



Final Regulation Agency Background Document

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| Agency name | Board of Health (Virginia Department of Health) |
| Virginia Administrative Code (VAC) citation | 12 VAC 5-650 |
| Regulation title | Schedule of Civil Penalties |
| Action title | New regulation establishing a uniform schedule of civil penalties for violations of onsite sewage and alternative discharging sewage treatment system regulations. |
| Date this document prepared | September 24, 2008/amended August 1, 2011 |

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

This regulation establishes a uniform schedule of civil penalties for violations of the Board of Health's (Board) regulations pertaining to conventional and alternative onsite sewage systems (12VAC5-610 or successor and 12VAC5-613 or successor), and for violations of the Board's regulations pertaining to alternative discharging sewage treatment systems for individual single family homes (12VAC5-640 or successor).

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The proposed Schedule of Civil Penalties (12VAC5-650-10 et seq.) underwent executive branch review and received approval from the Office of the Governor on May 28, 2009. The proposed regulations were published in the Virginia Register of Regulations on June 22, 2009. A public comment period ran from June 22, 2009 through August 21, 2009. The Virginia Department of Health (“Department”) received one comment from a citizen that proposed to add a definition of the term “modify” as it pertains to these regulations. The Department evaluated the comment and determined that the term would best be defined through an implementation policy rather than in the regulation. As such, the Board of Health, at its meeting on October 23, 2009, approved the final adoption of these regulations without a definition of the term “modify”. During the executive branch review process of the final regulation, the Office of the Governor recommended that the Department address the aforesaid public comment by adding a definition of the term “modify”. Thus, at the behest of the Office of the Governor, the Department withdrew the regulation and worked with the Office of the Attorney General to develop a definition of the term “modify” as it pertains to these regulations. The Department has shared this proposed amendment with the stakeholder who made the public comment and she has indicated that the proposed definition addresses her concerns. As such, the Department is now re-submitting the regulations with the added amendment for final executive branch review.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

- 1) Code of Virginia § 32.1-164.J (2007 Acts of Assembly, Chapter 514); 2) Board of Health/ Department; 3) mandatory.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

- 1) The regulation, while fulfilling specific statutory requirements, will allow the Department to employ civil penalties to enhance existing regulatory programs for supervising and controlling the safe and sanitary treatment and disposal of sewage. 2) Currently, the Department may ask for criminal penalties (Class I Misdemeanor), may initiate civil proceedings, and may collect civil charges only with the consent of the affected party. Under the final regulation, the Department may charge civil penalties in amounts that are relatively small in comparison to existing penalties. The goal of the regulation is to enhance the Department’s ability to protect public health and the environment by providing an enforcement tool that may be scaled to match the seriousness of a violation.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The regulation specifies uniform penalties for violations of the Board's regulations. The penalty for any one violation may not exceed \$100 for the initial violation, \$150 for each additional violation. Each day during which a violation is found to exist will constitute a separate offense, however violations arising from the same set of operative facts may not be charged more than once in any 10-day period. A series of violations arising from the same set of operative facts may not result in civil penalties exceeding a total of \$3,000. The Department may not charge civil penalties in cases where an unoccupied structure does not contribute to pollution of public or private water supplies or to the contraction or spread of disease. The Department may pursue other remedies as provided by law, however civil penalties must be in lieu of criminal penalties except where a violation contributes to or is likely to contribute to the pollution of public or private water supplies or the contraction or spread of disease. The Department may issue a civil summons ticket as provided by law for a scheduled violation.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
 - 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
 - 3) other pertinent matters of interest to the regulated community, government officials, and the public.*
- If there are no disadvantages to the public or the Commonwealth, please indicate.*
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1) The primary advantage to the public comes from improving the Department's ability to protect citizens and the environment from the harmful effects of sewage. As the number of alternative onsite sewage systems in the Commonwealth continues to increase, citizens, local governments, regulators, and onsite sewage professionals agree that ongoing operation, maintenance, and monitoring of these systems is essential to assure that they function properly. When these systems are not properly maintained and operated, they may discharge untreated or partially treated sewage directly into the Commonwealth's ground and surface waters. The Board's regulations and policies increasingly require owners of alternative onsite sewage systems to perform certain activities, such as monitoring inspections and maintenance, to assure that systems are operating properly. The ability to assess civil penalties, as an alternative to criminal enforcement, is a more effective enforcement strategy to employ in such a "performance-based" regulatory program. A disadvantage, expressed by some in the regulated communities, is that Department staff may misuse or abuse the new penalties.

2) Civil penalties will improve the Department's ability to enforce the Boards regulations by providing another enforcement tool. Existing statutes provide for enforcement actions via the Administrative Process Act (APA) such as informal fact-finding conferences to make case decisions, e.g., permit suspension, revocation, the issuance of orders by the Board, civil actions in circuit courts, and criminal actions. These are relatively "heavy" actions that are appropriate in some cases. Currently, civil charges can only be collected with the consent of the affected party and are employed in conjunction with a consent order. Properly used, civil penalties can be viable alternatives when existing enforcement tools are too heavy-handed for many routine enforcement actions. Civil penalties are not intended to be punitive, but are intended to encourage compliance with environmental health regulations before a situation deteriorates to the point that heavier enforcement is warranted. A disadvantage to the agency will be the perceived drains on agency staff and resources required to implement the new civil penalties.

3) Civil penalties are particularly critical for managing the onsite sewage and alternative discharging sewage system programs. Several local governments have enacted ordinances requiring operation and maintenance of alternative onsite sewage systems. The Board has promulgated regulations that require routine monitoring, maintenance, and reporting for alternative onsite systems; these regulations are

currently undergoing final executive branch review. These are already required in the alternative discharging system program. Typically, an owner is responsible for maintaining a contract with a private-sector provider to perform routine inspections, tests, and maintenance. The owner (or the provider) must forward inspection reports and test results to the Department. Criminal or other “heavy” enforcement actions are not appropriate for situations such as the failure to submit a report or keep a maintenance contract in effect. Civil penalties will provide options for the Department to scale its enforcement actions to the seriousness of a particular situation. The Department will develop administrative guidelines for implementing the civil penalties. These guidelines will seek to assure the penalties are not abused or misused by staff.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

| Section number | Requirement at proposed stage | What has changed | Rationale for change |
|----------------|-------------------------------|---|--|
| 10 | N/A | The agency added a definition of the term “modify”. | The agency made the change to address a public comment. The commenter felt that the term needed to be specifically defined so that regulants can reliably discern what activities could result in civil penalties. |

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

| Commenter | Comment | Agency response |
|---------------|---|--|
| Sandra Gentry | <p>Define "modify" as it applies here</p> <p>The proposed text states that it will be a violation to “modify or cause to modify... an onsite or alternative discharging sewage system without a permit.” What constitutes modification of a system? This needs to be defined. If it is already defined in other regulations, a reference needs to be made to this definition.</p> <p>At what level is a permit</p> | The agency modified the regulation to add a definition of the term “modify”. |

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| | required? Some may consider replacing a pump with another brand of pump or a float switch with another type to be a modification. Changing the timing of a distribution box or replacing that box if it has been damaged or replacing a control panel with another brand may be modification of the system. Without definite guidelines as to what can be done without a permit, those contractors who repair or maintain systems may be left wondering if their work could result in penalties. | |
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All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

No changes are proposed.

| Current section number | Proposed new section number, if applicable | Current requirement | Proposed change and rationale |
|------------------------|--|---------------------|--|
| 10 | | N/A | The agency added a definition of the term “modify. The agency made the change to address the concerns outlined in a public comment. The commenter felt that the term needed to be specifically defined so that regulants can reliably discern what activities could result in civil penalties. |

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

Because of the statutory requirement to establish a uniform schedule of civil penalties, the agency has not considered other methods.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The new regulation will have little direct impact on families in the Commonwealth. The action, by offering an alternative to existing criminal and civil enforcement, may encourage economic self-sufficiency and the assumption of responsibility on the part of regulated persons. The action is intended to improve the Department's enforcement capabilities, particularly in the area of operation and maintenance of alternative onsite sewage systems. As such, the agency expects that its efforts to protect public health and the environment (ground and surface water quality) will be improved and that families will benefit from a safer environment. The regulation will have a direct, short-term financial effect on a family that is in violation if a civil penalty is charged. This impact, however, should be balanced against the likelihood that in such cases a civil penalty will be in lieu of a potential criminal charge. Any civil penalties collected will be credited to the newly created Environmental Health Education and Training Fund. This fund is to be used to support training for private- and public-sector individuals in all areas of Environmental Health and may be used for research to improve public health and for protection of the environment. Family members may benefit directly from the improved availability of educational and training opportunities and indirectly from improved environmental and public health protection.