or are anticipated to become eligible for Medicaid within six months after admission to a NF.

**12VAC30-60-305. Screenings in the community and hospitals for Medicaid-funded long-term services and supports.**

**A. Community screenings for adults.**

1. Eligibility for Medicaid-funded LTSS shall be determined by the CBT after completion of a screening of the individual's needs and available supports. The CBT shall document a screening of all the supports available for that individual in the community (i.e., the immediate family, other relatives, other community resources, and other services in the continuum of LTSS). The screening shall be documented on the designated DMAS forms identified in 12VAC30-60-306.

2. Screenings shall be completed in the individual's residence unless the residence presents a safety risk for the individual or the CBT, or unless the individual or the representative requests that the screening be performed in an alternate location within the same jurisdiction. The individual shall be permitted to have another person or persons present at the time of the screening. Other than situations when a court has issued an order for a screening, the individual shall also be afforded the right to refuse to participate. The CBT shall determine the appropriate degree of participation and assistance given by other persons to the individual during the screening and accommodate the individual's preferences to the extent feasible.

3. The CBT shall:

a. Observe the individual's ability to perform ADLs according to 12VAC30-60-303 and consider the individual's communication or responses to questions or his representative's communication or responses;

b. Observe, assess, and report the individual's medical condition. This information shall be used to ensure accurate and comprehensive evaluation of the individual's need for modification of treatment or additional medical procedures to prevent destabilization even when the individual has demonstrated an inability to self-observe or evaluate the need to contact skilled medical professionals;

c. Identify the medical or nursing needs, or both, of the individual; and

d. Consider services and settings that may be needed by the individual in order for the individual to safely perform ADLs.

4. Upon completion of the screening and in consideration of the communication from the individual or his representative, if appropriate, and observations obtained during the screening, the CBT shall determine whether the individual meets the criteria set out in 12VAC30-60-303. If

the individual meets the criteria for LTSS, the CBT shall inform and provide choice to the individual and his representative, if appropriate, of the feasible alternatives to placement in a NF.

5. If waiver services or PACE, where available, are declined, the reason for the declination shall be recorded on the DMAS-97, Individual Choice - Institutional Care or Waiver Services Form. The CBT shall have this document signed by either the individual or his representative, if appropriate. In addition to the electronic document, a paper copy of the DMAS-97 form with the individual's or his representative's signature shall be retained in the individual's record by the screening entity.

6. If the individual meets criteria and selects community-based services, the CBT shall also document that the individual is at risk of NF placement in the absence of community-based services by finding that at least one of the following conditions exists:

a. The individual has been cared for in the home prior to the screening and evidence is available demonstrating a deterioration in the individual's health care condition, a significant change in condition, or a change in available supports preventing previous services and supports from meeting the individual's needs. Examples of such evidence may include (i) recent hospitalizations, (ii) attending physician documentation, or (iii) reported findings from medical or social service agencies.

b. There has been no significant change in condition or available support but evidence is available that demonstrates the individual's functional, medical, or nursing needs are not being met. Examples of such evidence may include (i) recent hospitalizations, (ii) attending physician documentation, or (iii) reported findings from medical or social service agencies.

7. If the individual selects NF placement, the CBT shall follow the Level I identification and Level II evaluation process as outlined in Part III (12VAC30-130-140 et seq.) of 12VAC30-130.

8. If the CBT determines that the individual does not meet the criteria set out in 12VAC30-60-303, the CBT shall notify in writing the individual and the individual's representative, as may be appropriate, that LTSS are being denied for the individual. The denial notice shall include the individual's right to appeal consistent with DMAS client appeals regulations (12VAC30-110).

9. For those screenings conducted in accordance with clause iv of 12VAC30-60-302 B 1, the DMAS designee shall follow the process outlined in this subsection.

**B. Community screenings for children.**

1. Eligibility for Medicaid-funded LTSS shall be determined by the DMAS designee after completion of a screening of the child's needs and available supports. The DMAS designee shall document a screening of all the



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supports available for that child in the community (i.e., the immediate family, other community resources, and other services in the continuum of LTSS). The screening shall be documented on the designated DMAS forms identified in 12VAC30-60-306.

2. Upon receipt of a screening request, the DMAS designee shall schedule an appointment to complete the requested screening. Community settings where screenings may occur include the child's residence, other residences, children's residential facilities, or other settings with the exception of acute care hospitals, rehabilitation units of acute care hospitals, and rehabilitation hospitals.

3. The DMAS designee shall:

a. Determine the appropriate degree of participation and assistance given by other persons to the individual during the screening in recognition of the individual's preferences to the extent feasible.

b. Observe the child's ability to perform ADLs according to 12VAC30-60-303 and consider the parent's, legal guardian's, or emancipated child's communications or responses to questions:

c. Observe, assess, and report the child's medical condition. This information shall be used to ensure accurate and comprehensive evaluation of the child's need for modification of treatment or additional medical procedures to prevent destabilization even when the child has demonstrated an inability to self-observe or evaluate the need to contact skilled medical professionals;

d. Identify the medical or nursing needs, or both, of the child; and

e. Consider services and settings that may be needed by the child in order for the child to safely perform ADLs in the community.

4. Upon completion of the screening and in consideration of the communication from the child or his representative, if appropriate, and observations obtained during the screening, the DMAS designee shall determine whether the child meets the criteria set out in 12VAC30-60-303. If the child meets the criteria for LTSS, the DMAS designee shall inform and provide choice to the child and his representative, if appropriate, of the feasible alternatives to NF placement.

5. If waiver services are declined, the reason for declining shall be recorded on the DMAS-97, Individual Choice - Institutional Care or Waiver Services Form. The DMAS designee shall have this document signed by either the child or his representative, if appropriate. In addition to the electronic document, a paper copy of the DMAS-97 form with the child's or his representative's signature shall be retained in the child's record by the screening entity.

6. If the child meets criteria and selects community-based services, the DMAS designee shall also document that the individual is at risk of NF placement in the absence of

community-based services by finding that at least one of the following conditions exists:

a. The child has been cared for in the home prior to the screening and evidence is available demonstrating a deterioration in the child's health care condition, a significant change in condition, or a change in available supports preventing previous services and supports from meeting the child's needs. Examples of such evidence may include (i) recent hospitalizations, (ii) attending physician documentation, or (iii) reported findings from medical or social service agencies.

b. There has been no significant change in condition or available support but evidence is available that demonstrates the child's functional, medical, or nursing needs are not being met. Examples of such evidence may include (i) recent hospitalizations, (ii) attending physician documentation, or (iii) reported findings from medical or social service agencies.

7. If the parent, entity having legal custody of the child, or emancipated child selects NF placement, the DMAS designee shall follow the Level I identification and Level II evaluation process as set out in Part III (12VAC30-130-140 et seq.) of 12VAC30-130.

8. If the DMAS designee determines that the child does not meet the criteria to receive LTSS as set out in 12VAC30-60-303, the DMAS designee shall notify in writing the parent, entity having legal custody of the child, or the emancipated child and representative, as may be appropriate, that LTSS are being denied for the child. The denial notice shall include the child's right to appeal consistent with DMAS client appeals regulations (12VAC30-110).

C. Screenings for adults and children in hospitals. For the purpose of this subsection, the term "individual" shall mean either an adult or a child.

1. Eligibility for Medicaid-funded LTSS shall be determined by the hospital screening team after completion of a screening of the individual's needs and available supports. The hospital screening team shall document a screening of all the supports available for that individual in the community (i.e., the immediate family, other relatives, other community resources, and other services in the continuum of LTSS).

2. Screenings shall be completed in the hospital prior to discharge. The individual shall be permitted to have another person or persons present at the time of the screening. Other than situations when a court has issued an order for a screening, the individual shall also be afforded the right to refuse to participate. The hospital screening team shall determine the appropriate degree of participation and assistance given by other persons to the individual during the screening and accommodate the individual's preferences to the extent feasible.

3. The hospital screening team shall:

- a. Observe the individual's ability to perform ADLs according to 12VAC30-60-303, excluding all institutionally induced dependencies, and consider the individual's communication or responses to questions or his representative's communication or responses;
- b. Observe, assess, and report the individual's medical condition. This information shall be used to ensure accurate and comprehensive evaluation of the individual's need for modification of treatment or additional medical procedures to prevent destabilization even when the individual has demonstrated an inability to self-observe or evaluate the need to contact skilled medical professionals;
- c. Identify the medical or nursing needs, or both, of the individual; and
- d. Consider services and settings that may be needed by the individual in order for the individual to safely perform ADLs.

4. Upon completion of the screening and in consideration of the communication from the individual or his representative, if appropriate, and observations obtained during the screening, the hospital screening team shall determine whether the individual meets the criteria set out in 12VAC30-60-303. If the individual meets the criteria for LTSS, the hospital screening team shall inform and provide choice to the individual and his representative, if appropriate, of the feasible alternatives to placement in a NF.

5. If waiver services or PACE, where available, are declined, the reason for the declination shall be recorded on the DMAS-97, Individual Choice - Institutional Care or Waiver Services Form. The hospital screening team shall have this document signed by either the individual or his representative, if appropriate. In addition to the electronic document, a paper copy of the DMAS-97 form with the individual's or his representative's signature shall be retained in the individual's record.

6. If the individual meets criteria and selects community-based services, the hospital screening team shall also document that the individual is at risk of NF placement in the absence of community-based services by finding that at least one of the following conditions exists:

- a. Prior to the inpatient admission, the individual was cared for in the home and evidence is available demonstrating a deterioration in the individual's health care condition, a significant change in condition, or a change in available supports preventing previous services and supports from meeting the individual's needs. Examples of such evidence may include (i) recent hospitalizations, (ii) attending physician documentation, or (iii) reported findings from medical or social service agencies.

b. There has been no significant change in condition or available support but evidence is available that demonstrates the individual's functional, medical, or nursing needs are not being met. Examples of such evidence may include (i) recent hospitalizations, (ii) attending physician documentation, or (iii) reported findings from medical or social service agencies.

7. If the individual selects NF placement, the hospital screening team shall follow the Level I identification and Level II evaluation process as outlined in Part III (12VAC30-130-140 et seq.) of 12VAC30-130.

8. If the hospital screening team determines that the individual does not meet the criteria set out in 12VAC30-60-303, the hospital screening team shall notify in writing the individual and the individual's representative, as may be appropriate, that LTSS are being denied for the individual. The denial notice shall include the individual's right to appeal consistent with DMAS client appeals regulations (12VAC30-110).

**12VAC30-60-306. Submission of screenings.**

A. The screening entity shall complete and submit the following forms to DMAS electronically on ePAS:

- 1. DMAS-95 - MI/IDD/RC (Supplemental Assessment Process Form Level I);
- 2. DMAS-96 (Medicaid-Funded Long-Term Care Service Authorization Form), as appropriate;
- 3. DMAS-97 (Individual Choice - Institutional Care or Waiver Services); and
- 4. UAI (Uniform Assessment Instrument).

B. For screenings performed in the community, the screening entity shall submit to DMAS on ePAS each screening form listed in subsection A of this section within 30 days of the individual's request date for screening.

C. For screenings performed in a hospital, the hospital team shall submit to DMAS on ePAS each screening form listed in subsection A of this section, which shall be completed prior to the individual's discharge. For individuals who will be admitted to a Medicare-funded skilled NF or to a Medicare-funded rehabilitation hospital (or rehabilitation unit) directly upon discharge from the hospital, the hospital screener shall have up to an additional three days post-discharge to submit the screening forms via ePAS.

**12VAC30-60-307. ~~Summary of pre-admission nursing facility criteria. (Repealed.)~~**

A. ~~An individual shall be determined to meet the nursing facility criteria when:~~

- 1. ~~The individual has both limited functional capacity and requires medical or nursing management according to the requirements of 12VAC30-60-303, or~~
- 2. ~~The individual is rated dependent in some functional limitations, but does not meet the functional capacity requirements, and the individual requires the daily direct~~

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services or supervision of a licensed nurse that cannot be managed on an outpatient basis (e.g., clinic, physician visits, home health services).

~~B. An individual shall not be determined to meet nursing facility criteria when one of the following specific care needs solely describes his or her condition:~~

- ~~1. An individual who requires minimal assistance with activities of daily living, including those persons whose only need in all areas of functional capacity is for prompting to complete the activity;~~
- ~~2. An individual who independently uses mechanical devices such as a wheelchair, walker, crutch, or cane;~~
- ~~3. An individual who requires limited diets such as a mechanically altered, low salt, low residue, diabetic, reducing, and other restrictive diets;~~
- ~~4. An individual who requires medications that can be independently self-administered or administered by the caregiver;~~
- ~~5. An individual who requires protection to prevent him from obtaining alcohol or drugs or to address a social or environmental problem;~~
- ~~6. An individual who requires minimal staff observation or assistance for confusion, memory impairment, or poor judgment;~~
- ~~7. An individual whose primary need is for behavioral management which can be provided in a community based setting;~~

## **12VAC30-60-308. Nursing facility admission and level of care determination requirements.**

Prior to an individual's admission, the NF shall review the completed screening forms to ensure that applicable NF admission criteria have been met and documented.

## **12VAC30-60-310. ~~{Reserved}~~ Competency training and testing requirements.**

By no later than December 31, 2018, each person performing screenings on behalf of a screening entity shall complete required training and competency assessments. A score of at least 80% on each module shall constitute satisfactory competency assessment results. The most current competency assessment results shall be kept in the screening entity's personnel records for each person performing screenings for the screening entity. Such documentation results shall be provided to DMAS upon its request.

1. All persons performing screenings shall complete the DMAS-approved training and pass the corresponding competency assessment with a score of at least 80% for each module of the training prior to performing screenings. This training shall be repeated no less than every three years resulting in a score of at least 80% on each module.
2. Failure to satisfy the training and competency assessment requirements may result in the retraction of Medicaid payment.

## **12VAC30-60-312. Evaluation to determine eligibility for Medicaid payment of nursing facility or home and community-based care services. (Repealed.)**

~~A. The screening team shall not authorize Medicaid-funded nursing facility services for any individual who does not meet nursing facility criteria. Once the nursing home preadmission screening team has determined whether or not an individual meets the nursing facility criteria, the screening team must determine the most appropriate and cost effective means of meeting the needs of the individual. The screening team must document a complete assessment of all the resources available for that individual in the community (i.e., the immediate family, other relatives, other community resources and other services in the continuum of long term care which are less intensive than nursing facility level of care services). The screening team shall be responsible for preauthorizing Medicaid-funded long term care according to the needs of each individual and the support required to meet those needs. The screening team shall authorize Medicaid-funded nursing facility care for an individual who meets the nursing facility criteria only when services in the community are either not a feasible alternative or the individual or the individual's representative rejects the screening team's plan for community services. The screening team must document that the option of community based alternatives has been explained, the reason community based services were not chosen, and have this document signed by the client or client's primary caregivers.~~

~~B. The screening team shall authorize community based waiver services only for an individual who meets the nursing facility criteria and is at risk of nursing home placement without waiver services. Waiver services are offered to such an individual as an alternative to avoid nursing facility admission pursuant to 42 CFR 441.302 (e)(1).~~

~~C. Federal regulations which govern Medicaid-funded home and community based services require that services only be offered to individuals who would otherwise require institutional placement in the absence of home and community based services. The determination that an individual would otherwise require placement in a nursing facility is based upon a finding that the individual's current condition and available support are insufficient to enable the individual to remain in the home and thus the individual is at risk of institutionalization if community based care is not authorized. The determination of the individual's risk of nursing facility placement shall be documented either on the state designated pre admission screening assessment or in a separate attachment for every individual authorized to receive community-based waiver services. To authorize community-based waiver services, the screening team must document that the individual is at risk of nursing facility placement by finding that one of the following conditions is met:~~

- ~~1. Application for the individual to a nursing facility has been made and accepted;~~

~~2. The individual has been cared for in the home prior to the assessment and evidence is available demonstrating a deterioration in the individual's health care condition or a change in available support preventing former care arrangements from meeting the individual's need. Examples of such evidence may be, but shall not necessarily be limited to:~~

- ~~a. Recent hospitalizations;~~
- ~~b. Attending physician documentation; or~~
- ~~e. Reported findings from medical or social service agencies.~~

~~3. There has been no change in condition or available support but evidence is available that demonstrates the individual's functional, medical and nursing needs are not being met. Examples of such evidence may be, but shall not necessarily be limited to:~~

- ~~a. Recent hospitalizations;~~
- ~~b. Attending physician documentation; or~~
- ~~e. Reported findings from medical or social service agencies.~~

**12VAC30-60-313. Individuals determined to not meet criteria for Medicaid-funded long-term services and supports.**

An individual shall be determined not to meet criteria for Medicaid-funded LTSS when one of the following specific care needs solely describes the individual's condition:

- 1. The individual requires minimal assistance with ADLs, including those individuals whose only need in all areas of functional capacity is for prompting to complete the activity;
- 2. The individual independently uses mechanical devices such as a wheelchair, walker, crutch, or cane;
- 3. The individual requires limited diets such as a mechanically altered, low-salt, low-residue, diabetic, reducing, or other restrictive diets;
- 4. The individual requires medications that can be independently self-administered or administered by the caregiver;
- 5. The individual requires protection to prevent him from obtaining alcohol or drugs or to address a social or environmental problem;
- 6. The individual requires minimal staff observation or assistance for confusion, memory impairment, or poor judgment; or
- 7. The individual's primary need is for behavioral management that can be provided in a community-based setting.

**12VAC30-60-315. Ongoing evaluations for individuals receiving Medicaid-funded long-term services and supports.**

A. Once an individual is admitted to community-based services, the community-based services provider shall be responsible for conducting ongoing evaluations to ensure that the individual meets, and continues to meet, the waiver program or PACE criteria, if appropriate. These ongoing evaluations shall be conducted using the Level of Care Review tab in the Medicaid portal. (<https://www.virginiamedicaid.dmas.virginia.gov/wps/portal>).

B. Once an individual is admitted to a NF, the NF shall be responsible for conducting ongoing evaluations to ensure that the individual meets, and continues to meet, the NF criteria. For this purpose, the NF shall use the federally required Minimum Data Set (MDS) form (see <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/MDS30RAIManual.html>). The post-admission evaluation shall be conducted no later than 14 days after the date of NF admission and promptly after an individual's significant change in condition.

C. For individuals who are enrolled in a MCO that is responsible for providing LTSS, the MCO shall conduct ongoing evaluations by qualified MCO staff to ensure the individual continues to meet criteria for LTSS.

**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 (12VAC30-60)

Certificate of Medical Necessity -- Durable Medical Equipment and Supplies, DMAS 352 (rev. 8/95).

Request for Hospice Benefits, DMAS 420 (rev. 1/99).

[Screening for Mental Illness, Mental Retardation/Individuals with Intellectual Disability, or Related Conditions, DMAS-95 MI/IDD/RC \(rev. 12/2015\)](#)

[Medicaid Funded Long-Term Services and Supports Authorization Form, DMAS-96 \(rev. 12/2015\)](#)

[Individual Choice - Institutional Care or Waiver Services Form, DMAS-97 \(rev. 8/2012\)](#)

[Virginia Uniform Assessment Instrument](#)

[Virginia Uniform Assessment Instrument, DMAS-98 \(eff. 2/2016\), including:](#)

- UAI-A; UAI-B; Eligibility Communication Document;
- Screening for Mental Illness, Mental Retardation/Intellectual Disability, or Related Conditions;
- MI/MR Supplemental: Level II; Medicaid Funded Long-

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Term Care Service Authorization Form; Individual Choice - Institutional Care or Waiver Services Form; and Attachment to Public Pay Short Form Assessment

[Community-Based Care Level of Care Review Instrument, DMAS-99LOC \(undated\)](#)

DOCUMENTS INCORPORATED BY REFERENCE (12VAC30-60)

Department of Medical Assistance Services Provider Manuals

(<https://www.virginiamedicaid.dmas.virginia.gov/wps/portal/ProviderManuals>):

Virginia Medicaid Nursing Home Manual

Virginia Medicaid Rehabilitation Manual

Virginia Medicaid Hospice Manual

Virginia Medicaid School Division Manual

~~Development of Special Criteria for the Purposes of Pre-Admission Screening, Medicaid Memo, October 3, 2012, Department of Medical Assistance Services~~

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV-TR), copyright 2000, American Psychiatric Association

Patient Placement Criteria for the Treatment of Substance-Related Disorders (ASAM PPC-2R), Second Edition, copyright 2001, American Society on Addiction Medicine, Inc.

[Medicaid Memo, Reissuance of the Pre-Admission Screening \(PAS\) Provider Manual, Chapter IV, November 22, 2016, Department of Medical Assistance Services](#)

Medicaid Special Memo, Subject: New Service Authorization Requirement for an Independent Clinical Assessment for Medicaid and FAMIS Children's Community Mental Health Rehabilitative Services, dated June 16, 2011, Department of Medical Assistance Services

Medicaid Special Memo, Subject: Changes to Children Community Mental Health Rehabilitative Services - Children's Services, July 1, 2010 & September 1, 2010, dated July 23, 2010, Department of Medical Assistance Services

Medicaid Special Memo, Subject: Changes to Community Mental Health Rehabilitative Services - Adult-Oriented Services, July 1, 2010 & September 1, 2010, dated July 23, 2010, Department of Medical Assistance Services

VA.R. Doc. No. R16-4355; Filed August 7, 2017, 8:01 a.m.

## Fast-Track Regulation

**Title of Regulation:** 12VAC30-60. Standards Established and Methods Used to Assure High Quality Care (amending 12VAC30-60-70).

**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:** October 4, 2017.

**Effective Date:** October 19, 2017.

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

**Basis:** Section 32.1-325 of the Code of Virginia grants the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the Plan for Medical Assistance according to the board's requirements. The Medicaid authority as established by § 1902(a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services.

This change serves to bring accreditation requirements for home health accrediting organizations (HHAs) in line with the exemptions from state licensure requirements set forth in § 32.1-162.8 of the Code of Virginia.

**Purpose:** The purpose of this action is to bring the accreditation requirements for HHAs in line with (i) the state licensure requirements outlined in § 32.1-162.8 of the Code of Virginia and (ii) the list of accreditation organizations for Medicare HHAs approved by the Centers for Medicare and Medicaid Services. Consistency among approved accreditation organizations will clarify and streamline requirements for providers and DMAS.

This regulation is essential to protect the health, safety, or welfare of citizens in that it provides consistency between the regulations and the Code of Virginia with regard to the licensure requirements for HHAs. This consistency will help ensure that HHAs are appropriately licensed to provide services to Medicaid members.

**Rationale for Using Fast-Track Rulemaking Process:** This regulatory change is expected to be noncontroversial in that it is not a change in process, but simply updates the regulations so that they are in accordance Code of Virginia provisions that have been in effect since July 1, 2010. Conversations with the Virginia Association for Home Care and Hospice, which is the HHA provider association, have yielded support for this regulatory change.

The three main reasons to make this regulatory change are:

1. Accreditation organizations (e.g. JCAHO and CHAP) may change from time to time. New accreditation organizations may arise and others may no longer offer accreditation for certain providers, programs, or facilities. The revised language for 12VAC30-60-70 allows for that flexibility.
2. Since many HHAs provide services under Medicare and Medicaid, aligning the Virginia Medicaid accreditation requirements to the Medicare requirements

will streamline HHA requirements and ensure consistency. The revised language for 12VAC30-60-70 ensures consistency.

3. Lastly, the Virginia Department of Health (VDH) oversees licensing, and exemptions from licensing, for HHAs. Virginia Medicaid can simplify its HHA requirements by mirroring the VDH language for accreditation requirements in order to qualify for an exemption from licensing as found in § 32.1-162.8 of the Code of Virginia.

Section 32.1-162.8 of the Code of Virginia exempts from licensure "any home care organization located in the Commonwealth that after initial licensure" is "certified by the Department of Health under provisions of Title XVIII or Title XIX of the Social Security Act; or accredited by any organization recognized by the Centers for Medicare and Medicaid Services for the purposes of Medicare certification; or licensed for hospice services under Article 7 (§ 32.1-162.1 et seq.)." The revised language for 12VAC30-60-70 provides for simplicity.

Conversations with the Virginia Association for Home Care and Hospice, the HHA provider association, have yielded support for this regulatory change, which simply brings Virginia Medicaid in line with VDH and Medicare requirements and allowances.

JCAHO and CHAP, which are currently approved accreditation organizations under 12VAC30-60-70 B, are also approved accreditation organizations by Medicare and would not be negatively impacted by this regulatory change.

Substance: Virginia regulations identify the requirements that HHAs must meet to participate as a provider of home health services in Virginia Medicaid and establish several licensure exemptions for HHAs after initial licensure. The current list of exemptions in Virginia regulations includes accreditation by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) or the Community Health Accreditation Program (CHAP). This language was promulgated in 2005 and incorporated into the Virginia Administrative Code, but different language was enacted by the legislature and incorporated into the Code of Virginia in 2010. The Code of Virginia uses broader language that establishes an exemption for HHAs accredited by any organization recognized by the Centers for Medicare and Medicaid Services for purposes of Medicare certification. The discrepancy between the Virginia Administrative Code and Code of Virginia language has not yet been rectified, and this regulatory change will bring the Virginia Administrative Code into alignment with § 32.1-162.8 of the Code of Virginia.

Issues: The primary advantage to the agency and to the public, including Medicaid providers and Medicaid members, is the alignment of statutory requirements with Virginia regulations so that the licensure requirements for HHAs are clear. There are no disadvantages to the agency or the public.

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

Summary of the Proposed Amendments to Regulation. The Department of Medical Assistance Services proposes to update this regulation to comply with Virginia Code Section 32.1-162.8 relating to exemptions from Home Health Agency (HHA) licensing.

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

Estimated Economic Impact. This regulation establishes several licensure exemptions for HHAs after initial licensure. The current list of exemptions in the regulation includes accreditation by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) and the Community Health Accreditation Program (CHAP). This language was written into the regulation in 2005, but different language was entered into § 32.1-162.8 of the Code of Virginia in 2010. The statute exempts "any organization recognized by the Centers for Medicare and Medicaid Services for the purposes of Medicare certification."

The proposed language replaces the specific exemptions for JCAHO and CHAP, both of which are recognized by the Centers for Medicare and Medicaid Services (CMS) for the purposes of Medicare certification, with the exact language in the statute. The Accreditation Commission for Health Care, Inc. (ACHC) is also currently recognized by CMS and is exempt under the statute, but is not specifically mentioned in the regulation.

The proposed amendment will align the language with the statute. Since all three organizations are currently exempt under the statute and will continue to be exempt, no significant economic effect is expected other than improving the consistency between the regulation and the statute.

Businesses and Entities Affected. The proposed amendment applies to HHAs recognized by CMS and therefore exempt from HHA licensure requirements. There are currently three organizations recognized by CMS.

Localities Particularly Affected. The proposed change does not affect any locality more than others.

Projected Impact on Employment. No impact on employment is expected.

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."

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Costs and Other Effects. All three HHAs are believed to be small businesses. The proposed amendment does not impose costs on them but may benefit them by improving the consistency between the regulation and the statute.

Alternative Method that Minimizes Adverse Impact. No adverse impact on small businesses is expected.

Adverse Impacts:

Businesses. The proposed amendments do not have an adverse impact on non-small businesses.

Localities. The proposed amendments will not adversely affect localities.

Other Entities. The proposed amendments will 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 concurs with this analysis.

Summary:

*The amendment conforms regulatory language to § 32.1-162.8 of the Code of Virginia by establishing an exemption for home health agencies accredited by any organization recognized by the Centers for Medicare and Medicaid Services for purposes of Medicare certification.*

## **12VAC30-60-70. Utilization control: home health services.**

A. Home health services that meet the standards prescribed for participation under Title XVIII, will be supplied.

B. Home health services shall be provided by a home health agency that is (i) licensed by the Virginia Department of Health (VDH), (ii) certified by the Virginia Department of Health under provisions of Title XVIII (Medicare) or Title XIX (Medicaid) of the Social Security Act, or (iii) ~~accredited either by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) or by the Community Health Accreditation Program (CHAP) established by the National League of Nursing~~ by any organization recognized by the Centers for Medicare and Medicaid Services (CMS) for purposes of Medicare certification. Services shall be provided on a part-time or intermittent basis to a recipient in any setting in which normal life activities take place. Home health services shall not be furnished to individuals residing in a hospital, nursing facility, intermediate care facility for individuals with intellectual disabilities, or any setting in which payment is or could be made under Medicaid for inpatient services that include room and board. Home health services must be ordered or prescribed by a physician and be part of a written plan of care that the physician shall review at least every 60 days.

C. Covered services. Any one of the following services may be offered as the sole home health service and shall not be contingent upon the provision of another service.

1. Nursing services;
2. Home health aide services;

3. Physical therapy services;
4. Occupational therapy services; or
5. Speech-language pathology services.

D. General conditions. The following general conditions apply to skilled nursing, home health aide, physical therapy, occupational therapy, and speech-language pathology services provided by home health agencies.

1. The patient must be under the care of a physician who is legally authorized to practice and who is acting within the scope of his license. The physician may be the patient's private physician or a physician on the staff of the home health agency or a physician working under an arrangement with the institution which is the patient's residence or, if the agency is hospital-based, a physician on the hospital or agency staff.

2. No payment shall be made for home health services unless a face-to-face encounter has been performed by an approved practitioner, as outlined in this subsection, with the Medicaid individual within the 90 days before the start of the services or within the 30 days after the start of the services. The face-to-face encounter shall be related to the primary reason the Medicaid individual requires home health services.

a. The face-to-face encounter shall be conducted by one of the following approved practitioners:

- (1) A physician licensed to practice medicine;
- (2) A nurse practitioner or clinical nurse specialist within the scope of his practice under state law and working in collaboration with the physician who orders the Medicaid individual's services;
- (3) A certified nurse midwife within the scope of his practice under state law;
- (4) A physician assistant within the scope of his practice under state law and working under the supervision of the physician who orders the Medicaid individual's services; or
- (5) For Medicaid individuals admitted to home health immediately after an acute or post-acute stay, the attending acute or post-acute physician.

b. The practitioner performing the face-to-face encounter shall document the clinical findings of the encounter in the Medicaid individual's record and communicate the clinical findings of the encounter to the ordering physician.

c. Face-to-face encounters may occur through telehealth, which shall not include by phone or email.

3. When a patient is admitted to home health services a start-of-care comprehensive assessment must be completed no later than five calendar days after the start of care date.

4. Services shall be furnished under a written plan of care and must be established and periodically reviewed by a physician. The requested services or items must be



necessary to carry out the plan of care and must be related to the patient's condition. The initial plan of care (certification) must be reviewed by the attending physician, or physician designee. The physician must sign the initial certification before the home health agency may bill DMAS.

5. A physician shall review and recertify the plan of care every 60 days. A physician recertification shall be performed within the last five days of each current 60-day certification period, (i.e., between and including days 56-60). The physician recertification statement must indicate the continuing need for services and should estimate how long home health services will be needed. The physician must sign the recertification before the home health agency may bill DMAS.

6. The physician-orders for therapy services shall include the specific procedures and modalities to be used, identify the specific discipline to carry out the plan of care, and indicate the frequency and duration for services.

7. A written physician's statement located in the medical record must certify that:

- a. The patient needs licensed nursing care, home health aide services, physical or occupational therapy, or speech-language pathology services;
- b. A plan for furnishing such services to the individual has been established and is periodically reviewed by a physician; and
- c. These services were furnished while the individual was under the care of a physician.

8. The plan of care shall contain at least the following information:

- a. Diagnosis and prognosis;
- b. Functional limitations;
- c. Orders for nursing or other therapeutic services;
- d. Orders for home health aide services, when applicable;
- e. Orders for medications and treatments, when applicable;
- f. Orders for special dietary or nutritional needs, when applicable; and
- g. Orders for medical tests, when applicable, including laboratory tests and x-rays.

E. Utilization review shall be performed by DMAS to determine if services are appropriately provided and to ensure that the services provided to Medicaid recipients are medically necessary and appropriate. Such post payment review audits may be unannounced. Services not specifically documented in patients' medical records as having been rendered shall be deemed not to have been rendered and no reimbursement shall be provided.

F. All services furnished by a home health agency, whether provided directly by the agency or under arrangements with

others, must be performed by appropriately qualified personnel. The following criteria shall apply to the provision of home health services:

1. Nursing services. Nursing services must be provided by a registered nurse or by a licensed practical nurse under the supervision of a graduate of an approved school of professional nursing and who is licensed as a registered nurse.

2. Home health aide services. Home health aides must meet the qualifications specified for home health aides by 42 CFR 484.36. Home health aide services may include assisting with personal hygiene, meal preparation and feeding, walking, and taking and recording blood pressure, pulse, and respiration. Home health aide services must be provided under the general supervision of a registered nurse. A recipient may not receive duplicative home health aide and personal care aide services.

3. Rehabilitation services. Services shall be specific and provide effective treatment for patients' conditions in accordance with accepted standards of medical practice. The amount, frequency, and duration of the services shall be reasonable. Rehabilitative services shall be provided with the expectation, based on the assessment made by physicians of patients' rehabilitation potential, that the condition of patients will improve significantly in a reasonable and generally predictable period of time, or shall be necessary to the establishment of a safe and effective maintenance program required in connection with the specific diagnosis.

a. Physical therapy services shall be directly and specifically related to an active written plan of care approved by a physician after any needed consultation with a physical therapist licensed by the Board of Physical Therapy. The services shall be of a level of complexity and sophistication, or the condition of the patient shall be of a nature that the services can only be performed by a physical therapist licensed by the Board of Physical Therapy, or a physical therapy assistant who is licensed by the Board of Physical Therapy and is under the direct supervision of a physical therapist licensed by the Board of Physical Therapy. When physical therapy services are provided by a qualified physical therapy assistant, such services shall be provided under the supervision of a qualified physical therapist who makes an onsite supervisory visit at least once every 30 days. This supervisory visit shall not be reimbursable.

b. Occupational therapy services shall be directly and specifically related to an active written plan of care approved by a physician after any needed consultation with an occupational therapist registered and licensed by the National Board for Certification in Occupational Therapy and licensed by the Virginia Board of Medicine. The services shall be of a level of complexity and sophistication, or the condition of the patient shall be of a



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nature that the services can only be performed by an occupational therapist registered and licensed by the National Board for Certification in Occupational Therapy and licensed by the Virginia Board of Medicine, or an occupational therapy assistant who is certified by the National Board for Certification in Occupational Therapy under the direct supervision of an occupational therapist as defined in this subdivision. When occupational therapy services are provided by a qualified occupational therapy assistant, such services shall be provided under the supervision of a qualified occupational therapist, as defined in this subdivision, who makes an onsite supervisory visit at least once every 30 days. This supervisory visit shall not be reimbursable.

c. Speech-language pathology services shall be directly and specifically related to an active written plan of care approved by a physician after any needed consultation with a speech-language pathologist licensed by the Virginia Department of Health Professions, Virginia Board of Audiology and Speech-Language Pathology. The services shall be of a level of complexity and sophistication, or the condition of the patient shall be of a nature that the services can only be performed by a speech-language pathologist licensed by the Virginia Board of Audiology and Speech-Language Pathology.

4. A visit shall be defined as the duration of time that a nurse, home health aide, or rehabilitation therapist is with a client to provide services prescribed by a physician and that are covered home health services. Visits shall not be defined in measurements or increments of time.

VA.R. Doc. No. R18-5054; Filed August 7, 2017, 4:07 p.m.

telephone (804) 786-4300, FAX (804) 786-8418, or email [john.crisanti@doli.virginia.gov](mailto:john.crisanti@doli.virginia.gov).

**Basis:** The Safety and Health Codes Board is authorized by subdivision 5 of § 40.1-22 of the Code of Virginia to adopt regulations to further, protect, and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal Occupational Safety and Health Act of 1970 (P.L. 91-596) and as may be necessary to carry out its functions established under Title 40.1 of the Code of Virginia. In adopting regulations to protect the occupational safety and health of employees, the board must adopt the standard that most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. However, such standards must be at least as stringent as the standards promulgated by the federal Occupational Safety and Health Act of 1970. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws.

**Purpose:** The purpose of the amendments is to establish procedures for the application of penalties for state and local government employers in accordance with § 40.1-2.1 of the Code of Virginia. Recent incidents that have resulted in the death of government employees, as well as other accident situations, have highlighted a need for an additional incentive for compliance with safety and health laws and regulations. From January 1, 2007, to August 1, 2014, 29 fatalities and catastrophes occurred in state and local government employment. The deterrent effect of a penalty can reduce this number by encouraging compliance and thereby protecting the health and safety of state and local government employees.

**Substance:** This proposed amendment addresses certain issues in regard to the Administrative Regulation for the Virginia Occupational Safety and Health Program of the VOSH program.

The proposed amendment establishes procedures for the application of penalties for state and local government employers in accordance with § 40.1-2.1 of the Code of Virginia. Chapter 526 of the 2016 Acts of Assembly allows the board to authorize the Commissioner of Labor and Industry to issue penalties to state and local government employers. During the legislative process, the Department of Labor and Industry represented to General Assembly members that it would pursue authorization from the board to allow the issuance of proposed penalties to state and local government employers for willful, repeat, and failure-to-abate violations, as well as serious violations that cause a fatal accident or are classified as "high gravity," that is, a violation that is classified as "high severity" and "high probability." An example of a "high gravity" serious

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## TITLE 16. LABOR AND EMPLOYMENT

### SAFETY AND HEALTH CODES BOARD

#### Proposed Regulation

**Title of Regulation:** 16VAC25-60. **Administrative Regulation for the Virginia Occupational Safety and Health Program (amending 16VAC25-60-10, 16VAC25-60-20, 16VAC25-60-30, 16VAC25-60-260, 16VAC25-60-270, 16VAC25-60-280).**

**Statutory Authority:** §§ 40.1-2.1, 40.1-6, and 40.1-22 of the Code of Virginia; Occupational Safety and Health Act of 1970 (P.L. 91-596).

**Public Hearing Information:** A public hearing will be scheduled. Contact the agency for details.

**Public Comment Deadline:** November 3, 2017.

**Agency Contact:** John J. Crisanti, Policy and Planning Manager, Department of Labor and Industry, Main Street Centre, 600 East Main Street, Richmond, VA 23219,

violation would be one where a violation directly results in nonfatal but serious injuries such as broken bones or amputations. Violations that are classified as non-high gravity serious and other-than-serious violations would not receive a penalty.

Issues: There is no primary advantage or disadvantage to the public.

The primary advantage to the agency or the Commonwealth: If the proposed imposition of penalties has the anticipated deterrent effect, proactive steps to develop and implement injury and illness prevention programs can have a significant positive impact in reducing injury and illness rates and the significant associated costs for state and local government employers. Recent incidents that have resulted in the death of government employees, as well as other accident situations, have highlighted a need for an additional incentive for compliance with the safety and health laws and regulations. From January 1, 2007, to August 1, 2014, 29 fatalities and catastrophes occurred in state and local government employment. The deterrent effect of a penalty can reduce this number by encouraging compliance. The department introduced this legislation in 2007 based on what it viewed at the time as a high number of fatalities among government employees. Unfortunately, the rate of fatalities and catastrophes for state and local employees has increased from an average of 2.2 per year before the department introduced the legislation to 3.9 per year since then.

Another primary advantage to the agency is that action by the General Assembly during the 2016 Session of the General Assembly amended the language in the existing statute to allow the issuance of monetary penalties to state and local government employers for certain occupational safety and health program violations. On March 29, 2016, a statutory change approved by the General Assembly was signed by Governor McAuliffe with an effective date of July 1, 2016. Perhaps, a primary disadvantage to the Commonwealth would be that state and local government employers now will be issued a penalty for violations of occupational safety and health laws in which a worker can be seriously injured or killed.

An average of three willful violations have been issued by the Virginia Occupational Safety and Health (VOSH) per year in the public sector. Since 2007, there have been 24 willful violations, all of which have been issued to local government employers. An average of 1.4 repeated violations are issued per year to local government and 3.3 to state agencies.

Approximately 5.0% of the serious violations issued are classified as high gravity. VOSH estimates that 15 such violations in state and local government would be subject to penalty per year. The average penalty issued for high gravity serious items is \$6,300.

VOSH estimates there are up to three willful violations per year and up to five repeat violations per year. The average

penalty for a "high gravity" willful violation is \$63,000 and for a repeat is \$12,600.

VOSH estimates that the total penalties on a per-year basis could range from zero to \$346,500.<sup>1</sup> In 2015, the National Safety Council reported that the average cost of a medically consulted occupational injury in 2013 was \$42,000.

The Washington State Plan, which is tied directly into the states' workers' compensation system, conducted a study on "The impact of DOSH Enforcement and Consultation Visits on Workers' Compensation Claims Rates and costs, 1999-2008,"<sup>2</sup> May, 2011. The study reviewed 10 annual studies on the topic and found that:

"...enforcement inspections conducted at fixed worksites 'were associated with a 7.4% larger decrease in non-MSD [musculoskeletal disorder] compensable claims rates relative to employers with no DOSH activity. DOSH consultation visits were associated with a 24.8% larger decrease in non-MSD compensable claims rates relative to employers with no DOSH activity'" and "...enforcement inspections were associated with a 3.1% larger decrease in compensable claims rates relative to employers with no DOSH activity. DOSH consultation visits were associated with an 8.5% larger decrease in compensable claims rates relative to employers with no DOSH activity."

Virginia employees will benefit from the identification and correction of workplace hazards as a result of cited violations and issued penalties, the development and implementation of injury and illness prevention programs, and the anticipated reduction in injuries and illnesses. No adverse impacts to employees are anticipated from the adoption of the proposed amendments.

According to OSHA publication, "Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job," the costs of workplace injury and illness are borne primarily by injured workers, their families, and taxpayer supported safety net programs; workers' compensation payments cover only a small fraction (about 21%) of lost wages and medical costs of work injuries and illnesses. Workers, their families, and private health insurance pay for nearly 63% of these costs, with taxpayers shouldering the remaining 16%.<sup>3</sup>

Adding penalties to citations issued does not significantly increase the workload for an individual VOSH Compliance Safety and Health Officer. It is only anticipated that approximately 21 violations per year will carry a penalty for state and local government employers.

No adverse impacts to employees are anticipated from the adoption of the proposed amendments.

Other than training DOLI employees on the changes to the regulation, no additional fiscal or other programmatic impacts are anticipated for the department from the adoption of the proposed amendments.

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<sup>1</sup> § 40.1-49.4 A 4 (a) of the Code of Virginia provides that the calculation of penalties shall take into account the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

<sup>2</sup> <http://www.Ini.wa.gov/Safety/Research/Files/OccHealth/DoshEnforce19992008.pdf>

<sup>3</sup> [https://www.osha.gov/Publications/inequality\\_michaels\\_june2015.pdf](https://www.osha.gov/Publications/inequality_michaels_june2015.pdf)

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

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 526 of the 2016 Acts of the Assembly,<sup>1</sup> the Safety and Health Codes Board (Board) proposes to amend the Administrative Regulation for the Virginia Occupational Safety and Health Program (VOSH program regulation) to allow the assessment of monetary penalties against public sector employers<sup>2</sup> for willful, repeat or failure-to-abate health and safety violations, as well as serious health and safety violations that cause a fatality or are classified as "high gravity."<sup>3</sup>

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

Estimated Economic Impact. Current regulation, and state law before Chapter 526 was passed, allows the Board's VOSH program to inspect the workplaces of public sector employers and issue notices of health and safety violation to them, but does not allow the issuance of monetary penalties to these entities. In accordance with Chapter 526, the Board now proposes to amend this regulation so that the Commissioner of Labor and Industry (Commissioner) may issue civil (monetary) penalties for willful, repeat or failure-to-abate health and safety violations. The Commissioner may also issue civil penalties for serious violations that result in a fatality or that are classified as "high gravity" violations. The Board also, as required by Chapter 526, proposes to add language to this regulation that allows public sector employers to contest proposed penalties to the Commissioner. The Commissioner can then initiate judicial proceedings if agreement on citations or penalties cannot be reached.

Board staff reports that the maximum penalty for a serious violation that results in a fatality or that is classified as "high gravity" is currently \$7,000 and the maximum penalty for a willful, repeat or failure-to-abate violation is currently \$70,000. A bill was passed in the 2017 General Assembly session,<sup>4</sup> however, that will increase these maximum penalties to \$12,471 and \$124,709 respectively.<sup>5</sup> Board staff reports that they compiled information on public sector employer incidences between 2007 and 2014 and found approximately 20 cases that involved either a fatality or a catastrophe where three or more employees were hospitalized or were considered willful violations. Of those cases, Board staff estimates that 15 involved one or more violations<sup>6</sup> that would have resulted in monetary penalties if these employers had been private businesses. Of these cases, one involved a state

agency and 19 involved a locality; proposed penalties would have ranged between approximately \$5,250 and \$280,000. As these possible penalties were calculated under current maximum statutory penalty language, proposed penalties for cases decided after this proposed regulation goes into effect would likely be about 80% higher than these numbers (between approximately \$9,300 and \$498,000). Board staff estimates that there may be approximately three willful violations and five repeat violations, as well as 15 serious violations resulting in a fatality or serious injury, each year that would be subject to penalties on account of this proposed regulation.

Board staff reports that these regulatory changes, and the law change that allowed them, are being pursued in order to induce public sector employers to better comply with rules aimed at protecting the health and safety of their employees. Monetary penalties issued against private sector employers are likely an effective means of focusing those employers on safety and reducing the number and severity of violations. Such penalties are a cost that lowers total profit for those businesses. To the extent that those costs can be avoided (in a way that costs less than the penalties would) companies can increase their profits by better protecting the safety of their employees.

This profit motive does not exist in the public sector and so monetary penalties may not induce public sector employers in the same way, or as effectively, as they do private businesses. Large state agencies and localities with larger budgets in particular would likely be less motivated to change their behavior as a result of VOSH program penalties. Monetary penalties may be somewhat more effective in focusing smaller agencies and localities on safety, because the people managing deficient employee areas or projects are more likely to be aware of the effects of any additional costs on total agency or locality budgets, and because any penalty would likely represent a larger part of that total budget. Board staff reports, for instance, that even a penalty as relatively small as \$15,000 would completely eliminate the Department of Labor and Industry's annual conference budget for training VOSH inspectors. Board staff also reports that all penalties would likely be paid out of state general fund or non-general fund monies (or local tax revenues) as it is unlikely that the federal government would allow federal funds to be used for such a purpose even for public programs where there are traditionally federal matching funds. To the extent that penalties are very large, they may impact the ability of state agencies to carry out their other duties and may require localities to curtail some services (even ones that may affect the health and safety of local citizens).

Businesses and Entities Affected. These proposed regulatory changes will affect all 133 localities, all state agencies and any other independent public sector employers who have employees in the Commonwealth.

Localities Particularly Affected. Localities that have a greater number of building projects may be particularly affected.

Projected Impact on Employment. There may be some (likely very) small decrease in public sector employment if VOSH penalties prove large enough to cause localities to curtail some services.

Effects on the Use and Value of Private Property. This proposed regulation is unlikely to affect the use or value of private property in the Commonwealth.

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

Small Businesses:

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

Costs and Other Effects. These proposed regulatory changes are unlikely to affect small businesses.

Alternative Method that Minimizes Adverse Impact. These proposed regulatory changes are unlikely to affect small businesses.

Adverse Impacts:

Businesses. These proposed regulatory changes are unlikely to affect any private business in the Commonwealth.

Localities. Localities will be subject to monetary VOSH program penalties after this proposed regulation becomes effective.

Other Entities. State agencies, and any other independent public sector employers who have employees in the Commonwealth, will be subject to monetary VOSH program penalties after this proposed regulation becomes effective.

<sup>1</sup> <http://leg1.state.va.us/cgi-bin/legp504.exe?161+ful+CHAP0526>

<sup>2</sup> Such employers include Virginia state agencies and Virginia localities as well as other independent public sector entities, like the Metropolitan Washington Transit Authority and the Metropolitan Washington Airports Authority, that conduct work within Virginia's jurisdiction.

<sup>3</sup> High gravity violations are those that result in nonfatal but serious injuries like broken bones or amputations.

<sup>4</sup> <http://leg1.state.va.us/cgi-bin/legp504.exe?171+ful+CHAP0263>. This Chapter also requires, beginning in 2018, the Commissioner to annually adjust maximum penalties by the percentage increase of the Consumer Price Index for all Urban Consumers.

<sup>5</sup> Penalties will increase on July 1, 2017 for private employers and will be instituted at the higher rate for public employers when this proposed regulation becomes effective.

<sup>6</sup> The range of the number of violations was one to eight.

Agency's Response to Economic Impact Analysis: The Department of Labor and Industry has no additional comment in response to the economic impact analysis.

Summary:

*The proposed amendments (i) establish procedures for the application of penalties for state and local government employers in accordance with § 40.1-2.1 of the Code of Virginia and (ii) allow Virginia Occupational Safety and Health to issue proposed penalties to state and local government employers for willful, repeat, and failure-to-abate violations, as well as serious violations that cause a fatal accident or are classified as "high gravity" (i.e., a violation that is classified as "high severity" and "high probability"). Violations that are classified as nonhigh gravity serious, and other-than-serious violations would not receive a penalty.*

Part I  
Definitions

**16VAC25-60-10. Definitions.**

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

"Abatement period" means the period of time defined or set out in the citation for correction of a violation.

"Board" means the Safety and Health Codes Board.

"Bureau of Labor Statistics" means the Bureau of Labor Statistics of the ~~United States~~ U.S. Department of Labor.

"Citation" means the notice to an employer that the commissioner has found a condition or conditions that violate Title 40.1 of the Code of Virginia or the standards, rules or regulations established by the commissioner or the board.

"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any such reference shall include his authorized representatives.

"Commissioner of Labor and Industry" means only the individual who is Commissioner of Labor and Industry.

"Department" means the Virginia Department of Labor and Industry.

"De minimis violation" means a violation ~~which that~~ has no direct or immediate relationship to safety and health.

"Employee" means an employee of an employer who is employed in a business of his employer.

"Employee representative" means a person specified by employees to serve as their representative.

"Employer" means any person or entity engaged in business who has employees but does not include the United States.

"Establishment" means, for the purpose of ~~record keeping~~ recordkeeping requirements, a single physical location where business is conducted or where services or industrial operations are performed, e.g. for example, factory, mill, store, hotel, restaurant, movie theater, farm, ranch, bank, sales office, warehouse, or central administrative office. Where distinctly separate activities are performed at a single physical

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location, such as contract activities operated from the same physical location as a lumberyard; each activity is a separate establishment. In the public sector, an establishment is either (i) a single physical location where a specific governmental function is performed; or (ii) that location which is the lowest level where attendance or payroll records are kept for a group of employees who are in the same specific organizational unit, even though the activities are carried on at more than a single physical location.

"Failure to abate" means that the employer has failed to correct a cited violation within the period permitted for its correction.

"FOIA" means the Freedom of Information Act.

"Gravity based penalty" means an unadjusted penalty that is calculated based on the severity of the hazard and the probability that an injury or illness would result from the hazard.

"High gravity violation" means a violation with a gravity based penalty calculated at the statutory maximums contained in subsections H, I, and J of § 40.1-49.4 of the Code of Virginia.

"Imminent danger condition" means any condition or practice in any place of employment such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through standard enforcement procedures provided by Title 40.1 of the Code of Virginia.

"OSHA" means the Occupational Safety and Health Administration of the ~~United States~~ U.S. Department of Labor.

"Other violation" means a violation which is not, by itself, a serious violation within the meaning of the law but which has a direct or immediate relationship to occupational safety or health.

"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 employer" means the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.~~

"Public employee" means any employee of a public employer. Volunteer members of volunteer fire departments, pursuant to § 27-42 of the Code of Virginia, members of volunteer rescue squads who serve without pay, and other volunteers pursuant to the Virginia State Government Volunteers Act are not public employees. Prisoners confined in jails controlled by any political subdivision of the Commonwealth and prisoners in institutions controlled by the Department of Corrections are not public employees unless employed by a public employer in a work-release program pursuant to § 53.1-60 or § 53.1-131 of the Code of Virginia.

"Public employer" means the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.

"Recordable occupational injury and illness" means (i) a fatality, regardless of the time between the injury and death or the length of illness; (ii) a nonfatal case that results in lost work days; or (iii) a nonfatal case without lost work days which results in transfer to another job or termination of employment, which requires medical treatment other than first aid, or involves loss of consciousness or restriction of work or motion. This category also includes any diagnosed occupational illness which is reported to the employer but is not otherwise classified as a fatality or lost work day case.

"Repeated violation" means a violation deemed to exist in a place of employment that is substantially similar to a previous violation of a law, standard or regulation that was the subject of a prior final order against the same employer. A repeated violation results from an inadvertent or accidental act, since a violation otherwise repeated would be willful.

"Serious violation" means a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. The term "substantial probability" does not refer to the likelihood that illness or injury will result from the violative condition but to the likelihood that, if illness or injury does occur, death or serious physical harm will be the result.

"Standard" means an occupational safety and health standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

"VOSH" means Virginia Occupational Safety and Health.

"Willful violation" means a violation deemed to exist in a place of employment where (i) the employer committed an intentional and knowing, as contrasted with inadvertent, violation and the employer was conscious that what he was doing constituted a violation; or (ii) the employer, even though not consciously committing a violation, was aware that a hazardous condition existed and made no reasonable effort to eliminate the condition.

"Working days" means Monday through Friday, excluding legal holidays, Saturday, and Sunday.

## Part II

### General Provisions

#### **16VAC25-60-20. Jurisdiction.**

All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer,

employee, and place of employment in the Commonwealth of Virginia except where:

1. The United States is the employer or exercises exclusive jurisdiction;
2. The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider federal OSHA case law in determining where jurisdiction over specific working conditions has been preempted by the regulations of a federal agency; or
3. The employer is a public employer, as that term is defined in this chapter. In such cases, the Virginia laws, standards, and regulations governing occupational safety and health are applicable as stated, including 16VAC25-60-10, 16VAC25-60-30, 16VAC25-60-260, 16VAC25-60-280, 16VAC25-60-290, and 16VAC25-60-300.

**16VAC25-60-30. Applicability to public employers.**

A. All occupational safety and health standards adopted by the board shall apply to public employers and their employees in the same manner as to private employers.

B. All sections of this chapter shall apply to public employers and their employees. Where specific procedures are set out for the public sector, such procedures shall take precedence.

C. The following portions of Title 40.1 of the Code of Virginia shall apply to public employers: §§ § 40.1-10; subdivisions A 1 and A 4, except that the reference to subsection G in subdivision A 4 does not apply, and subsections C, D, H, I, and J of § 40.1-49.4 A(1); and §§ 40.1-49.8, 40.1-51, 40.1-51.1, 40.1-51.2, 40.1-51.2:1, 40.1-51.3, 40.1-51.3:2, and 40.1-51.4:2.

D. Section 40.1-51.2:2 A of the Code of Virginia shall apply to public employers except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained.

E. Sections 40.1-49.4 Subdivision A 4, except that the reference to subsection G in subdivision A 4 does not apply, and subsections C, D, F, H, I, and J of § 40.1-49.4 of the Code of Virginia and §§ 40.1-49.9, 40.1-49.10, 40.1-49.11, 40.1-49.12, and 40.1-51.2:2 of the Code of Virginia shall apply to public employers other than the Commonwealth and its agencies.

F. If the commissioner determines that an imminent danger situation, as defined in § 40.1-49.4 F of the Code of Virginia, exists for an employee of the Commonwealth or one of its agencies, and if the employer does not abate that imminent danger immediately upon request, the Commissioner of Labor and Industry shall forthwith petition the governor to direct that the imminent danger be abated.

G. If the commissioner is unable to obtain a voluntary agreement to resolve a violation of § 40.1-51.2:1 of the Code of Virginia by the Commonwealth or one of its agencies, the

Commissioner of Labor and Industry shall petition for redress in the manner provided in this chapter.

Part VI  
Citation and Penalty

**16VAC25-60-260. Issuance of citation and proposed penalty.**

A. Each citation shall be in writing and describe with particularity the nature of the violation or violations, including a reference to the appropriate safety or health provision of Title 40.1 of the Code of Virginia or the appropriate rule, regulation, or standard. In addition, the citation must fix a reasonable time for abatement of the violation. The commissioner shall have authority to propose penalties for cited violations in accordance with § 40.1-49.4 of the Code of Virginia and this chapter. The citation will contain substantially the following: "NOTICE: This citation will become a final order of the commissioner unless contested within fifteen working days from the date of receipt by the employer." The citation may be delivered to the employer or his agent by the commissioner or may be sent by certified mail or by personal service to an officer or agent of the employer or to the registered agent if the employer is a corporation.

1. No citation may be issued after the expiration of six months following the occurrence of any alleged violation. The six-month ~~time frame~~ timeframe is deemed to be tolled on the date the citation is issued by the commissioner, without regard for when the citation is received by the employer. For purposes of calculating the six-month ~~time frame~~ timeframe for citation issuance, the following requirements shall apply:

a. The six-month ~~time frame~~ timeframe begins to run on the day after the incident or event occurred or notice was received by the commissioner (as specified ~~below~~ in subdivisions 1 b through e of this subsection), in accordance with § 1-210 A of the Code of Virginia. The word "month" shall be construed to mean one calendar month in accordance with § 1-223 of the Code of Virginia.

b. An alleged violation is deemed to have "occurred" on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected.

c. Notwithstanding subdivision 1 a of this subsection, if an employer fails to notify the commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence as required by § 40.1-51.1 D of the Code of Virginia, the six-month ~~time frame~~ timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.

d. Notwithstanding subdivision 1 a of this subsection, if the commissioner is first notified of a work-related

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incident resulting in an injury or illness to an ~~employee(s)~~ employee through receipt of an Employer's Accident Report (EAR) form from the Virginia Workers' Compensation Commission as provided in § 65.2-900 of the Code of Virginia, the six-month ~~time frame~~ timeframe shall not be deemed to commence until the commissioner actually receives the EAR form.

e. Notwithstanding subdivision 1 a of this subsection, if the commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an ~~employee(s)~~ employee, through receipt of a complaint in accordance with 16VAC25-60-100 or referral, the six-month ~~time frame~~ timeframe shall not be deemed to commence until the commissioner actually receives the complaint or referral.

B. A citation issued under subsection A of this section to an employer who violates any VOSH law, standard, rule or regulation shall be vacated if such employer demonstrates that:

1. Employees of such employer have been provided with the proper training and equipment to prevent such a violation;
2. Work rules designed to prevent such a violation have been established and adequately communicated to employees by such employer and have been effectively enforced when such a violation has been discovered;
3. The failure of employees to observe work rules led to the violation; and
4. Reasonable steps have been taken by such employer to discover any such violation.

C. For the purposes of subsection B of this section only, the term "employee" shall not include any officer, management official or supervisor having direction, management control or custody of any place of employment which was the subject of the violative condition cited.

D. The penalties as set forth in § 40.1-49.4 of the Code of Virginia shall also apply to violations relating to the requirements for ~~record-keeping~~ recordkeeping, reports or other documents filed or required to be maintained and to posting requirements.

E. In determining the amount of the proposed penalty for a violation the commissioner will ordinarily be guided by the system of penalty adjustment set forth in the VOSH Field Operations Manual. In any event the commissioner shall consider the gravity of the violation, the size of the business, the good faith of the employer, and the employer's history of previous violations.

The commissioner shall have authority to propose civil penalties to public employers for willful, repeat, and failure-to-abate violations in accordance with subsections I and J of § 40.1-49.4, and for serious violations that cause death to an employee or are classified as high gravity in accordance with subsection H of § 40.1-49.4.

F. On multi-employer worksites for all covered industries, citations shall normally be issued to an employer whose employee is exposed to an occupational hazard (the exposing employer). Additionally, the following employers shall normally be cited, whether or not their own employees are exposed:

1. The employer who actually creates the hazard (the creating employer);
2. The employer who is either:
  - a. Responsible, by contract or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
  - b. Responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
3. The employer who has the responsibility for actually correcting the hazard (the correcting employer).

G. A citation issued under subsection F of this section to an exposing employer who violates any VOSH law, standard, rule or regulation shall be vacated if such employer demonstrates that:

1. The employer did not create the hazard;
2. The employer did not have the responsibility or the authority to have the hazard corrected;
3. The employer did not have the ability to correct or remove the hazard;
4. The employer can demonstrate that the creating, the controlling ~~and/or~~ or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees were exposed;
5. The employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;
6. Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; and
7. When extreme circumstances justify it, the exposing employer shall have removed his employees from the job.

## **16VAC25-60-270. Contest of citation or proposed penalty; general proceedings.**

A. An employer to whom a citation, abatement order, or proposed penalty has been issued may contest the citation by notifying the commissioner in writing of the contest. The notice of contest must be mailed or delivered by hand within 15 working days from the receipt of the citation or proposed penalty. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the 15-working-day period in which the employer must contest.



B. The notice of contest shall indicate whether the employer is contesting the alleged violation, the proposed penalty or the abatement time.

C. Employees may contest abatement orders by notifying the commissioner in the same manner as described in subsection A of this section.

~~C. D.~~ The employer's contest of a citation or proposed penalty shall not affect the citation posting requirements of 16VAC25-60-40 unless and until the court ruling on the contest vacates the citation.

~~D. E.~~ When the commissioner has received written notification of a contest of citation or proposed penalty, he will attempt to resolve the matter by settlement, using the procedures of 16VAC25-60-330 and 16VAC25-60-340.

~~E. F.~~ If the matter is not settled or it is determined that settlement does not appear probable, the commissioner will initiate judicial proceedings by referring the contested issues to the appropriate Commonwealth's Attorney and arranging for the filing of a bill of complaint and issuance of a subpoena to the employer.

~~F. G.~~ A contest of the proposed penalty only shall not stay the time for abatement.

**16VAC25-60-280. General contest proceedings applicable to the public sector.**

~~A. The commissioner will not propose penalties for citations issued to public employers.~~

~~B. A.~~ Public employers may contest citations ~~or~~ abatement orders, or proposed penalties by notifying the commissioner in writing of the contest. The notice of contest must be mailed or delivered by hand within 15 working days from receipt of the citation or abatement order. No mistake, inadvertence, or neglect on the part of the employer shall serve to extend the 15-working-day period during which the employer may contest.

~~C. B.~~ The notice of contest shall indicate whether the public employer is contesting the alleged violations, the proposed penalty, or the abatement order.

~~D. C.~~ Public employees may contest abatement orders by notifying the commissioner in the same manner as described at subsection ~~B~~ A of this section.

~~E. D.~~ The commissioner shall seek to resolve any controversies or issues rising from a citation issued to any public employer in an informal conference as described in 16VAC25-60-330.

~~F. E.~~ The contest by a public employer shall not affect the requirements to post the citation as required at 16VAC25-60-40 unless and until the commissioner's or the court ruling on the contest vacates the citation. A contest of a citation may stay the time permitted for abatement pursuant to § 40.1-49.4 C of the Code of Virginia.

F. A contest of the proposed penalty only shall not stay the time for abatement.

VA.R. Doc. No. R17-4963; Filed August 7, 2017, 8:48 a.m.

## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### VIRGINIA BOARD FOR ASBESTOS, LEAD, AND HOME INSPECTORS

#### Proposed Regulation

Title of Regulation: **18VAC15-20. Virginia Asbestos Licensing Regulations (amending 18VAC15-20-10, 18VAC15-20-20, 18VAC15-20-33, 18VAC15-20-52, 18VAC15-20-53, 18VAC15-20-454, 18VAC15-20-456, 18VAC15-20-459.4; adding 18VAC15-20-33.1, 18VAC15-20-33.2, 18VAC15-20-456.1).**

Statutory Authority: §§ 54.1-201 and 54.1-501 of the Code of Virginia.

Public Hearing Information:

September 27, 2017 - 10 a.m. - Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 200, Richmond, VA 23233

Public Comment Deadline: November 3, 2017.

Agency Contact: Trisha Henshaw, Executive Director, Virginia Board for Asbestos, Lead, and Home Inspectors, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email alhi@dpor.virginia.gov.

Basis: Section 54.1-201 A 5 of the Code of Virginia authorizes the board "...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 54.1-501 of the Code of Virginia provides the authority for the board to promulgate regulations governing (i) the licensing of and establishment of performance criteria for asbestos contractors and asbestos analytical laboratories and (ii) the functions and duties of project monitors on asbestos projects. The content of the regulations is pursuant to the board discretion, but shall not be in conflict with the purposes of the statutory authority.

Purpose: The proposed amendments are designed to (i) clarify existing regulatory requirements, particularly for firms operating as asbestos contractors and asbestos analytical laboratories; and (ii) enhance protection of the public's health, safety, and welfare by ensuring analytical laboratories and project monitors demonstrate minimum competency and adequate transparency.

The board considered the need to amend existing asbestos analytical laboratory licensing requirements after receiving inquiries from laboratory applicants regarding the necessity to obtain a separate license for each location. Upon reviewing § 54.1-503 B of the Code of Virginia, it is clear that licensure of analytical laboratories applies to a "person," defined in



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§ 54.1-500 as "a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association or any other individual or entity." The current regulatory requirement for each location of a laboratory (entity) to obtain a separate license does not align with the statutory provisions, causing confusion for asbestos analytical laboratories with branch offices in various sites, because all printed licenses bear the same name and address information as the main firm.

The board reviewed licensing models utilized by other regulatory boards in developing the proposed requirements for laboratory licensing to include branch office locations. The proposed amendments will remove the requirement that each laboratory location be separately licensed and, instead, require only the main office to be licensed. Each branch office location will need to be listed with the board and provide documentation of its qualifications to perform analysis. The intent of the proposed action is to reduce the regulatory burden on analytical laboratories operating in multiple locations, while also protecting the public by ensuring that each laboratory location is qualified to perform asbestos analysis.

Project monitors who analyze air samples on site are already required to be employed by a licensed analytical laboratory. However, currently there is no related provision that final clearance reports prepared for clients include the laboratory results on the employing laboratory's letterhead. The proposed amendments will put in place such a requirement so as to provide greater transparency and protection to the public.

During review of the current regulations, the board identified areas pertaining to entry requirements that were ambiguous, needlessly complicated, and sometimes unnecessary. The proposed action makes amendments to ensure the regulations are clearly written, consistent, and easily understandable by applicants, licensees, and the public.

Substance: Proposed substantive changes to existing sections:

1. 18VAC15-20-10. Revise scope section to reflect that persons (e.g., firms) are subject to licensure and that asbestos analytical laboratories with more than one location only need to obtain a license for the main office location. Branch offices of these laboratories will need to be listed with the board.
2. 18VAC15-20-20. Add definitions for "responsible individual" (the designated point-of-contact for a licensed firm's regulatory compliance) as well as terms referring to various accrediting agencies in the field of asbestos testing or analysis.
3. 18VAC15-20-33. Rewrite entry qualifications section pertaining to all asbestos contractors and asbestos analytical laboratories. General qualifications for firms include requirements for applicant to disclose adverse criminal and disciplinary history, as well as information related to substantial identity of interest (i.e., same controlling principals or owners) with revoked licensees.

Qualifications specific to contractors and laboratories are proposed in 18VAC15-20-33.1 and 18VAC15-20-33.2.

4. 18VAC15-20-52 and 18VAC15-20-53. Revised fee sections to add application and renewal fees for asbestos analytical laboratory branch offices.

5. 18VAC15-20-454. Revise section prohibiting transfer of asbestos contractor license to specify that licenses are issued to firms; any change to the firm's business entity type (e.g., conversion from corporation to a limited liability company) renders the license void, and the successor entity must obtain its own license.

6. 18VAC15-20-456. Revise asbestos project monitor responsibilities section to add requirement for air sample reports that are part of final clearance reports to be (i) on the letterhead of the employing asbestos analytical laboratory and (ii) signed by project monitor. Also removes language pertaining to performance of on-site analysis, which will be addressed in a new section (18VAC15-20-456.1).

7. 18VAC15-20-459.4. Rewrite laboratory status change section to require reporting of (i) any change to the laboratory's responsible individual, rather than supervisors or signing officers; (ii) loss of accreditation by an employed analyst or project monitor; and (iii) any change in types of analysis performed by branch offices. Also adds language equivalent to proposed amendments to 18VAC15-20-454 regarding restrictions on license transfers, applicable to asbestos analytical laboratories.

Proposed new sections:

1. 18VAC15-20-33.1 and 18VAC15-20-33.2 pertain to specific entry requirements for asbestos contractors and asbestos analytical laboratories, respectively. For asbestos analytical laboratories, the board proposes to require that (i) laboratories designate a "responsible individual" at each location for regulatory compliance and (ii) each branch office demonstrate minimum competency to perform the types of asbestos testing or analysis to be undertaken at that location.
2. 18VAC15-20-456.1 outlines professional responsibilities of project monitors who perform onsite analysis that previously appeared in 18VAC15-20-456. The proposed action also adds language regarding training and accreditation requirements for project monitors performing onsite analysis.

Issues: Asbestos is a known human carcinogen that can cause chronic lung disease, as well as lung and other cancers. There is no "safe" level of asbestos exposure. Any type of asbestos fiber can cause injury and may contribute to the risk of getting an asbestos-related disease. The board's regulatory program is designed to help protect the public, as well as the regulated community, from the risk of asbestos.

With regard to the board's proposed action, the primary advantage to the public is that the revisions will improve the

clarity of the regulations, conform to current board practices and legal requirements, and better align with industry standards of practice, all to better protect the health, safety, and welfare of citizens of the Commonwealth. The proposed amendments benefit the regulated community by ensuring the regulations are clearly written, consistent, and easily understandable. The action offers the least burdensome compliance option available to applicants and licensees while providing much needed protection to citizens, striking the appropriate balance that should be attained when looking at regulations. No disadvantages to the public have been identified at this time.

The primary advantage to the Commonwealth is that the revisions reflect the importance Virginia places on ensuring regulations are the least burdensome but also provide protection to the citizens of the Commonwealth. There are no disadvantages posed by these proposed regulations to the board, the Department of Professional and Occupational Regulation, or the Commonwealth.

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

Summary of the Proposed Amendments to Regulation. The Board for Asbestos, Lead, and Home Inspectors (Board) proposes to amend its regulation that governs asbestos licensure. Specifically, the Board proposes to add and amend several definitions as well as clarify the entry requirements and information needed to be licensed for firms seeking asbestos licensure. The Board also proposes to restructure the rules for asbestos analytical labs and lower the licensure fees for labs with more than one physical site.

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

Estimated Economic Impact. Most of the regulatory changes proposed by the Board do not change any substantive requirement or duty for any entity but, instead, are aimed at making the regulatory text easier to read and understand. Changes to the definitions in the regulation as well as language that clarifies, for instance, that firm licenses are nontransferable fall into this category of change. No affected entity is likely to incur costs on account of changes such as these. To the extent that the current regulation contains outdated definitions, or might be otherwise confusing or opaque, these changes will benefit readers by making the regulation more easily understood.

In addition to these clarifying changes, the Board proposes several substantive changes to this regulation's requirements for asbestos analytical labs. Currently, laboratories with more than one physical location must license each location individually, pay the same fee for each location's licensure and provide the Board with duplicative information for that licensure. The Board now proposes to allow laboratories to license their main lab and then license other physical locations as branch offices.

The Board also proposes to institute new, lower fees for branch office licensure. Currently, the fee for each laboratory licensed (whether or not they are branch offices) is \$120. The renewal fee is \$75, and the fee for late renewal is \$110. The Board proposes to institute fees for branch office licensure that are \$100, \$55, and \$90, respectively. Laboratories with more than one physical location will see savings of \$20 per fee per branch office on account of these proposed fee changes. These laboratories will also see other savings on account of the proposed changes to the licensure process that eliminate the need to provide the same information and paperwork multiple times.

Businesses and Entities Affected. Board staff reports that, as of May 1, 2017, the Board has licensed 186 asbestos contractors, 313 asbestos project managers, and 89 asbestos analytical labs. All of these entities, as well as any entities that may seek licensure in the future, will be affected by these proposed regulatory changes. Board staff reports that most of these entities would be considered small businesses.

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

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

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

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

### Small Businesses:

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

Costs and Other Effects. No small businesses will be adversely affected by these proposed regulatory changes. These proposed changes will decrease fees for asbestos analytical labs with more than one physical location.

Alternative Method that Minimizes Adverse Impact. No small businesses will be adversely affected by these proposed regulatory changes.

### Adverse Impacts:

Businesses. No businesses will be adversely affected by these proposed regulatory changes.

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

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

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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) clarify requirements for entities required to obtain a license for asbestos-related work by amending the definition of "person," the licensure requirements for asbestos analytical laboratories with multiple locations, the asbestos firm entry requirements for consistency with other similar regulations applicable to firms, and the information applicants need to be licensed; (ii) specify that firm licenses may not be transferred and are valid only so long as the business entity holding the license is in existence and when asbestos analytical laboratories must notify the board of changes to responsible personnel and types of analysis performed at laboratory locations; (iii) expand the responsibilities of asbestos project monitors to include changes to air sample reporting requirements; and (iv) add language (a) detailing specific entry requirements for asbestos contractors and asbestos analytical laboratories, respectively, and (b) pertaining to conduct during onsite analysis.*

Part I  
Scope

**18VAC15-20-10. Scope.**

The purpose of this section is to identify ~~individuals and firms~~ persons, as defined in 18VAC15-20-20, who need to be licensed.

Asbestos Contractor's License: Required for firms that contract with another person, for compensation, to carry out an asbestos abatement project that exceeds 10 linear or 10 square feet.

Asbestos Worker's License: Required for individuals who remove or otherwise engage in an asbestos project.\*

Asbestos Supervisor's License: Required for individuals who supervise an asbestos abatement project. The Commonwealth of Virginia National Emission Standards for Hazardous Air Pollutants (NESHAP) Program recognizes the "competent person" as an individual licensed under this classification.\*

Asbestos Inspector's License: Required for individuals who inspect buildings to identify asbestos-containing material.\*

Asbestos Management Planner's License: Required for individuals who prepare or update an asbestos management plan.\*

Asbestos Project Monitor's License: Required for individuals who act as a project monitor on asbestos abatement sites. ~~Project monitors who analyze Phase Contrast Microscopy (PCM) asbestos air samples on an asbestos abatement project shall be employed by a firm that holds a valid Virginia Asbestos Analytical Laboratory~~

~~license, and shall have National Institute of Occupational Safety and Health (NIOSH) 582 training, or equivalent.~~

Asbestos Analytical Laboratory License: Required for firms serving as laboratories that analyze air or bulk samples for the presence of asbestos by ~~Polarized Light Microscopy~~ polarized light microscopy (PLM), phase contrast microscopy (PCM), or ~~Transmission Electron Microscopy~~ transmission electron microscopy (TEM). A laboratory that has multiple locations shall obtain an asbestos analytical laboratory license for the main office, and submit the remaining offices as branch offices in accordance with this chapter.

Asbestos Project Designer's License: Required for individuals who prepare or update an asbestos abatement project design, specifications for asbestos abatement projects, and addenda to the specifications.\*

Accredited Asbestos Training Program: ~~Required~~ Approval from the board is required for those who offer asbestos training programs to individuals seeking licensure as an asbestos worker, supervisor, inspector, management planner, project monitor or project designer.

\*Employees who conduct asbestos response actions, inspections, prepare management plans or project designs for their employer, on property owned or leased by the employer, are exempt from Virginia asbestos licensure; however, they are required to meet all OSHA and EPA training requirements.

Part II  
Definitions and General

**18VAC15-20-20. Definitions.**

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

"AAR" means the Asbestos Analyst Registry program offered by the AIHA Registry Programs.

"AAT" means Asbestos Analyst Testing.

"Accredited asbestos training program" means a training program that has been approved by the board to provide training for individuals to engage in asbestos abatement, conduct asbestos inspections, prepare management plans, prepare project designs or act as a project monitor.

"Accredited asbestos training provider" means a firm or individual who has been approved by the board to offer an accredited asbestos training program.

"ACM" means asbestos-containing material.

"AHERA" means Asbestos Hazard Emergency Response Act, 40 CFR Part 763, Subpart E.

"AIHA" means American Industrial Hygiene Association.

"Approval letter" means a written notice confirming the firm or individual applicant's licensure or accreditation by the board.

"Asbestos" means the asbestiform varieties of actinolite, amosite, anthophyllite, chrysotile, crocidolite, and tremolite.

"Asbestos Analytical Laboratory License" means an authorization issued by the board to perform phase contrast, polarized light, or transmission electron microscopy on material known or suspected to contain asbestos.

"Asbestos-containing material" or "ACM" means any material or product which contains more than 1.0% asbestos or such percentage as established by EPA final rule.

"Asbestos contractor" means any person who has met the board's requirements and has been issued an asbestos contractor's license by the board to enter into contracts to perform asbestos projects.

"Asbestos Contractor's License" means an authorization issued by the board permitting a person to enter into contracts to perform an asbestos abatement project.

"Asbestos inspector" means any person who performs an inspection as defined in this chapter.

"Asbestos Inspector's License" means an authorization issued by the board permitting a person to perform ~~on-site~~ onsite investigations to identify, classify, record, sample, test and prioritize by exposure potential asbestos-containing materials.

"Asbestos Management Plan" means a program designed to control or abate any potential risk to human health from asbestos.

"Asbestos management planner" means any person preparing or updating a management plan.

"Asbestos Management Planner's License" means an authorization issued by the board permitting a person to prepare or update an asbestos management plan.

"Asbestos project" or "asbestos abatement project" means an activity involving job set-up for containment, removal, encapsulation, enclosure, encasement, renovation, repair, construction or alteration of asbestos-containing materials. An asbestos project or asbestos abatement project shall not include nonfriable asbestos-containing roofing, flooring and siding material which when installed, encapsulated or removed does not become friable.

"Asbestos project design" means any descriptive form written as instructions or drafted as a plan describing the construction of an asbestos abatement area or site, response action or work practices to be utilized on the asbestos abatement project.

"Asbestos project designer" means any person providing an asbestos project design or specifications for an asbestos abatement project.

"Asbestos Project Designer's License" means an authorization issued by the board permitting a person to design an asbestos abatement project.

"Asbestos project monitor" means any person hired by a building owner, lessee or his agent to monitor, inspect,

provide visual clearance or clearance monitoring of an asbestos abatement project.

"Asbestos Project Monitor's License" means an authorization issued by the board permitting a person to monitor an asbestos project, subject to board regulations.

"Asbestos supervisor" means any person so designated by an asbestos contractor who provides ~~on-site~~ onsite supervision and direction to the workers engaged in asbestos projects.

"Asbestos Supervisor's License" means an authorization issued by the board permitting an individual to supervise and work on an asbestos project.

"Asbestos worker" means any person who engages in an asbestos abatement project.

"Asbestos Worker's License" means an authorization issued by the board permitting an individual to work on an asbestos project.

"ASHARA" means Asbestos School Hazard Abatement Reauthorization Act, 40 CFR Part 763, Subpart E.

"BAPAT" means the Bulk Asbestos Proficiency Analytical Testing Program of the AIHA Proficiency Analytical Testing Programs.

"Board" means the Virginia Board for Asbestos, Lead, and Home Inspectors.

"Department" means the Department of Professional and Occupational Regulation.

"Direct supervision" means a licensed or accredited inspector, management planner, project monitor or project designer, who undertakes to supervise the activities of an unlicensed inspector, management planner, project monitor or project designer, shall be physically present on the premises at all times while any unlicensed inspector, management planner, project monitor or project designer under his supervision is engaged in the activities of an inspector, management planner, project monitor or project designer.

"Director" means the Director of the Department of Professional and Occupational Regulation.

"Employee" means all persons in the service of another under any contract of hire, express or implied, oral or written.

"Encapsulation" means the treatment of asbestos-containing material (ACM) with a material that surrounds or embeds asbestos fibers in an adhesive matrix to prevent the release of fibers, as the encapsulant creates a membrane over the surface (bridging encapsulant) or penetrates the material and binds its components together (penetrating encapsulant).

"Encasement" means any process by which an asbestos-containing material (ACM) is sprayed with an insulating sealer which is then mechanically fastened to the asbestos covered substrate. The insulating sealer is then covered with a sealer to give structural strength and durability.

"Enclosure" means the construction or installation over or around the asbestos-containing material (ACM) of any leak tight solid or flexible coverings, which will not deteriorate or

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decompose for an extended period of time, so as to conceal the ACM, contain ACM fibers, and render the ACM inaccessible.

"Environmental remediation activity" means any activity planned or carried out for the purpose of reducing or eliminating any environmental hazard, including activities necessary to train individuals in the proper or lawful conduct of such activities, which are regulated by federal or state law or regulation.

"EPA" means ~~United States~~ U.S. Environmental Protection Agency.

"Financial interest" means financial benefit accruing to an individual or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership exceeds 3.0% of the total equity of the business; (ii) annual gross income that exceeds, or may be reasonably anticipated to exceed \$1,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination of it, paid or provided by a business that exceeds or may be reasonably expected to exceed \$1,000 annually; (iv) ownership of real or personal property if the interest exceeds \$1,000 in value and excluding ownership in business, income, salary, other compensation, fringe benefits or benefits from the use of property.

"Firm" means any company, partnership, corporation, sole proprietorship, association, or other business entity.

"Friable" means that the material when dry, may be crumbled, pulverized or reduced to powder by hand pressure and includes previously nonfriable material after such previously nonfriable material becomes damaged to the extent that when dry it may be crumbled, pulverized, or reduced to powder by hand pressure.

"Guest instructor" means an instructor who is invited to instruct a specific topic or topics in an accredited asbestos training program and whose instruction is limited to two hours per day.

"Hands-on experience" means the physical participation of students in an asbestos training program. The physical participation includes mock sampling and inspection techniques, report preparation, writing project specifications, glovebag demonstrations and containment construction.

"IHLAP" means the Industrial Hygiene Laboratory Accreditation Program of the AIHA Laboratory Accreditation Programs, LLC.

"IHPAT" means the Industrial Hygiene Proficiency Analytical Testing Program of the AIHA Proficiency Analytical Testing Programs.

"Immediate family" means (i) a spouse, (ii) a sibling or step sibling, (iii) a parent or step parent, (iv) children or step children, or (v) any other person residing in the same household as the individual.

"Inspection" means an activity undertaken to determine the presence or location, or to access the condition of, friable or nonfriable asbestos-containing material (ACM) or suspected ACM, whether by visual or physical examination, or by collecting samples of such material. This term includes reinspections of friable and nonfriable known or assumed ACM that has been previously identified. The term does not include the following:

1. Periodic surveillance of the type described in 40 CFR 763.92(b) solely for the purpose of recording or reporting a change in the condition of known or assumed ACM;
2. Inspections performed by employees or agents of federal, state, or local governments solely for the purpose of determining compliance with applicable statutes or regulations; or
3. Visual inspections solely for the purpose of determining completion of response actions.

"Instructor" means a person who instructs one or more accredited asbestos training programs, to include the principal instructor, but excluding guest instructors.

"Licensee" means any person, as defined by § 54.1-500 of the Code of Virginia, who has been issued and holds a currently valid license as an asbestos worker, asbestos supervisor, asbestos inspector, asbestos management planner, asbestos project designer, asbestos project monitor or asbestos contractor under this chapter.

"NIOSH" means National Institute of Occupational Safety and Health.

"NIST" means National Institute of Standards and Technology.

"NVLAP" means the Asbestos Fiber Analysis Program of the National Institute of Standards and Technology National Voluntary Laboratory Accreditation Program.

"Occupied" means any area of any building designed or intended for human occupancy for any purpose.

"OSHA" means the U.S. Department of Labor Occupational Safety and Health Administration.

"OSHA Class III Work" means repair and maintenance operations where asbestos-containing material (ACM), including thermal system insulation and surfacing material, is likely to be disturbed.

~~"PAT" means Proficiency Analytical Testing proficiency analytical testing.~~

"PCM" means phase contrast microscopy.

~~"Person" means a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association or any other firm, individual, or any other entity.~~

"PLM" means polarized light microscopy.

"Preliminary review" means a review conducted by the department following the submission of training materials to

ascertain if the proposed asbestos training program meets the standards established by this chapter.

"Principal instructor" means an instructor whose main responsibility is to instruct accredited asbestos training programs, supervise other instructors, and manage the overall asbestos training program curriculum.

"Removal" means the physical removal of asbestos-containing material (ACM) in accordance with all applicable regulations.

"Renovation" means altering in any way, one or more facility components.

"Repair" means returning damaged asbestos-containing material (ACM) to an undamaged condition or to an intact state so as to prevent fiber release.

"Residential buildings" means site-built homes, modular homes, condominium units, mobile homes, manufactured housing, and duplexes, or other multi-unit dwellings consisting of four units or fewer that are currently in use or intended for use only for residential purposes.

"Response action" means any method, including removal, encapsulation, enclosure, encasement, or operation and maintenance, that protects human health and the environment from friable asbestos-containing material.

"Responsible individual" means the employee, officer, manager, owner, or principal of the firm who shall be designated by each firm to ensure compliance with Chapter 5 (§ 54.1-500 et seq.) of Title 54.1 of the Code of Virginia and all regulations of the board and to receive communications and notices from the board that may affect the firm. In the case of a sole proprietorship, the sole proprietor shall be the responsible individual.

"Substantial change" means a change in overall asbestos training program, materials, principal instructors, training managers, directors, ownership, facilities, equipment, examinations, and certificates of completion. The addition of updated regulations, exam questions or news articles shall not be considered a substantial change.

"TEM" means transmission electron microscopy.

"Training manager" means the individual responsible for administering a training program and monitoring the performance of the instructors.

"Visual inspection" means a process of looking for conditions, which if not corrected during the asbestos abatement project, will lead to residual asbestos-containing dust or debris. Visual inspection includes examination of an asbestos abatement project area prior to clearance air monitoring for evidence that the project has been successfully completed as indicated by the absence of residue, dust and debris.

**18VAC15-20-33. ~~Qualifications~~ General qualifications for licensure—business entities licensure: firms.**

~~A. General. Every business entity shall secure a license before transacting business. Each firm applying for a license shall meet the requirements of this section.~~

~~B. Name. The business name shall be disclosed on the application. The name under which the entity conducts business and holds itself out to the public (i.e., the trade or fictitious name) shall also be disclosed on the application. Business entities The applicant shall disclose the name under which the business entity conducts business and holds itself out to the public. The firm shall register their trade or fictitious names, when applicable, with the State Corporation Commission or the clerk of the circuit court in the county or jurisdiction locality where the business is to be conducted in accordance with §§ 59.1-69 through 59.1-76 Chapter 5 (§ 59.1-69 et seq.) of Title 59.1 of the Code of Virginia before submitting their an application to the board.~~

~~C. Address. The applicant shall disclose the firm's mailing address; and the firm's physical address. A post office box is only acceptable as a mailing address when a physical address is also provided.~~

~~D. Form of organization. Applicants shall meet the additional requirements listed below in this subsection for their business type the firm's form of organization:~~

1. Corporations. ~~All applicants~~ Applicants shall have been incorporated in the Commonwealth of Virginia or, if a foreign corporation, shall have obtained a certificate of authority to conduct business in Virginia from the State Corporation Commission in accordance with ~~§ 13.1-544.2~~ requirements governing corporations pursuant to Title 13.1 of the Code of Virginia. ~~The corporation~~ Corporations shall be in good standing with the State Corporation Commission at the time of application to the board and at all times when the license is in effect.

2. Limited liability companies. ~~All applicants~~ Applicants shall have obtained a certificate of organization in the Commonwealth of Virginia or, if a foreign limited liability company, shall have obtained a certificate of registration to do business in Virginia from the State Corporation Commission in accordance with ~~§ 13.1-1105~~ requirements governing limited liability companies pursuant to Title 13.1 of the Code of Virginia. ~~The company~~ Companies shall be in good standing with the State Corporation Commission at the time of application to the board and at all times when the license is in effect.

3. Partnerships. ~~All applicants~~ Applicants shall have a written partnership agreement. The partnership agreement shall state that ~~all professional asbestos abatement~~ services of the partnership shall be under the direction and control of a licensed or certified professional the appropriate asbestos abatement licensee.

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4. Sole proprietorships. Sole proprietorships desiring to use an assumed or fictitious name, that is, a name other than the individual's full name, shall have their assumed or fictitious name recorded by the clerk of the court of the county or jurisdiction wherein the business is to be conducted.

## E. Qualifications.

1. Asbestos contractor. Each applicant shall hold a valid Virginia contractor license issued by the Virginia Board for Contractors with an asbestos specialty and shall be in compliance with all other requirements found in Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia governing the regulation of contractors.

2. Asbestos analytical laboratory. Each applicant shall submit evidence of meeting the standards to perform one or more of the following analysis:

a. For PLM analysis, a current NVLAP accreditation for bulk asbestos fiber analysis or a current AIHA accreditation and proficiency in the AIHA bulk asbestos program. A copy of the NVLAP Certificate of Accreditation, Scope of Accreditation and documentation of NVLAP proficiency or a copy of an AIHA accreditation certificate and proof of proficiency in the AIHA bulk program shall be submitted with the application.

b. For PCM analysis:

(1) At fixed laboratory sites, a current accreditation by AIHA or evidence that each facility has been rated "proficient" in the PAT Program's most recent round of asbestos evaluations, or evidence that each analyst is listed or has applied for listing in the Asbestos Analyst Registry (AAR) and has a performance rating of "acceptable" for the most recent Asbestos Analyst Testing (AAT) round. Each analyst shall have completed the NIOSH 582 training program or equivalent.

(2) For on site analysis, each on site analyst shall be listed or shall have applied for listing in the AAR and have a performance rating of "acceptable" for the most recent AAT round, or is accredited by AIHA or has been rated "proficient" in the PAT Program's most recent round of asbestos evaluations. Each analyst shall have completed the NIOSH 582 training program or equivalent.

c. For TEM analysis, a current accreditation by NVLAP to analyze asbestos airborne fibers using TEM. A copy of the NVLAP Certificate of Accreditation, Scope of Accreditation and documentation of NVLAP proficiency shall be submitted with the application.

F. Conviction or guilt. Neither E. In accordance with § 54.1-204 of the Code of Virginia, the applicant shall disclose the following information about the firm nor the and its owners, officers or, managers, members, and directors shall have been convicted or found guilty, regardless of adjudication, in any

jurisdiction of any felony or of any misdemeanor involving lying, cheating or stealing or of any violation while engaged in environmental remediation activity that resulted in the significant harm or the imminent and substantial threat of significant harm to human health or the environment, there being no appeal pending therefrom or the time of appeal having lapsed. Any plea of nolo contendere shall be considered a conviction for the purposes of this section. A certified copy of the final order, decree or case decision by a court or regulatory agency with lawful authority to issue such order, decree or case decision shall be admissible as prima facie evidence of such conviction or discipline. The board, at its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia, as applicable:

1. All felony convictions;

2. All misdemeanor convictions involving lying, cheating, or stealing; and

3. Any conviction resulting from engaging in environmental remediation activity that resulted in the significant harm or the imminent and substantial threat of significant harm to human health or the environment.

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 board, at its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia. The applicant has the right to request further review of any such action by the board under the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

G. Standards of practice and conduct. Applicants shall be in compliance with the standards of practice and conduct set forth 18VAC15-20-400 through 18VAC15-20-454 and 18VAC15-20-459.2 through 18VAC15-20-459.5 at the time of application to the board, while the application is under review by the board, and at all times when the license is in effect.

H. Standing. Both the firm and the owners, officers and directors shall be in good standing in every jurisdiction where licensed and the applicant shall not have had a license that was suspended, revoked or surrendered in connection with any disciplinary action in any jurisdiction prior to applying for licensure in Virginia. F. The applicant shall report (i) the suspension, revocation, or surrender of a license, certification, or registration in connection with a disciplinary action by any jurisdiction and (ii) whether the firm, owners, officers, managers, members, or directors have been the subject of discipline in any jurisdiction prior to applying for licensure and while the application is under review by the board. The board, at its discretion, may deny licensure to an applicant based on disciplinary action by any jurisdiction.

I. Denial of license. The board may refuse to issue a license to any asbestos contractor or asbestos analytical laboratory applicant if the applicant or its owners, officers or directors have a financial interest in an asbestos contractor whose

~~asbestos license has been revoked, suspended, or denied renewal in any jurisdiction.~~

G. The board may deny the application of an applicant who is shown to have a substantial identity of interest with a person whose license or certificate has been revoked or not renewed by the board. A substantial identity of interest includes (i) a controlling financial interest by the individual or corporate principals of the person whose license or certificate has been revoked or has not been renewed or (ii) substantially identical owners, officers, managers, members, or directors, as applicable.

H. An applicant shall not knowingly make a materially false statement, submit falsified documents, or fail to disclose a material fact requested in connection with an application submitted to the board.

**18VAC15-20-33.1. Qualifications for asbestos contractor license.**

In addition to the requirements of 18VAC15-20-33, each applicant for an asbestos contractor license shall hold a valid Virginia contractor license issued by the Virginia Board for Contractors with an asbestos contracting specialty and shall be in compliance with all other requirements found in Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia governing the regulation of contractors.

**18VAC15-20-33.2. Qualifications for asbestos analytical laboratory license.**

A. In addition to the requirements of 18VAC15-20-33, each applicant for an asbestos analytical laboratory license shall submit evidence of meeting the standards to perform one or more of PLM, PCM, or TEM analysis.

1. For PLM analysis, one of the following:

- a. Current NVLAP accreditation demonstrated by submittal of a copy of the Certificate of Accreditation, Scope of Accreditation, and documentation of proficiency with the application;
- b. The asbestos analytical laboratory is rated "proficient" in the BAPAT Program and maintains the training and quality control document such as is necessary to demonstrate competency in performing analysis; or
- c. The asbestos analytical laboratory is accredited under the IHLAP and maintains the training and quality control documentation such as is necessary to demonstrate competency.

2. For PCM analysis, each analyst shall have completed the NIOSH 582 or NIOSH 582 Equivalency course. In addition, at least one of the following must be satisfied:

- a. At fixed laboratory sites, one of the following qualifications must be met:
  - (1) The asbestos analytical laboratory is accredited under the IHLAP and maintains the training and quality control documentation such as is necessary to demonstrate competency;

(2) The asbestos analytical laboratory is rated "proficient" in the IHPAT Program and maintains the training and quality control document such as is necessary to demonstrate competency in performing analysis; or

(3) Each analyst is listed in the AAR and has a performance rating of "acceptable" for the most recent AAT round.

b. For onsite analysis, one of the following qualifications must be met:

(1) The asbestos analytical laboratory is rated "proficient" in the IHPAT Program and maintains the training and quality control document such as is necessary to demonstrate competency in performing onsite analysis;

(2) The asbestos analytical laboratory is accredited under the IHLAP and maintains compliance with the requirements of its accreditation, as well as the training and quality control document such as is necessary to demonstrate competency in performing analysis; or

(3) Each analyst is listed in the AAR and has a performance rating of "acceptable" for the most recent AAT round.

3. For TEM analysis, a current accreditation by NVLAP to analyze asbestos airborne fibers using TEM. A copy of the NVLAP Certificate of Accreditation, Scope of Accreditation, and documentation of NVLAP proficiency shall be submitted with the application.

B. The applicant shall name a responsible individual for the asbestos analytical laboratory.

C. Any branch office of an asbestos analytical laboratory shall complete a branch office application from the board. Each branch office shall name a resident responsible individual at each branch office.

D. The branch office application shall provide the information contained in subsection A of this section for the applicable branch office.

E. Any of the training and quality control documentation required to be maintained pursuant to this section shall be provided to the board upon request.

**18VAC15-20-52. Application fees.**

Application fees are set out in this section.

Fee Type	Fee Amount	When Due
Application for worker, supervisor, inspector, management planner, project designer or project monitor license	\$80	With application



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Application for asbestos analytical laboratory license	\$120	With application	<u>Late renewal for asbestos analytical laboratory branch office (includes a \$35 late renewal fee in addition to the regular \$45 renewal fee)</u>	\$90	<u>With renewal application</u>
<u>Application for asbestos analytical laboratory branch office</u>	\$100	<u>With application</u>	Late renewal for asbestos contractor's license (includes a \$35 late renewal fee in addition to the regular \$70 renewal fee)	\$105	With renewal application
Application for an asbestos contractor license	\$110	With application	Late renewal for accredited asbestos training program approval (includes a \$35 late renewal fee in addition to the regular \$125 renewal fee)	\$160	With renewal application
Application for accredited asbestos training program approval	\$500 per day of training	With application			
<b>18VAC15-20-53. Renewal and late renewal fees.</b>					
Renewal and late renewal fees are set out in this section.					
Fee Type	Fee Amount	When Due			
Renewal for worker, supervisor, inspector, management planner, project designer or project monitor license	\$45	With renewal application	<b>18VAC15-20-454. Transfer of asbestos contractor license.</b>		
Renewal for asbestos analytical laboratory license	\$75	With renewal application	<del>The transfer of an asbestos contractor license is prohibited.</del>		
<u>Renewal for asbestos analytical laboratory branch office</u>	\$55	<u>With renewal application</u>	<u>Asbestos contractor licenses are issued to firms as defined in this chapter and are not transferable. Whenever the legal firm holding the license is dissolved or altered to form a new firm, the original license becomes void and shall be returned to the board within 30 days of the change. Additionally, the new firm shall apply for a new license, on a form provided by the board, within 30 days of the change in the firm. Such changes include:</u>		
Renewal for asbestos contractor's license	\$70	With renewal application	<u>1. Death of a sole proprietor;</u>		
Renewal for accredited asbestos training program approval	\$125	With renewal application	<u>2. Death or withdrawal of a general partner in a general partnership or the managing partner in a limited partnership;</u>		
Late renewal for worker, supervisor, inspector, management planner, project designer or project monitor license (includes a \$35 late renewal fee in addition to the regular \$45 renewal fee)	\$80	With renewal application	<u>3. Termination or cancellation of a corporation or limited liability company; and</u>		
Late renewal for asbestos analytical laboratory license (includes a \$35 late renewal fee in addition to the regular \$75 renewal fee)	\$110	With renewal application	<u>4. Conversion, formation, or dissolution of a corporation, a limited liability company, or an association or any other firm recognized under the laws of the Commonwealth of Virginia.</u>		
<b>18VAC15-20-456. Responsibilities.</b>					
A. Asbestos project monitors shall conduct inspections of the contractor's work practices and inspections of the containment.					
B. Asbestos project monitors shall be present on the job site each day response actions are being conducted or in accordance with the owner-approved contractual agreement with the project monitor, shall perform the duties and functions established in 18VAC15-20-455, and shall maintain a daily log of all work performed. The daily log shall include; <del>but not be limited to,</del> inspection reports, air sampling data,					

type of work performed by the contractor, problems encountered and corrective action taken.

C. Asbestos project monitors shall take final air samples on all abatement projects, except for abatement projects in residential buildings.

~~D. Project monitors who analyze PCM air samples on site shall be employed by a licensed analytical laboratory and shall be listed or have applied for listing in the AAR and rated "acceptable" or is accredited by AHA or has been rated "proficient" in the PAT Program's most recent round of asbestos evaluations. The asbestos project monitor shall include, prior to reoccupancy, the air sample report on the employing asbestos analytical laboratory's letterhead in the final clearance report. Such report shall include the licensed asbestos project monitor's signature.~~

**18VAC15-20-456.1. Onsite analysis by project monitors.**

Project monitors who analyze PCM air samples on site shall (i) be employed by a licensed asbestos analytical laboratory, (ii) have completed the NIOSH 582 or NIOSH 582 Equivalency Course, and (iii) satisfy one of the following:

1. The project monitor is listed in the AAR and rated "acceptable" for the most recent AAT round;
2. The licensed asbestos analytical laboratory employing the project monitor is rated as "proficient" in the IHPAT Program and maintains training and quality control documentation necessary to demonstrate competency in performing onsite analysis; or
3. The licensed asbestos analytical laboratory employing the project monitor is accredited under the IHLAP, remains in compliance with accreditation requirements, and maintains training and quality control documentation necessary to demonstrate competency in performing onsite analysis.

**18VAC15-20-459.4. Change of status.**

~~A. The licensee shall notify the department immediately within 10 days of any addition or deletion regarding employment of trained and experienced supervisors, and any changes regarding the signing officer's relationship with the company changes to the resident responsible individual for each laboratory location.~~

B. The licensee shall notify the board within 10 business days upon the loss of accreditation or proficiency rating by NVLAP ~~or AHA, IHLAP, or IHPAT~~ by any laboratory location. The asbestos analytical laboratory shall notify the board if an employed analyst or project monitor performing asbestos laboratory analysis is removed from the AAR.

C. The licensee shall notify the board, in writing, if the ~~type of analysis to be performed~~ it will undertake is different from the type of analysis ~~in for~~ for which the initial license was issued. The licensee shall submit a new application ~~or branch office application, as applicable,~~ or branch office application, as applicable, reflecting the changes and submit evidence of meeting the qualifications required by this chapter to perform the analysis. ~~The above information shall~~

~~be submitted to the board prior to performing the analysis. The licensee must receive approval from the board prior to performing the analysis. No additional fees are required to upgrade amend the type of analysis performed by the analytical laboratory licensee licensee.~~

D. The licensee shall notify the department within 10 days of any changes in the laboratory location.

E. Asbestos analytical laboratory licenses are issued to firms as defined in this chapter and are not transferable. Whenever the legal firm holding the license is dissolved or altered to form a new firm, the original license becomes void and shall be returned to the board within 30 days of the change. Additionally, the new firm shall apply for a new license, on a form provided by the board, within 30 days of the change in the firm. Such changes include:

1. Death of a sole proprietor;
2. Death or withdrawal of a general partner in a general partnership or the managing partner in a limited partnership;
3. Termination or cancellation of a corporation or limited liability company; and
4. Conversion, formation, or dissolution of a corporation, a limited liability company, or an association or any other firm recognized under the laws of the Commonwealth of Virginia.

VA.R. Doc. No. R17-4855; Filed August 7, 2017, 2:58 p.m.

**BOARD OF DENTISTRY**

**Final Regulation**

**REGISTRAR'S NOTICE:** The Board of Dentistry is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The Board of Dentistry will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Titles of Regulations: 18VAC60-21. Regulations Governing the Practice of Dentistry (amending 18VAC60-21-10).

**18VAC60-25. Regulations Governing the Practice of Dental Hygiene (amending 18VAC60-25-10, 18VAC60-25-110).**

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

Effective Date: October 4, 2017.

Agency Contact: Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4437, FAX (804) 527-4428, or email sandra.reen@dhp.virginia.gov.

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# Regulations

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## Summary:

*The amendments conform regulations regarding remote supervision of the practice of a dental hygienist to changes pursuant to Chapter 410 of the 2017 Acts of Assembly by (i) removing the requirement for supervision to be provided by the employing dentist from the definition of "remote supervision" and (ii) adding a requirement to document in the patient's record confirmation from the patient that he does not have another dentist of record whom he is seeing regularly.*

### Part I General Provisions

#### **18VAC60-21-10. 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"

"Maxillofacial"

"Oral and maxillofacial surgeon"

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

"AAOMS" means the American Association of Oral and Maxillofacial Surgeons.

"ADA" means the American Dental Association.

"Advertising" means a representation or other notice given to the public or members thereof, directly or indirectly, by a dentist on behalf of himself, his facility, his partner or associate, or any dentist affiliated with the dentist or his facility by any means or method for the purpose of inducing purchase, sale, or use of dental methods, services, treatments, operations, procedures, or products, or to promote continued or increased use of such dental methods, treatments, operations, procedures, or products.

"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 by the

board to perform reversible, intraoral procedures as specified in 18VAC60-21-150 and 18VAC60-21-160.

"Mobile dental facility" means a self-contained unit in which dentistry is practiced that is not confined to a single building and can be transported from one location to another.

"Nonsurgical laser" means a laser that is not capable of cutting or removing hard tissue, soft tissue, or tooth structure.

"Portable dental operation" means a nonfacility in which dental equipment used in the practice of dentistry is transported to and utilized on a temporary basis at an out-of-office location, including patients' homes, schools, nursing homes, or other institutions.

"Radiographs" means intraoral and extraoral radiographic images of hard and soft tissues used for purposes of diagnosis.

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

"Direct supervision" means that the dentist examines the patient and records diagnostic findings prior to delegating restorative or prosthetic treatment and related services to a dental assistant II for completion the same day or at a later date. The dentist prepares the tooth or teeth to be restored and remains immediately available in the office to the dental assistant II for guidance or assistance during the delivery of treatment and related services. The dentist examines the patient to evaluate the treatment and services before the patient is dismissed.

"Direction" means the level of supervision (i.e., immediate, direct, indirect, or general) that a dentist is required to exercise with a dental hygienist, a dental assistant I, or a dental assistant II or that a dental hygienist is required to exercise with a dental assistant to direct and oversee the delivery of treatment and related services.

"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.

"Immediate supervision" means the dentist is in the operatory to supervise the administration of sedation or provision of treatment.

"Indirect supervision" means the dentist examines the patient at some point during the appointment and is continuously present in the office to advise and assist a dental hygienist or a dental assistant who is (i) delivering hygiene treatment, (ii) preparing the patient for

examination or treatment by the dentist, or (iii) preparing the patient for dismissal following treatment.

"Remote supervision" means that a supervising dentist is accessible and available for communication and consultation with a dental hygienist ~~employed by such dentist~~ during the delivery of dental hygiene services but such dentist may not have conducted an initial examination of the patients who are to be seen and treated by the dental hygienist and may not be present with the dental hygienist when dental hygiene services are being provided. For the purpose of practice by a public health dental hygienist, "remote supervision" means that a public health dentist has regular, periodic communications with a public health dental hygienist regarding patient treatment, but such dentist may not have conducted an initial examination of the patients who are to be seen and treated by the dental hygienist and may not be present with the dental hygienist when dental hygiene services are being provided.

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

"Analgesia" means the diminution or elimination of pain.

"Conscious/moderate sedation" or "moderate sedation" means a drug-induced depression of consciousness, during which patients respond purposefully to verbal commands, either alone or accompanied by light tactile stimulation. Reflex withdrawal from a painful stimulus is not considered a purposeful response. No interventions are required to maintain a patent airway, and spontaneous ventilation is adequate. Cardiovascular function is usually maintained.

"Deep sedation" means a drug-induced depression of consciousness during which patients cannot be easily aroused but respond purposefully following repeated or painful stimulation. Reflex withdrawal from a painful stimulus is not considered a purposeful response. The ability to independently maintain ventilatory function may be impaired. Patients may require assistance in maintaining a patent airway, and spontaneous ventilation may be inadequate. Cardiovascular function is usually maintained.

"Enteral" means any technique of administration in which the agent is absorbed through the gastrointestinal tract or oral mucosa (i.e., oral, rectal, sublingual).

"General anesthesia" means a drug-induced loss of consciousness during which patients are not arousable, even by painful stimulation. The ability to independently maintain ventilator function is often impaired. Patients often require assistance in maintaining a patent airway, and positive pressure ventilation may be required because of depressed spontaneous ventilation or drug-induced depression of neuromuscular function. Cardiovascular function may be impaired.

"Inhalation" means a technique of administration in which a gaseous or volatile agent, including nitrous oxide, is introduced into the pulmonary tree and whose primary effect is due to absorption through the pulmonary bed.

"Inhalation analgesia" means the inhalation of nitrous oxide and oxygen to produce a state of reduced sensation of pain with minimal alteration 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.

"Minimal sedation" means a drug-induced state during which patients respond normally to verbal commands. Although cognitive function and physical coordination may be impaired, airway reflexes, and ventilator and cardiovascular functions are unaffected. Minimal sedation includes "anxiolysis" (the diminution or elimination of anxiety through the use of pharmacological agents in a dosage that does not cause depression of consciousness) and includes "inhalation analgesia" when used in combination with any anxiolytic agent administered prior to or during a procedure.

"Moderate sedation" (see the definition of conscious/moderate sedation).

"Monitoring" means to observe, interpret, assess, and record appropriate physiologic functions of the body during sedative procedures and general anesthesia appropriate to the level of sedation as provided in Part VI (18VAC60-21-260 et seq.) of this chapter.

"Parenteral" means a technique of administration in which the drug bypasses the gastrointestinal tract (i.e., intramuscular, intravenous, intranasal, submucosal, subcutaneous, or intraocular).

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

"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 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"

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# Regulations

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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).

"Remote supervision" means that a supervising dentist is accessible and available for communication and consultation with a dental hygienist ~~employed by such dentist~~ during the delivery of dental hygiene services but such dentist may not have conducted an initial examination of the patients who are to be seen and treated by the dental hygienist and may not be present with the dental hygienist when dental hygiene services are being provided. For the purpose of practice by a public health dental hygienist, "remote supervision" means that a public health dentist has regular, periodic communications with a public health dental hygienist regarding patient treatment, but such dentist may not have conducted an initial examination of the patients who are to be seen and treated by the dental hygienist and may not be present with the dental hygienist when dental hygiene services are being provided.

"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 III

### Standards of Conduct

#### **18VAC60-25-110. Patient records; confidentiality.**

A. A dental hygienist shall be responsible for accurate and complete information in patient records for those services provided by a hygienist or a dental assistant under direction to include the following:

1. Patient's name on each page in the patient record;
2. A health history taken at the initial appointment, which is updated when local anesthesia or nitrous oxide/inhalation analgesia is to be administered and when medically indicated and at least annually;
3. Options discussed and oral or written consent for any treatment rendered with the exception of prophylaxis;
4. List of drugs administered and the route of administration, quantity, dose, and strength;
5. Radiographs, digital images, and photographs clearly labeled with the patient's name, date taken, and teeth identified;
6. A notation or documentation of an order required for treatment of a patient by a dental hygienist practicing

under general supervision as required in 18VAC60-25-60 C; and

7. Notation of each treatment rendered, date of treatment, and the identity of the dentist and the dental hygienist providing service.

B. A dental hygienist shall comply with the provisions of § 32.1-127.1:03 of the Code related to the confidentiality and disclosure of patient records. A dental hygienist shall not willfully or negligently breach the confidentiality between a practitioner and a patient. A breach of confidentiality that is required or permitted by applicable law or beyond the control of the hygienist shall not be considered negligent or willful.

C. A dental hygienist practicing under remote supervision shall document in the patient record that he has obtained (i) the patient's or the patient's legal representative's signature on a statement disclosing that the delivery of dental hygiene services under remote supervision is not a substitute for the need for regular dental examinations by a dentist and (ii) ~~verbal or written permission of any dentist who has treated the patient in the previous 12 months and can be identified by confirmation from~~ the patient that the patient does not have a dentist of record whom he is seeing regularly.

VA.R. Doc. No. R18-5207; Filed August 7, 2017, 6:44 p.m.

**DEPARTMENT OF HEALTH PROFESSIONS**

**Final Regulation**

**REGISTRAR'S NOTICE:** The Department of Health Professions is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The Department of Health Professions will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** 18VAC76-20. Regulations Governing the Prescription Monitoring Program (amending 18VAC76-20-40).

**Statutory Authority:** § 54.1-2520 of the Code of Virginia.

**Effective Date:** October 4, 2017.

**Agency Contact:** Ralph Orr, Program Manager, Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4523, FAX (804) 527-4470, or email ralph.orr@dhp.virginia.gov.

**Summary:**

*The amendment conforms the regulation to § 54.1-2521 C of the Code of Virginia as it became effective on January 1, 2017. The amendment requires that persons subject to report to the Prescription Monitoring Program do so within 24 hours or the dispenser's next business day, whichever comes first.*

**18VAC76-20-40. Standards for the manner and format of reports and a schedule for reporting.**

A. Data shall be transmitted to the department or its agent within ~~seven days~~ 24 hours of dispensing or the dispenser's next business day, whichever comes later, as provided in the Electronic Reporting Standard for Prescription Monitoring Programs, Version 4.2 (September 2011) of the American Society of Automation in Pharmacy (ASAP), which are hereby incorporated by reference into this chapter.

B. Data shall be transmitted in a file layout provided by the department and shall be transmitted by a media acceptable to the vendor contracted by the director for the program. Such transmission shall begin on a date specified by the director, no less than 90 days from notification by the director to dispensers required to report.

C. Under extraordinary circumstances, an alternative means of reporting may be approved by the director.

D. Data not accepted by the vendor due to a substantial number of errors or omissions shall be corrected and resubmitted to the vendor within five business days of receiving notification that the submitted data had an unacceptable number of errors or problems.

E. Required data elements shall include those listed in subsection B of § 54.1-2521 of the Code of Virginia and the following:

1. The Drug Enforcement Administration (DEA) registration number of the dispenser;
2. The National Provider Identifier of the prescriber;
3. The total number of refills ordered;
4. Whether the prescription is a new prescription or a refill;
5. Whether the prescription is a partial fill;
6. The gender code;
7. The species code;
8. The Electronic Prescription Reference Number, and the Electronic Prescription Order Number if it is an electronic prescription; and
9. The date the prescription was written by the prescriber.

VA.R. Doc. No. R18-5212; Filed August 9, 2017, 3:42 p.m.

**BOARD OF MEDICINE**

**Final Regulation**

**REGISTRAR'S NOTICE:** The Board of Medicine is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The Board of Medicine will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

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# Regulations

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**Title of Regulation:** **18VAC85-80. Regulations Governing the Licensure of Occupational Therapists (amending 18VAC85-80-71).**

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

**Effective Date:** October 4, 2017.

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

**Summary:**

*The amendments conform requirements for continuing education to Chapter 411 of the 2017 Acts of the Assembly, which specifies requirements for Type 1 continuing education learning activities for occupational therapists and identifies entities from which continuing education can be attained so that continuing education complies with Medicare conditions of participation.*

**18VAC85-80-71. Continued competency requirements for renewal of an active license.**

A. In order to renew an active license biennially, a practitioner shall complete the Continued Competency Activity and Assessment Form that is provided by the board and that shall indicate completion of at least 20 contact hours of continuing learning activities as follows:

1. A minimum of 10 of the 20 hours shall be in Type 1 activities ~~offered by a sponsor or organization recognized by the profession and may include in service training, self-study courses, continuing education courses, specialty certification, or professional workshops, which shall consist of an organized program of study, classroom experience, or similar educational experience that is related to a licensee's current or anticipated roles and responsibilities in occupational therapy and approved or provided by one of the following organizations or any of its components:~~

- a. Virginia Occupational Therapy Association;
- b. American Occupational Therapy Association;
- c. National Board for Certification in Occupational Therapy;
- d. Local, state, or federal government agency;
- e. Regionally accredited college or university;
- f. Health care organization accredited by a national accrediting organization granted authority by the Centers for Medicare and Medicaid Services to assure compliance with Medicare conditions of participation; or
- g. An American Medical Association Category 1 Continuing Medical Education program.

2. No more than 10 of the 20 hours may be Type 2 activities, which may include consultation with another therapist, independent reading or research, preparation for a presentation, or other such experiences that promote

continued learning. Up to two of the Type 2 continuing education hours may be satisfied through delivery of occupational therapy services, without compensation, to low-income individuals receiving services through a local health department or a free clinic organized in whole or primarily for the delivery of health services. One hour of continuing education may be credited for three hours of providing such volunteer services as documented by the health department or free clinic.

B. A practitioner shall be exempt from the continuing competency requirements for the first biennial renewal following the date of initial licensure in Virginia.

C. The practitioner shall retain in his records the completed form with all supporting documentation for a period of six years following the renewal of an active license.

D. The board shall periodically conduct a random audit of at least one to two percent of its active licensees to determine compliance. The practitioners selected for the audit shall provide the completed Continued Competency Activity and Assessment Form and all supporting documentation within 30 days of receiving notification of the audit.

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

F. The board may grant an extension of the deadline for continuing competency requirements for up to one year for good cause shown upon a written request from the licensee prior to the renewal date.

G. The board may grant an exemption for all or part of the requirements for circumstances beyond the control of the licensee, such as temporary disability, mandatory military service, or officially declared disasters.

VA.R. Doc. No. R18-5159; Filed August 7, 2017, 6:52 p.m.

## Final Regulation

**REGISTRAR'S NOTICE:** The Board of Medicine is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The Board of Medicine will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** **18VAC85-170. Regulations Governing the Practice of Genetic Counselors (amending 18VAC85-170-60).**

**Statutory Authority:** §§ 54.1-2400 and 54.1-2957.18 of the Code of Virginia.

**Effective Date:** October 4, 2017.

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

**Summary:**

*The amendment conforms to Chapter 422 of the 2017 Acts of the Assembly by extending the date of the grandfather provision for waiving the requirements of a master's degree and American Board of Genetic Counseling or American Board of Medical Genetics certification as prerequisites for licensure.*

**18VAC85-170-60. Licensure requirements.**

A. An applicant for a license to practice as a genetic counselor shall provide documentation of (i) a master's degree from a genetic counseling training program that is accredited by the Accreditation Council of Genetic Counseling and (ii) a current, valid certificate issued by the ABGC or ABMG to practice genetic counseling.

B. Pursuant to § 54.1-2957.19 D of the Code of Virginia, applicants for licensure who do not meet the requirements of subsection A of this section may be issued a license provided they (i) apply for licensure before ~~July 1, 2016~~ December 31, 2018; (ii) comply with the board's regulations relating to the NSGC Code of Ethics; (iii) have at least 20 years of documented work experience practicing genetic counseling; (iv) submit two letters of recommendation, one from a genetic counselor and another from a physician; and (v) have completed, within the last five years, 25 hours of continuing education approved by the NSGC or the ABGC. For the purpose of this subsection, the board deems the provisions of Part IV (18VAC85-170-110 et seq.) of this chapter to be consistent with the NSGC Code of Ethics.

C. An applicant for a temporary license shall provide documentation of having been granted the active candidate status by the ABGC. Such license shall expire 12 months from issuance or upon expiration of active candidate status, whichever comes first.

VA.R. Doc. No. R18-5192; Filed August 7, 2017, 6:45 p.m.

**BOARD OF PHARMACY****Proposed Regulation**

**Title of Regulation:** 18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-320, 18VAC110-20-540, 18VAC110-20-550, 18VAC110-20-555).

**Statutory Authority:** §§ 54.1-2400 and 54.1-3307 of the Code of Virginia.

**Public Hearing Information:**

September 26, 2017 - 9:05 a.m. - Perimeter Center, 9960 Mayland Drive, Suite 201, Board Room 2, Richmond, VA 23233

**Public Comment Deadline:** November 3, 2017.

**Agency Contact:** Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

**Basis:** Regulations are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the Board of Pharmacy the authority to promulgate regulations to administer the regulatory system. The specific authority of the board to regulate the practice of pharmacy is found in § 54.1-3307 of the Code of Virginia.

**Purpose:** Granting the pharmacist authority to dispense a quantity of a Schedule VI substance greater than the amount initially noted on the prescription would benefit patients and prescribers with greater flexibility and improved medication adherence. A pharmacist would be able to use professional judgment about whether to dispense in conformity with the prescribed amount and dosage. Such flexibility will enable a pharmacist to more easily synchronize the patient's medications, allowing prescriptions to run out on the same date and reducing the patient's visits to the pharmacy.

Allowing the use of electronic devices for emergency and stat-drug boxes is becoming a standard for acute long-term care facilities, as such devices can minimize diversion and direct access for staff to the correct location for first dose administration.

Both changes are reasonable accommodations in the practice of pharmacy that will benefit the health and safety of patients without jeopardizing the integrity and efficacy of the drug supply in the Commonwealth.

**Substance:** In response to two petitions for rulemaking, the proposed amendments:

1) Amend 18VAC110-20-320 to authorize a pharmacist, when deemed appropriate in the pharmacist's professional judgement and upon request by the patient, to dispense a quantity of a Schedule VI drug, excluding psychotherapeutic agents, anxiolytics, sedatives, or hypnotics or drugs of concern, in excess of the specific quantity prescribed for a dispensing, not to exceed the total amount authorized in refills; and

2) Amend 18VAC110-20-540, 18VAC110-20-550, and 18VAC110-20-555 to specifically authorize the use of an automated dispensing device in a nursing home for obtaining drugs that would be stocked in a stat-drug box or an emergency kit.

**Issues:** The primary advantage to the public is more flexibility in obtaining Schedule VI drugs. If a consumer is prescribed a drug for a chronic condition and has a certain number of refills on the prescription, the patient may prefer to get the total quantity dispensed rather than having to come back or reorder when the drug is due to be refilled. The advantage to residents of nursing homes would be drugs used for nonroutine administration would be more readily available through an automated dispensing device. There are no disadvantages to the public. There are no advantages or disadvantages to the agency.



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# Regulations

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

Summary of the Proposed Amendments to Regulation. In response to a petition for rulemaking,<sup>1</sup> the Board of Pharmacy proposes to allow a pharmacist to dispense a quantity of certain Schedule VI drugs greater than the face amount prescribed, up to the total amount authorized in refills. In response to a separate petition for rulemaking,<sup>2</sup> the Board proposes to allow the use of automated drug dispensing devices in nursing homes in lieu of manual emergency drug kits and stat-drug boxes.

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

Estimated Economic Impact. Current regulation only allows pharmacists to dispense Schedule VI medication at, or less than, the quantity for which a prescription is written. As requested in a petition for rulemaking, the Board now proposes to authorize pharmacists to dispense any Schedule VI drugs not specifically excluded by this proposed regulation<sup>3</sup> in a quantity in excess of the face amount prescribed and not exceeding the total quantity authorized in refills. Under this proposed rule, a pharmacist will be able to dispense Schedule VI medications in these larger allowable quantities if 1) a patient has requested that his medication be dispensed in a larger quantity than is written on his prescription and 2) it is deemed appropriate by the pharmacist using his professional judgement. Since Schedule VI drugs are deemed at low risk of abuse, and the Schedule VI drugs that are possibly more dangerous are excluded from the proposed rule change, no entity is likely to be harmed by this proposed change. Consumers are likely to benefit from this change as it allows them greater flexibility to manage the timing of medication purchases.

Current regulation requires that nursing homes have a controlled substances registration (if they do not have an in-house pharmacy) in order to use an automated drug dispensing system in all instances. This rule is more stringent than Drug Enforcement Administration (DEA) rules, which allow nursing homes to use automated drug dispensing systems to dispense emergency or first dose medications without having to obtain a controlled substances registration. As requested in a petition for rulemaking, the Board now proposes to also allow the use of automated drug dispensing systems, that are stocked exclusively with drugs that would be stocked in a stat-drug box or an emergency drug kit, to dispense emergency or first dose medications without a controlled substances registration so long as access to the automated drug dispensing systems are restricted to licensed nurses, pharmacists, prescribers and registered medication technicians. The Board also proposes to allow automated drug dispensing systems to be stocked, with drugs that would be stocked in a stat-drug box, in quantities determined by provider pharmacies rather than in quantities specified by this regulation for stat-drug boxes. No entity is likely to be

harmed by these changes. Both nursing homes and their patients are likely to benefit from having added flexibility as to how drugs that may be necessary to maintain the health of patients, in the case of an emergency or after hours, are stored and dispensed.

Businesses and Entities Affected. These proposed regulatory changes will affect pharmacies that dispense Schedule VI drugs, provider pharmacies and nursing homes that have automated dispensing devices. Board staff reports that there are 1,852 pharmacies that are permitted by the Board to dispense medication in Virginia.

Localities Particularly Affected. No locality is likely to be particularly affected by these proposed regulatory changes.

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

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

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

### Small Businesses:

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

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

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

### Adverse Impacts:

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

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

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

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<sup>1</sup> This petition can be found here: <http://townhall.virginia.gov/viewpetition.cfm?petitionid=245>.

<sup>2</sup> This petition can be found here: <http://townhall.virginia.gov/viewpetition.cfm?petitionid=247>.

<sup>3</sup> This new proposed rule will not apply to Schedule VI drugs that are classified by the American Hospital Formulary Service as psychotherapeutic agents, anxiolytics, sedatives or hypnotics. Anxiolytics are medications that inhibit anxiety in a patient.

Agency's Response to Economic Impact Analysis: The Board of Pharmacy concurs with the analysis of the Department of Planning and Budget on proposed amendments.

Summary:

*In response to two separate petitions for rulemaking, the proposed amendments (i) permit a pharmacist, when deemed appropriate in the pharmacist's professional judgement and upon request by the patient, to dispense a quantity of a Schedule VI drug, excluding certain drugs, in excess of the specific quantity prescribed for a dispensing, not to exceed the total amount authorized in refills and (ii) authorize the use of automated dispensing devices in nursing homes in lieu of manual emergency drug kits and stat-drug boxes.*

**18VAC110-20-320. Refilling of ~~Schedule~~ Schedules III through VI prescriptions.**

A. A prescription for a drug listed in Schedule III, IV, or V shall not be dispensed or refilled more than six months after the date on which such prescription was issued, and no such prescription authorized to be filled may be refilled more than five times.

1. Each refilling of a prescription shall be entered on the back of the prescription or on another record in accordance with § 54.1-3412 and 18VAC110-20-255, initialed and dated by the pharmacist as of the date of dispensing. If the pharmacist merely initials and dates the prescription, it shall be presumed that the entire quantity ordered was dispensed.
2. The partial dispensing of a prescription for a drug listed in Schedule III, IV, or V is permissible, provided that:
  - a. Each partial dispensing is recorded in the same manner as a refilling;
  - b. The total quantity of drug dispensed in all partial dispensing does not exceed the total quantity prescribed; and
  - c. No dispensing occurs after six months after the date on which the prescription order was issued.

B. A prescription for a drug listed in Schedule VI ~~shall~~ may be refilled ~~only~~ as expressly authorized by the practitioner. If no such authorization is given, the prescription shall not be refilled, except as provided in § 54.1-3410 C or subdivision 4 of § 54.1-3411 of the Code of Virginia. Except for drugs classified by the American Hospital Formulary Service as psychotherapeutic agents, anxiolytics, sedatives, or hypnotics or for drugs of concern as defined in § 54.1-2519 of the Code of Virginia, a pharmacist, using professional judgment and upon request by the patient, may refill a drug listed in Schedule VI with any quantity, up to the total amount authorized, taking all refills into consideration.

A prescription for a Schedule VI drug or device shall not be dispensed or refilled more than one year after the date on which it was issued unless the prescriber specifically

authorizes dispensing or refilling for a longer period of time not to exceed two years.

C. As an alternative to all manual recordkeeping requirements provided for in subsections A and B of this section, an automated data processing system as provided in 18VAC110-20-250 may be used for the storage and retrieval of all or part of dispensing information for prescription drugs dispensed.

D. The timing of dispensing an authorized refill of a prescription shall be within reasonable conformity with the directions for use as indicated by the practitioner; if directions have not been provided, then any authorized refills may only be dispensed in reasonable conformity with the recommended dosage and with the exercise of sound professional judgment. An authorized refill may be dispensed early provided the pharmacist documents a valid reason for the necessity of the early refill.

**18VAC110-20-540. Emergency drug kit.**

A. The pharmacist providing services may prepare an emergency kit for a long-term care facility in which access to the kit is restricted to a licensed nurse, pharmacist, or prescriber and only these licensed individuals may administer a drug taken from the kit and only under the following conditions:

1. The contents of the emergency kit shall be of such a nature that the absence of the drugs would threaten the survival of the patients.
2. The contents of the kit or an automated drug dispensing system, as provided in subsection B of this section, shall be determined by the provider pharmacist in consultation with the medical and nursing staff of the institutions and shall be limited to drugs for administration by injection or inhalation only, except that Nitroglycerin SL and diazepam rectal gel may be included.
3. The kit is sealed in such a manner that it will preclude any possible loss of the drug.
  - a. The dispensing pharmacy must have a method of sealing such kits so that once the seal is broken, it cannot be reasonably resealed without the breach being detected.
  - b. If a seal is used, it shall have a unique numeric or alphanumeric identifier to preclude replication, resealing, or both. The pharmacy shall maintain a record of the seal identifiers when placed on a box or kit and maintain the record until such time as the seal is replaced.
  - c. In lieu of seals, a kit with a built-in mechanism preventing resealing or relocking once opened except by the provider pharmacy is also acceptable.
4. The kit shall have a form to be filled out upon opening the kit and removing contents to write the name of the person opening the kit, the date, time and name and quantity of items removed. The opened kit is maintained under secure conditions and returned to the pharmacy within 72 hours for replenishing.

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5. Any drug used from the kit shall be covered by a prescription, signed by the prescriber, when legally required, within 72 hours.

B. Drugs that would be stocked in an emergency kit, pursuant to this section, may be stocked in an automated drug dispensing system in a nursing home in accordance with 18VAC110-20-555.

## **18VAC110-20-550. Stat-drug box.**

A. An additional drug box called a stat-drug box may be prepared by a pharmacy to provide for initiating therapy prior to the receipt of ordered drugs from the pharmacy. Access to the stat-drug box is restricted to a licensed nurse, pharmacist, or prescriber and only these licensed individuals may administer a drug taken from the stat-drug box. Additionally, a valid prescription or lawful order of a prescriber must exist prior to the removal of any drug from the stat-drug box. A stat-drug box shall be subject to the following conditions:

1. The box is sealed in such a manner that will preclude the loss of drugs.

a. The dispensing pharmacy must have a method of sealing such boxes so that once the seal is broken, it cannot be reasonably resealed without the breach being detected.

b. If a seal is used, it shall have a unique numeric or alphanumeric identifier to preclude replication or resealing, or both. The pharmacy shall maintain a record of the seal identifiers when placed on a box and maintain the record until such time as the seal is replaced.

c. In lieu of seals, a box with a built-in mechanism preventing resealing or relocking once opened except by the provider pharmacy is also acceptable.

2. The box shall have a form to be filled out upon opening the box and removing contents to write the name of the person opening the box, the date, the time, and the name and quantity of ~~item(s)~~ items removed. When the stat-drug box has been opened, it is returned to the pharmacy.

3. There shall be a listing of the contents of the box maintained in the pharmacy and also attached to the box in the facility. This same listing shall become a part of the policy and procedure manual of the facility served by the pharmacy.

4. The drug listing on the box shall bear an expiration date for the box. The expiration date shall be the day on which the first drug in the box will expire.

5. The contents of the box shall be limited to those drugs in which a delay in initiating therapy may result in harm to the patient.

a. The listing of drugs contained in the stat-drug box shall be determined by the provider pharmacist in consultation with the medical and nursing staff of the long-term care facility.

b. The stat-drug box shall contain no more than 20 solid dosage units per schedule of ~~Schedule~~ Schedules II through V drugs except that one unit of liquid, not to exceed 30 ml, may be substituted for a solid dosage unit. If the unit of a liquid that may contain more than one dose is removed from the stat-drug box pursuant to a patient order, the remainder shall be stored with that patient's other drugs, may be used for subsequent doses administered to that patient, and shall not be administered to any other patient.

B. Drugs that would be stocked in a stat-drug box, pursuant to this section, may be stocked in an automated drug dispensing system in a nursing home in accordance with 18VAC110-20-555, except that the quantity of drugs in Schedules II through V stocked in the system shall be determined by the provider pharmacist in consultation with the medical and nursing staff of the nursing home.

## **18VAC110-20-555. Use of automated dispensing devices.**

Nursing homes licensed pursuant to Chapter 5 (§ 32.1-123 et seq.) of Title 32.1 of the Code of Virginia may use automated drug dispensing systems, as defined in § 54.1-3401 of the Code of Virginia, upon meeting the following conditions:

1. Drugs placed in an automated drug dispensing system in a nursing home shall be under the control of the pharmacy providing services to the nursing home, the pharmacy shall have ~~on-line~~ online communication with and control of the automated drug dispensing system, and access to any drug for a patient shall be controlled by the pharmacy.

2. A nursing home without an in-house pharmacy shall obtain a controlled substances registration prior to using an automated dispensing system, unless the system is exclusively stocked with drugs that would be kept in a stat-drug box pursuant to 18VAC110-20-550 or an emergency drug kit pursuant to 18VAC110-20-540 and are solely administered for stat or emergency administration.

3. For facilities not required to obtain a controlled substance registration, access to the automated dispensing device shall be restricted to a licensed nurse, pharmacist, or prescriber, or a registered pharmacy technician for the purpose of stocking or reloading.

4. Removal of drugs from any automated drug dispensing system for administration to patients can only be made pursuant to a valid prescription or lawful order of a prescriber under the following conditions:

a. A drug, including a drug that would be stocked in a stat-drug box pursuant to subsection B of 18VAC110-20-550, may not be administered to a patient from an automated dispensing device until a pharmacist has reviewed the prescription order and electronically authorized the access of that drug for that particular patient in accordance with the order.

b. The PIC of the provider pharmacy shall ensure that a pharmacist who has ~~on-line~~ online access to the system is

- available at all times to review a prescription order as needed and authorize administering pursuant to the order reviewed.
- c. Drugs that would be stocked in an emergency drug kit pursuant to 18VAC110-20-540 may be accessed prior to receiving electronic authorization from the pharmacist provided that the absence of the drugs would threaten the survival of the patients.
- d. Automated dispensing devices shall be capable of producing a hard-copy record of distribution that shall show patient name, drug name and strength, dose withdrawn, dose to be administered, date and time of withdrawal from the device, and identity of person withdrawing the drug.
- ~~4.~~ 5. Drugs placed in automated dispensing devices shall be in the manufacturer's sealed original unit dose or unit-of-use packaging or in repackaged unit-dose containers in compliance with the requirements of 18VAC110-20-355 relating to repackaging, labeling, and records.
- ~~5.~~ 6. Prior to the removal of drugs from the pharmacy, a delivery record shall be generated for all drugs to be placed in an automated dispensing device, which shall include the date; drug name, dosage form, and strength; quantity; nursing home; a unique identifier for the specific device receiving drugs; and initials of the pharmacist checking the order of drugs to be removed from the pharmacy and the records of distribution for accuracy.
- ~~6.~~ 7. At the direction of the PIC, drugs may be loaded in the device by a pharmacist or a pharmacy technician adequately trained in the proper loading of the system.
- ~~7.~~ 8. At the time of loading, the delivery record for all ~~Schedule Schedules~~ II through VI drugs shall be signed by a nurse or other person authorized to administer drugs from that specific device, and the record returned to the pharmacy.
- ~~8.~~ 9. At the time of loading any ~~Schedule Schedules~~ II through V drug, the person loading will verify that the count of that drug in the automated dispensing device is correct. Any discrepancy noted shall be recorded on the delivery record and immediately reported to the PIC, who shall be responsible for reconciliation of the discrepancy or the proper reporting of a loss.
- ~~9.~~ 10. The PIC of the provider pharmacy or his designee shall conduct at least a monthly audit to review distribution and administration of ~~Schedule Schedules~~ II through V drugs from each automated dispensing device as follows:
- a. The audit shall reconcile records of all quantities of ~~Schedule Schedules~~ II through V drugs dispensed from the pharmacy with records of all quantities loaded into each device to detect whether any drugs recorded as removed from the pharmacy were diverted rather than being placed in the proper device.
  - b. A discrepancy report shall be generated for each discrepancy in the count of a drug on hand in the device. Each such report shall be resolved by the PIC or his designee within 72 hours of the time the discrepancy was discovered or, if determined to be a theft or an unusual loss of drugs, shall be immediately reported to the board in accordance with § 54.1-3404 E of the Drug Control Act.
  - c. The audit shall include a review of a sample of administration records from each device per month for possible diversion by fraudulent charting. A sample shall include all ~~Schedule Schedules~~ II through V drugs administered for a time period of not less than 24 consecutive hours during the audit period.
  - d. The audit shall include a check of medical records to ensure that a valid order exists for a random sample of doses recorded as administered.
  - e. The audit shall also check for compliance with written procedures for security and use of the automated dispensing devices, accuracy of distribution from the device, and proper recordkeeping.
  - f. The hard copy distribution and administration records printed out and reviewed in the audit shall be initialed and dated by the person conducting the audit. If nonpharmacist personnel conduct the audit, a pharmacist shall review the record and shall initial and date the record.
- ~~10.~~ 11. Automated dispensing devices shall be inspected monthly by pharmacy personnel to verify proper storage, proper location of drugs within the device, expiration dates, the security of drugs and validity of access codes.
- ~~11.~~ 12. Personnel allowed access to an automated dispensing device shall have a specific access code which records the identity of the person accessing the device.
- ~~12.~~ 13. The PIC of the pharmacy providing services to the nursing home shall establish, maintain, and assure compliance with written policy and procedure for the accurate stocking and proper storage of drugs in the automated drug dispensing system, accountability for and security of all drugs maintained in the automated drug dispensing system, preventing unauthorized access to the system, tracking access to the system, complying with federal and state regulations related to the storage and dispensing of controlled substances, maintaining patient confidentiality, maintaining required records, and assuring compliance with the requirements of this chapter. The manual shall be capable of being accessed at both the pharmacy and the nursing home.
- ~~13.~~ 14. All records required by this section shall be filed in chronological order from date of issue and maintained for a period of not less than two years. Records shall be maintained at the address of the pharmacy providing services to the nursing home except:

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a. Manual Schedule VI distribution records may be maintained in offsite storage or electronically as an electronic image that provides an exact image of the document that is clearly legible provided such offsite or electronic storage is retrievable and made available for inspection or audit within 48 hours of a request by the board or an authorized agent.

b. Distribution and delivery records and required signatures may be generated or maintained electronically provided:

(1) The system being used has the capability of recording an electronic signature that is a unique identifier and restricted to the individual required to initial or sign the record.

(2) The records are maintained in a read-only format that cannot be altered after the information is recorded.

(3) The system used is capable of producing a hard-copy printout of the records upon request.

c. ~~Schedule H-V~~ Schedules II through V distribution and delivery records may only be stored offsite or electronically as described in subdivisions 13 a and 13 b of this section if authorized by DEA or in federal law or regulation.

d. Hard-copy distribution and administration records that are printed and reviewed in conducting required audits may be maintained ~~off-site~~ offsite or electronically provided they can be readily retrieved upon request; provided they are maintained in a read-only format that does not allow alteration of the records; and provided a separate log is maintained for a period of two years showing dates of audit and review, the identity of the automated dispensing device being audited, the time period covered by the audit and review, and the initials of all reviewers.

V.A.R. Doc. No. R16-27; Filed August 10, 2017, 10:15 a.m.

## Final Regulation

**REGISTRAR'S NOTICE:** The Board of Pharmacy is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 13 of the Code of Virginia, which exempts amendments to regulations of the board to schedule a substance in Schedule I or II pursuant to subsection D of § 54.1-3443 of the Code of Virginia. The board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** 18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-322).

**Statutory Authority:** §§ 54.1-2400 and 54.1-3443 of the Code of Virginia.

**Effective Date:** October 4, 2017.

**Agency Contact:** Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300,

Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

### Summary:

*The amendments add three compounds into Schedule I of the Drug Control Act as recommended by the Virginia Department of Forensic Science pursuant to § 54.1-3443 of the Code of Virginia. The compounds added by this regulatory action will remain in effect for 18 months or until the compounds are placed in Schedule I by legislative action of the General Assembly.*

### 18VAC110-20-322. Placement of chemicals in Schedule I.

~~A. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:~~

~~1. N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]-butanamide (other name: butyryl fentanyl);~~

~~2. Flubromazolam;~~

~~3. 5-methoxy-N,N-methylisopropyltryptamine (Other name: 5-MeO-MIPT);~~

~~4. Cannabimimetic agents:~~

~~a. N-(1-Amino-3,3-dimethyl-1-oxobutan-2-yl)-1-[(4-fluorophenyl)methyl]-1H-indazole-3-carboxamide (other name: ADB-FUBINACA);~~

~~b. Methyl 2-[1-[(4-fluorophenyl)methyl]-1H-indazole-3-carboxamido]-3,3-dimethylbutanoate (other name: MDMB-FUBINACA); and~~

~~c. Methyl 2-[1-(5-fluoropentyl)-1H-indazole-3-carboxamido]-3,3-dimethylbutanoate (other names: 5-fluoro-ADB, 5-Fluoro-MDMB-PINACA);~~

~~The placement of drugs listed in this subsection shall remain in effect until December 14, 2017, unless enacted into law in the Drug Control Act.~~

~~B. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:~~

~~1. Beta-keto-N,N-dimethylbenzodioxolylbutanamine (other names: Dibutylone, bk-DMBDB);~~

~~2. 1-(1,3-benzodioxol-5-yl)-2-(ethylamino)-1-pentanone (other name: N-ethylpentylone);~~

~~3. 1-[1-(3-methoxyphenyl)cyclohexyl]piperidine (other name: 3-methoxy-PCP);~~

~~4. 1-[1-(4-methoxyphenyl)cyclohexyl]piperidine (other name: 4-methoxy-PCP);~~

~~5. 4-Chloroethcathinone (other name: 4-CEC);~~

~~6. 3-Methoxy-2-(methylamino)-1-(4-methylphenyl)-1-propanone (other name: Mexedrone);~~

~~7. 3,4-dichloro-N-[2-(dimethylamino)cyclohexyl]-N-methylbenzamide (other name: U-47700);~~

8. ~~3,4-dichloro-N-((1-(dimethylamino)cyclohexyl)methyl)benzamide (other name: AH 7921);~~
9. ~~N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]-pentanamide (other name: Pentanoyl-fentanyl);~~
10. ~~N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]-2-furancarboxamide (other name: Furanyl-fentanyl);~~
11. ~~N-(3-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl]-propanamide (other name: 3-fluorofentanyl);~~
12. ~~Clonazepam; and~~
13. ~~Cannabimimetic agents:~~
- a. ~~Methyl 2-((1-(4-fluorophenyl)methyl)-1H-indazole-3-carbonyl)amino-3-methylbutanoate (other names: AMB-FUBINACA, FUB-AMB);~~
- b. ~~N-(adamantan-1-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide (other name: FUB-AKB48);~~
- c. ~~N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide (other name: 5F-AKB48);~~
- d. ~~Naphthalen-1-yl-1-pentyl-1H-indazole-3-carboxylate (other name: SDB-005); and~~
- e. ~~N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)indole-3-carboxamide (other name: AB-CHMICA).~~

~~The placement of drugs listed in this subsection shall remain in effect until March 7, 2018, unless enacted into law in the Drug Control Act.~~

~~C. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:~~

1. ~~1-propionyl-lysergic acid diethylamide (other name: 1P-LSD);~~
2. ~~(2-methylaminopropyl)benzofuran (other name: MAPB);~~
3. ~~Ethyl-phenyl(piperidin-2-yl)acetate (other name: Ethylphenidate);~~
4. ~~2-(3-fluorophenyl)-3-methylmorpholine (other name: 3-fluorophenmetrazine); and~~
5. ~~N-(4-fluorophenyl)-N-[1-(2-phenylethyl)-4-piperidinyl]-butanamide (other name: para-fluorobutyrylfentanyl), its optical, positional, and geometric isomers, salts, and salts of isomers.~~

~~The placement of drugs listed in this subsection shall remain in effect until May 10, 2018, unless enacted into law in the Drug Control Act.~~

~~D. A. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:~~

1. ~~1-(1,3-benzodioxol-5-yl)-2-(dimethylamino)-1-pentanone (other names: N,N-Dimethylpentylone, Dipentylone);~~

2. ~~4-chloro-alpha-Pyrrolidinovalerophenone (other name: 4-chloro-alpha-PVP);~~
3. ~~4-methyl-alpha-Pyrrolidinohexiophenone (other name: MPHP);~~
4. ~~4-fluoro-alpha-Pyrrolidinoheptiophenone (other name: 4-fluoro-PV8);~~
5. ~~1-(4-methoxyphenyl)-2-(pyrrolidin-1-yl)octan-1-one (other name: 4-methoxy-PV9);~~
6. ~~4-allyloxy-3,5-dimethoxyphenethylamine (other name: Allylescaline);~~
7. ~~4-methyl-alpha-ethylaminopentiophenone; and~~
8. ~~N-(4-fluorophenyl)-2-methyl-N-[1-(2-phenylethyl)-4-piperidinyl]-propanamide (other name: para-fluoroisobutyryl-fentanyl).~~

~~The placement of drugs listed in this subsection shall remain in effect until August 22, 2018, unless enacted into law in the Drug Control Act.~~

~~E. B. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:~~

1. ~~6-ethyl-6-nor-lysergic acid diethylamide (other name: ETH-LAD), its optical, position, and geometric isomers, salts, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation;~~
2. ~~6-allyl-6-nor-lysergic acid diethylamide (other name: AL-LAD), its optical, position, and geometric isomers, salts, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation;~~
3. ~~Synthetic opioids:~~
- a. ~~N-[1-[2-hydroxy-2-(2-thienyl)ethyl]-4-piperidinyl]-N-phenylpropanamide (other name: beta-hydroxythiofentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation;~~
- b. ~~N-(2-fluorophenyl)-N-[1-(2-phenylethyl)-4-piperidinyl]-propanamide (other names: 2-fluorofentanyl, ortho-fluorofentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation; and~~
- c. ~~N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]-2-propenamide (other name: Acryl-fentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation;~~

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## 4. Cannabimimetic agents:

a. 1-pentyl-N-(phenylmethyl)-1H-indole-3-carboxamide (other name: SDB-006), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation; and

b. Quinolin-8-yl 1-(4-fluorobenzyl)-1H-indole-3-carboxylate (other name: FUB-PB-22), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation; and

5. Benzodiazepine: flubromazepam, its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

The placement of drugs listed in this subsection shall remain in effect until December 13, 2018, unless enacted into law in the Drug Control Act.

C. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:

1. 4-Bromo-2,5-dimethoxy-N-[(2-hydroxyphenyl)methyl]benzeneethanamine (25B-NBOH), its optical, position, and geometric isomers, salts and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

2. Methyl N-[1-(cyclohexylmethyl)-1H-indole-3-carbonyl]valinate (MMB-CHMICA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

3. N-(1-phenethylpiperidin-4-yl)-N-phenyltetrahydrofuran-2-carboxamide (Tetrahydrofuran fentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation.

The placement of drugs listed in this subsection shall remain in effect until February 18, 2019, unless enacted into law in the Drug Control Act.

V.A.R. Doc. No. R18-5166; Filed August 9, 2017, 3:43 p.m.

## BOARD OF VETERINARY MEDICINE

### Final Regulation

**Title of Regulation: 18VAC150-20. Regulations Governing the Practice of Veterinary Medicine (amending 18VAC150-20-10, 18VAC150-20-30 through 18VAC150-20-140, 18VAC150-20-172 through 18VAC150-20-220; adding 18VAC150-20-201).**

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

**Effective Date: October 25, 2017.**

**Agency Contact:** Leslie L. Knachel, Executive Director, Board of Veterinary Medicine, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4468, FAX (804) 527-4471, or email [leslie.knachel@dhp.virginia.gov](mailto:leslie.knachel@dhp.virginia.gov).

### **Summary:**

*As a result of a periodic review, the amendments (i) organize requirements for greater clarity, (ii) update the descriptions and requirements for veterinary establishments consistent with current practices, (iii) specify rules in accordance with board interpretation for ease of compliance, (iv) adjust requirements for licensure by endorsement, and (v) increase accountability and security for prescription drugs.*

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

### Part I

#### General Provisions

### **18VAC150-20-10. Definitions.**

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

**"AAVSB" means the American Association of Veterinary State Boards.**

~~**"Animal shelter" means a facility, other than a private residential dwelling and its surrounding grounds, that is used to house or contain animals and that is owned, operated, or maintained by a nongovernmental entity including, but not limited to, a humane society, animal welfare organization, society for the prevention of cruelty to animals, or any other organization operating for the purpose of finding permanent adoptive homes for animals.**~~

**"Automatic emergency lighting" is lighting that is powered by battery, generator, or alternate power source other than electrical power, is activated automatically by electrical power failure, and provides sufficient light to complete surgery or to stabilize the animal until surgery can be continued or the animal moved to another establishment.**

**"AVMA" means the American Veterinary Medical Association.**

**"Board" means the Virginia Board of Veterinary Medicine.**

**"Companion animal" means any dog, cat, horse, nonhuman primate, guinea pig, hamster, rabbit not raised for human food or fiber, exotic or native animal, reptile, exotic or native bird, or any feral animal or animal under the care, custody or ownership of a person or any animal that is bought, sold, traded, or bartered by any person. Agricultural animals, game species, or any animals regulated under federal law as research animals shall not be considered companion animals for the purposes of this chapter.**

"CVMA" means the Canadian Veterinary Medical Association.

"DEA" means the U.S. Drug Enforcement Administration.

~~"Full service establishment" means a stationary or ambulatory facility that provides surgery and encompasses all aspects of health care for small or large animals, or both.~~

[ "ICVA" means the International Council for Veterinary Assessment. ]

"Immediate ~~and direct~~ supervision" means that the licensed veterinarian is immediately available to the licensed veterinary technician or assistant, either electronically or in person, and provides a specific order based on observation and diagnosis of the patient within the last 36 hours.

[ ~~"NBVME" means the National Board of Veterinary Medical Examiners. ]~~

"Owner" means any person who (i) has a right of property in an animal; (ii) keeps or harbors an animal; (iii) has an animal in his care; or (iv) acts as a custodian of an animal.

~~"Pound" means a facility operated by the state or a locality for the purpose of impounding or harboring seized, stray, homeless, abandoned, or unwanted animals; or a facility operated for the same purpose under a contract with a locality or an incorporated society for the prevention of cruelty to animals.~~

"Preceptee" or "extern" means a student who is enrolled and in good standing in an AVMA accredited college of veterinary medicine or AVMA accredited veterinary technology program and who is receiving practical experience under the supervision of a licensed veterinarian or licensed veterinary technician.

"Preceptorship" or "externship" means a formal arrangement between an AVMA accredited college of veterinary medicine or an AVMA accredited veterinary technology program and a veterinarian who is licensed by the board and responsible for the practice of the preceptee. A preceptorship or externship shall be overseen by faculty of the college or program.

"Private animal shelter" means a facility that is used to house or contain animals and that is owned or operated by an incorporated, nonprofit, and nongovernmental entity, including a humane society, animal welfare organization, society for the prevention of cruelty to animals, or any other organization operating for the purpose of finding permanent adoptive homes for animals.

"Professional judgment" includes any decision or conduct in the practice of veterinary medicine, as defined by § 54.1-3800 of the Code of Virginia.

"Public animal shelter" means a facility operated by the Commonwealth, or any locality, for the purpose of impounding or sheltering seized, stray, homeless, abandoned, unwanted, or surrendered animals, or a facility operated for the same purpose under a contract with any locality.

~~"Restricted service establishment" means a stationary or ambulatory facility which does not meet the requirements of a full service establishment.~~

"Specialist" means a veterinarian who has been awarded and has maintained the status of diplomate of a specialty organization recognized by the American Board of Veterinary Specialties of the American Veterinary Medical Association, or any other organization approved by the board.

"Surgery" means treatment through revision, destruction, incision or other structural alteration of animal tissue. Surgery does not include dental extractions of single-rooted teeth or skin closures performed by a licensed veterinary technician upon a diagnosis and pursuant to direct orders from a veterinarian.

[ ~~"Veterinarian in charge" "Veterinarian-in-charge" ]~~ means a veterinarian who holds an active license in Virginia and who is responsible for maintaining a veterinary establishment within the standards set by this chapter, for complying with federal and state laws and regulations, and for notifying the board of the establishment's closure.

"Veterinary establishment" [ or "establishment" ] means any ~~fixed~~ stationary or ~~mobile~~ ambulatory practice, veterinary hospital, animal hospital, or premises wherein or out of which veterinary medicine is being conducted.

"Veterinary technician" means a person licensed by the board as required by § 54.1-3805 of the Code of Virginia.

## **18VAC150-20-30. Posting of licenses; accuracy of address.**

A. All licenses, and registrations ~~and permits~~ issued by the board shall be posted in a place conspicuous to the public at the establishment where veterinary services are being provided or available for inspection at the location where an equine dental technician is working. Licensees who do relief or temporary work in an establishment shall carry a license with them or post it at the establishment. Ambulatory veterinary practices that do not have an office accessible to the public shall carry their licenses and ~~permits~~ registrations in their vehicles.

B. It shall be the duty and responsibility of each licensee, registrant, and holder of a registration ~~permit~~ to operate a veterinary establishment to keep the board apprised at all times of his current address of record and the public address, if different from the address of record. All notices required by law or by this chapter to be mailed to any veterinarian, veterinary technician, registered equine dental technician, or holder of a ~~permit~~ registration to operate a veterinary establishment, shall be validly given when mailed to the address of record furnished to the board pursuant to this regulation. All address changes shall be furnished to the board within 30 days of such change.

## **18VAC150-20-70. Licensure renewal requirements.**

A. Every person licensed by the board shall, by January 1 of every year, submit to the board a completed renewal application and pay to the board a renewal fee as prescribed



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in 18VAC150-20-100. Failure to renew shall cause the license to lapse and become invalid, and practice with a lapsed license may subject the ~~licensees~~ licensee to disciplinary action by the board. Failure to receive a renewal notice does not relieve the licensee of his responsibility to renew and maintain a current license.

B. Veterinarians shall be required to have completed a minimum of 15 hours, and veterinary technicians shall be required to have completed a minimum of eight hours, of approved continuing education for each annual renewal of licensure. Continuing education credits or hours may not be transferred or credited to another year.

1. Approved continuing education credit shall be given for courses or programs related to the treatment and care of patients and shall be clinical courses in veterinary medicine or veterinary technology or courses that enhance patient safety, such as medical recordkeeping or compliance with requirements of the Occupational Health and Safety Administration (OSHA).

2. An approved continuing education course or program shall be sponsored by one of the following:

- a. The AVMA or its constituent and component/branch associations, specialty organizations, and board certified specialists in good standing within their specialty board;
- b. Colleges of veterinary medicine approved by the AVMA Council on Education;
- c. International, national, or regional conferences of veterinary medicine;
- d. Academies or species-specific interest groups of veterinary medicine;
- e. State associations of veterinary technicians;
- f. North American Veterinary Technicians Association;
- g. Community colleges with an approved program in veterinary technology;
- h. State or federal government agencies;
- i. American Animal Hospital Association (AAHA) or its constituent and component/branch associations;
- j. Journals or veterinary information networks recognized by the board as providing education in veterinary medicine or veterinary technology; or
- k. An organization or entity approved by the Registry of Approved Continuing Education of the ~~American Association of Veterinary State Boards~~ AAVSB.

3. A licensee is exempt from completing continuing education requirements and considered in compliance on the first renewal date following his initial licensure by examination.

4. The board may grant an exemption for all or part of the continuing education requirements due to circumstances beyond the control of the licensee, such as temporary

disability, mandatory military service, or officially declared disasters.

5. The board may grant an extension for good cause of up to one year for the completion of continuing education requirements upon written request from the licensee prior to the renewal date. Such an extension shall not relieve the licensee of the continuing education requirement.

6. Licensees are required to attest to compliance with continuing education requirements on their annual license renewal and are required to maintain original documents verifying the date and subject of the program or course, the number of continuing education hours or credits, and certification from an approved sponsor. Original documents must be maintained for a period of two years following renewal. The board shall periodically conduct a random audit to determine compliance. Practitioners selected for the audit shall provide all supporting documentation within ~~40~~ 14 days of receiving notification of the audit unless an extension is granted by the board.

7. Continuing education hours required by disciplinary order shall not be used to satisfy renewal requirements.

8. Up to two hours of the 15 hours required for annual renewal of a veterinarian license and up to one hour of the eight hours required for annual renewal of a veterinary technician license may be satisfied through delivery of veterinary services, without compensation, to low-income individuals receiving health services through a local health department or a free clinic organized in whole or primarily for the delivery of those services. One hour of continuing education may be credited for three hours of providing such volunteer services, as documented by the health department or free clinic.

[ ~~8~~ 9. ] Falsifying the attestation of compliance with continuing education on a renewal form or failure to comply with continuing education requirements may subject a licensee to disciplinary action by the board, consistent with § 54.1-3807 of the Code of Virginia.

C. A licensee who has requested that his license be placed on inactive status is not authorized to perform acts that are considered the practice of veterinary medicine or veterinary technology and, therefore, shall not be required to have continuing education for annual renewal. To reactivate a license, the licensee is required to submit evidence of completion of continuing education hours as required by § 54.1-3805.2 of the Code of Virginia and this section equal to the number of years in which the license has not been active for a maximum of two years.

**18VAC150-20-75. Expired license; reinstatement; practice with an expired or lapsed license not permitted.**

A. A license may be renewed up to one year after the expiration date, provided a late fee as prescribed in 18VAC150-20-100 is paid in addition to the required renewal fee. A license shall automatically lapse if the licensee fails to

renew by the expiration date. The practice of veterinary medicine without a current, active license is unlawful and may subject the licensee to disciplinary action by the board.

B. Reinstatement of licenses expired for more than one year shall be at the discretion of the board. To reinstate a license, the licensee shall pay the reinstatement fee as prescribed in 18VAC150-20-100 and submit evidence of completion of continuing education hours as required by § 54.1-3805.2 of the Code of Virginia and 18VAC150-20-70 equal to the number of years in which the license has been expired, for a maximum of two years. The board may require additional documentation of clinical competency and professional activities.

**18VAC150-20-100. Fees.**

The following fees shall be in effect:

Veterinary application for licensure	\$200
Veterinary license renewal (active)	\$175
Veterinary license renewal (inactive)	\$85
Veterinary reinstatement of expired license	\$255
Veterinary license late renewal	\$60
Veterinarian reinstatement after disciplinary action	\$450
Veterinary technician application for licensure	\$65
Veterinary technician license renewal	\$50
Veterinary technician license renewal (inactive)	\$25
Veterinary technician license late renewal	\$20
Veterinary technician reinstatement of expired license	\$95
Veterinary technician reinstatement after disciplinary action	\$125
Equine dental technician initial registration	\$100
Equine dental technician registration renewal	\$70
Equine dental technician late renewal	\$25
Equine dental technician reinstatement	\$120
Initial veterinary establishment <del>permit</del> registration	\$300
Veterinary establishment renewal	\$200
Veterinary establishment late renewal	\$75
Veterinary establishment reinstatement	\$75
Veterinary establishment reinspection	\$300

Veterinary establishment -- change of location	\$300
Veterinary establishment -- change of veterinarian-in-charge	\$40
Duplicate license	\$15
Duplicate wall certificate	\$25
Returned check	\$35
Licensure verification to another jurisdiction	\$25

Part II

Licensure for Veterinarians and Veterinary Technicians

**18VAC150-20-110. Requirements for licensure by examination as a veterinarian.**

A. The applicant, in order to be licensed by the board to practice veterinary medicine, shall:

1. ~~Have received a degree in veterinary medicine from a college or school of veterinary medicine accredited by the AVMA or have fulfilled the requirements of the Educational Commission of Foreign Veterinary Graduates (ECFVG) of the AVMA or any other substantially equivalent credentialing body as determined by the board, as verified by an official transcript from the applicant's college or school, indicating completion of the veterinary degree [ . In lieu of a degree from an accredited college or school, an applicant may submit verification that he has fulfilled the requirements of the Educational Commission of Foreign Veterinary Graduates of the AVMA or the Program for the Assessment of Veterinary Education Equivalence of the AAVSB or any other substantially equivalent credentialing body as determined by the board ];~~ and

2. Have passed the North American Veterinary License Examination (since the fall of 2000) or the National Board Examination and the Clinical Competency Test (prior to the fall of 2000) of the [ NBVME ICVA ] or any other substantially equivalent national examination as approved by the board with a score acceptable to the board.

~~[ 3. In lieu of a degree from an accredited college or school, an applicant may submit verification that he has fulfilled the requirements of the Educational Commission of Foreign Veterinary Graduates (ECFVG) of the AVMA or the Program for the Assessment of Veterinary Education Equivalence (PAVE) of the AAVSB or any other substantially equivalent credentialing body as determined by the board. ]~~

~~2. File the following documents with the board: B. All applicants shall also:~~

~~a. A 1. Submit the application fee specified in 18VAC150-20-100 and a complete and notarized application on a form obtained from the board;~~

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~~b. An official copy, indicating veterinary degree, of the applicant's college or school transcript;~~

~~e. Certification of a full and unrestricted~~ 2. Provide verification that any license to practice veterinary medicine by each board from which the applicant holds a license, issued by a board of veterinary medicine in another state or United States jurisdiction is in good standing;

~~3. Pass the North American Veterinary License Examination or the National Board Examination and the Clinical Competency Test approved by the American Association of Veterinary State Boards or any other substantially equivalent national examination as approved by the board with a score acceptable to the board.~~

~~4. 3.~~ Sign a statement attesting that the applicant has read, understands, and will abide by the statutes and regulations governing [ ~~veterinary the~~ ] practice [ ~~of veterinary medicine~~ ] in Virginia; and

~~5. 4.~~ Have committed no acts ~~which that~~ would constitute a violation of § 54.1-3807 of the Code of Virginia.

~~B. C.~~ If the application for licensure has not been successfully completed within one year from the date of initial submission, a new application and fee shall be required.

## **18VAC150-20-115. Requirements for licensure by examination as a veterinary technician.**

A. The applicant, in order to be licensed by the board as a veterinary technician, shall:

1. Have received a degree in veterinary technology from a college or school accredited by the AVMA or the CVMA.

2. Have filed with the board the following documents:

a. A complete [ ~~and notarized~~ ] application on a form obtained from the board;

b. An official copy, indicating a veterinary technology degree, of the applicant's college or school transcript; and

c. ~~Certification~~ Verification that the applicant is in good standing by each board in another state or United States jurisdiction from which the applicant holds a license, certification, or registration to practice veterinary technology.

~~3. Pass a~~ Have passed the Veterinary Technician National Examination approved by the AAVSB or any other board-approved, national board examination for veterinary technology with a score acceptable to the board.

4. Sign a statement attesting that the applicant has read, understands, and will abide by the statutes and regulations governing [ ~~veterinary the~~ ] practice [ ~~of veterinary medicine~~ ] in Virginia.

[ ~~5. Have submitted the application fee specified in 18VAC150-20-100.~~

~~5. 6.~~ ] Have committed no acts that would constitute a violation of § 54.1-3807 of the Code of Virginia.

B. The application for licensure shall be valid for a period of one year after the date of initial submission, after which time a new application and fee shall be required.

## **18VAC150-20-120. Requirements for licensure by endorsement as a veterinarian.**

~~A.~~ The board may, in its discretion, grant a license by endorsement to an applicant who is licensed to practice veterinary medicine in another [ ~~state, the District of Columbia, or possessions or territories jurisdiction~~ ] of the United States, provided that the applicant:

~~1. All licenses are in good standing.~~ Holds at least one current, unrestricted license in another jurisdiction of the United States and is not a respondent in any pending or unresolved board action in any jurisdiction;

~~2. The applicant has been~~ Provides documentation of having been regularly engaged in clinical practice for at least two of the past four years immediately preceding application; and

~~3. The applicant has met all applicable requirements of 18VAC150-20-110, except foreign trained veterinarians who have attained specialty recognition by a board recognized by the AVMA are exempt from the requirements of ECFVG or any other substantially equivalent credentialing body as determined by the board.~~ Provides documentation of completion of at least 30 hours of continuing education requirements during the preceding four years;

~~4. [ Submits the application fee specified in 18VAC150-20-100 and a complete application on a form obtained from the board;~~

~~5. ]~~ Signs a statement attesting that the applicant has read, understands, and will abide by the statutes and regulations governing [ ~~veterinary the~~ ] practice [ ~~of veterinary medicine~~ ] in Virginia; and

[ ~~5. 6.~~ ] Has committed no acts that would constitute a violation of § 54.1-3807 of the Code of Virginia.

~~B. Provided that the applicant has met the requirements of subsection A of this section, the board may, in its discretion, waive the requirement that the applicant pass the national board exam or the clinical competency test, or both.~~

## **18VAC150-20-121. Requirements for licensure by endorsement for veterinary technicians.**

In its discretion, the board may grant a license by endorsement to an applicant who is licensed, certified or registered to practice as a veterinary technician in another [ ~~state, the District of Columbia, or possessions or territories jurisdiction~~ ] of the United States, provided that the applicant:

~~1. All licenses, certificates or registrations are in good standing~~ Holds at least one current and unrestricted license, certification, or registration [ issued by the regulatory entity ] in another jurisdiction of the United States and that

he is not a respondent in any pending or unresolved board action in any jurisdiction;

2. ~~The applicant has been~~ Provides documentation of having been regularly engaged in clinical practice as a licensed, certified, or registered veterinary technician for at least two of the past four years immediately preceding application; and

3. ~~The applicant has~~ Has received a degree in veterinary technology from a college or school accredited by the AVMA or the CVMA or has passed a the Veterinary Technician National Examination approved by the AAVSB or any other board-approved national board examination for veterinary technology with a score acceptable to the board-;

4. Provides documentation of completion of at least [ 12 16 ] hours of continuing education requirements during the preceding four years;

5. [ Submits the application fee specified in 18VAC150-20-100 and a complete application on a form obtained from the board;

6. ] Signs a statement attesting that the applicant has read, understands, and will abide by the statutes and regulations governing [ veterinary the ] practice [ of veterinary medicine ] in Virginia; and

[ ~~6. 7. ]~~ Has committed no acts that would constitute a violation of § 54.1-3807 of the Code of Virginia.

**18VAC150-20-130. Requirements for practical training in a preceptorship or externship.**

A. The practical training and employment of qualified students of veterinary medicine or veterinary technology shall be governed and controlled as follows:

1. A veterinary student who is ~~duly~~ enrolled and in good standing in a veterinary college or school accredited or approved by the AVMA may be engaged in a preceptorship or externship. A veterinary preceptee or extern may perform duties that constitute the practice of veterinary medicine for which he has received adequate instruction by the college or school and only under the on-premises supervision of a licensed veterinarian.

2. A veterinary technician student who is ~~duly~~ enrolled and in good standing in a veterinary technology program accredited or approved by the AVMA may be engaged in a preceptorship or externship. A veterinary technician preceptee or extern may perform duties that constitute the practice of veterinary technology for which he has received adequate instruction by the program and only under the on-premises supervision of a licensed veterinarian or licensed veterinary technician.

B. Whenever a veterinary preceptee or extern is performing surgery on a patient, either assisted or unassisted, the supervising veterinarian shall be in the operatory during the procedure. Prior to allowing a preceptee or extern in veterinary medicine to perform surgery on a patient

unassisted by a licensed veterinarian, a licensed veterinarian shall receive written [ ~~approval~~ informed consent ] from the owner.

C. When there is a [ veterinary ] preceptee or extern practicing in the establishment, the supervising veterinarian shall disclose such practice to owners. The disclosure shall be by signage clearly visible to the public or by inclusion on an informed consent form.

D. A veterinarian or veterinary technician who supervises a preceptee or extern remains responsible for the care and treatment of the patient.

**18VAC150-20-135. Voluntary practice by out-of-state practitioners.**

Any veterinarian who seeks registration to practice on a voluntary basis under the auspices of a publicly supported all volunteer, nonprofit organization that sponsors the provision of health care to populations of underserved people shall:

1. File a complete application for registration on a form provided by the board at least five business days prior to engaging in such practice. An incomplete application will not be considered;
2. Provide a complete record of professional licensure in each state in which he has held a license and a copy of every current license;
3. Provide the name of the nonprofit organization, the dates and location of the voluntary provision of services;
4. Pay a registration fee of \$10; and
5. Provide a ~~notarized~~ statement from a representative of the nonprofit organization attesting to its compliance with provisions of subdivision 4 of § 54.1-3801 of the Code of Virginia.

Part III  
Unprofessional Conduct

**18VAC150-20-140. Unprofessional conduct.**

Unprofessional conduct as referenced in subdivision 5 of § 54.1-3807 of the Code of Virginia shall include the following:

1. Representing conflicting interests except by express consent of all concerned given after a full disclosure of the facts. Acceptance of a fee from both the buyer and the seller is prima facie evidence of a conflict of interest.
2. Practicing veterinary medicine or equine dentistry where an unlicensed person has the authority to control the professional judgment of the licensed veterinarian or the equine dental technician.
3. Issuing a certificate of health unless he shall know of his own knowledge by actual inspection and appropriate tests of the animals that the animals meet the requirements for the issuance of such certificate on the day issued.
4. Revealing confidences gained in the course of providing veterinary services to a client, unless required by law or

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necessary to protect the health, safety, or welfare of other persons or animals.

5. Advertising in a manner ~~which that~~ is false, deceptive, or misleading or ~~which that~~ makes subjective claims of superiority.

6. Violating any state law, federal law, or board regulation pertaining to the practice of veterinary medicine, veterinary technology or equine dentistry.

7. Practicing veterinary medicine or as an equine dental technician in such a manner as to endanger the health and welfare of his patients or the public, or being unable to practice veterinary medicine or as an equine dental technician with reasonable skill and safety.

8. Performing surgery on animals in an unregistered veterinary establishment or not in accordance with the establishment ~~permit~~ registration or with accepted standards of practice.

9. Refusing the board or its agent the right to inspect an establishment at reasonable hours.

10. Allowing unlicensed persons to perform acts restricted to the practice of veterinary medicine, veterinary technology, or an equine dental technician including any invasive procedure on a patient or delegation of tasks to persons who are not properly trained or authorized to perform such tasks.

11. Failing to provide immediate ~~and direct~~ supervision to a licensed veterinary technician or an assistant in his employ.

12. Refusing to release a copy of a valid prescription upon request from ~~a client an owner, unless there are medical reasons documented in the patient record and the veterinarian would not dispense the medication from his own practice.~~

13. Misrepresenting or falsifying information on an application or renewal form.

14. Failing to report suspected animal cruelty to the appropriate authorities.

15. Failing to release a copy of patient records when requested by the owner; a law-enforcement entity; or a federal, state, or local health regulatory agency.

16. Committing an act constituting fraud, deceit, or misrepresentation in dealing with the board or in the ~~veterinarian-client-patient~~ veterinarian-owner-patient relationship, or with the public.

17. Representing oneself as a "specialist" without meeting the definition set forth in 18VAC150-20-10 or using the words "specialist" or "specialty" in the name of a veterinary establishment unless there is a veterinarian on staff who meets the definition of a "specialist."

18. Failure to submit evidence of correction resulting from a violation noted in an inspection or reported by another

agency within 14 days, unless an extension is granted by the board.

## **18VAC150-20-172. Delegation of duties.**

A. A licensed veterinarian may delegate the administration (including by injection) of Schedule VI drugs to a properly trained assistant under his immediate ~~and direct~~ supervision. The prescribing veterinarian has a specific duty and responsibility to determine that the assistant has had adequate training to safely administer the drug in a manner prescribed.

B. Injections involving ~~anesthetic or~~ chemotherapy drugs, subgingival scaling, [intubation,] or the placement of intravenous catheters shall not be delegated to an assistant. An assistant shall also not be delegated the induction of sedation or anesthesia by any means. The monitoring of a sedated or anesthetized patient may be delegated to an assistant, provided [the patient is no longer intubated and provided] a veterinarian or licensed veterinary technician remains on premises until the patient is fully recovered.

~~B. Additional C. [The following tasks Tasks] that may be delegated by a licensed veterinarian to a properly trained assistant [include] but are not limited to the following:~~

1. Grooming;
2. Feeding;
3. Cleaning;
4. Restraining;
5. Assisting in radiology;
6. Setting up diagnostic tests;
7. [Prepping a patient or equipment for surgery Clipping and scrubbing in preparation for surgery];
8. Dental polishing and scaling of teeth above the gum line (supragingival);
9. Drawing blood samples; or
10. Filling of Schedule VI prescriptions under the direction of a veterinarian licensed in Virginia.

~~C. D.~~ A licensed veterinarian may delegate duties electronically, verbally, or in writing to appropriate veterinary personnel provided the veterinarian has physically examined the patient within the previous 36 hours.

~~D. E.~~ Massage therapy ~~or~~, physical therapy, or laser therapy may be delegated by a veterinarian to persons qualified by training and experience by an order from the veterinarian.

~~E. F.~~ The veterinarian remains responsible for the duties being delegated and remains responsible for the health and safety of the animal.

## **18VAC150-20-173. Informed consent for surgery.**

A. Before surgery is performed, informed consent shall be obtained from the owner and documented in the patient record. Veterinarians shall inform an owner of the risks, benefits, and alternatives of the recommended surgery that a reasonably prudent practitioner in similar practice in Virginia would tell an owner.

B. An exception to the requirement for consent prior to performance of surgery may be made in an emergency situation when a delay in obtaining consent would likely result in imminent harm to the patient.

C. If a veterinary [ ~~student~~ ] preceptee [ ~~;~~ ] or extern is to perform the surgery, [ either assisted or unassisted, ] the informed consent shall include that information. [ If the surgery is to be performed by a preceptee or extern unassisted by the veterinarian, the written informed consent shall specifically state that information. ]

Part V  
Veterinary Establishments

**18VAC150-20-180. Requirements to be registered as a veterinary establishment.**

A. Every veterinary establishment shall apply for registration on a form provided by the board [ ~~and may be issued~~ ] and submit the application fee specified in 18VAC150-20-100. The board may issue ] a permit registration as a ~~full-service or restricted-service~~ stationary or ambulatory establishment. Every veterinary establishment shall have a veterinarian-in-charge registered with the board in order to operate.

1. Veterinary medicine may only be practiced out of a registered establishment except in emergency situations or in limited specialized practices as provided in 18VAC150-20-171. The injection of a microchip for identification purposes shall only be performed in a veterinary establishment, except personnel of public or private animal shelters ~~or pounds~~ may inject animals while in their possession.

2. [ ~~Applications~~ An application ] for ~~permits~~ registration must be made to the board 45 days in advance of opening or changing the location of the establishment or requesting a change in the establishment category ~~to a full-service establishment listed on the registration.~~

3. Any addition or renovation of a stationary establishment or an ambulatory establishment that involves changes to the structure or composition of a surgery room shall require reinspection by the board and payment of the required fee prior to use.

B. A veterinary establishment will be registered by the board when:

1. It is inspected by the board and is found to meet the standards set forth by 18VAC150-20-190 and 18VAC150-20-200 or 18VAC150-20-201 where applicable. If, during a new or routine inspection, violations or deficiencies are found necessitating a reinspection, the prescribed reinspection fee will be levied. Failure to pay the fee shall be deemed unprofessional conduct and, until paid, the establishment shall be deemed to be unregistered.

2. A veterinarian currently licensed by and in good standing with the board is registered with the board in

writing as veterinarian-in-charge and ~~has paid~~ ensures that the establishment registration fee has been paid.

**18VAC150-20-181. Requirements for veterinarian-in-charge.**

A. The veterinarian-in-charge of a veterinary establishment is responsible for:

1. Regularly being on site ~~on a schedule of no less than monthly and providing~~ as necessary to provide routine oversight to the veterinary establishment for patient safety and compliance with law and regulation.

2. Maintaining the facility within the standards set forth by this chapter.

3. Performing the biennial controlled substance inventory and ensuring compliance at the facility with any federal or state law relating to controlled substances as defined in § 54.1-3404 of the Code of Virginia. The performance of the biennial inventory may be delegated to another licensee, provided the veterinarian-in-charge signs the inventory and remains responsible for its content and accuracy.

4. Notifying the board in writing of the closure of the ~~permitted~~ registered facility 10 days prior to closure.

5. Notifying the board immediately if no longer acting as the veterinarian-in-charge.

6. Ensuring the establishment maintains a current and valid ~~permit~~ registration issued by the board.

B. Upon any change in veterinarian-in-charge, these procedures shall be followed:

1. The veterinarian-in-charge registered with the board remains responsible for the establishment and the stock of controlled substances until a new veterinarian-in-charge is registered or for five days, whichever occurs sooner.

2. An application for a new ~~permit~~ registration, naming the new veterinarian-in-charge, shall be made five days prior to the change of the veterinarian-in-charge. If no prior notice was given by the previous veterinarian-in-charge, an application for a new ~~permit~~ registration naming a new veterinarian-in-charge shall be filed as soon as possible, but no more than 10 days, after the change.

3. The previous establishment ~~permit~~ registration is void on the date of the change of veterinarian-in-charge and shall be returned by the former veterinarian-in-charge to the board five days following the date of change.

4. Prior to the opening of the business, on the date of the change of veterinarian-in-charge, the new veterinarian-in-charge shall take a complete inventory of all [ ~~Schedule~~ ] H-V [ Schedules ] II through V drugs on hand. He shall date and sign the inventory and maintain it on premises for ~~two~~ three years. That inventory may be designated as the official biennial controlled substance inventory.

C. Prior to the sale or closure of a veterinary establishment, [ ~~involving the transfer of patient records to another location~~ ] the veterinarian-in-charge shall:

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1. Follow the requirements for transfer of patient records [ to another location ] in accordance with § 54.1-2405 of the Code of Virginia; and

2. ~~Provide~~ If there is no transfer of records upon sale or closure of an establishment, the veterinarian-in-charge shall provide ] to the board information about the location of [ or access to ] patient records and the disposition of all scheduled drugs.

## **18VAC150-20-185. Renewal of veterinary establishment permits registrations.**

A. Every veterinary establishment shall be required to renew the registration ~~permit~~ by January 1 of each year and pay to the board a registration fee as prescribed in 18VAC150-20-100.

B. Failure to renew the establishment ~~permit registration~~ by January 1 of each year shall cause the ~~permit registration~~ to expire and become invalid. Practicing veterinary medicine in an establishment with an expired registration may subject a licensee or registration holder to disciplinary action by the board. The ~~permit registration~~ may be reinstated without reinspection within 30 days of expiration, provided the board receives a properly executed renewal application, renewal fee, and a late fee as prescribed in 18VAC150-20-100.

C. Reinstatement of an expired ~~permit registration~~ after 30 days shall be at the discretion of the board and contingent upon a reinspection and payment of the late fee, the reinspection fee, the renewal fee and the veterinary establishment ~~permit registration~~ reinstatement fee.

## **18VAC150-20-190. Requirements for drug storage, dispensing, destruction, and records for all establishments, full service and restricted.**

A. All drugs shall be maintained, administered, dispensed, prescribed and destroyed in compliance with state and federal laws, which include § 54.1-3303 of the Code of Virginia, the Drug Control Act (§ 54.1-3400 et seq. of the Code of Virginia), applicable parts of the federal Food, Drug, and Cosmetic Control Act (21 USC § 301 et seq.), the Prescription Drug Marketing Act (21 USC § 301 et seq.), and the Controlled Substances Act (21 USC § 801 et seq.), as well as applicable portions of Title 21 of the Code of Federal Regulations.

B. All repackaged tablets and capsules dispensed for companion animals shall be in approved safety closure containers, except safety caps shall not be required when any person who requests that the medication not have a safety cap, or in such cases in which the medication is of such form or size that it cannot be reasonably dispensed in such containers (e.g., topical medications, ophthalmic, or otic). A ~~client~~ An owner request for nonsafety packaging shall be documented in the patient record.

C. All drugs dispensed for companion animals shall be labeled with the following:

1. Name and address of the facility;

2. ~~Name~~ First and last name of ~~client~~ owner;

3. Animal identification and species;

4. Date dispensed;

5. Directions for use;

6. Name, strength (if more than one dosage form exists), and quantity of the drug; and

7. Name of the prescribing veterinarian.

D. ~~All drugs shall be maintained~~ veterinary establishments shall maintain drugs in a ~~secured~~ secure manner with precaution taken to prevent theft or diversion. Only the veterinarian [ ~~or licensed,~~ ] veterinary technician [ , pharmacist, or pharmacy technician ] shall have access to [ ~~Schedule Schedules~~ ] II through V drugs [ , with the exception provided in subdivision 6 of this subsection ].

~~1. All Schedule II through V drugs shall be maintained under lock at all times, with access to the veterinarian or veterinary technician only, but not to any unlicensed personnel. In a stationary establishment, the general stock of [ Schedule Schedules ] II through V drugs shall be stored in a securely locked cabinet or safe that is not easily movable.~~

2. The establishment may also have a working stock of [ ~~Schedule Schedules~~ ] II through V drugs that shall be kept in (i) a securely locked container, cabinet, or safe when not in use or (ii) direct possession of a veterinarian or veterinary technician. A working stock shall consist of only those drugs that are necessary for use during a normal business day or 24 hours, whichever is less.

3. Whenever the establishment is closed, all general and working stock of [ ~~Schedule Schedules~~ ] II through V drugs and any dispensed prescriptions that were not delivered during normal business hours shall be securely stored as required for the general stock.

4. Prescriptions that have been dispensed and prepared for delivery shall be maintained under lock or in an area that is not readily accessible to the public and may be delivered to an owner by an unlicensed person, as designated by the veterinarian.

~~2. 5. Whenever a veterinarian discovers a theft or any unusual loss of [ Schedule Schedules ] II, III, IV, or through V drugs is discovered, he the veterinarian-in-charge, or in his absence, his designee, shall immediately report such theft or loss to the Board of Veterinary Medicine and the Board of Pharmacy and to the U.S. Drug Enforcement Administration DEA. The report to the boards shall be in writing and sent electronically or by regular mail. The report to the DEA shall be in accordance with 21 CFR 1301.76(b). If the veterinarian-in-charge is unable to determine the exact kind and quantity of the drug loss, he shall immediately take a complete inventory of all [ ~~Schedule Schedules~~ ] II through V drugs.~~

[ 6. Access to drugs by unlicensed persons shall be allowed only under the following conditions:

- a. An animal is being kept at the establishment outside of the normal hours of operation, and a licensed practitioner is not present in the facility;
- b. The drugs are limited to those dispensed to a specific patient; and
- c. The drugs are maintained separately from the establishment's general drug stock and kept in such a manner so they are not readily available to the public. ]

E. [ ~~Schedule Schedules~~ ] II, III, IV and through V drugs shall be destroyed by (i) transferring the drugs to another entity authorized to possess or provide for proper disposal of such drugs or (ii) destroying the drugs ~~by burning in an incinerator that is~~ in compliance with applicable local, state, and federal laws and regulations. If [ ~~Schedule Schedules~~ ] II through V drugs are to be destroyed, a DEA drug destruction form shall be fully completed and used as the record of all drugs to be destroyed. A copy of the destruction form shall be retained at the veterinarian practice site with other inventory records.

F. The drug storage area shall have appropriate provision for temperature control for all drugs and biologics, ~~including. If drugs requiring refrigeration are maintained at the facility, they shall be kept in~~ a refrigerator with the interior thermometer maintained between 36°F and 46°F. ~~If a refrigerated drug is in~~ [ ~~Schedule Schedules~~ ] II through V, ~~the drug shall be kept in a locked container secured to the refrigerator, or the refrigerator shall be locked.~~ Drugs stored at room temperature shall be maintained between 59°F and 86°F.

G. The stock of drugs shall be reviewed frequently, ~~and expired drugs shall be removed from the working stock of drugs at the expiration date and shall not be administered or dispensed.~~

~~G. H.~~ H. A distribution record shall be maintained in addition to the patient's record, in chronological order, for the administration and dispensing of all [ ~~Schedule~~ ] II through V drugs.

This record is to be maintained for a period of ~~two~~ three years from the date of transaction. This record shall include the following:

1. Date of transaction;
2. Drug name, strength, and the amount dispensed, administered, and wasted;
3. Client Owner and animal identification; and
4. Identification of the veterinarian authorizing the administration or dispensing of the drug.

~~H. I.~~ I. Original invoices for all [ ~~Schedule Schedules~~ ] II, III, IV and through V drugs received shall be maintained in chronological order on the premises where the stock of drugs is held, and the actual date of receipt ~~is~~ shall be noted.

~~Invoices for Schedule II drugs shall be maintained separately from other records.~~ All drug records shall be maintained for a period of ~~two~~ three years from the date of transaction.

~~I. J.~~ J. A complete and accurate inventory of all [ ~~Schedule Schedules~~ ] II, III, IV and through V drugs shall be taken, dated, and signed on any date that is within two years of the previous biennial inventory. Drug strength must be specified. This inventory shall indicate if it was made at the opening or closing of business and shall be maintained on the premises where the drugs are held for ~~two~~ three years from the date of taking the inventory.

~~K.~~ K. Inventories and records, including original invoices, of Schedule II drugs shall be maintained separately from all other records, and the establishment shall maintain a continuous inventory of all Schedule II drugs received, administered, or dispensed, with reconciliation at least monthly. Reconciliation requires an explanation noted on the inventory for any difference between the actual physical count and the theoretical count indicated by the distribution record. A continuous inventory shall accurately indicate the physical count of each Schedule II drug in the general and working stocks at the time of performing the inventory.

~~J. L.~~ L. Veterinary establishments in which bulk reconstitution of injectable, bulk compounding, or the prepackaging of drugs is performed shall maintain adequate control records for a period of one year or until the expiration, whichever is greater. The records shall show the name of the ~~drug(s)~~ drugs used; strength, if any; date repackaged; quantity prepared; initials of the veterinarian verifying the process; the assigned lot or control number; the manufacturer's or distributor's name and lot or control number; and an expiration date.

M. If a limited stationary or ambulatory practice uses the facilities of another veterinary establishment, the drug distribution log shall clearly reveal whose [ Schedule Schedules ] II through V drugs were used. If the establishment's drug stock is used, the distribution record shall show that the procedure was performed by a visiting veterinarian who has the patient record. If the visiting veterinarian uses his own stock of drugs, he shall make entries in his own distribution record and in the patient record and shall leave a copy of the patient record at the other establishment.

**18VAC150-20-195. Recordkeeping.**

A. A legible, daily record of each patient treated shall be maintained by the veterinarian at the [ ~~permitted~~ registered ] veterinary establishment and shall include ~~pertinent medical data such as drugs administered, dispensed or prescribed, and all relevant medical and surgical procedures performed. Records should contain~~ at a minimum:

1. Name of the patient and the owner;
2. Identification of the treating veterinarian and of the person making the entry (Initials may be used if a master list that identifies the initials is maintained.);



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~~1. 3.~~ Presenting [ ~~complaint/reason~~ complaint or reason ] for contact;

~~4.~~ Date of contact;

~~2. 5.~~ Physical examination findings, ~~if appropriate;~~

~~3. 6.~~ Tests and diagnostics performed and results;

~~4. 7.~~ Procedures [ ~~performed/treatment~~ performed, treatment ] given [ , ] and results; ~~and~~

~~5. 8.~~ Drugs (~~and their dosages~~) administered, dispensed, or prescribed, including quantity, strength and dosage, and route of administration. For vaccines, identification of the lot and manufacturer shall be maintained;

9. Radiographs or digital images clearly labeled with identification of the establishment, the patient name, date taken, and anatomic specificity. If an original radiograph or digital image is transferred to another establishment or released to the owner, a record of this transfer or release shall be maintained on or with the patient's records; and

10. Any specific instructions for discharge or referrals to other practitioners.

B. ~~Individual records~~ An individual record shall be maintained on each patient, except that records for economic animals or litters of companion animals under the age of four months may be maintained on a per client owner basis. ~~Client~~ Patient records, including radiographs or digital images, shall be kept for a period of three years following the last office visit or discharge of such animal from a veterinary establishment.

~~C. An animal identification system must be used by the establishment.~~

~~D. Upon the sale or closure of a veterinary establishment involving the transfer of patient records to another location, the veterinarian shall follow the requirements for transfer of patient records in accordance with § 54.1-2405 of the Code of Virginia.~~

~~E. C.~~ An initial rabies certification for an animal receiving a primary rabies vaccination shall clearly display the following information: "An animal is not considered immunized for at least 28 days after the initial or primary vaccination is administered."

## **18VAC150-20-200. Standards for stationary veterinary establishments.**

A. ~~Full-service~~ Stationary establishments. A ~~full-service~~ stationary establishment shall provide surgery and encompass all aspects of health care for small or large animals, or both. All ~~full-service~~ stationary establishments shall meet the requirements set forth ~~below~~ in this subsection:

1. Buildings and grounds must be maintained to provide sanitary facilities for the care and medical well-being of patients.

a. Temperature, ventilation, and lighting must be consistent with the medical well-being of the patients.

b. ~~Water and waste.~~ There shall be on-premises:

(1) Hot and cold running water of drinking quality, as defined by the Virginia Department of Health;

(2) An acceptable method of disposal of deceased animals, in accordance with any local ordinance or state and federal regulations; and

(3) Refrigeration exclusively for carcasses of companion animals that require storage for 24 hours or more.

c. Sanitary toilet and lavatory shall be available for personnel and ~~clients~~ owners.

2. Areas within building. The areas within the facility shall include the following:

a. A reception area separate from other designated rooms;

b. Examination room or rooms containing a table or tables with nonporous surfaces;

c. ~~Surgery room. There shall be a~~ A room which that is reserved only for surgery and used for no other purpose. ~~The walls of the surgery room must be constructed of nonporous material and extend from the floor to the ceiling.~~ In order that surgery can be performed in a manner compatible with current veterinary medical practice with regard to anesthesia, asepsis, life support, and monitoring procedures, the surgery room shall:

(1) Have walls constructed of nonporous material and extending from the floor to the ceiling;

(2) Be of a size adequate to accommodate a surgical table, anesthesia support equipment, surgical supplies, ~~the veterinarian, an assistant, and the patient~~ and all personnel necessary for safe performance of the surgery;

~~(2)~~ (3) Be kept so that storage in the surgery room shall be limited to items and equipment normally related to surgery and surgical procedures;

(4) Have a surgical table made of nonporous material;

(5) Have surgical supplies, instruments, and equipment commensurate with the kind of services provided;

(6) Have surgical and automatic emergency lighting to facilitate performance of procedures; and

~~(3)~~ (7) For ~~small animal facilities~~ establishments that perform surgery on small animals, have a door to close off the surgery room from other areas of the practice.

~~d. Laboratory. 3.~~ The veterinary establishment shall have, ~~as at~~ at a minimum, proof of use of either in-house laboratory service or outside laboratory services for performing ~~the following~~ lab tests, consistent with appropriate professional care for the species being treated:

(1) ~~Urinalysis, including microscopic examination of sediment;~~

(2) ~~Complete blood count, including differential;~~

(3) ~~Flotation test for ova of internal parasites;~~

- (4) Skin scrapings for diagnosing external parasites;
- (5) Blood chemistries;
- (6) Cultures and sensitivities;
- (7) Biopsy;
- (8) Complete necropses, including histopathology; and
- (9) Serology.

~~e. Animal housing areas. These shall be provided with 4. For housing animals, the establishment shall provide:~~

~~a. An animal identification system at all times when housing an animal;~~

~~b. Accommodations of appropriate size and construction to prevent residual contamination or injury;~~

~~(1) Separate compartments constructed in such a way as to prevent residual contamination;~~

~~(2) c. Accommodations allowing for the effective separation of contagious and noncontagious patients; and~~

~~(3) d. Exercise runs which areas that provide and allow effective separation of animals or walking the animals at medically appropriate intervals.~~

~~3. Radiology. 5. A veterinary establishment shall: a. Either either have radiology service in-house or documentation of outside services for obtaining diagnostic-quality radiographs. b. If radiology is in-house: (1) Each radiograph shall be permanently imprinted with the identity of the facility or veterinarian, patient and the date of exposure. Each radiograph shall also be clearly labeled by permanent imprinting to reflect anatomic specificity. (2) Document, the establishment shall:~~

~~a. Document that radiographic equipment complies with Part VI (12VAC5-481-1581 et seq.), Use of Diagnostic X-Rays in the Healing Arts, of the Virginia Radiation Protection Regulations of the Virginia Department of Health, which requirements are adopted by this board and incorporated herewith by reference in this chapter.~~

~~e. Maintain radiographs as a part of the patient's record. If a radiograph is transferred to another establishment or released to the client, a record of this transfer must be maintained on or with the patient's records.~~

~~b. Maintain and utilize lead aprons and gloves and individual radiation exposure badges for each employee exposed to radiographs.~~

~~4. Equipment; minimum requirements. 6. Minimum equipment in the establishment shall include:~~

~~a. Examination room containing a table with nonporous surface.~~

~~b. Surgery suite.~~

~~(1) Surgical table with nonporous surface;~~

~~(2) Surgical supplies, instruments and equipment commensurate with the kind of surgical services provided;~~

~~(3) Automatic emergency lighting;~~

~~(4) Surgical lighting;~~

~~(5) Instrument table, stand, or tray; and~~

~~(6) Waste receptacle.~~

~~e. Radiology (if in house).~~

~~(1) Lead aprons and gloves;~~

~~(2) Radiation exposure badges; and~~

~~(3) X ray machine.~~

~~d. General equipment.~~

~~(1) Steam pressure sterilizer or an a. An appropriate method of sterilizing instruments;~~

~~(2) b. Internal and external sterilization monitors; if steam pressure sterilizers are used;~~

~~(3) c. Stethoscope;~~

~~(4) Thermometer;~~

~~(5) d. Equipment for delivery of assisted ventilation appropriate to the species being treated, including but not necessarily limited to: (a) A resuscitation bag; and (b) Endotracheal endotracheal tubes;~~

~~(6) Scales e. Adequate means of determining patient's weight; and~~

~~(7) f. Storage for records.~~

~~B. Additional requirements for stationary establishments.~~

~~1. A stationary establishment that is open to the public 24 hours a day shall have licensed personnel on premises at all times and shall be equipped to handle emergency critical care and hospitalization. The establishment shall have radiology/imaging and laboratory services available on site.~~

~~2. A stationary establishment that is not open to the public 24 hours a day shall have licensed personnel available during its advertised hours of operation and shall disclose to the public that the establishment does not have continuous staffing in compliance with § 54.1-3806.1 of the Code of Virginia.~~

~~3. All stationary establishments shall provide for continuity of care when a patient is transferred to another establishment.~~

~~Restricted C. Limited stationary establishments. When the scope of practice is less than full service, a specifically restricted limited establishment permit registration shall be required. Upon submission of a completed application, satisfactory inspection, and payment of the permit [veterinary establishment] registration fee, a restricted limited establishment permit registration may be issued. Such restricted establishments shall have posted in a conspicuous manner the specific limitations on the scope of practice on a form provided by the board.~~

~~1. Large animal establishment, ambulatory practice. A large animal ambulatory establishment is a mobile practice~~

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in which health care of large animals is performed at the location of the animal. Surgery on large animals may be performed as part of a large animal ambulatory practice provided the facility has surgical supplies, instruments and equipment commensurate with the kind of surgical services provided. All large animal ambulatory establishments shall meet the requirements of a full service establishment in subsection A of this section with the exception of those set forth below:

- a. All requirements for buildings and grounds.
- b. All requirements for an examination room and surgery suite.
- c. Equipment for assisted ventilation.
- d. Scales.

2. ~~Small animal establishment, house call practice.~~ A small animal house call establishment is a mobile practice in which health care of small animals is performed at the residence of the owner of the small animal. Surgery may be performed only in a surgical suite that has passed inspection. ~~Small animal house call facilities shall meet the requirements of a full service establishment in subsection A of this section with the exception of those set forth below:~~

- a. All requirements for buildings and grounds.
- b. All requirements for an examination room or surgery suite.
- c. Steam pressure sterilizer.
- d. Internal or external sterilization monitor.

3. ~~Small animal establishment, outpatient practice.~~ A small animal outpatient establishment is a stationary facility or ambulatory practice where health care of small animals is performed. This practice may include surgery, provided the facility is equipped with a surgery suite as required by subdivision A 2 c of this section. Overnight hospitalization shall not be required. All other requirements of a full service establishment shall be met.

€ D. A separate [ ~~facility permit establishment~~ ] registration is required for separate practices that share the same location.

## **18VAC150-20-201. Standards for ambulatory veterinary establishments.**

A. Agricultural or equine ambulatory practice. An agricultural or equine ambulatory establishment is a mobile practice in which health care is performed at the location of the animal. Surgery on large animals may be performed as part of an agricultural or equine ambulatory practice provided the establishment has surgical supplies, instruments, and equipment commensurate with the kind of surgical procedures performed. All agricultural or equine ambulatory establishments shall meet the requirements of a stationary establishment for laboratory, radiology, and minimum equipment, with the exception of equipment for assisted ventilation.

B. House call or proceduralist establishment. A house call or proceduralist establishment is an ambulatory practice in which health care of small animals is performed at the residence of the owner of the small animal or another establishment registered by the board. A veterinarian who has established a veterinarian-owner-patient relationship with an animal at the owner's residence or at another registered veterinary establishment may also provide care for that animal at the location of the patient.

1. Surgery may be performed only in a surgical suite at a registered establishment that has passed inspection. [ However, surgery requiring only local anesthetics may be performed at a location other than in a surgical suite. ]
2. House call or proceduralist establishments shall meet the requirements of a stationary establishment for laboratory, radiology, and minimum equipment, with the exception of equipment for assisted ventilation.

C. Mobile service establishment. A mobile service establishment is a veterinary clinic or hospital that can be moved from one location to another and from which veterinary services are provided. A mobile service establishment shall meet all the requirements of a stationary establishment appropriate for the services provided.

D. A separate establishment registration is required for separate practices that share the same location.

## **18VAC150-20-210. Revocation or suspension of a veterinary establishment permit registration.**

~~A.~~ The board may revoke or suspend or take other disciplinary action deemed appropriate against the registration ~~permit~~ of a veterinary establishment if it finds the establishment to be in violation of any ~~provisions~~ provision of laws or regulations governing veterinary medicine or if:

1. The board or its agents are denied access to the establishment to conduct an inspection or investigation;
2. The ~~licensee~~ holder of a registration does not pay any and all prescribed fees or monetary penalties;
3. The establishment is performing procedures beyond the scope of a ~~restricted~~ limited [ stationary ] establishment ~~permit registration~~; or
4. The establishment has no veterinarian-in-charge registered with the board.

~~B.~~ The Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) shall apply to any determination under this section.

### Part VI Equine Dental Technicians

## **18VAC150-20-220. Requirements for registration as an equine dental technician.**

A. A person applying for registration as an equine dental technician shall provide a recommendation from at least two veterinarians licensed in Virginia who attest that at least 50% of their practice is equine, and that they have observed the

applicant within the past five years immediately preceding the attestation and can attest to his competency to be registered as an equine dental technician.

B. The qualifications for registration shall include documentation of one of the following:

1. Current certification from the International Association of Equine Dentistry;
2. Completion of a board-approved certification program or training program;
3. Completion of a veterinary technician program that includes equine dentistry in the curriculum; or
4. Evidence of equine dental practice for at least five years and proof of 16 hours of continuing education in equine dentistry completed within the five years immediately preceding application for registration.

C. In order to maintain an equine dental technician registration, a person shall renew such registration by January 1 of each year by payment of the renewal fee specified in 18VAC150-20-100 and attestation of obtaining 16 hours of continuing education relating to equine dentistry within the past three years.

1. Equine dental technicians shall be required to maintain original documents verifying the date and subject of the continuing education program or course, the number of continuing education hours, and certification of completion from a sponsor. Original documents shall be maintained for a period of two years following renewal. The board shall periodically conduct a random audit to determine compliance. Practitioners selected for the audit shall provide all supporting documentation within ~~40~~ 14 days of receiving notification of the audit, unless granted an extension by the board.

a. The board may grant an exemption for all or part of the continuing education requirements due to circumstances beyond the control of the technician, such as temporary disability, mandatory military service, or officially declared disasters.

b. The board may grant an extension for good cause of up to one year for the completion of continuing education requirements upon written request from the technician prior to the renewal date. Such an extension shall not relieve the technician of the continuing education requirement.

2. Registration may be renewed up to one year after the expiration date, provided a late fee as prescribed in 18VAC150-20-100 is paid in addition to the required renewal fee.

3. Reinstatement of registration expired for more than one year shall be at the discretion of the board. To reinstate a registration, the applicant shall pay the reinstatement fee as prescribed in 18VAC150-20-100 and submit evidence of completion of continuing education hours equal to the number of years in which the registration has been expired,

for a maximum of two years. The board may require additional documentation of clinical competency and professional activities.

VA.R. Doc. No. R16-4496; Filed August 4, 2017, 2:30 p.m.

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**TITLE 22. SOCIAL SERVICES**

**DEPARTMENT FOR AGING AND REHABILITATIVE SERVICES**

**Final Regulation**

Title of Regulation: **22VAC30-80. Auxiliary Grants Program (amending 22VAC30-80-10, 22VAC30-80-20, 22VAC30-80-30, 22VAC30-80-40, 22VAC30-80-45, 22VAC30-80-60, 22VAC30-80-70).**

Statutory Authority: §§ 51.5-131 and 51.5-160 of the Code of Virginia.

Effective Date: October 4, 2017.

Agency Contact: Tishaun Harris-Ugworji, Program Consultant, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Richmond, VA, VA 23229, telephone (804) 662-7531, or email tishaun.harrisugworji@dars.virginia.gov.

Summary:

*The amendments (i) permit assisted living facilities and adult foster care programs to accept payments from third parties for certain goods and services provided to auxiliary grants recipients, (ii) address documentation for and permitted uses of third-party payments, and (iii) clarify the services and goods that providers are required to provide under the Auxiliary Grants Program.*

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

**22VAC30-80-10. Definitions.**

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

"Adult foster care" or "AFC" means a locally optional program that provides room and board, supervision, and special services to an ~~adult~~ individual who has a physical or mental health need. Adult foster care may be provided for up to three ~~adults~~ individuals by any one provider who is approved by the local department of social services.

"Assisted living care" means a level of service provided by an assisted living facility for ~~adults~~ individuals who may have physical or mental impairments and require at least moderate assistance with the activities of daily living. Included in this level of service are individuals who are dependent in behavior pattern (i.e., abusive, aggressive, disruptive) as documented on the Uniform Assessment Instrument.

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"Assisted living facility" or "ALF" means, as defined in § 63.2-100 of the Code of Virginia, any congregate residential setting that provides or coordinates personal and health care services, 24-hour supervision, and assistance (scheduled and unscheduled) for the maintenance or care of four or more adults who are aged, infirm or disabled and who are cared for in a primarily residential setting, except (i) a facility or portion of a facility licensed by the State Board of Health or the Department of Behavioral Health and Developmental Services, but including any portion of such facility not so licensed; (ii) the home or residence of an individual who cares for or maintains only persons related to him by blood or marriage; (iii) a facility or portion of a facility serving infirm or disabled persons between the ages of 18 and 21, or 22 if enrolled in an educational program for the handicapped pursuant to § 22.1-214 of the Code of Virginia, when such facility is licensed by the department as a children's residential facility under Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia, but including any portion of the facility not so licensed; and (iv) any housing project for persons 62 years of age or older or the disabled that provides no more than basic coordination of care services and is funded by the U.S. Department of Housing and Urban Development, by the U.S. Department of Agriculture, or by the Virginia Housing Development Authority. Included in this definition are any two or more places, establishments or institutions owned or operated by a single entity and providing maintenance or care to a combined total of four or more aged, infirm or disabled adults. Maintenance or care means the protection, general supervision and oversight of the physical and mental well-being of an aged, infirm or disabled individual.

Assuming responsibility for the well-being of individuals residing in an ALF, either directly or through contracted agents, is considered "general supervision and oversight."

"Authorized payee" means the individual who may be a court-appointed conservator or guardian, a person with a valid power of attorney, or an authorized representative with the documented authority to accept funds on behalf of the individual. An authorized payee for the auxiliary grant shall not be (i) the licensee or (ii) the owner of, employee of, or an entity hired by or contracted by the ALF or AFC home.

"Authorized representative" means the person representing or standing in place of the individual receiving the auxiliary grant for the conduct of the auxiliary grant recipient's affairs (i.e., personal or business interests). "Authorized representative" may include a guardian, conservator, attorney-in-fact under durable power of attorney, trustee, or other person expressly named in writing by the individual as his agent. An authorized representative shall not be (i) the licensee or (ii) the owner of, employee of, or an entity hired by or contracted by the ALF or AFC home unless the auxiliary grant recipient designates such a person to assist with financial management of his personal needs allowance

as a choice of last resort because there is no other authorized representative willing or available to serve in this capacity.

"Auxiliary Grants Program" or "AG" means a state and locally funded assistance program to supplement income of an individual receiving Supplemental Security Income (SSI) or adult who would be eligible for SSI except for excess income, who resides in an ALF or in AFC home with an established rate.

"Certification" means ~~a~~ an official approval as designated on the form provided by the department and prepared by the ALF annually certifying that the ALF has properly managed the personal funds and personal needs allowances of individuals residing in the ALF and is in compliance with program regulations and appropriate licensing regulations.

"Department" means the Department for Aging and Rehabilitative Services.

"Established rate" means the rate as set forth in the appropriation act or as set forth to meet federal maintenance of effort requirements.

"Licensee" means any person, association, partnership, corporation, or governmental unit to whom a license to operate an [ ~~AFC is issued in accordance with 22VAC40-60 or a license to operate an~~ ] ALF is issued in accordance with 22VAC40-72.

"Personal funds" means payments the individual receives, whether earned or unearned, including wages, pensions, Social Security benefits, and retirement benefits. "Personal funds" does not include personal needs allowance.

"Personal needs allowance" means ~~an amount of money reserved for meeting the adult's personal needs when computing the amount of the AG payment~~ a portion of the AG payment that is reserved for meeting the individual's personal needs. The amount is established by the Virginia General Assembly.

"Personal representative" means the person representing or standing in the place of the individual for the conduct of his affairs. This may include a guardian, conservator, attorney-in-fact under durable power of attorney, next of kin, descendent, trustee, or other person expressly named by the individual as his agent.

"Personal toiletries" means hygiene items provided to the individual by the ALF or AFC home including deodorant, razor, shaving cream, shampoo, soap, toothbrush, and toothpaste.

"Program" means the Auxiliary Grant Program.

"Provider" means an ALF that is licensed by the Department of Social Services or an AFC provider that is approved by a local department of social services.

"Provider agreement" means a document that the ALF must complete and submit to the department when requesting to be approved for admitting individuals receiving AG.

"Qualified assessor" means an individual who is authorized by 22VAC30-110 to perform an assessment, reassessment, or change in level of care for an individual applying for AG or residing in an ALF.

"Rate" means the established rate.

"Residential living care" means a level of service provided by an ALF for ~~adults~~ individuals who may have physical or mental impairments and require only minimal assistance with the activities of daily living. Included in this level of service are individuals who are dependent in medication administration as documented on the Uniform Assessment Instrument (UAI).

"Third-party payment" means a payment made by a third party to an ALF or AFC home on behalf of an AG recipient for goods or services other than for food, shelter, or specific goods or services required to be provided by the ALF or AFC home as a condition of participation in the Auxiliary Grants Program in accordance with 22VAC30-80-45.

"Uniform Assessment Instrument" or "UAI" means the department-designated assessment form. It is used to record assessment information for determining the level of service that is needed.

**22VAC30-80-20. Assessment.**

A. In order to receive payment from the program for care in an ALF or in AFC home, an individual applying for AG shall have been assessed by a qualified assessor using the UAI in accordance with 22VAC30-110 and determined to need residential or assisted living care or AFC.

B. As a condition of eligibility for the program, a UAI shall be completed on an individual prior to admission, except for an emergency placement as documented and approved by a Virginia adult protective services worker; at least once annually; and whenever there is a significant change in the individual's level of care, and a determination is made that the individual needs residential or assisted living care in an ALF or AFC home.

C. The ALF or AFC provider is prohibited from charging a security deposit or any other form of compensation for providing a room and services to the individual. The collection or receipt of money, gift, donation or other consideration from or on behalf of an individual for any services provided is prohibited.

**22VAC30-80-30. Basic services.**

The rate established under the program shall cover the following services:

1. Room and board.
  - a. ~~Provision of a~~ A furnished room in accordance with 22VAC40-72-730;
  - b. Housekeeping services based on the needs of the individual;
  - c. Meals and snacks provided in accordance with 22VAC40-72 including, but not limited to food service,

nutrition, number and timing of meals, observance of religious dietary practices, special diets, menus for meals and snacks, and emergency food and water. A minimum of three well-balanced meals shall be provided each day. When a diet is prescribed for an individual by his physician, it shall be prepared and served according to the physician's orders. Basic and bedtime snacks shall be made available for all individuals desiring them and shall be listed on the daily menu. Unless otherwise ordered in writing by the individual's physician, the daily menu, including snacks, for each individual shall meet the guidelines of the U.S. Department of Agriculture's Food Guide Pyramid, taking into consideration the age, sex, and activity of the resident. Second servings shall be provided, if requested, at no additional charge. At least one meal each day shall include a hot main dish; and

d. Clean bed linens and towels as needed by the individual and at least once a week.

2. Maintenance and care.

a. Minimal assistance as defined in 22VAC40-72-10 with personal hygiene including bathing, dressing, oral hygiene, hair grooming and shampooing, care of clothing, shaving, care of toenails and fingernails or arranging for such assistance if the resident's medical condition precludes facility from providing the service, arranging for haircuts as needed, and care of needs associated with menstruation or occasional bladder or bowel incontinence [ that occurs less than weekly ];

b. Medication administration as required by licensing regulations including insulin injections;

c. Provision of personal toiletries including toilet paper;

d. Minimal assistance with the following:

- (1) Care of personal possessions;
  - (2) Care of personal ~~fund~~ needs allowance if requested by the individual and provider policy allows this practice, and in compliance with 22VAC40-72-140 and 22VAC40-72-150, Standards for Licensed Assisted Living Facilities;
  - (3) Use of the telephone;
  - (4) Arranging [ nonmedical ] transportation;
  - (5) Obtaining necessary personal items and clothing;
  - (6) Making and keeping appointments; and
  - (7) Correspondence;
- e. [ Securing Arranging ] health care and transportation when needed for medical treatment;
- f. Providing social and recreational activities in accordance with 22VAC40-72-520; and
- g. General supervision for safety.

**22VAC30-80-40. Personal needs allowance.**

A. The personal needs allowance is included in the monthly AG payment to the individual and must be used by or on

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behalf of the individual for personal items. These funds shall not be commingled with the funds of the provider and shall be maintained in a separate bank account or given directly to the individual or authorized representative. The personal needs allowance shall not be charged by the provider for any item or service not requested by the individual. The provider shall not require an individual or his ~~personal~~ authorized representative to request any item or service as a condition of admission or continued stay. The provider must inform the individual or his ~~personal~~ authorized representative of a charge for any requested item or service not covered under the AG and the amount of the charge. The personal needs allowance is expected to cover the cost of the following items and services:

1. Clothing;
2. Personal toiletries not included in those to be provided by the provider or if the individual requests a specific type or brand of toiletry;
3. Personal items including tobacco products, sodas, and snacks beyond those required in subdivision 1 c of 22VAC30-80-30.
4. Hair care services;
5. Over-the-counter medication, medical copayments and deductibles, insurance premiums;
6. Other needs such as postage stamps, dry cleaning, laundry, direct bank charges, personal transportation, and long distance telephone calls;
7. Personal telephone, television, or radio;
8. Social events and entertainment offered outside the scope of the activities program; and
9. Other items agreed upon by both parties except those listed in subsection B of this section.

B. The personal needs allowance shall not be encumbered by the following:

1. Recreational activities required by licensing regulations (including any transportation costs of those activities);
2. Administration of accounts (bookkeeping, account statements);
3. Debts owed the provider for basic services as outlined by regulations; or
4. Provider laundry charges in excess of \$10 per month.

## **22VAC30-80-45. Conditions of participation in the program.**

A. Provider agreement for ALF.

1. As a condition of participation in the program, the ALF provider is required to complete and submit to the department a signed provider agreement as stipulated ~~below in subdivision 2 of this subsection~~. The agreement is to be submitted prior to the ALF accepting AG payment for qualified individuals. A copy of the ALF's current license must be submitted with the provider agreement.

2. The ALF provider shall agree to the following conditions in the provider agreement to participate in the program:

- a. Provide services in accordance with all laws, regulations, policies, and procedures that govern the provision of services in the facility;
- b. Submit an annual certification form by October 1 of each year;
- c. Care for individuals with AG in accordance with the requirements ~~herein~~ in this chapter at the current established rate;
- d. Refrain from charging the individual, his family, or his authorized personal representative a security deposit or any other form of compensation as a condition of admission or continued stay in the facility;
- e. Accept the established rate as payment in full for services rendered;
- f. Account for the personal needs allowances in a separate bank account and apart from other facility funds and issue a ~~monthly~~ statement to each individual regarding his account balance that includes any payments deposited or withdrawn during the previous calendar month;
- g. Provide a 60-day written notice to the regional licensing office in the event of the facility's closure or ownership change;
- h. Provide written notification of the date and place of an individual's discharge or the date of an individual's death to the local department of social services determining the individual's AG eligibility and to the qualified assessor within 10 days of the individual's discharge or death; and
- i. Return to the local department of social services determining the individual's AG eligibility, all AG funds received after the death or discharge date of an individual in the facility.

B. As a condition of participation in the program, the AFC provider shall be approved by a local department of social services and comply with the requirements set forth in 22VAC30-120.

C. ALFs and AFC homes providing services to AG recipients may accept third-party payments made by persons or entities for [ the actual costs of ] goods or services [ ~~to be~~ that have been ] provided to the AG recipient. The department shall not include such payments as income for the purpose of determining eligibility for or calculating the amount of an AG provided that the payment is made:

1. Directly to the ALF or AFC home by the third party on behalf of the individual after the goods or services have been provided;
2. Voluntarily by the third party, and not in satisfaction of a condition of admission, continued stay, or provision of proper care and services, unless the AG recipient's physical

needs exceed the services required to be provided by the ALF as a condition of participation in the auxiliary grant program; and

3. For specific goods or services provided to the individual other than food, shelter, or other specific goods or services required to be provided by the ALF or AFC home as a condition of participation in the AG program.

D. Third-party payments shall not be used to pay for a private room in an ALF or AFC home.

E. ALFs and AFC homes shall document all third-party payments received on behalf of an individual, including the source, amount, and date of the payment, and the goods or services for which such payments were made. Documentation related to the third-party payments shall be provided to the department upon request.

F. ALFs and AFC homes shall provide each AG recipient and his authorized representative with a written list of the goods and services that shall be covered by the AG as defined in this chapter, including a clear statement that the facility shall not charge an individual or the individual's family or authorized representative additional amounts for goods or services included on such list. [ This statement shall be signed by the AG recipient or authorized representative as acknowledgment of receipt and shall be made available to the department upon request. ]

**22VAC30-80-60. Reimbursement.**

A. Any ~~moneys~~ payments contributed toward the cost of care pending AG eligibility determination shall be reimbursed to the individual or contributing party by the ALF or AFC provider once eligibility for AG is established and that payment received. The payment shall be made payable to the individual, who will then reimburse the provider for care. If the individual is not capable of managing his finances, his ~~personal~~ authorized representative is responsible for reimbursing the provider.

B. In the event an ALF is closed, the facility shall prorate the rate up to the date of the individual's discharge and return the balance of the AG to the local department of social services that determined the individual's eligibility for the ~~grant~~ AG. If the facility maintained the individual's personal needs allowance, the facility shall provide a final accounting of the individual's personal needs allowance account within 60 days of the individual's discharge. Verification of the accounting and of the reimbursement to the individual shall be ~~mailed sent~~ to the case management agency responsible for the individual's annual reassessment. In the event of the individual's death, the provider shall give to the individual's personal representative a final accounting of the individual's funds within 60 calendar days of the event. All AG funds received after the death or discharge date shall be returned to the local department of social services responsible for determining the individual's AG eligibility as soon as practicable.

C. Providers who do not comply with the requirements of this ~~regulation~~ chapter may be subject to adverse action, which may include suspension of new AG program admissions or termination of provider agreements.

**22VAC30-80-70. Certification ALF certification and record requirements.**

A. ALFs shall submit an annual certification form by October 1 of each year for the preceding state fiscal year. The certification shall include the following: identifying information about the ALF, census information including a list of individuals who resided in the facility and received AG during the reporting period and personal needs allowance accounting information. If a provider fails to submit an annual certification form, the provider will not be authorized to accept additional individuals with AG.

B. All information reported by an ALF on the certification form shall be subject to audit by the department. Financial information that is not reconcilable to the provider's general ledger or similar records could result in establishment of a liability to the provider. Records shall be retained for three years after the end of the reporting period or until audited by the department, whichever is first.

C. All records maintained by an AFC provider, as required by 22VAC30-120, shall be made available to the department or the approving local department of social services upon request. All records are subject to audit by the department. Financial information that is not reconcilable to the provider's records could result in establishment of a liability to the provider. Records shall be retained for three years after the end of the reporting period or until audited by the department, whichever is first.

VA.R. Doc. No. R16-4472; Filed August 4, 2017, 2:24 p.m.

**Final Regulation**

**REGISTRAR'S NOTICE:** The Department for Aging and Rehabilitative Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 3, which excludes regulations that consist only of changes in style or form or corrections of technical errors and § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved. The Department for Aging and Rehabilitative Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **22VAC30-100. Adult Protective Services (amending 22VAC30-100-10, 22VAC30-100-50).**

Statutory Authority: § 51.5-131 of the Code of Virginia; 42 USC § 1397(3).

Effective Date: October 4, 2017.

Agency Contact: Paige L. McCleary, Adult Services Program Consultant, Department for Aging and Rehabilitative



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# Regulations

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Services, 8004 Franklin Farms Drive, Richmond, VA 23229, telephone (804) 662-7605, or email [paige.mccleary@dars.virginia.gov](mailto:paige.mccleary@dars.virginia.gov).

## Summary:

*The amendments comport definitions of "abuse," "neglect," "exploitation," and "adult protective services" with Chapter 195 of the 2017 Acts of Assembly. The phrase "as defined in § 63.2-1603" is added and the definition of "exploitation" is amended to mirror the broader and more descriptive definition of "adult exploitation" in Chapter 195. In addition, amendments update the names of two agencies. The Virginia Office of Protection and Advocacy is changed to the disAbility Law Center of Virginia and the Department of Health, Center for Quality Health Care Services and Consumer Protection is changed to Department of Health, Office of Licensure and Certification.*

## 22VAC30-100-10. Definitions.

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

"Abuse" means the willful infliction of physical pain, injury or mental anguish or unreasonable confinement of an adult as defined in § 63.2-1603 of the Code of Virginia.

"Adult" means any person in the Commonwealth who is abused, neglected, or exploited, or is at risk of being abused, neglected, or exploited; and is 18 years of age or older and incapacitated, or is 60 years of age and older.

~~"Adult protective services" means the receipt, investigation and disposition of complaints and reports of adult abuse, neglect, and exploitation of adults 18 years of age and over who are incapacitated and adults 60 years of age and over by the local department of social services. Adult protective services also include the provision of casework and care management by the local department in order to stabilize the situation or to prevent further abuse, neglect, and exploitation of an adult at risk of abuse, neglect and exploitation. If appropriate and available, adult protective services may include the direct provision of services by the local department or arranging for home based care, transportation, adult day services, meal service, legal proceedings, alternative placements and other activities to protect the adult and restore self-sufficiency to the extent possible services provided by the local department that are necessary to protect an adult as defined in § 63.2-1603 of the Code of Virginia from abuse, neglect, or exploitation.~~

"Collateral" means a person whose personal or professional knowledge may help confirm or rebut the allegations of adult abuse, neglect or exploitation or whose involvement may help ensure the safety of the adult.

"Commissioner" means the commissioner of the department.

"Conservator" means a person appointed by the court who is responsible for managing the estate and financial affairs of an

incapacitated person, and where the context plainly indicates, includes a "limited conservator" or a "temporary conservator."

"Department" means the Virginia Department for Aging and Rehabilitative Services.

"Director" means the director or his delegated representative of the department of social services of the city or county in which the adult resides or is found.

"Disposition" means the determination of whether or not adult abuse, neglect or exploitation has occurred.

"Documentation" means information and materials, written or otherwise, concerning allegations, facts and evidence.

~~"Exploitation" means the illegal, unauthorized, improper, or fraudulent use of an incapacitated adult as defined in § 63.2-1603 of the Code of Virginia or his funds, property, benefits, resources, or other assets for another's profit, benefit, or advantage, including a caregiver or person serving in a fiduciary capacity, or that deprives the adult of his rightful use of or access to such funds, property, benefits, resources, or other assets. "Adult exploitation" includes (i) an intentional breach of a fiduciary obligation to an adult to his detriment or an intentional failure to use the financial resources of an adult in a manner that results in neglect of such adult; (ii) the acquisition, possession, or control of an adult's financial resources or property through the use of undue influence, coercion, or duress; and (iii) forcing or coercing an adult to pay for goods or services or perform services against his will for another's profit, benefit, or advantage if the adult did not agree, or was tricked, misled, or defrauded into agreeing, to pay for such goods or services or perform such services. This includes acquiring an adult's resources through the use of the adult's mental or physical incapacity, the disposition of the incapacitated adult's property by a second party to the advantage of the second party and to the detriment of the incapacitated adult, misuse of funds, acquiring an advantage through threats to withhold needed support or care unless certain conditions are met, or persuading an incapacitated adult to perform services including sexual acts to which the adult lacks the capacity to consent.~~

"Guardian" means a person who has been legally invested with the authority and charged with the duty of taking care of the person and managing his property and protecting the rights of the person who has been declared by the circuit court to be incapacitated and incapable of administering his own affairs. The powers and duties of the guardian are defined by the court and are limited to matters within the areas where the person in need of a guardian has been determined to be incapacitated.

"Guardian ad litem" means an attorney appointed by the court to represent the interest of the adult for whom a guardian or conservator is requested. On the hearing of the petition for appointment of a guardian or conservator, the guardian ad litem advocates for the adult who is the subject of

the hearing, and his duties are usually concluded when the case is decided.

"Incapacitated person" means any adult who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate or carry out reasonable decisions concerning his ~~or her~~ well-being. This definition is for the purpose of establishing an adult's eligibility for adult protective services and such adult may or may not have been found incapacitated through court procedures.

"Involuntary protective services" means those services authorized by the court for an adult who has been determined to need protective services and who has been adjudicated incapacitated and lacking the capacity to consent to receive the needed protective services.

"Lacks capacity to consent" means a preliminary judgment of a local department of social services social worker that an adult is unable to consent to receive needed services for reasons that relate to emotional or psychiatric problems, intellectual disability, developmental delay, or other reasons which impair the adult's ability to recognize a substantial risk of death or immediate and serious harm to himself. The lack of capacity to consent may be either permanent or temporary. The worker must make a preliminary judgment that the adult lacks capacity to consent before petitioning the court for authorization to provide protective services on an emergency basis pursuant to § 63.2-1609 of the Code of Virginia.

"Legally incapacitated" means that the person has been adjudicated incapacitated by a circuit court because of a mental or physical condition which renders him, either wholly or partially, incapable of taking care of himself or his estate.

"Legally incompetent" means a person who has been adjudicated incompetent by a circuit court because of a mental condition which renders him incapable of taking care of his person or managing his estate.

"Legitimate interest" means a lawful, demonstrated privilege to access the information as defined in § 63.2-104 of the Code of Virginia.

"Local department" means any local department of social services in the Commonwealth of Virginia.

"Mandated reporters" means those persons who are required to report pursuant to § 63.2-1606 of the Code of Virginia when such persons have reason to suspect that an adult is abused, neglected, or exploited or is at risk of adult abuse, neglect, or exploitation.

"Mental anguish" means a state of emotional pain or distress resulting from activity (verbal or behavioral) of a perpetrator. The intent of the activity is to threaten or intimidate, cause sorrow or fear, humiliate, change behavior or ridicule. There must be evidence that it is the perpetrator's activity that has caused the adult's feelings of pain or distress.

"Neglect" means that an adult as defined in § 63.2-1603 is living under such circumstances that he is not able to provide for himself or is not being provided such services as are necessary to maintain his physical and mental health and that the failure to receive such necessary services impairs or threatens to impair his well-being. However, no adult shall be considered neglected solely on the basis that such adult is receiving religious nonmedical treatment or religious nonmedical nursing care in lieu of medical care, provided that such treatment or care is performed in good faith and in accordance with the religious practices of the adult and there is written or oral expression of consent by that adult. Neglect includes the failure of a caregiver or another responsible person to provide for basic needs to maintain the adult's physical and mental health and well-being, and it includes the adult's neglect of self. Neglect includes, ~~but is not limited to:~~

1. The lack of clothing considered necessary to protect a person's health;
2. The lack of food necessary to prevent physical injury or to maintain life, including failure to receive appropriate food for adults with conditions requiring special diets;
3. Shelter that is not structurally safe; has rodents or other infestations which may result in serious health problems; or does not have a safe and accessible water supply, safe heat source or sewage disposal. Adequate shelter for an adult will depend on the impairments of an adult; however, the adult must be protected from the elements that would seriously endanger his health (e.g., rain, cold or heat) and could result in serious illness or debilitating conditions;
4. Inadequate supervision by a caregiver (paid or unpaid) who has been designated to provide the supervision necessary to protect the safety and well-being of an adult in his care;
5. The failure of persons who are responsible for caregiving to seek needed medical care or to follow medically prescribed treatment for an adult, or the adult has failed to obtain such care for himself. The needed medical care is believed to be of such a nature as to result in physical ~~and/or or~~ mental injury or illness if it is not provided;
6. Medical neglect includes, ~~but is not limited to,~~ the withholding of medication or aids needed by the adult such as dentures, eye glasses, hearing aids, walker, etc. It also includes the unauthorized administration of prescription drugs, over-medicating or under-medicating, and the administration of drugs for other than bona fide medical reasons, as determined by a licensed health care professional; and
7. Self-neglect by an adult who is not meeting his own basic needs due to mental ~~and/or or~~ physical impairments. Basic needs refer to such things as food, clothing, shelter, health or medical care.

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# Regulations

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"Notification" means informing designated and appropriate individuals of the local department's action and the individual's rights.

"Preponderance of evidence" means the evidence as a whole shows that the facts are more probable and credible than not. It is evidence that is of greater weight or more convincing than the evidence offered in opposition.

"Report" means an allegation by any person that an adult is in need of protective services. The term "report" shall refer to both reports and complaints of abuse, neglect, and exploitation of adults. The report may be made orally or in writing to the local department or by calling the Adult Protective Services Hotline.

"Service plan" means a plan of action to address the service needs of an adult in order to protect the adult, to prevent future abuse, neglect or exploitation, and to preserve the autonomy of the adult whenever possible.

"Unreasonable confinement" means the use of restraints (physical or chemical), isolation, or any other means of confinement without medical orders, when there is no emergency and for reasons other than the adult's safety or well-being or the safety of others.

"Valid report" means the local department of social services has evaluated the information and allegations of the report and determined that the local department shall conduct an investigation because all of the following elements are present:

1. The alleged victim adult is 60 years of age or older or is 18 years of age or older and is incapacitated;
2. There is a specific adult with enough identifying information to locate the adult;
3. Circumstances allege abuse, neglect or exploitation or risk of abuse, neglect or exploitation; and
4. The local department receiving the report is a local department of jurisdiction as described in 22VAC30-100-20.

"Voluntary protective services" means those services provided to an adult who, after investigation by a local department, is determined to be in need of protective services and consents to receiving the services so as to prevent further abuse, neglect, and exploitation of an adult at risk of abuse, neglect and exploitation.

## **22VAC30-100-50. Disclosure of adult protective services information.**

A. This chapter describes the protection of confidential information including a description of when such information must be disclosed, when such disclosure of the information is at the discretion of the local department, what information may be disclosed, and the procedure for disclosing the information.

B. Department staff having legitimate interest shall have regular access to adult protective services records maintained by the local department.

C. The following agencies have licensing, regulatory and legal authority for administrative action or criminal investigations, and they have a legitimate interest in confidential information when such information is relevant and reasonably necessary for the fulfillment of their licensing, regulatory and legal responsibilities:

1. Department of Behavioral Health and Developmental Services;
2. ~~Virginia Office for Protection and Advocacy~~ disAbility Law Center of Virginia;
3. Office of the Attorney General, including the Medicaid Fraud Control Program;
4. Department for Aging and Rehabilitative Services;
5. Department of Health, including the ~~Center for Quality Health Care Services and Consumer Protection~~ Office of Licensure and Certification and the Office of the Chief Medical Examiner;
6. Department of Medical Assistance Services;
7. Department of Health Professions;
8. Department for the Blind and Vision Impaired;
9. Department of Social Services, including the Division of Licensing Programs;
10. The Office of the State Long-Term Care Ombudsman and local ombudsman;
11. Law-enforcement agencies;
12. Medical examiners;
13. Adult fatality review teams;
14. Prosecutors; and
15. Any other entity deemed appropriate by the commissioner or local department director that demonstrates a legitimate interest.

D. The local department shall disclose all relevant information to representatives of the agencies identified in subsection C of this section except the identity of the person who reported the abuse, neglect or exploitation unless the reporter authorizes the disclosure of his identity or the disclosure is ordered by the court.

E. The local department shall refer any appropriate matter and all relevant documentation to the appropriate licensing, regulatory or legal authority for administrative action or criminal investigation.

F. Local departments may release information to the following persons when the local department has determined the person making the request has legitimate interest in accordance with § 63.2-104 of the Code of Virginia and the release of information is in the best interest of the adult:

1. Representatives of public and private agencies including community services boards, area agencies on aging and local health departments requesting disclosure when the agency has legitimate interest;
2. A physician who is treating an adult whom he reasonably suspects is abused, neglected or exploited;
3. The adult's legally appointed guardian or conservator;
4. A guardian ad litem who has been appointed for an adult who is the subject of an adult protective services report;
5. A family member who is responsible for the welfare of an adult who is the subject of an adult protective services report;
6. An attorney representing a local department in an adult protective services case;
7. The Social Security Administration; or
8. Any other entity that demonstrates to the commissioner or local department director that legitimate interest is evident.

G. Local departments are required to disclose information under the following circumstances:

1. When disclosure is ordered by a court;
2. When a person has made an adult protective services report and an investigation has been completed; or
3. When a request for access to information is made pursuant to the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq. of the Code of Virginia).

H. Any or all of the following specific information may be disclosed at the discretion of the local department to agencies or persons specified in subsection F of this section:

1. Name, address, age, race, and gender of the adult who is the subject of the request for information;
2. Name, address, age, race, and gender of the person who is alleged to have perpetrated the abuse, neglect, or exploitation;
3. Description of the incident or incidents of abuse, neglect, or exploitation;
4. Description of medical problems to the extent known;
5. Disposition of the adult protective services report; and
6. The protective service needs of the adult.

I. The identity of the person who reported the suspected abuse, neglect or exploitation shall be held confidential unless the reporter authorizes the disclosure of his identity or disclosure is ordered by the court.

J. Agencies or persons who receive confidential information pursuant to subsection G of this section shall provide the following assurances to the local department:

1. The purpose for which information is requested is related to the protective services goal in the service plan for the adult;

2. The information will be used only for the purpose for which it is made available; and

3. The information will be held confidential by the department or individual receiving the information except to the extent that disclosure is required by law.

K. Methods of obtaining assurances. Any one of the following methods may be used to obtain assurances required in subsection J of this section:

1. Agreements between local departments and other community service agencies that provide blanket assurances required in subsection J of this section for all adult protective services cases; or

2. State-level agreements that provide blanket assurances required in subsection C of this section for all adult protective services cases.

L. Notification that information has been disclosed. When information has been disclosed pursuant to this chapter, notice of the disclosure shall be given to the adult who is the subject of the information or to his legally appointed guardian. If the adult has given permission to release the information, further notification shall not be required.

VA.R. Doc. No. R18-5143; Filed August 8, 2017, 3:03 p.m.

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# GOVERNOR

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## EXECUTIVE ORDER NUMBER 66 (2017)

### **DECLARATION OF A STATE OF EMERGENCY FOR THE COMMONWEALTH OF VIRGINIA DUE TO CIVIL UNREST**

#### Importance of the Issue

On this date, August 12, 2017, I am declaring a state of emergency to exist for the Commonwealth of Virginia due to civil unrest leading up to, resulting from, and subsequent to the Unite the Right rally and counter-protests in the City of Charlottesville. The actions of the event participants have caused numerous injuries, damage to local infrastructure, and severe damage to public and private property.

The health and general welfare of the citizens of the Commonwealth require that state action be taken to help alleviate the conditions caused by this situation. The effects of this incident constitute a disaster wherein human life and public and private property are imperiled, as described in § 44-146.16 of the Code of Virginia.

Therefore, by virtue of the authority vested in me by § 44-146.17 of the Code of Virginia, as Governor and as Director of Emergency Management, and by virtue of the authority vested in me by Article V, Section 7 of the Constitution of Virginia and by § 44-75.1 of the Code of Virginia, as Governor and Commander-in-Chief of the armed forces of the Commonwealth, and subject always to my continuing and ultimate authority and responsibility to act in such matters, I hereby confirm, ratify, and memorialize in writing my verbal orders issued on this date, August 12, 2017, whereby I am proclaiming that a state of emergency exists, and I am directing that appropriate assistance be rendered by agencies of both state and local governments to alleviate any conditions resulting from the incident, and to implement recovery and mitigation operations and activities so as to return impacted areas to pre-event conditions in so far as possible. Pursuant to § 44-75.1(A)(3) and (A)(4) of the Code of Virginia, I am also directing that the Virginia National Guard and the Virginia Defense Force be called forth to state active duty to be prepared to assist in providing such aid. This shall include Virginia National Guard assistance to the Virginia Department of State Police with the Governor's authority to arrest individuals for felonies committed in their presence, to arrest individuals for offenses against public safety (riot, unlawful assembly, etc.), to take action necessary to protect lives and preserve property, and to perform such other law enforcement functions as the Superintendent of State Police, in consultation with the State Coordinator of Emergency Management, the Adjutant General, and the Secretary of Public Safety and Homeland Security, may find necessary. In all instances, members of the Virginia National Guard and Virginia Defense Force shall remain subject to military command as prescribed by § 44-78.1 of the Code of

Virginia and are not subject to the civilian authorities of county or municipal governments.

In order to marshal all public resources and appropriate preparedness, response, and recovery measures to meet this threat and recover from its effects, and in accordance with my authority contained in § 44-146.17 of the Code of Virginia, I hereby order the following protective and restoration measures:

A. Implementation by state agencies of the Commonwealth of Virginia Emergency Operations Plan (COVEOP), as amended, along with other appropriate state agency plans.

B. Activation of the Virginia Emergency Operations Center (VEOC) and the Virginia Emergency Support Team (VEST) to coordinate the provision of assistance to local governments. I am directing that the VEOC and VEST coordinate state actions in support of affected localities, other mission assignments to agencies designated in the COVEOP, and others that may be identified by the State Coordinator of Emergency Management, in consultation with the Secretary of Public Safety and Homeland Security, which are needed to provide for the preservation of life, protection of property, and implementation of recovery activities.

C. The evacuation of areas threatened or stricken by effects of the civil unrest, as appropriate: Following a declaration of a local emergency pursuant to § 44-146.21 of the Code of Virginia, if a local governing body determines that evacuation is deemed necessary for the preservation of life or other emergency mitigation, response, or recovery effort, pursuant to § 44-146.17(1) of the Code of Virginia, I direct the evacuation of all or part of the populace therein from such areas and upon such timetable as the local governing body, in coordination with the VEOC, acting on behalf of the State Coordinator of Emergency Management, shall determine. Notwithstanding the foregoing, I reserve the right to direct and compel evacuation from the same and different areas and determine a different timetable both where local governing bodies have made such a determination and where local governing bodies have not made such a determination. Also, in those localities that have declared a local emergency pursuant to § 44-146.21 of the Code of Virginia, if the local governing body determines that controlling movement of persons is deemed necessary for the preservation of life, public safety, or other emergency mitigation, response, or recovery effort, pursuant to § 44-146.17(1) of the Code of Virginia, I authorize the control of ingress and egress at an emergency area, including the movement of persons within the area and the occupancy of premises therein upon such timetable as the local governing body, in coordination with the State Coordinator of Emergency Management and the VEOC, shall determine. Violations of any order to citizens to evacuate shall constitute a violation of this Executive Order and are punishable as a Class 1 misdemeanor.

D. The activation, implementation, and coordination of appropriate mutual aid agreements and compacts, including the Emergency Management Assistance Compact (EMAC), and the authorization of the State Coordinator of Emergency Management to enter into any other supplemental agreements, pursuant to §§ 44-146.17(5) and 44-146.28:1 of the Code of Virginia, to provide for the evacuation and reception of injured and other persons and the exchange of medical, fire, police, National Guard personnel and equipment, public utility, reconnaissance, welfare, transportation, and communications personnel, equipment, and supplies. The State Coordinator of Emergency Management is hereby designated as Virginia's authorized representative within the meaning of the Emergency Management Assistance Compact, § 44-146.28:1 of the Code of Virginia.

E. The authorization of the Departments of State Police, Transportation, and Motor Vehicles to grant temporary overweight, over width, registration, or license exemptions to all carriers transporting essential emergency relief supplies, livestock or poultry, feed or other critical supplies for livestock or poultry, heating oil, motor fuels, or propane, or providing restoration of utilities (including, but not limited to: electricity, gas, phone, water, wastewater, and cable) in and through any area of the Commonwealth in order to support the disaster response and recovery, regardless of their point of origin or destination. Weight exemptions are not valid on interstate highways or on posted structures for restricted weight unless there is an associated Federal emergency declaration.

All over width loads, up to a maximum of 12 feet, and over height loads up to a maximum of 14 feet must follow Virginia Department of Motor Vehicles (DMV) hauling permit and safety guidelines.

In addition to described overweight/over width transportation privileges, carriers are also exempt from vehicle registration with the Department of Motor Vehicles. This includes vehicles en route and returning to their home base. The above-cited agencies shall communicate this information to all staff responsible for permit issuance and truck legalization enforcement.

F. This Emergency Declaration implements limited relief from the provisions 49 CFR 390-399. Accordingly, the State Coordinator of Emergency Management recognizes the exemption for hours of service by any carrier when transporting essential emergency relief supplies, passengers, property, livestock, poultry, equipment, food, feed for livestock or poultry, fuel, construction materials, and other critical supplies to or from any portion of the Commonwealth for purpose of providing direct relief or assistance as a result of this disaster, pursuant to § 52-8.4 of the Code of Virginia and Title 49 Code of Federal Regulations, Section 390.23 and Section 395.3.

G. The foregoing overweight/over width transportation privileges as well as the regulatory exemption provided by § 52-8.4(A) of the Code of Virginia, and implemented in 19VAC30-20-40(B) of the "Motor Carrier Safety Regulations," shall remain in effect for 30 days from the onset of the disaster, or until emergency relief is no longer necessary, as determined by the Secretary of Public Safety and Homeland Security in consultation with the Secretary of Transportation, whichever is earlier.

H. The implementation and discontinuance of provisions authorized in paragraphs F through H above shall be disseminated by the publication of administrative notice to all affected and interested parties. I hereby delegate to the Secretary of Public Safety and Homeland Security, after consultation with other affected Cabinet Secretaries, the authority to implement this order as set forth in § 2.2-104 of the Code of Virginia.

I. The authorization of appropriate oversight boards, commissions, and agencies to ease building code restrictions and to permit emergency demolition, hazardous waste disposal, debris removal, emergency landfill siting, and operations and other activities necessary to address immediate health and safety needs without regard to time-consuming procedures or formalities and without regard to application or permit fees or royalties.

J. The authorization of a maximum of \$600,000 in state sum sufficient funds for state and local governments mission assignments authorized and coordinated through the Virginia Department of Emergency Management that are allowable as defined by The Stafford Act. This funding is also available for state response and recovery operations and incident documentation. Out of this state disaster sum sufficient, \$250,000, or more if available, is authorized for the Department of Military Affairs for the state's portion of the eligible disaster-related costs incurred for salaries, travel, and meals during mission assignments authorized and coordinated through the Virginia Department of Emergency Management. \$350,000, or more if available, is authorized to cover the disaster-related costs incurred for salaries, travel, and meals during mission assignments of any defined specialty teams and the Virginia Emergency Operations Center.

K. The implementation by public agencies under my supervision and control of their emergency assignments as directed in the COVEOP without regard to normal procedures pertaining to performance of public work, entering into contracts, incurring of obligations or other logistical and support measures of the Emergency Services and Disaster Laws, as provided in § 44-146.28(b) of the Code of Virginia. Section 44-146.24 of the Code of Virginia also applies to the disaster activities of state agencies.

L. Designation of members and personnel of volunteer, auxiliary, and reserve groups including search and rescue (SAR), Virginia Associations of Volunteer Rescue Squads

(VAVRS), Civil Air Patrol (CAP), member organizations of the Voluntary Organizations Active in Disaster (VOAD), Radio Amateur Civil Emergency Services (RACES), volunteer fire fighters, Citizen Corps Programs such as Medical Reserve Corps (MRCs), Community Emergency Response Teams (CERTs), and others identified and tasked by the State Coordinator of Emergency Management for specific disaster-related mission assignments as representatives of the Commonwealth engaged in emergency services activities within the meaning of the immunity provisions of § 44-146.23(a) and (f) of the Code of Virginia, in the performance of their specific disaster-related mission assignments.

M. The activation of the statutory provisions in § 59.1-525 et seq. of the Code of Virginia related to price gouging. Price gouging at any time is unacceptable. Price gouging is even more reprehensible during a time of disaster after issuance of a state of emergency. I have directed all applicable executive branch agencies to take immediate action to address any verified reports of price gouging of necessary goods or services. I make the same request of the Office of the Attorney General and appropriate local officials. I further request that all appropriate executive branch agencies exercise their discretion to the extent allowed by law to address any pending deadlines or expirations affected by or attributable to this disaster event.

N. The following conditions apply to the deployment of the Virginia National Guard and the Virginia Defense Force:

1. The Adjutant General of Virginia, after consultation with the State Coordinator of Emergency Management, shall make available on state active duty such units and members of the Virginia National Guard and Virginia Defense Force and such equipment as may be necessary or desirable to assist in preparations and response to this incident and in alleviating the human suffering and damage to property.

2. Pursuant to §§ 44-146.17, 44-146.28(d), and 44-75.1(A)(3) of the Code of Virginia, the Virginia National Guard shall prepare for and assist the Virginia State Police throughout the duration of the Unite the Right Rally in Charlottesville, Virginia on August 12, 2017. The Virginia National Guard will be mobilized on Friday August 11, 2017, to prepare and provide assistance through the conclusion of the event. Assistance shall include, but not be limited to:

- Providing for safe movement of traffic and pedestrians;
- Assisting with the safety and security of event attendees and law enforcement officers;
- Providing crowd control;
- Assisting with arrests;
- Providing security to arrestees during detainment;

The members of the Virginia National Guard activated for this Rally shall be authorized, under Virginia Code Section 44-75.1(A)(3), to do all acts necessary to accomplish the above assistance, and to enforce the following laws, to include the power of arrest: All violations of Chapter 9, Article 1 of Virginia Code Section 18.2 (Crimes Against Peace and Order; Riot and Unlawful Assembly), and such other acts necessary to protect lives, preserve property, and in defense of self and others.

3. In all instances, members of the Virginia National Guard and Virginia Defense Force shall remain subject to military command as prescribed by § 44-78.1 of the Code of Virginia and are not subject to the civilian authorities of county or municipal governments. Any bonds and/or insurance required by § 52-7 of the Code of Virginia shall be provided for them at the expense of the Commonwealth. This shall not be deemed to prohibit working in close cooperation with members of the Virginia Departments of State Police or Emergency Management or local law enforcement or emergency management authorities or receiving guidance from them in the performance of their duties.

4. Should service under this Executive Order result in the injury or death of any member of the Virginia National Guard, the following will be provided to the member and the member's dependents or survivors:

a. Workers' Compensation benefits provided to members of the National Guard by the Virginia Workers' Compensation Act, subject to the requirements and limitations thereof; and, in addition,

b. The same benefits, or their equivalent, for injury, disability, and/or death, as would be provided by the federal government if the member were serving on federal active duty at the time of the injury or death. Any such federal-type benefits due to a member and his or her dependents or survivors during any calendar month shall be reduced by any payments due under the Virginia Workers' Compensation Act during the same month. If and when the time period for payment of Workers' Compensation benefits has elapsed, the member and his or her dependents or survivors shall thereafter receive full federal-type benefits for as long as they would have received such benefits if the member had been serving on federal active duty at the time of injury or death. Any federal-type benefits due shall be computed on the basis of military pay grade E-5 or the member's military grade at the time of injury or death, whichever produces the greater benefit amount. Pursuant to § 44-14 of the Code of Virginia, and subject to the availability of future appropriations which may be lawfully applied to this purpose, I now approve of future expenditures out of appropriations to the Department of Military Affairs for such federal-type benefits as being manifestly for the benefit of the military service.

5. The following conditions apply to service by the Virginia Defense Force:

a. Virginia Defense Force personnel shall receive pay at a rate equivalent to a National Guard soldier of like rank, not to exceed 25 years of service.

b. Lodging and meals shall be provided by the Adjutant General or reimbursed at standard state per diem rates;

c. All privately owned equipment, including, but not limited to, vehicles, boats, and aircraft, will be reimbursed for the expense of fuel. Damage or loss of said equipment will be reimbursed, minus reimbursement from personal insurance, if said equipment was authorized for use by the Adjutant General in accordance with § 44-54.12 of the Code of Virginia;

d. In the event of death or injury, benefits shall be provided in accordance with the Virginia Workers' Compensation Act, subject to the requirements and limitations thereof.

Upon my approval, the costs incurred by state agencies and other agents in performing mission assignments through the VEOC of the Commonwealth as defined herein and in § 44-146.28 of the Code of Virginia, other than costs defined in the paragraphs above pertaining to the Virginia National Guard and pertaining to the Virginia Defense Force, in performing these missions shall be paid from state funds.

Effective Date of this Executive Order

This Executive Order shall be effective August 12, 2017, and shall remain in full force and effect until August 17, 2017, unless sooner amended or rescinded by further executive order. Termination of the Executive Order is not intended to terminate any federal-type benefits granted or to be granted due to injury or death as a result of service under this Executive Order.

Given under my hand and under the Seal of the Commonwealth of Virginia, this 12th day of August, 2017.

/s/ Terence R. McAuliffe  
Governor



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# GENERAL NOTICES/ERRATA

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## AIR POLLUTION CONTROL BOARD

### State Implementation Plan Proposed Revision - Very Fine Particulate Matter

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

Regulations affected: The regulations of the board affected by this action are as follows: (i) 9VAC5-30, Ambient Air Quality Standards; (ii) Article 9 (Permits for Major Stationary Sources and Major Modifications Locating in Nonattainment Areas or the Ozone Transport Region) of 9VAC5-80, Permits for Stationary Sources; and (iii) 9VAC5-160, Regulation for General Conformity.

Purpose of notice: DEQ is seeking comment on the issue of whether the regulation amendments should be submitted as a revision to the SIP.

Public comment period: September 4, 2017, to October 4, 2017.

Public hearing: A public hearing may be conducted if a request is made in writing to the contact listed at the end of this notice. In order to be considered, the request must include the full name, address, and telephone number of the person requesting the hearing and be received by DEQ by the last day of the comment period. Notice of the date, time, and location of any requested public hearing will be announced in a separate notice, and another 30-day comment period will be conducted.

Public comment stage: The regulation amendments are exempt from the state administrative procedures for adoption of regulations contained in Article 2 of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) by the provisions of § 2.2-4006 A 4 c of the Administrative Process Act because they are necessary to meet the requirements of the federal Clean Air Act and do not differ materially from the pertinent EPA regulations. Since the amendments are exempt from administrative procedures for the adoption of regulations, DEQ is accepting comment only on the issue cited above under "purpose of notice" and not on the content of the regulation amendments.

Description of proposal: The proposed revision will consist of amendments to existing regulation provisions concerning the national ambient air quality standard (NAAQS) for very fine particulate matter (PM<sub>2.5</sub>) based on the August 24, 2016,

(81 FR 58010) EPA rule that addresses a range of nonattainment area SIP requirements for the 2012 PM<sub>2.5</sub> NAAQS. The major provisions of the proposal are as follows: (i) the 1997 PM<sub>2.5</sub> ambient air quality standard is revoked; (ii) the applicability section of Rule 8-9 is amended to indicate that different pollutants are not summed to determine applicability of a major stationary source or major modification; (iii) the definition of "regulated NSR pollutant" in Rule 8-9 is amended to specify precursors of PM<sub>2.5</sub>; (iv) the definition of "significant" in Rule 8-9 is amended to specify precursors of PM<sub>2.5</sub>; and (v) the applicability section of the Regulation for General Conformity is amended to specify PM<sub>2.5</sub> precursors in the list of emissions applicability rates.

Federal information: This notice is being given to satisfy the public participation requirements of federal regulations (40 CFR 51.102) and not any provision of state law. Except as noted below, the proposal will be submitted as a revision to the Commonwealth of Virginia SIP under § 110(a) of the federal Clean Air Act in accordance with 40 CFR 51.104. It is planned to submit all provisions of the proposal as a revision to the Commonwealth of Virginia SIP.

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

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

- 1) Main Street Office, 8th Floor, 629 East Main Street, Richmond, VA, telephone (804) 698-4070,
- 2) Southwest Regional Office, 355 Deadmore Street, Abingdon, VA, telephone (276) 676-4800,
- 3) Blue Ridge Regional Office, 3019 Peters Creek Road, Roanoke, VA, telephone (540) 562-6700,
- 4) Valley Regional Office, 4411 Early Road, Harrisonburg, VA, telephone (540) 574-7800,
- 5) Piedmont Regional Office, 4949-A Cox Road, Glen Allen, VA, telephone (804) 527-5020,
- 6) Northern Regional Office, 13901 Crown Court, Woodbridge, VA, telephone (703) 583-3800, and
- 7) Tidewater Regional Office, 5636 Southern Boulevard, Virginia Beach, VA, telephone (757) 518-2000.

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

**DEPARTMENT OF ENVIRONMENTAL QUALITY**  
**Notice of Periodic Review and Small Business Impact Review**

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Department of Environmental Quality is conducting a periodic review and small business impact review of **9VAC15-30, Regulations for the Certification of Recycling Machinery and Equipment for Local Tax Exemption Purposes**. 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 September 4, 2017, and ends September 26, 2017.

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 Melissa Porterfield, Office of Regulatory Affairs, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4238, FAX (804) 698-4019, or email [melissa.porterfield@deq.virginia.gov](mailto:melissa.porterfield@deq.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.

**BOARD OF MEDICAL ASSISTANCE SERVICES**  
**Nursing Facility Manual (Chapter V and Appendix F) Draft for Stakeholder Input**

Public comment period: August 15, 2017, to September 15, 2017.

The draft versions of Chapter V and Appendix F of the Nursing Facility manual are posted on the DMAS website for

public comment through September 15, 2017. View the drafts at [http://www.dmas.virginia.gov/content\\_pgs/pd-pmnl.aspx](http://www.dmas.virginia.gov/content_pgs/pd-pmnl.aspx).

The finalized versions of Chapter V and Appendix F of the Nursing Facility manual will be officially posted by September 22, 2017, at <https://www.virginiamedicaid.dmas.virginia.gov/wps/portal/ProviderManual>.

Contact Information: Emily McClellan, Regulatory Manager, Division of Policy and Research, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, TDD (800) 343-0634, or email [emily.mcclellan@dmas.virginia.gov](mailto:emily.mcclellan@dmas.virginia.gov).

**DEPARTMENT OF PLANNING AND BUDGET**

**Commercial Activities List - Public Comments and Recommendations**

Pursuant to § 2.2-1501.1 of the Code of Virginia, the Virginia Department of Planning and Budget (DPB) has updated the Commercial Activities List (CAL). The CAL is posted on the DPB website under Documents, Instructions and Publications as "Commercial Activities List - 2017" and is also included as an attachment to this notice.

DPB is seeking written comments on the CAL and invites recommendations from the public regarding activities being performed by state agencies that might better be performed by the private sector. The public comment period will begin September 4, 2017, and end September 18, 2017. Please include "CAL" in the subject of the email.

Contact Information: Cari Corr, Virginia Department of Planning and Budget, 1111 East Broad Street, Richmond, VA 23219, telephone (804) 225-4549, or email [cari.corr@dpb.virginia.gov](mailto:cari.corr@dpb.virginia.gov).

Virginia Commercial Activities List for FY 2016 and FY 2017

NIGP	NIGP title
90608	Automation; Controls; Instrumentation - Architectural Services
90648	Historical Preservation
91013	Elevator Installation, Maintenance and Repair
91223	Construction, General (Backfill Services, Digging, Ditching, Road Grading, Rock Stabilization, etc.)
91265	Maintenance and Repair, Tennis/Sport Court
91316	Construction, Communication Equipment (Includes Antenna Towers)

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91359	Construction and Upgrades, Wastewater Treatment Plant	92824	Buses, School and Mass Transit, Maintenance and Repair
91360	Construction, Water System/Plants, Main and Service Line	93881	Scientific Equipment Maintenance and Repair
91427	Carpentry	94155	HVAC Systems Maintenance and Repair, Power Plant
91464	Plastering	94620	Auditing
91504	Advertising, Outdoor Billboard, etc.	94649	Financial Services (Not Otherwise Classified)
91806	Administrative Consulting	94650	Fund Raising Services
91807	Advertising Consulting	94752	Harvesting Services, Forest
91815	Architectural Consulting	94807	Administration Services, Health
91819	Buildings, Structures and Components Consulting	94828	Dental Services
91831	Construction Consulting	94844	Health Physics Services
91875	Management Consulting	94876	Psychologists/Psychological and Psychiatric Services (Including Behavioral Management Services)
91878	Medical Consulting	95226	Day Care (Adult)
91885	Personnel/Employment Consulting (Human Resources)	95245	Food Stamps/Coupons
91891	Roofing Consultant	95256	Housekeeping Services
92000	Data Processing, Computer, Programming, and Software Services	95277	Research and Evaluation, Human Services (Including Productivity Audits)
92022	Data Preparation and Processing Services (Including Bates Coding)	95285	Support Services
92032	Intelligent Transportation System Software (To Include Design, Development, and Maintenance Services)	95605	Business Research Services
92037	Networking Services (Including Installation, Security, and Maintenance)	95638	Library Services (Not Otherwise Classified)
92039	Processing System Services, Data (Not Otherwise Classified)	95826	Construction Management Services
92040	Programming Services, Computer	95839	Financial Management Services
92416	Course Development Services, Instructional/Training	95859	Industrial Management Services
92418	Educational Services, Alternative	95874	Personnel Management Services
92474	Special Education	95939	Dam and Levee Construction, Maintenance, Management and Repair
92480	Tutoring	95973	Ship Maintenance and Repair
92500	Engineering Services, Professional	95984	Towing Services, Marine
92597	Water Supply, Treatment, and Distribution/Engineering	96110	Business Plan Development Services
92694	Water Pollution Services	96114	Commissioning of Facilities Services (Functional and Prefunctional)
		96116	Claims Processing Services
		96129	Economic Impact Studies

96130	Employment Agency and Search Firm Services (Including Background Investigations and Drug Testing for Employment)
96173	Theatrical Services (Including Production, Scenery Design, Stage, etc.)
96196	Non-Professional Services (Not Otherwise Classified)
96248	Interior Design/Decorator Services
96252	Mapping Services (Including Cartography and Surveying Services, Not Aerial)(See 920-33 for Digitized Mapping Services) and 905-10 for Aerial Mapping and Survey Services)
96269	Personnel Services, Temporary
96343	Intergovernmental/Inter-Agency Contracts
96728	Computer Hardware and Software Manufacturing Services
96847	Inspection Services, Construction Type
96881	Traffic Sign Maintenance and Repair
98854	Lighting Services for Parks, Athletic Fields, Parking Lots, etc.
99029	Disaster Preparedness/Emergency Planning Services
99050	Installation of Security and Alarm Equipment
99067	Patrol Services
99079	Sanitizing and Disinfecting Services, Security, Fire, Safety and Emergency

regulation to provide the regulated community with flexibility concerning how they demonstrate financial assurance. The wordings of the financial mechanisms are included in the regulation and are to be used by the regulated community. This assists with reducing the regulatory burden on the regulated community.

This regulation does not duplicate or conflict with federal or state law. The Facility and Aboveground Storage Tank (AST) Regulation (9VAC25-91) is a companion regulation to this regulation. The Facility and Aboveground Storage Tank (AST) Regulation contains the technical standards for aboveground storage tanks while this regulation address the financial assurance requirements for aboveground storage tanks and pipeline facilities.

No comments were received during the public comment period.

The regulation was last amended in 2013 to include an additional financial mechanism in the regulation. The financial assurance mechanisms included in the regulation continue to be available to the regulated community from financial institutions.

The agency recommends retaining this regulation with minor changes that will be made as part of a separate regulatory action. During this review, 9VAC25-640-30 was identified as needing to be revised to be consistent with the exclusions found in the Facility and Aboveground Storage Tank (AST) Regulations (9VAC25-91). Additionally, 9VAC25-640-250 was identified as obsolete and no longer needed. These changes will not impact small businesses.

The regulation continues to meet the objective of protecting the public from expenses related to containment and cleanup necessitated by accidental releases arising from the operation of petroleum ASTs and pipeline facilities. All owners including small business owners are allowed to select from multiple financial assurance mechanisms to demonstrate financial assurance. This provides the regulated community with flexibility concerning compliance with the financial assurance requirements.

Contact Information: Melissa Porterfield, Office of Regulatory Affairs, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4238, FAX (804) 698-4019, or email [melissa.porterfield@deq.virginia.gov](mailto:melissa.porterfield@deq.virginia.gov).

**Proposed Consent Order for the Cumberland Plateau Regional Housing Authority**

An enforcement action has been proposed for the Cumberland Plateau Regional Housing Authority for violations at the Hurley Heights 1 (Lots A, 1 and 2) Sewage Treatment Plant in Buchanan County, Virginia. The proposed consent order contains a civil charge and a schedule of compliance to address the violations. A description of the proposed action is

**STATE WATER CONTROL BOARD**

**Small Business Impact Review - Report of Findings**

Pursuant to § 2.2-4007.1 of the Code of Virginia, the State Water Control Board conducted a small business impact review of **9VAC25-640, Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements**, and determined that this regulation should be retained in its current form. The State Water Control Board is publishing its report of findings dated June 21, 2017, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

The current regulation continues to be needed. The regulation is structured to minimize the impact on the regulated community, including those that are small businesses, while protecting human health and the environment. The regulation requires financial assurance to be provided based on the amount of petroleum that is being stored. Multiple different types of financial mechanisms have been included in the

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available at the Department of Environmental Quality office named below or online at [www.deq.virginia.gov](http://www.deq.virginia.gov). Ralph T. Hilt will accept comments by email at [ralph.hilt@deq.virginia.gov](mailto:ralph.hilt@deq.virginia.gov), FAX at (276) 676-4899, or postal mail at Department of Environmental Quality, Southwest Regional Office, 355-A Deadmore Street, Abingdon, VA 24210, from September 5, 2017, through October 4, 2017.

### VIRGINIA CODE COMMISSION

#### Notice to State Agencies

**Contact Information:** *Mailing Address:* Virginia Code Commission, Pocahontas Building, 900 East Main Street, 8th Floor, Richmond, VA 23219; *Telephone:* (804) 698-1810; *Email:* [varegs@dls.virginia.gov](mailto:varegs@dls.virginia.gov).

**Meeting Notices:** Section 2.2-3707 C of the Code of Virginia requires state agencies to post meeting notices on their websites and on the Commonwealth Calendar at <https://commonwealthcalendar.virginia.gov>.

**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.