



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

Agency Name:	Department of Health
VAC Chapter Number:	12 VAC 5 - 615
Regulation Title:	Authorized Onsite Soil Evaluator Regulations
Action Title:	Publication of Final Regulations
Date:	May 1, 2002

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

These final AOSE Regulations will replace emergency regulations that expired January 2, 2001. The final Regulations allow the agency to accept private site evaluations and designs, in compliance with the Board of Health's (Board) regulations for onsite sewage systems, designed and certified by an Authorized Onsite Soil Evaluator (AOSE) or a licensed Professional Engineer (PE) in consultation with an AOSE (AOSE/PE). Since the Regulations were proposed, language was added to say that the Virginia Department of Health (VDH) may accept evaluations and designs for proprietary pre-engineered systems that have been deemed by VDH to comply with the Board's regulations, however these are not subject to time limits or deemed approval. The 'sunset date' has been changed from December 31, 2002, to December 31, 2005. Language has been added since the Regulations were proposed to emphasize that VDH has discretion in choosing whether to initiate permit revocation proceedings and to encourage VDH to modify approvals, with the owner's consent, rather than revoke them. Under the final Regulations an

AOSE is not required to modify a permit if the owner damages the approved site. The requirements for inspecting sewage systems at the time of installation are changed since the Regulations were proposed. VDH may, but is not required to, perform such final inspections of AOSE/PE designed systems. Traditional systems have been defined to include provisional, general, proprietary pre-engineered and other systems contained in 12 VAC 5- 610- 20 et seq. (the Sewage Handling and Disposal Regulations- SHDR). The AOSE Regulations as proposed required all currently-certified AOSEs to pass written and field tests by the 'sunset date;' the final Regulations do not require such testing. As proposed, the AOSE Regulations did not require VDH employees to pay the AOSE application fee; under the final Regulations they are not exempt from the fee. Under the final Regulations, requests for professional courtesy reviews must include a statement from the owner giving VDH permission to enter the property.

Changes Made Since the Proposed Stage

Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.

Section 10: Language was added to this section (see related changes in Sections 80.A and 120) to accommodate Va. Code 32.1-163.5.D regarding proprietary, pre-engineered sewage systems that have been deemed by the Department to comply with the Board of Health's regulations. The changes allow the Department to accept certified evaluations and designs for these systems from an AOSE/PE in accordance with the final AOSE regulations. However, in accordance with 32.1-163.5.D the provisions of the Code for deemed approval and the prescribed time limits do not apply to such proprietary, pre-engineered systems.

Section 50: This section was changed by increasing the number of members of the permanent AOSE advisory committee from 14 to 15, adding a person who is "a REALTOR licensed in Virginia."

Section 60.A: This section was changed from the proposed Regulations by replacing the date of "December 31, 2001," with "December 31, 2005." This date has been referred to as the 'sunset date' and is the date after which VDH will only accept site and soil evaluation reports from an AOSE/PE. Language was also added to the section to clarify that VDH will continue to accept 'bare' applications from owners and their agents after the 'sunset date.'

Section 70.A: This section was changed by adding the word "certain" before the words "traditional systems." This change was made to emphasize that an AOSE is limited to submitting designs for only those "traditional systems" that do not require the practice of engineering.

Section 70.B.1: This section was changed by striking the word "for" and adding the words "as it deems necessary to assure" between the words "application" and "compliance." This change is intended to be permissive with respect to VDH's review of the AOSE/PE documentation submitted with an application for a permit, letter, or subdivision review. The change would allow the agency, once it had established the reliability of an individual AOSE/PE's work, to approve individual applications without an administrative (Level 1) review. The agency would review a percentage or a sample of an AOSE/PE's submittals, but would not be required to review each one in detail.

Section 70.B.5: This section was changed by striking the word "shall" and adding the word "may" between the words "Department" and "initiate" in the first sentence. In addition, the words "or modify" were added between the words "revoke" and "its approval" in the first sentence. Language was also added at the end of the section to clarify that the Department may modify a permit, letter, or subdivision approval with the consent of the owner; the language also provides that the owner may be required to submit a new application in such cases or to provide engineering plans if necessary. These changes are intended to give VDH discretion in whether to initiate proceedings to revoke or modify an approval and to encourage owners and VDH to resolve potential revocation situations by mutual agreement.

Section 70.C: This section was modified by adding language to the effect that an AOSE/PE may not be forced to make changes to a permit or other approval when the need for such changes arises from damage or other actions by the owner.

Section 70.D: This section was modified by striking the requirement that VDH perform a final inspection on a system where an AOSE/PE certified the design. AOSE/PEs are required to perform such final inspections, VDH may perform them. A requirement was added to this section for the AOSE/PE to submit 'as built' drawings for systems they inspect to the owner and the health department.

Section 80.A: Language was added to this section dealing with "proprietary, pre-engineered systems" (see related changes in Sections 10 and 120). The changes allow VDH to accept AOSE/PE evaluations and designs for such systems, however the processing time limits and "deemed approval" do not apply.

Section 80.C: The words "or request for subdivision review" were added to clarify that the section applies to applications for permits, certification letters, and requests for subdivision review.

Section 120 (definitions) "Backlog": The sentence "Working days characterized by severe weather conditions shall not be included in any backlog calculation" was deleted from the definition. A similar sentence was added to the definition of "Processing Time."

Section 120 (definitions) "Deemed Approval": The phrase "and proprietary, pre-engineered systems deemed by the Department to comply with the Board's regulations" was added to the portion of the definition that lists exclusions from deemed approval (see related changes in Sections 10 and 80.A).

Section 120 (definitions) "Processing Time": The sentence, "Working days characterized by severe weather conditions shall not be included in any calculation of processing time." was added.

Section 120 (definitions) "Traditional Systems: The phrase, "including proprietary, pre-engineered systems deemed by the Department to comply with the Board's regulations, that have received provisional or general approval under, or" was added. The sentence, "At present traditional systems include gravity, pumped, and low-pressure distribution (lpd) septic effluent drainfields, and Wisconsin-type mound systems." was deleted. The changes are intended to clarify that traditional systems include proprietary, pre-engineered systems, systems that have received provisional or general approval, and those systems for which the SHDR contain design criteria.

Section 210: The proposed AOSE Regulations required all persons who are currently certified as AOSEs to pass the written and field test by December 31, 2002. The changes to this section remove that requirement.

Section 220: This section was related to Section 210 and was deleted.

Section 250: The sentence, "Those persons currently employed by the Department shall not be required to pay the application fee." was deleted.

Section 350: The word "client's" was stricken from the third sentence and the phrase, "of public health, the environment, or the client" was added. This section was modified to emphasize that an AOSE /PE has an obligation to the public as well as to the client.

Section 390: Language was added to paragraphs A and C of this section to require that any request for a professional courtesy review include a written statement from the property owner giving the Department permission to enter the property.

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

On April 26, 2002, the Board of Health adopted the Regulations for Authorized Onsite Soil Evaluators.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

Sections 32.1-163.4, 32.1-163.5, 32.1-164, and 32.1-164.1:01 of the Code of Virginia contain requirements and provisions for AOSEs. These sections require the Board of Health to establish a program for qualifying individuals as AOSEs, to accept private evaluations and designs for onsite sewage systems for residential development from an AOSE or from a PE in consultation with an AOSE, to contract with an AOSE for evaluations when backlogs exceed 15 days, and they allow for the discretionary use of the Onsite Sewage Indemnification Fund to support the program for training and recognizing AOSEs. The Board's program must include, but is not limited to, approved training courses, written and field tests, application fees to cover the costs of the program, renewal fees and schedules, and procedures for listing, removing from the list, and reinstating individuals as AOSEs. The Department is not required to perform a field check of any evaluation accepted in proper form from an AOSE or a PE prior to issuing a permit, a certification letter, or a subdivision approval although it may conduct such field analyses as may be necessary to protect public health and the integrity of the Commonwealth's environment. Section 32.1-163.5 of the Code establishes specific time limits for processing requests submitted by AOSE/PEs for residential development and provides that in the event the Department does not issue or deny a requested approval within the specified time limit the request shall be "deemed approved" however, neither the processing time limits nor deemed approval apply to a "proprietary, pre-engineered septic system deemed by the Department to comply with the Board's regulations." The Office of the Attorney General has certified that the Board has statutory authority to promulgate the final regulation and that it comports with the applicable state law.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not

acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The Board of Health has a statutory mandate to establish a program for AOSEs (and PEs in consultation with AOSEs) and for accepting evaluations and designs from AOSEs and PEs. Under the proposed regulations the Department of Health is not required to conduct routine administrative or field checks on submittals by AOSEs and PEs prior to making a decision to approve or disapprove an application. Errors in evaluation or design by an AOSE/PE may result in costly delays for owners, potential damage to the environment, threats to public health, and in some cases loss of significant investments. Therefore, to minimize the potential for such errors and to protect the health, safety, and welfare of the citizens, it is essential that the regulations establish minimum qualifications for AOSE training, testing, and experience, as well as standards of conduct and enforcement procedures. Because "deemed approval" may result in the issuance of a permit, letter, or subdivision approval (for residential development) without any review by the Department and because the Department may only conduct administrative reviews and field checks on a portion of the sites certified by AOSE/PEs as part of its quality control and oversight duties, the AOSE Regulations must establish minimum standards for the content of packages submitted for approval. The AOSE Regulations are specifically intended to speed the processing of requests for onsite sewage system permits, certification letters, and subdivision approvals by defining roles and responsibilities for private evaluators and designers.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

The final Regulations are similar to the Emergency Regulations for Authorized Onsite Soil Evaluators that expired January 2, 2001, however there are substantive changes from those Emergency Regulations. 1. Language was added to the final AOSE Regulations to include provisions from Section 32.1-163.5 of the Code regarding "proprietary, pre-engineered septic systems." The new language provides that VDH may accept evaluations and designs for such systems from AOSE/PEs, however those applications are not subject to the processing time limits nor to the "deemed approved" provisions of the Code (Sections 10, 80.A, and 120). 2. The proposed and final Regulations establish an AOSE advisory committee (Section 50). 3. The proposed and final Regulations establish a cut-off date after which the Department will not accept evaluation reports and designs from non-AOSEs (Section 60). 4. The proposed and final Regulations provide that the Department will accept evaluations and designs for private wells (Section 60.C). 5. The proposed and final Regulations provide that the Department may conduct field checks at any time (Section 70). 6. The proposed and final Regulations establish "professional courtesy reviews" (Section 70, 390). 7. Language was added to the final Regulations to emphasize that an AOSE is limited to submitting designs for "certain traditional systems," those that do not require the practice of engineering (Section 70.A). 8. Language was added to the final Regulations to give VDH discretion to conduct an administrative (Level 1)

review of a portion of an AOSE/PE's submittals as an alternative to conducting such reviews of all AOSE/PE submittals (Section 70.B.1). 9. The final Regulations provide that VDH may initiate proceedings to revoke (or modify with the owner's consent) an approval issued on the basis of an AOSE/PE certification when it has reason to believe that the site and/or design do not comply with the Sewage Handling and Disposal Regulations. The revocation provision was mandatory in the proposed Regulations. (Section 70.B.5). 7. The proposed and final Regulations provide for an affected party to appeal a permit (or other approval) revocation to the Sewage Handling and Disposal Appeal Review Board (Section 70.B.5). 10. Language was added to the final Regulations to provide that an AOSE/PE may not be required to make changes to a permit or other approval when the need for such changes arises from damage or other actions by the owner (Section 70.C). 11. The proposed and final Regulations require AOSE/PEs to inspect systems (and wells) installed pursuant to their designs; the final Regulations require "as built" drawing(s) to be submitted to the local health department; the final Regulations provide that VDH is not required to inspect sewage systems installed pursuant to AOSE/PE designs (Section 70.D and E). 12. The proposed and final Regulations include new or revised definitions (Section 120). 13. The proposed and final Regulations allow AOSE/PEs to certify evaluations and designs for repair or replacement systems (Section 120). 14. The proposed and final Regulations provide for the making of final agency decisions via informal proceedings with two exceptions (Section 150, 180, 200) and more closely align the appeal provisions with the Administrative Process Act.

15. New language in the final Regulations provides that persons who are certified as AOsEs on the effective date of the final Regulations are not required to pass the Department's written and field tests. 16. The proposed and final Regulations establish new requirements for certification as an AOSE (Section 230). 17. Under the final Regulations all persons applying for certification as an AOSE (including VDH employees) must pay the required application fee (Section 250). 18. The proposed and final Regulations establish a requirement for standardizing requests to VDH for information and that an AOSE make a "good faith effort" to secure accurate information (Section 280, 370). 19. The proposed and final Regulations differentiate between "suspension" and "revocation" with respect to certification as an AOSE (Section 290, 300). 20. Specific requirements for the content of reports have been dropped from the proposed regulations and replaced with a general requirement that such reports must be "in a form approved by the Division" (Section 350, 360). 21. The final Regulations were modified to emphasize that an AOSE/PE has an obligation to the public as well as to the client (Section 350). 22. The proposed and final Regulations require VDH to generate a report when it performs a field check and to send a copy of that report to the owner and the appropriate AOSE (Section 400).

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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 include a sentence to that effect.

The primary advantage associated with the final Regulations is that citizens have an avenue for securing health department approvals (permits, letters, subdivision review) for residential development within very specific time limits by going to the private sector for evaluations and designs. This is a benefit in areas where the number of requests exceeds the health department's resources and applicants would otherwise have to wait for the health department to respond to their requests.

Some citizens have expressed concerns that private evaluations and designs may not comply with the Board's regulations for sewage systems (SHDR) and may be less reliable than the Department's evaluations and designs. They have asked that the health department conduct field reviews on all AOSE/PE submittals prior to approval, or if that is not possible, to limit the health department's ability to conduct field checks and/or revoke an approval once such approval has been granted. The Department cannot follow either of these recommendations because of resource limitations and the Board's statutory authority and responsibility to protect public health and safety. To many the new program represents a liability and a potential for environmental, public health, and financial losses.

Some other issues associated with the new program include "deemed approval," resolving difficulties with local ordinances and local governments, the timing of field checks (Level 2 Reviews), requirements for becoming an AOSE, and whether or not a person should be required to be an AOSE in order to perform site and soil evaluations for onsite sewage systems.

The provisions for "deemed approval" are mandated by law and the Board does not have discretion to include or exclude them from the proposed regulations. Many localities have ordinances governing onsite sewage systems that are more stringent than the Board of Health's regulations and most have subdivision ordinances that are unique. Some localities have been reluctant to accept the concept that a private evaluator/designer could provide the same level of public health and environmental protection as the local health department. The final Regulations provide that a locality may decide to include its more-stringent ordinances in the AOSE/PE program or it may hold those ordinances separate from the program. Those localities that choose to hold their ordinances separate from the AOSE/PE program will most likely experience delays in processing requests and some confusion on the part of citizens and AOSE/PEs seeking approvals. In such localities a submittal may be "deemed approved" in accordance with the Board of Health's regulations but still require a separate onsite review to determine whether it complies with more stringent local ordinances. The final Regulations seek to establish a measurable and consistent standard for submitting subdivision requests. However, the subdivision process varies widely among localities. Differences in subdivision ordinances and local policies in some cases has necessitated working out new procedures with local subdivision administrators and local government officials. Some localities seem opposed to the program because they see it as eroding local control over growth and zoning and that errors by AOSEs may result in problems for citizens.

The proposed regulations provide that VDH may review a package submitted in proper form and may make a decision to issue or deny approval without conducting a field check. The Department's guidance documents will strongly encourage local health departments to conduct field checks prior to issuing an approval. The field checks will apply to a minimum percentage of the submittals as a quality control measure to assess the performance of AOSE/PEs and to protect public health and the environment prior to issuing a permit or other approval. Many have expressed concerns that this will result in approvals issued for sites and designs that do not comply with the Board of Health's regulations. In addition to being consistent with the

legislative mandate, the proposed regulations are intended to assure the quality of the private evaluations and designs through the adoption of appropriate AOSE training, testing, and experience requirements and through a quality control program with appropriate enforcement and disciplinary actions when needed.

Many within the soil science community have expressed the opinion that a person should be required to be a Certified Professional Soil Scientist in order to become an AOSE. Also, many have expressed the opinion that one should not be required to become an AOSE in order to evaluate sites and submit reports to the Department.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

The proposed Authorized Onsite Soil Evaluator Regulations were published in the Virginia Register of Regulations for public comment on October 8, 2001. The sixty-day public comment period ended December 7, 2001. During the public comment period, the agency received written comments from twenty individuals. Three public hearings were held. The first was on October 25, 2001, at the Lord Fairfax Community College in Middletown; the second was on November 7, 2001, at the Roanoke County Administration Building in Roanoke; and the third was on November 29, 2001, at the Board of Supervisor's meeting room in Henrico County. A total of 39 persons spoke at the three public hearings. The following pages contain a summary of all the comments received and the agency's response to those comments. The Virginia Department of Health expresses its appreciation to all who offered comments on these proposed regulations.

Comment: Field reviews, timing of reviews, revocations of site approvals, liabilities. VDH received more than 50 comments related to field checks (Level 2 Reviews), the timing of the reviews, revocations of VDH approvals and the associated liabilities. The primary issue concerns the potential liabilities that exist for AOSEs, owners, lenders, agents, and others, because VDH may revoke an approval on the basis of its findings. Many recognized the need for the reviews- to protect public health and prevent costly delays by finding errors; but they also said that VDH should be required to perform all field checks before issuing an approval and should be prohibited from doing them afterward. Many also said that once an approval is issued, VDH should be prevented from revoking it. Others said that VDH should modify system designs when needed and only revoke an approval if no other option exists for safe disposal of sewage. Many said that VDH should perform no field checks of AOSE/PE work; others asked the agency to perform field checks on all AOSE/PE submittals. Some said that VDH did not need to review this type of work because AOSEs and PEs are licensed and insured. Others suggested that VDH require AOSEs and PEs to be sufficiently bonded so that they are held responsible for their decisions. Some persons stated that VDH requires AOSEs to be certified, pass a written and field test, and maintain continuing education; thus, VDH does not need to perform field checks. Some commented that VDH should let the court system handle AOSE/PE errors and not worry about the reviews. Five individuals offered comments to the effect that the AOSE Regulations should require AOSEs to be insured or bonded, or that the AOSE Regulations should establish a special fund (like the Onsite Sewage Indemnification Fund) to

reimburse property owners when an AOSE makes a mistake. One person asked to amend §§ 70.B.2 and 400 to say that VDH may conduct field checks of any AOSE/PE evaluation prior to issuing an approval, but VDH would be limited to reviewing only designs after that time.

Response: Section 32.1-164.A of the Code of Virginia states, "The Board shall have supervision and control over the safe and sanitary collection, conveyance, transportation, treatment, and disposal of sewage, all sewerage systems, and treatment works as they affect the public health and welfare." The section further provides that "The regulation of sewage, as it may affect the public health, shall be primarily the responsibility of the Board." Two separate sections of the Code of Virginia (32.1-164.H and 32.1-163.5.B) establish the Board's responsibility and authority for accepting evaluations and designs from AOSE/PEs. Both sections provide that the Department may conduct such review and field analyses as deemed necessary to protect the integrity of the Commonwealth's environment. Given the Board's statutory mandates and responsibilities, VDH believes it must perform a minimum level of administrative and field checks to assure that AOSE/PEs adequately protect public health and the environment. Without such oversight, groundwater contamination and risks to public health may go undiscovered for extensive periods of time. The Department recognizes that there are potential financial liabilities for owners and others associated with the AOSE program. However, these are not public health and safety issues, and the Board of Health does not have statutory authority to require AOSE/PEs to be insured or bonded for the purpose of protecting financial interests- their own or the interests of others. VDH does not have the resources to conduct field reviews of 100% of AOSE/PE submittals within the time limits mandated by the Code of Virginia (Sections 163.5 and 164.H). Under the final Regulations the agency, through its guidance documents, will encourage local health departments to accomplish a minimum level of field reviews (10%) within the time limits specified. However, the Board cannot promulgate a regulation that prevents VDH from performing field reviews. Such a prohibition would abrogate the Board's primary responsibility for supervising the safe and sanitary treatment and disposal of sewage as it may affect public health. The Board cannot sacrifice an essential governmental interest, such as protection of public health, to correct a mistake of an AOSE/PE or to protect the financial interests of an individual. Many changes were incorporated into the final Regulations to address issues associated with Level 2 Reviews. Section 70.B.2 does not contain a timeframe for these field checks. The emergency regulations stated that these would be done only after an approval was issued. In response to public comments, § 70.B.5 of the final Regulations was amended by changing the word "shall" to "may," giving VDH discretion to initiate revocation proceedings. That section also encourages VDH to modify system designs, with the owner's consent, as an alternative to revocation proceedings. Section 70.D was amended to provide that VDH may, but it is not required to, inspect a sewage system designed by an AOSE/PE when it is installed. This measure removes the requirement for redundant inspections and, in effect, reduces the potential for VDH to discover AOSE/PE errors. Courtesy reviews were recommended by the AOSE ad hoc advisory committee (August, 2000) as a potential mechanism for avoiding problems with Level 2 Reviews. Upon request by an AOSE/PE, VDH may provide a courtesy review (see §§ 70.B.3, 70.B.4, 120, and 390) of a site or a proposed subdivision before an 'official' application is filed. Provisions were added to the proposed AOSE regulations to allow an owner to appeal a revocation decision to the existing Sewage Handling and Disposal Appeal Review Board. This option was not available under the Emergency Regulations and provides an aggrieved owner the opportunity to challenge VDH's decision before a citizen board.

Comment: Notification of Level 2 Review. Several citizens asked that VDH provide notification to the owner and/or the AOSE/PE at the time that it conducts a Level 2 Review (field check).

Response: Section 400 was added to the proposed AOSE Regulations and requires VDH to generate a report when it performs a field check of an AOSE/PE's evaluation and/or design and requires the agency to send a copy of that report to the owner and the appropriate AOSE. VDH's guidance documents will encourage local health departments to notify the owner when they are planning to conduct a Level 2 Review.

Comment: Level 2 Review methods. A number of citizens commented that it is not fair that VDH conducts Level 2 Reviews using a hand auger when the AOSE/PE is required to utilize backhoe pits during the primary site evaluation. A related comment was that VDH does not look at the same profile holes as the AOSE and therefore cannot perform a fair review.

Response: Requiring an owner to provide a backhoe for a second site evaluation (Level 2 Review) was seen as a financial hardship under the interim AOSE program and the Emergency Regulations. Because most Level 2 Reviews will be conducted during the mandated time limits for processing AOSE/PE submittals (prior to issuing an approval), VDH anticipates that these points will be less divisive than under the interim program and the Emergency Regulations.

Comment: Regulatory process. A number of individuals said that VDH did not give adequate notice of the public hearings, that it did not follow the recommendations of the ad hoc advisory committee, and that the new regulations will not resolve the problems that they have experienced under the Emergency Regulations.

Response: VDH followed the requirements of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia, the "APA") and all applicable policies for promulgating regulations, including public notice and participation requirements. To the extent that it was able, and to the extent that it was in the best interests of the Commonwealth, VDH followed the recommendations of the AOSE ad hoc advisory committees (February 10, 1999 and August 18, 2000). Some of the problems that citizens have experienced, such as the revocation of VDH approvals or the revocation of an individual's AOSE certification, are unavoidable given the fact that VDH is not able to review 100% of the AOSE/PE submittals, nor is it able to ignore its responsibilities as an agent of the Board of Health. Since the Sewage Handling and Disposal Regulations (12 VAC 5-610-20 et seq., the "SHDR") were adopted in 1982 VDH has revoked or modified many of its own permits because it discovered that they did not comply with the minimum requirements. The final Regulations and VDH's program for implementing them seek to minimize revocations and AOSE disciplinary actions, however VDH does not expect that these can be absolutely eliminated.

Comment: Lack of uniformity and consistency in implementing the AOSE program. Five individuals commented that the AOSE emergency regulations were implemented differently in various health districts. One individual noted that some of the differences are related to differing local requirements and procedures for subdivisions.

Response: The agency recognizes that there have been inconsistencies in implementing the Emergency Regulations. Some difficulties can be expected when starting any new regulatory program. VDH believes that many of the inconsistencies are due to varying local interpretations of the regulations, local resistance to “opting in” to the AOSE program with respect to more stringent local ordinances, and general uneasiness on the part of VDH field staff and local governments about accepting AOSE/PE evaluations and designs. VDH will provide new guidance documents with the final Regulations and will offer training updates to field staff and AOSE/PEs for implementing the final Regulations.

Comment: Excessive paperwork/information. Two individuals commented that there is too much information required for AOSE/PE submittals, including excessive duplication requirements. One questioned the need for three copies of construction drawings.

Response: The permanent AOSE Advisory committee established to advise VDH and the commissioner on implementation issues will be asked to examine these issues and make suggestions. VDH requires only one copy of the evaluation reports and application documents, however, three copies of the construction drawings are necessary so that one can be given to the owner, one may be retained in VDH’s files, and the other may be given to a contractor or the AOSE. This has been standard practice for many years within VDH for engineering plans and drawings. VDH believes that it is more cost effective to the public to require these copies at the time of application. If VDH has to generate copies of construction drawings when they are requested, there is usually some delay involved in providing the copies and the requestor typically is asked to pay the costs of making the copies as well as the costs of searching the files (if necessary).

Comment: Site location/precision. VDH received four comments relating to the requirement that an AOSE/PE locate a soil absorption area (drainfield) with accuracy and precision of three feet or less (§ 360). One said the requirement was unreasonable and would require surveying the sites which doubles the cost of doing the job. Another individual said that soil absorption areas need to be mapped precisely and should be located by surveyors. One person complained that VDH inappropriately comes to the AOSE when there is a problem with a survey plat; and one person questioned the cost of requiring “the original topo contour lines by detail survey” for subdivision review.

Response: VDH agrees with the individual who said it is important to precisely locate the soil absorption area. The AOSE regulations do not require that all sites be survey-located. Section 460 of the SHDR requires, “As a minimum, prior to issuance of the construction permit the perimeter of the soil absorption area site or sites shall be shown on a copy of a surveyed plat of the property.” The survey plat requirement may be waived under certain circumstances by local health departments. In similar fashion, the requirement for showing the original topography for a subdivision is an existing requirement from § 360 of the SHDR. As the AOSE program was implemented under the interim program and the Emergency Regulations, an AOSE/PE may show the location of the soil absorption area, drawn to scale, on a survey plat. VDH believes that the requirement for precision and accuracy of three feet or less is reasonable given the fact

that in many cases sites are located as close to a property line as the (minimum) of 5 feet, or as close as 10 feet to a house foundation.

Comment: 'Grandfather' issues. Seven persons made comments to the effect that the AOSE regulations should not prevent a person, who is not an AOSE but who may be a certified soil scientist, from evaluating sites and submitting 'advisory' reports to VDH. One individual said that people should be required to be AOSEs to practice in this area. Two asked that VDH extend the 'sunset date' from December 31, 2002, to allow additional time for those who wish to become AOSEs to complete the required training and testing. The sunset date is the date after which VDH will only accept work from an AOSE/PE. Two commented that VDH should not require currently certified AOSEs to take the written and field tests. Four comments were received to the effect that VDH should consider provisions for 'grandfathering' persons who have been performing site and soil evaluations in Virginia for many years as AOSEs without requiring any additional training or testing. One comment suggested that the provision in the final Regulations that VDH will only accept evaluations and reports from AOSE/PEs after the 'sunset date' (§ 60.A) is inconsistent with 32.1-163.4 of the Code of Virginia because that section of the Code deals only with backlog situations.

Response: Section 163.4 of the Code of Virginia states that VDH will only accept private evaluations from AOSEs. That section, some have argued, only applies to backlog situations where VDH is to contract with an AOSE for evaluations, and therefore should not be applied broadly to all private soil evaluations. VDH disagrees. When the legislature adopted the initial AOSE statutes in 1994, it in effect 'raised the bar' by defining the specific roles, responsibilities, and qualifications for those who perform private site and soil evaluations. It is reasonable to allow citizens an adequate period of time to acquire the necessary training and to pass the required tests to become an AOSE. For these reasons, the 'sunset date' in § 60 was extended to December 31, 2005. The AOSE ad hoc advisory committee recommended in August, 2000, that all those who are certified as AOSEs on the effective date of the final AOSE Regulations should be required to pass the written and field tests by the 'sunset date.' On March 1, 2002, the ad hoc committee reconsidered and changed its recommendation. On the basis of that recommendation, the requirement for testing current AOSEs contained in § 210 was deleted from the final Regulations. The ad hoc advisory committee also considered whether an individual with many years of experience evaluating site and soil conditions in Virginia for onsite sewage systems should be 'grandfathered' as an AOSE without the requirement to take training courses or pass the written and field tests. The committee did not support such a recommendation. VDH agrees with that recommendation and did not include any provisions for grandfathering in the final Regulations. The ad hoc advisory committee and VDH share the belief that the potential risks to public health as well as the potential liabilities associated with the AOSE program require that AOSEs demonstrate a high level of knowledge, skills, and ability.

Comment: Double standards/VDH qualifications. Several people commented that VDH employees who review the work of AOSE/PEs should be AOSEs, should pay the same fees, and should submit the same work as a private AOSE. Eight comments were received to the effect that the AOSE Regulations do not require Level 2 review of sites approved by VDH's employees and those sites should be reviewed in the field (i.e. a field check) the same as AOSE/PE's sites.

One comment asked to modify § 150 to require that all the activities of a “private or public sector” AOSE/PE comply with the AOSE Regulations.

Response: VDH encouraged its environmental health specialists to obtain AOSE certification under the Emergency Regulations. Requiring AOSE certification as a condition of employment is a decision most appropriately left to VDH management and not the regulatory process. Section 250 was modified in response to public comment to require all persons, including VDH employees, to pay the same fees for AOSE certification. VDH will examine the comments regarding the documentation produced by its employees as well as the requirements for reviewing that work with the assistance of the permanent AOSE advisory committee. VDH believes that these management issues, not regulatory ones. While VDH agrees that the actions of its employees should comply with applicable regulations at all times, it declines to make the requested change to § 150 because it believes that these are primarily management issues, not regulatory ones.

Comment: AOSE advisory committee/Board of Health. One individual asked that realtors be represented on the permanent AOSE advisory committee; another said that there need to be representatives [from our area] who are involved with this [AOSE program] on a daily basis. One person said that the Board of Health should have one, preferably two, positions held by persons who are at least an AOSE or CPSS. Seven comments were received saying that VDH should create an advisory committee to deal with AOSE problems; the committee should include a health department official, a lender, a builder, an engineer, and a septic system installer.

Response: Section 50 of the proposed AOSE Regulations created a permanent AOSE advisory committee. That section was amended in the final Regulations to add a member who is a REALTOR. When the state health commissioner appoints the membership of the advisory committee, he will seek to assure that those members represent statewide interests and that they are in fact intimately involved with the AOSE program. The Board of Health does not have authority to promulgate regulations regarding its membership. The membership of the Board of Health is provided in § 32.1-5 of the Code of Virginia, its members are appointed by the Governor.

Comment: Department of Professional and Occupational Regulation (DPOR). VDH received eighteen comments saying that the certification program for AOSEs should be under DPOR. Three others said that the program should not be handled by VDH but by a separate board established for that purpose.

Response: The Code of Virginia § 164.G requires the Board of Health to “establish a program for qualifying individuals as authorized onsite soil evaluators. The Board's program shall include, but not be limited to, approved training courses, written and field tests, application fees to cover the costs of the program, renewal fees and schedules, and procedures for listing, removing from the list, and reinstating individuals as authorized onsite soil evaluators.” The Board cannot promulgate an AOSE regulation that assigns the program to DPOR because it does not have that authority. For the same reason, the Board of Health cannot establish a separate board for the AOSE program.

Comment: Informal hearings. One comment suggested modifying the sections on case decisions and AOSE disciplinary actions (§§180 and 290) so that the hearing officer for an informal hearing would be a non-departmental hearing officer designated by the commissioner and confirmed by the named party or the AOSE. Several individuals commented that the proposed AOSE Regulations contain provisions for the same kind of [unfair] informal hearings that were conducted under the Emergency Regulations.

Response: VDH did not make the suggested change because the Administrative Process Act (§ 2.2- 4000 et seq. of the Code of Virginia) provides that such hearings are to be before the agency or its subordinates, or, in the alternative, before a hearing officer appointed in accordance with § 2.2- 4024 of the Code of Virginia. The Office of the Attorney General has reviewed the sections of the proposed Regulations (as well as the Emergency Regulations) dealing with case decisions and informal hearings and found that they comport with the APA (§ 2.2- 4000 et seq. of the Code of Virginia). In all cases VDH is required to follow the APA. Any person who is the named party to a case decision has the right to challenge that decision in accordance with the provisions of the APA.

Comment: AOSE prohibited from certifying previously denied sites. Three persons offered comments on the part of the proposed Regulations that prohibits an AOSE/PE from certifying a site that has been previously rejected by VDH. One person noted that an owner cannot hire an AOSE to disagree with VDH decisions if VDH has already rejected the site. The same individual complained that under the Emergency Regulations, the burden for proving that an AOSE was not on such a site should lie with VDH, not the AOSE. Another person said that the regulation as written may prevent an AOSE from presenting new evidence in a hearing where VDH is considering suspending or revoking the AOSE's certification. One person noted that it was "odd" that an AOSE cannot "come back and influence or override a [VDH] decision on a permit, or a rejection."

Response: The prohibition contained in § 320 of the proposed Regulations is intended to prevent an AOSE/PE from overturning a VDH denial via the "shall accept" and "deemed approved" provisions of the Code (§ 32.1-163.5). When VDH denies an application for a permit, the owner has the right to challenge that denial by requesting an informal and then a formal hearing. Allowing an AOSE/PE to overturn a case decision (denial of a permit) would circumvent the appeal process. Neither the Emergency Regulations nor the proposed Regulations prevent an owner or an AOSE/PE from gathering or submitting evidence in an administrative hearing or other proceeding. The APA (§ 2.2-4020 of the Code of Virginia) assigns the burden of proof in formal proceedings to the "proponent or applicant," however § 2.2-4019 of the Code does not assign such a burden in informal proceedings.

Comment: Appeal rights. Six individuals made comments related to appeals under the proposed AOSE Regulations. One person objected to the provision in the AOSE Regulations that causes the owner to forfeit his right to a hearing to challenge a permit revocation when he files a new application for a sewage system permit. Three persons asked that the AOSE Regulations allow an AOSE to act for an owner to initiate the administrative appeal of a permit denial. Two individuals commented favorably on the change in the proposed AOSE Regulations that will

allow an owner to appeal a permit revocation to the Sewage Handling and Disposal Appeal Review Board.

Response: The neither the proposed nor the final AOSE Regulations contain any provision that requires an owner to forfeit his right to challenge the revocation of a construction permit or other approval. It has been VDH's longstanding practice to insist that an owner choose a remedy when there are multiple options for resolving a dispute. In the case of a permit revocation, the owner has the option to request a hearing, and thereby potentially overturn the decision, or to file a new application for a 'modified' system design. VDH normally insists that the owner follow one course or the other, but not both simultaneously. Only the owner has right to challenge the denial or the revocation of a permit. The Board of Health cannot promulgate a regulation that would give that standing to another party such as an AOSE/PE.

Comment: Courtesy reviews. A total of eight persons commented on "professional courtesy reviews." Four objected to the reviews because they are not case decisions. Two asked to make the reviews mandatory. One suggested changing the name to "Compliance Review," and requiring that the documentation from such reviews be submitted with an application. One comment suggested the VDH would need the owner's permission to conduct such reviews and that there will be problems because the reviews are not final decisions. One person approved of the courtesy reviews.

Response: VDH will strive to provide as many courtesy reviews as resources allow, however, it must be able to prioritize its activities. Making such reviews mandatory, or making them a case decision, invites backlogs in applications for construction permits, which are given priority over speculative activities such as certification letters and subdivision reviews. VDH declines the suggestions to make the courtesy reviews into case decisions or to change the name. Since they are not case decisions, it would be inappropriate to refer to them as "compliance reviews."

Comment: Citizen concerns/public health and environmental concerns. One person commented that there needs to be some "leeway to make the system user friendly" in those situations where the citizen gets 'caught in the middle' between VDH and an AOSE/PE. Another person commented that AOSE/PEs are not required to protect public health and the environment as VDH is tasked to do and suggested changing §350 so that AOsEs were required to protect public health and the environment. Four comments expressed concerns that private AOSE evaluations may lead to environmental harm, one of those strenuously opposed the authorization of private soil evaluations.

Response: Section § 350 was amended from the proposed to the final Regulations to reflect the AOSE/PE's obligation to protect public health and the environment when considering their clients' interests. The AOSE ad hoc advisory committee and VDH share the citizen's concerns about public health and the environment. VDH believes that the AOSE Regulations as proposed and with changes in the final version provide for an appropriate level of oversight and will protect public health and the environment.

Comment: AOSE/PE relationships. VDH received two comments asking to clarify the relationship between an AOSE and a PE who consults with and AOSE, or to modify § 90.D by

requiring a PE who consults with an AOSE to document such consultation with a seal and signature from the AOSE. Another comment expressed concern that PEs would get “free rein” to design sewage systems.

Response: VDH declined to make the requested change to § 90.D. The agency does not believe that the AOSE Regulations need to govern this facet of an engineer’s practice. VDH believes it is the PE’s responsibility to assure that his consultation with an AOSE is adequate to assure compliance with the SHDR. Since professional engineers are regulated by DPOR, the Board of Health has little authority to regulate them, except to assure that the evaluations and design that they may submit under the AOSE program comply with the SHDR and the AOSE Regulations.

Comment: AOSE training. One person noted that there is a significant need for training to be made available for AOsEs.

Response: The AOSE ad hoc advisory committee agreed and so does VDH. Training will be an important part of the AOSE program as it moves forward.

Comment: Final inspections of installed sewage systems. Two persons were essentially opposed to requiring AOSE/PEs to inspect sewage systems; one of them also said that AOsEs should not be involved in construction, design, or inspections of wells. One individual was in favor of having the AOSE/PE perform the final inspection of an installed system without a corresponding requirement for VDH to inspect.

Response: The AOSE ad hoc committee recommended that AOSE/PEs be required to inspect those sewage systems that they designed. VDH followed that recommendation in the proposed Regulations. The ad hoc committee reaffirmed its recommendation when it met March 1, 2002. Under the final Regulations, VDH may, but is not required to, conduct a final inspection of a sewage system when it is installed. AOSE/PEs are required to perform the inspection.

Comment: Installer/contractor certification. Four comments asked for either additional training or certification of sewage system installers as mechanisms for preventing and solving problems with the AOSE program.

Response: Installer certification is an integral part of onsite sewage programs in other states. VDH believes that such certification could improve the quality of systems installed and it should be considered in Virginia. The Board of Health’s mandate for the AOSE program does not include a requirement to certify installers. The Board may consider promulgating regulations to require such certification in the future, if it has such authority.

Comment: Requirements to become an AOSE. Of the nine persons who commented on this subject, five said that an AOSE should be required to be a CPSS, two said that an AOSE did not need to be a CPSS, and one said that the qualifications need to be increased. One person asked that the requirements for becoming an AOSE (§ 230.B) be modified so that a non-CPSS individual would need six years of experience and a related four-year degree; the options contained in §§ 230.C and 230.D should be deleted.

Response: VDH followed the recommendations of the ad hoc advisory committee for these requirements. VDH declined to make the requested changes to § 230. The requirements contained in the proposed and final Regulations are based on the recommendations of the ad hoc advisory committee.

Comment: Loss of AOSE certification. One person said that an AOSE needs to have a “reasonable avenue to defend himself” against losing his credentials, that the AOSE can in some circumstances be barred from introducing new evidence to defend himself, and the AOSE can only appeal an adverse decision to circuit court.

Response: All administrative proceedings conducted under the AOSE Regulations must comply with the APA and an AOSE has the right to challenge such decision in accordance with the APA. Nothing in the AOSE Regulations prohibits an AOSE from gathering or submitting evidence in an administrative or other proceeding. (See also the discussion in the category related to AOSE/PE certifications of sites previously denied by VDH).

Comment: Systems that an AOSE may design. Two comments complained that the definition of “traditional systems” in the proposed Regulations is confusing. Seven comments asked VDH not to require engineering plans when a pump is required because VDH does not require them when its EHS does these designs and because “the public should not have to shoulder this expense.” One person objected to the requirement that AOSE/PEs must submit an abbreviated design for a certification letter because VDH is supposed to know how to design systems.

Response: Sections 80.A and 120 were modified in the final Regulations to clarify the types of system designs permitted by AOsEs. The definition of “traditional systems” was modified to include all systems that have provisional or general approval under the SHDR. These include proprietary, pre-engineered systems as well as those systems that are prescribed in the SHDR. Section 90 of the AOSE Regulations provides that AOsEs may submit evaluations for all traditional systems, however they may only submit designs for those traditional systems that do not require the practice of engineering. VDH recognizes that the Board of Health does not regulate the “practice of engineering.” That practice is regulated by DPOR. However, the SHDR establish certain requirements for those applications that require plans prepared by a PE and those that do not. In its guidance documents VDH will attempt to resolve the uncertainty that continues to exist in this area. In the meantime, it is incumbent on the AOSE to determine whether he is improperly engaging in the practice of engineering. VDH requires the abbreviated design information for certification letters because the certification is based upon a finding (either by an AOSE or VDH) that a particular site is suitable for a sewage system under the current regulations of the Board of Health. In order to adequately review an AOSE/PE submittal, VDH needs to know what type or category of system the AOSE/PE is saying that a site is suitable for.

Comment: Right of entry. Two individuals commented on VDH’s right to enter property (32.1-25 of the Code of Virginia). One said that he did not want the health department coming into his office by force to obtain records, the other said that if VDH is contemplating “unlimited access” to private property under the AOSE Regulations that VDH should make sure that the person signing the application understands.

Response: VDH's right to enter private property is governed by 32.1-25 of the Code of Virginia. The Board of Health has no authority to modify or change those requirements by regulation.

Comment: Access to VDH records/information. One individual said that AOSEs do not have time to drive to health department offices to seek out information that may be in VDH's files regarding subject properties or neighboring properties. That person asked that the Regulations be changed so that VDH would bear the burden of providing pertinent information to AOSEs. Another comment said that VDH should be compensated for time spent processing requests for information, and another person suggested that there should be no fee charged to an AOSE for file searches by VDH to locate records on existing systems and wells. One comment asked to amend § 460 to say that AOSE/PE evaluations, drawings, designs, etc. in VDH's possession remain the property of the AOSE/PE and will not be released for public use until the AOSE/PE is fully compensated for creating the documents.

Response: VDH does not have the resources to search out and provide the information that AOSE/PEs need in order to prepare accurate evaluations and designs, nor can it anticipate the information an AOSE/PE will need. VDH can only respond to requests for information. For these reasons the AOSE Regulations place this burden on the AOSE/PE. Under the Virginia Freedom of Information Act (FOIA, Code of Virginia, § 2.2-3700 et seq.) VDH may charge reasonable fees for searching and copying its records. The FOIA provides that all records in the possession of the agency are open for public inspection and copying unless they are specifically exempt from FOIA. Since AOSE/PE documents are not exempt from FOIA, the request to amend the AOSE Regulations so that AOSE/PE information would not be released until the AOSE/PE had been fully compensated would not comply with the FOIA.

Comment: Local government. One person noted that local governments resent the AOSE Regulations and the AOSE program because it dictates to them how to run their planning and development processes. Another person noted that § 350.D.1 requires that requests for subdivision review must be submitted with a request from the local government, a requirement that directly conflicts with a county ordinance. A local government representative said that his county wanted AOSE/PEs to submit reports and designs that comply with the SHDR, but his county would not be opting into the AOSE program with its local ordinances. One person asked VDH to modify § 60.B to say that in a locality where the local government has not 'opted in' to the AOSE program with its more stringent local ordinances, an applicant must obtain a certification of compliance with local ordinances from a local health department official, not a "local official."

Response: The Board of health has a statutory mandate to implement the program for AOSEs and to accept evaluations and designs from AOSE/PEs. VDH's obligation to review proposed subdivisions is to local governments (see §§15.2-2242 and 2260 of the Code of Virginia) and therefore the AOSE regulations establish the requirement that the local government make the request. Under the final AOSE Regulations a local government may decide to 'opt in' and implement its more-stringent local ordinances via and AOSE Regulations or it may decide not to do so. VDH opted not to make the requested change. Implementation of the AOSE program with respect to local ordinances has been complex. Also, VDH's relationships with local

governments is intimately tied to the cooperative budgets and the contracts for services that accompany those budgets. The state health department, acting through a local health department, only has authority to act on a local ordinance to the extent that the ordinance and contract for services provide such authority.

Comment: One person commented that there should be an evaluation of a property every time it changes hands.

Response: This kind of broad requirement belongs in the SHDR if the Board of Health has such authority, and if not, in the Code of Virginia.

Comment: Two people said that VDH and the AOSE/PEs are business competitors and that the competition is not fair. One suggested that the private sector should do all evaluations and designs and that VDH should handle permitting and enforcement.

Response: The Board of Health currently does not have a choice in implementing the AOSE Regulations and program.

Comment: One person suggested that once the funds in the special AOSE fund reached a certain level, the excess could be used to support an onsite training center.

Response: VDH agrees that an Onsite Training Center would benefit the entire onsite wastewater community and VDH supports establishing one. The Board of Health does not have authority to establish the kind of fund that is contemplated.

Comment: One individual said that a problem with the proposed Regulations is that an AOSE/PE is required to find a replacement site if the owner damages the first one.

Response: Section 70.C was amended to clarify that an AOSE/PE is not required to submit minor or major revisions when the need for such revisions arises from damages or other actions by the owner.

Comment: One comment suggested that the provisions in the final Regulations for applications and other submittals to contain information “in accordance with the department’s policies” is vague and inefficient.

Response: The AOSE ad hoc advisory committee suggested that the detailed requirements for forms, content of reports, etc. be removed from the AOSE regulations and placed in agency guidance documents. This allows a greater degree of flexibility to make changes when they are needed.

Comment: One person asked VDH to incorporate language in § 60.A to the effect that VDH will continue to accept applications after the ‘sunset date’ from owners and conduct site evaluations pursuant to those applications.

Response: VDH made the requested change to the final Regulations.

Comment: One comment asked VDH to clarify § 70.C.3 in the final Regulations so that when major revisions are needed, such revisions must be accompanied by a new application and AOSE/PE package.

Response: This section in the proposed Regulations incorrectly referred to Part III. This was changed so that it refers to Part IV, the part of the Regulations that contains the requirements for applications.

Comment: One comment questioned the authority for allowing AOSE/PEs to site or inspect private wells.

Response: The Office of the Attorney General reviewed both the proposed and the final AOSE Regulations and determined that the Board has the authority to promulgate them.

Comment: Two people said the program has some positive aspects and with modification is worth keeping.

Response: Thank you.

Comment: One said the program is not acceptable and he refuses to become an AOSE.

Response: Thank you.

Comment: One comment asked to clarify the meaning of “disapproved” in § 80.C.

Response: That section was modified by including the phrase, “or request for subdivision review” to show that the section is intended to apply to applications for permits and letters as well as to requests from local governments for subdivision review.

Comment: A suggestion was received that the definition of “processing time” should be modified so that applications could be kept by the local health department in an ‘inactive’ status when additional information is needed to complete the processing of the application. The final Regulations provide that such applications shall be denied.

Response: VDH declined to make the requested change. Since the implementation of the AOSE program July 1, 1999, VDH has sought to standardize practices statewide so that incomplete or deficient applications are denied, with the reasons given in writing. Under such circumstances the owner has 90 days during which he may perfect the application and resubmit it without paying a new application fee.

Comment: One comment asked that the definition of “deemed approval” be modified so that “the reasons for the lack of action to approve or disapprove an application shall be provided in the documentation.”

Response: VDH declined to incorporate the suggested change.

Comment: One comment suggested changing §§ 280 and 290 so that an AOSE/PE's obligation for certifying evaluations and designs is to "substantially comply" with the minimum requirements of the SHDR.

Response: "Substantial compliance" is the compliance standard that already exists under the SHDR. There is no need to restate it in the AOSE Regulations.

Comment: One comment suggested that the authority to revoke or suspend an AOSE's certification should exist at a lower level within VDH.

Response: The commissioner may delegate authority under the AOSE regulations, with the exception of the authority to issue orders (see § 40.B).

Comment: Seven comments were received saying that regional soil regulations might make the AOSE program more environmentally practical and economically feasible for the public.

Response: The AOSE Regulations do not establish site and soil criteria for onsite sewage systems. These are established in the SHDR.

Comment: One comment noted that the second sentence of § 410 does not make sense.

Response: None.

Comment: One said that hiring an AOSE costs on average about \$1500.00 including surveying, attorney fees, etc. and that is expensive.

Response: None.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

1. Section 10: Language was added to this section since the Regulations were proposed (see related changes in Sections 80.A and 120) to accommodate Va. Code 32.1-163.5.D regarding proprietary, pre-engineered sewage systems that have been deemed by VDH to comply with the Board of Health's regulations. The changes allow VDH to accept certified evaluations and designs for these systems from an AOSE/PE in accordance with the final AOSE Regulations. However, in accordance with 32.1-163.5.D the provisions of the Code for deemed approval and the prescribed time limits do not apply to such proprietary, pre-engineered systems.

2. Section 50- This was a new section in the proposed Regulations that establishes an AOSE advisory committee composed of members appointed by the commissioner to advise the agency on policies, procedures and program issues. The proposed Regulations provided for a 14-member committee, the final Regulations have added a fifteenth member who is "a REALTOR licensed in Virginia."
3. Prior Section 50.A- This section was renumbered (60.A) and amended in the proposed Regulations by adding December 31, 2002, as the date after which VDH will no longer accept evaluation reports and designs from non-AOSEs. After this 'sunset date' VDH will only accept such reports from AOSEs and PEs in consultation with an AOSE. The final Regulations change the 'sunset date' to December 31, 2005, and also emphasize that VDH will continue to accept 'bare' applications from owners and agents after that date.
4. Section 60.C- This is new language added to the proposed Regulations and retained in the final Regulations to allow for the acceptance of evaluations and designs for private wells in accordance with the Private Well Regulations (12 VAC 5-630-10 et seq.) .
5. Prior section 60- Previous language in this section (Emergency Regulations) provided that VDH would perform field checks of AOSE and PE evaluations and designs after an approval was issued. The section was renumbered (70) and amended in the proposed Regulations (retained in the final Regulations) to provide that the Department may conduct field checks at any time, including prior to approval.
6. Section 70.A is changed from the proposed Regulations by adding the word "certain" before the words "traditional systems." This change was made to emphasize that an AOSE is limited to submitting designs for only those "traditional systems" that do not require the practice of engineering.
7. Section 70.B.1: This section was changed from the proposed Regulations by striking the word "for" and adding the words "as it deems necessary to assure" between the words "application" and "compliance." This change is intended to be permissive with respect to VDH's review of the AOSE/PE documentation submitted with an application for a permit, letter, or subdivision review. The change would allow the agency, once it had established the reliability of an individual AOSE/PE's work, to approve individual applications without an administrative (Level 1) review. The agency would review a percentage or a sample of an AOSE/PE's submittals, but would not be required to review each one in detail.
8. Sections 70.B.3 and 70.B.4, 390- New language in the proposed Regulations (retained in the final Regulations) in these sections establish "professional courtesy reviews." Under these provisions VDH will provide on-site consultation regarding marginal or questionable sites when requested by an AOSE or PE prior to the submission of an application for a permit or certification letter or prior to a request from local government for review of a proposed subdivision plat.
9. Section 70.B.5: Prior section 60.B.5 (Emergency Regulations) was renumbered (70.B.5) and amendments to this section in the proposed Regulations provided that VDH must initiate proceedings to revoke an approval that was issued on the basis of an AOSE or PE certification when it has reason to believe that the site and/or design do not comply with the SHDR (12 VAC 5-610-10 et seq.); and that when VDH revokes such an approval the affected (named) party may appeal the revocation to the Sewage Handling and Disposal Appeal Review Board. This section was changed from the proposed Regulations by striking the word "shall" and adding the word "may" between the words "Department" and "initiate" in the first sentence. In addition, the words "or modify" were added between the words "revoke" and "its approval" in the first

sentence. Language was also added at the end of the section to clarify that the Department may modify a permit, letter, or subdivision approval with the consent of the owner; the language also provides that the owner may be required to submit a new application in such cases or to provide engineering plans if necessary. These changes are intended to give VDH discretion in whether to initiate proceedings to revoke or modify an approval and to encourage owners and VDH to resolve potential revocation situations by mutual agreement.

10. Section 70.C was modified from the proposed Regulations by adding language to the effect that an AOSE/PE may not be forced to make changes to a permit or other approval when the need for such changes arises from damage or other actions by the owner.

11. Prior section 60.D- The previous language in this section (Emergency Regulations) required an owner to file a completion statement signed by the AOSE or PE upon installation of a system, although no inspection was required. The section was renumbered (70.D) in the proposed Regulations and the requirement was replaced with a requirement that the AOSE and PE inspect systems (and wells) installed pursuant to their designs and file an inspection report and completion statement. Under the proposed Regulations VDH was also required to inspect all systems and wells. This section was modified in the final Regulations by striking the requirement that VDH perform a final inspection on a system where an AOSE/PE certified the design. Under the final Regulations, AOSE/PEs are required to perform final inspections, VDH may perform them. A requirement was added to this section for the AOSE/PE to submit 'as built' drawings for systems they inspect to the owner and the health department.

12. Section 80.A: New language was added to the final Regulations that was not contained in the proposed Regulations to deal with "proprietary, pre-engineered systems" (see related changes in Sections 10 and 120). The changes allow the Department to accept AOSE/PE evaluations and designs for such systems, however the processing time limits and deemed approval do not apply.

13. Section 80.C: The words "or request for subdivision review" were added in the final Regulations to clarify that the section applies to applications for permits, certification letters, and requests for subdivision review.

14. Prior section 110: This section from the Emergency Regulations was renumbered (120) and new definitions were included in the proposed Regulations for the terms: backlog, bare application, complete application, professional courtesy review, processing time, residential development, traditional systems. The previous definition of "traditional systems" (Emergency Regulations) specifically excluded repair permits. That exclusion was removed in the proposed and final Regulations and the term "repair or replacement systems" was added to the definition of "residential development." These changes allow the AOSE/PE to certify an evaluation and design for a repair system that was prohibited under the Emergency Regulations. The following modifications to definitions were made in the final Regulations: "Backlog" was modified by deleting the sentence, "Working days characterized by severe weather conditions shall not be included in any backlog calculation." A similar sentence was added to the definition of "Processing Time." "Deemed Approval" was modified by adding the phrase, "and proprietary, pre-engineered systems deemed by the Department to comply with the Board's regulations" to the portion of the definition that lists exclusions from deemed approval (see related changes in Sections 10 and 80.A). "Traditional Systems" was modified by adding the phrase, "including proprietary, pre-engineered systems deemed by the Department to comply with the Board's regulations, that have received provisional or general approval under, or." The sentence, "At present traditional systems include gravity, pumped, and low-pressure distribution (lpd) septic effluent drainfields, and Wisconsin-type mound systems" was deleted. The changes to the

definition of traditional systems reflect the increasing number of conventional and alternative systems that are available and clarify that traditional systems include proprietary, pre-engineered systems, systems that have received provisional or general approval, and those systems for which criteria are contained in the Sewage Handling and Disposal Regulations.

15. Emergency Regulations sections 140, 170, 190: In the proposed Regulations section 140 became 150, 170 became 180, and 190 was deleted. Language in the Emergency Regulations provided for both informal and formal proceedings in many instances. Amendments to these sections contained in the proposed and final Regulations provide for final agency decisions via informal proceedings with two exceptions- the issuance of an Order and the appeal by an affected party of a revocation of a permit, letter, or subdivision approval to the Sewage Handling and Disposal Appeal Review Board. Broad provisions allowing parties not directly affected by the regulations have been removed.

16. Section 210 - In this section the Emergency Regulations stated that those persons who were AOSEs on the effective date would remain so until June 30, 2001. That provision was replaced in the proposed Regulations with a requirement that all AOSEs must pass the Department's written and field tests on or before December 31, 2002. Those AOSEs whose certifications would expire prior to that date could apply for renewal and have their certificates renewed if they met the minimum requirements, however they would have to pass the written and field tests on or before December 31, 2002. The final Regulations remove the requirement that current AOSE pass the written and field tests.

17. Section 220: The proposed Regulations contained provisions in Section 220 related to the testing requirements of Section 210. The section was deleted from the final Regulations.

18. Section 220 from the Emergency Regulations was renumbered (230) in the proposed Regulations. Section 230 in the proposed Regulations contained the basic requirements for persons to become AOSEs. The requirements were modified from the Emergency Regulations with respect to training, testing, and experience.

19. Section 250 of the proposed Regulations contained the sentence, "Those persons currently employed by the Department shall not be required to pay the application fee." That sentence was deleted from the final Regulations.

20. Emergency Regulations Section 270 (renumbered in the proposed Regulations as 280) and new section 370- Amendments to section 280 and new language in section 370 contained in the proposed and final Regulations deal with information that AOSEs need in order to produce evaluations and designs that comply with the SHDR. Under these new provisions, AOSEs must make a good faith effort to obtain accurate and timely information regarding site and soil conditions on adjacent parcels. He or she then certifies that the information is true and correct "to the best of his or her knowledge." Section 370 establishes a requirement that requests for information be submitted in a standard format determined by the Division.

21. Emergency Regulations Sections 280, 290 were renumbered 290 and 300- Amendments to these sections contained in the proposed and final Regulations differentiate between "suspension" and "revocation" with respect to certification as an AOSE. Suspension is for a specific period of time and does not require that the AOSE file a new application for reinstatement. An AOSE whose certification has been revoked may not file a new application for 12 months and must file a new application and pay the application fee in addition to performing whatever remedial actions may have been specified by VDH to request reinstatement of AOSE status.

22. In Section 350 of the final Regulations the word "client's" was stricken from the third sentence and the phrase, "of public health, the environment, or the client" was added to emphasize that an AOSE/PE has an obligation to the public as well as to the client.
23. Emergency Regulations Sections 340, 350 were renumbered in the proposed Regulations as Sections 360 and 380. The Emergency Regulations contained detailed requirements for the elements of a site evaluation report, system design, etc. Those specific requirements for the content of reports were dropped from the proposed and final Regulations and replaced with a general requirement that such reports must be "in a form approved by the Division."
24. Section 390: This was a new section in the proposed Regulations that details "professional courtesy reviews" and provides that such reviews are discretionary, may be limited by the Department, and are not considered case decisions. Language was added to the final Regulations, paragraphs A and C, to require that any request for a professional courtesy review include a written statement from the property owner giving the Department permission to enter the property.
25. Section 400: This section was added to the proposed and final Regulations and requires VDH to generate a report when it performs a field check of an AOSE or PE's evaluation and/or design and requires the agency to send a copy of that report to the owner and the appropriate AOSE.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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.

By relying on private evaluations and designs for permitting and approval decisions the proposed regulation encourages AOSEs and PEs to be responsible for their actions as those actions may affect public health and quality of the environment as well as the investments of their clients. The program also offers economic opportunities to expand existing consulting businesses or to start new ones. The regulation is not expected to erode in any way the authority of parents or to affect the strength of marital commitments.