



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Department of Health
VAC Chapter Number:	12 VAC 5-615
Regulation Title:	Regulations for Authorized Onsite Soil Evaluators
Action Title:	Adopt Permanent Regulations Establishing the AOSE Program following the Adoption of Emergency Regulations Required by 1999 Law
Date:	September 15, 2000

This information is required pursuant 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*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

These regulations will replace emergency regulations that were effective January 3, 2000. The proposed replacement regulations do not differ from the emergency regulations in substance, and will allow the agency to accept private site evaluations and designs, in compliance with the Board of Health's regulations for septic systems, designed and certified by an Authorized Onsite Soil Evaluator (AOSE) or a licensed Professional Engineer (PE) in consultation with an AOSE.

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 must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed 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 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.

In accordance with the law cited above, 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 the integrity of the Commonwealth's environment. The Code establishes specific time limits for processing requests submitted by AOSEs and provides that in the event the Department fails to issue or deny a requested approval within the specified time limit the request shall be "deemed approved." The regulations seek to carry out these requirements.

The Office of the Attorney General has certified that the Board has statutory authority to promulgate the proposed regulation and that it comports with the applicable state law.

The text of the authorizing law is available electronically on Virginia's Legislative Information System:

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+32.1-163.4>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+32.1-163.5>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+32.1-164>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+32.1-164.1C01>

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed 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 underlying rationale for these regulations is to establish a program to provide an adjunct procedure to alleviate historical backlogs in approving sites for sewage system permits. 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 will not conduct routine field checks on submittals by AOSEs and PEs prior to making a decision to approve or disapprove an application.

Without an effective regulatory structure, errors in evaluation or design by an AOSE or a PE would likely result in costly delays for owners, potential damage to the environment and 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 and experience (and other requirements), as well as standards of conduct and enforcement procedures. The proposed regulations seek to do precisely this. Because "deemed approval" (i.e., approval of a site that occurs upon an AOSE's assessment that is not reviewed by the Department within a specified period of time) may result in the issuance of a permit, letter, or subdivision approval without any review by the Department and because the Department will only conduct field checks after approval as part of its quality control and oversight duties, the regulations must establish minimum standards for the content of packages submitted for approval.

These 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. Overall, the goal of the regulations is to implement a program allowing a role for AOSEs in approving onsite sewage systems that is consistent with the authorizing law and protective of public health in the Commonwealth.

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 providing detail of the regulatory action's changes.

The proposed regulations are identical to the Emergency Regulations for Authorized Onsite Soil Evaluators that were effective January 3, 2000. The proposed regulations are intended to ensure 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. (For additional detail, please see Form TH-04 relating to the emergency regulations elsewhere on this website.)

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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 include a sentence to that effect.

The primary advantages associated with the proposed regulations are that citizens have an avenue for securing health department approvals (permits, letters, subdivision review) 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 local 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 regulations and may be less reliable than the Department's evaluations and designs. They have asked that the health department continue to conduct field reviews on AOSE/PE submittals prior to approval. To these individuals the new program represents a liability and a potential for environmental, public health, and financial losses. Some other issues associated with the new program involve "deemed approval," resolving difficulties with local ordinances and local governments, requirements for becoming an AOSE, and whether or not the Department should conduct field checks prior to issuing an approval. 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 proposed 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. The proposed 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 the Department will review a package submitted in proper form and make a decision to issue or deny approval without conducting a field check. Field checks are to be conducted on a percentage (10 percent) of the submittals as a quality control measure to assess the performance of AOSE/PEs and to protect public health and the

environment. 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. This concern constitutes the primary potential disadvantage of the regulations.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

(a) The proposed regulations will not result in any increase or decrease in costs to the Commonwealth over those associated with the current onsite sewage permitting program, administered by the Department's Office of Environmental Health Services in cooperation with environmental health staff in local health departments. It is anticipated that any cost savings that might be realized by not conducting field checks will be offset by increased responsibilities for the state to monitor the performance of AOSEs, conduct administrative actions, review packages submitted, and other activities associated with administering the AOSE/PE program.

(b) There should be no net increase or decrease in costs to localities.

(c) The proposed regulation does not mandate that citizens utilize the services of AOSE/PEs. Therefore, the citizens are only affected when, and if, they choose to hire an AOSE/PE. Those individuals likely to use the AOSE/PE certification process include individuals and businesses owning property that is to be used for residential or light commercial development.

(d) During the first year of the AOSE/PE program, a total of approximately 1,000 approvals were issued by the Department for permits, letters, and subdivision lots combined. By comparison, statewide applications for onsite sewage system construction permits total approximately 40,000 annually.

(e) Since the costs to individuals results from hiring a private AOSE/PE and is dependent on market forces, the Department does not have specific cost figures.

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 cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

There are no changes proposed, the language of the proposed regulations is identical to the Emergency Regulations for Authorized Onsite Soil Evaluators, effective December 31, 1999.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

Given that the Board of Health is under a legislative mandate to establish a program for AOSEs and PEs, a regulatory program appears to be the only acceptable and reasonable alternative. The minimum standards for submitting packages for approval were based on existing requirements in the Sewage Handling and Disposal Regulations (12 VAC 5-610-10 et seq.) and were considered to be the minimum requirements necessary to establish the suitability of a site for an onsite sewage system. Certain provisions of the proposed regulations, such as "deemed approval" and the time limits for reviewing packages, were taken directly from the statute where there is no discretion to adopt different standards. Where the agency has discretion, such as in the timing and frequency of field checks, the proposed regulations seek to minimize the processing time required to review a properly submitted package while at the same time emphasizing the private AOSE/PE's responsibility for determining that the sites and designs certified comply with the Board of Health's regulations.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

From April to July, 2000, the Department convened a series of stakeholder meetings, facilitated by the University of Virginia's Institute for Environmental Negotiation (IEN), to develop consensus recommendations for the proposed AOSE regulations. No public comments were received during the NOIRA comment period. Recommendations stemming from these comments are discussed below. Due to time limitations and the expansiveness of many of these recommendations, they will be considered for inclusion during the public comment period following publication of these regulations.

The stakeholder committee made 22 specific recommendations that will likely be incorporated into the final regulations as closely as possible. The recommendations are as follows:

RECOMMENDATION #1 "Deemed Approved:" The new regulations should continue the same timeline for permit approval with Level 1 reviews and "deemed approval" as outlined in GMP 100 and the Emergency Regulations.

RECOMMENDATION #2 Final inspections: The new regulations should establish that, when a permit is issued on the basis of an AOSE/ PE design and evaluation, then the AOSE/PE is responsible for the final inspection of that system. If the AOSE is unable to inspect the system,

the VDH will do so for a fee; otherwise the VDH will not inspect those systems. The VDH will conduct final inspections for all other systems.

RECOMMENDATION #3 VDH Professional Courtesy Reviews: The new regulations should make limited numbers of "professional courtesy" VDH field reviews available for AOSE/PEs. When such review is requested, the application will not be subject to counting for backlog calculation and there will not be any time limits for these reviews. A standard for "reasonableness" will apply to both the time in which courtesy field reviews are conducted and the frequency of requests by any individual.

RECOMMENDATION #4 VDH Professional Courtesy Reviews-Subdivisions: With regard to subdivisions, the new regulations should not prohibit professional courtesy early consultation, similar to a preliminary engineering conference, after the "base map" for the subdivision is developed but prior to submission of the subdivision package.

RECOMMENDATION #5 AOSE Appeal: The new regulations should provide that, whenever the VDH performs a field check (Level 2 review) the AOSE should receive a copy of the Level 2 review. If the VDH intends to revoke a permit approval, the AOSE shall be able to challenge the factual basis for the VDH revocation.

RECOMMENDATION #6 Burden of Proof for Permit Revocations: The new regulations should stipulate that there will be a high-level test for revocations of permits. Simple disagreement or interpretation of soil conditions is not sufficient to revoke a permit. The proposal for a high burden of proof should be developed by further meetings of the Ad Hoc Committee or of the permanent Advisory Committee.

RECOMMENDATION #7 Responsibility for Operation and Maintenance of On-Site Wastewater Treatment Systems: The Committee recognizes that education of property owners with on-site wastewater treatment systems about proper operation and professional maintenance, particularly in the case of engineered systems, is a critical issue for the protection of both public health and ground water quality. The Committee urges the VDH to address this issue, particularly to establish standard mechanisms for how operational knowledge about on-site systems can be communicated to new owners or occupants. The VDH should continue its role of protecting public health and being the "first responder" by working with problems encountered with all existing onsite systems. But it also should seek to improve property owners' understanding that they bear responsibility for proper operation and maintenance of their on-site systems. Ideas and options that the VDH may wish to consider to achieve these objectives are:

? The homeowner could be provided with an operational manual by the AOSE and VDH at the time of system approval.

? A schedule of mandated inspections would be administered.

? Disclosure of information about the system to the new homeowner at time of purchase.

? Public education campaign by VDH.

? AOSE/PEs would be required to warrant their work for 1 year.

? Real estate firms and lending institutions should require system check and/or maintenance when property changes hands.

? Require a notice of need for maintenance contract on systems.

RECOMMENDATION #8 Minimum Requirements for the AOSE

? The AOSE written and field tests must be taken and passed by all those who are currently an AOSE under the emergency regulations and by all those who wish to become an AOSE in the future (excluding those who already have taken the AOSE test dated January 2000 or thereafter).

? These tests would have to be passed by a stipulated time (to be determined by the VDH).

? In the interim transition period, AOsEs may have the option of submitting a septic system application for a Level 2 Review, which can serve as the field test component of the AOSE test.

? On the written and field tests, questions should relate only to the regulations and the application of those regulations. Test questions should not cover areas of personal philosophy or areas of pure soil science or pure engineering.

? Qualified AOsEs under the temporary regulations should be allowed to perform AOSE work at least until July 1, 2002, following the same requirements as for CPSSs under the emergency regulations.

Specific Additional Recommendations:

? CPSS: To become an AOSE, all persons who are CPSSs must pass the AOSE written and field tests.

? Non-CPSS: To become an AOSE, a person who is not a CPSS and who has a related four-year degree such as science or engineering, must have at least four years of full-time field experience, must pass approved AOSE training, and must pass the AOSE written and field tests.

? A person who is not a CPSS and who has a college degree not related to AOSE work, or who has a two-year college degree, must have at least six years of full-time field experience, pass approved AOSE training, receive a sign-off from either a supervisor or an AOSE which states that the person is sufficiently experienced to become an AOSE, and must pass the written and field AOSE tests.

? A person who is not a CPSS and who has no degree, must have at least eight years of full-time field experience, pass approved AOSE training, receive a sign-off from either a supervisor or an AOSE which states that the person is sufficiently experienced to become an AOSE, and pass the written and field AOSE tests.

? AOSE: Any person who has passed the AOSE tests dated January 2000 or later, will be considered an AOSE under the permanent regulations. Persons who have been operating as AOsEs under the emergency regulations, but who have not yet passed the AOSE written and field tests, must pass the AOSE tests by (a date as yet to determined) in order to continue submitting applications as an AOSE.

? EHS: To become an AOSE, all persons who are Environmental Health Specialists employed by the Virginia Department of Health must meet one of the above requirements.

RECOMMENDATION #9 Training: The new regulations should reflect the intent of creating regional training, but should allow for flexibility, (e.g., "AOSE training will be held in a manner similar to current VDH training." The regulations should be accompanied by policy recommendations to have training in different regions of the state. The Committee strongly recommends that monies be allocated from the Onsite Indemnification Fund to provide training for AOSE/PEs.

RECOMMENDATION #10 Requests for Information: The new regulations should specify that AOsEs need to provide clear and specific information (tax #, parcel #, etc.) when requesting

records from VDH. The VDH should develop a standardized format for requests for information and a standardized format for VDH responses. Features should be shown as per 12 VAC 5-610-460. However, the new regulations should allow sufficient flexibility to enable current systems that work well to continue.

RECOMMENDATION #11 Information Technology: The VDH should make information available on the web, with a GIS interface, to enable free and easy access for everyone.

RECOMMENDATION #12 AOSE Liability: The new regulations should indicate that AOSEs must make a “good faith” effort to get accurate information, and that their signature certifies that all information submitted is true and correct to the best of the AOSE’s knowledge. The regulations should state that AOSEs will not be held liable for inaccurate or incomplete information provided to them.

RECOMMENDATION #13 VDH Assistance: The VDH should emphasize and define the role of clerks in providing information and ensuring that records are kept organized. The VDH should establish guidelines for a uniform filing system throughout the state. The VDH should send AOSEs a copy of permit approvals. There should be no charge for retrieval of records for AOSEs, where possible.

RECOMMENDATION #14 Timeframes: The VDH should establish specific timeframes for VDH provision of information to AOSEs.

RECOMMENDATION #15 Paperwork reduction: The new regulations should aim as an overall goal to reduce the paperwork required for individual lot applications and subdivision packages. Several recommendations for consideration are that the VDH:

- 1) eliminate repetition of the name and address at the top of each page of the application package;
- 2) require three copies of only the primary construction permit and not of the additional data which accompanies it (soil data, etc.);
- 3) hold denied applications for a defined period of time, so that only the revision or update would need to be resubmitted in lieu of the entire package; and
- 4) for subdivision packages, condense the design form and summary sheet into a one-page table format. The permanent regulations should not contain specific requirements for submittal packages and, instead, should contain a general statement that the packages must be complete as determined by the Division. The VDH will, by the effective date of the regulations, develop the package requirements with the Ad Hoc Advisory Committee and publish a new GMP.

RECOMMENDATION #16 Education: The new regulations should emphasize the need to encourage and promote standard interpretation of terms throughout the state. The VDH should identify terms and situations that are susceptible to varying interpretation and develop standard interpretations that are included in AOSE training, the AOSE written and field tests, and AOSE continuing education courses.

RECOMMENDATION #17 Encouraging County “Opt-In:” The new regulations should encourage and enable localities to “opt in” to the state permit approval process, which streamlines the process by incorporating both state and local requirements into one review.

RECOMMENDATION #18 Education: The VDH should develop an aggressive education and outreach program to localities, particularly those with local ordinances governing septic design and location. The goal of this program should be to inform localities about the new AOSE program, how the approval process will interface with enforcement of any local ordinances, and the advantages of “opting in” to the VDH approval process.

RECOMMENDATION #19 Information for AOSEs: The VDH should make available to all AOSEs a list of counties with local ordinances governing septic design and placement, and a list of those counties that have “opted in.”

RECOMMENDATION #20 Certification and Inspection: The AOSE/PE should be given authority to certify well site/area pursuant to 12 VAC 5-610-630. The Committee further recommends that the new regulations specify that AOSE/PEs must inspect well and septic permits but that inspection of well-only permits be optional.

RECOMMENDATION #21 Training: The VDH should open its well regulations training module to AOSE/PEs on an optional basis. The “Basic Training” for EHSs/AOSEs should include an introduction to wells sufficient to enable the AOSE to site a well.

RECOMMENDATION #22 Advisory Committee: The new regulations should establish a permanent AOSE Advisory Committee, with the following membership: 4 AOSEs from different parts of the state, one or more of whom is a member of the Virginia Association of Professional Soil Scientists; 4 VDH field employees who are AOSEs; 2 contractors (system installers); 1 PE; 3 discretionary voting positions who are selected by the committee for appointment by the State Health Commissioner for up to one year and renewable thereafter.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

As indicated above, VDH has examined the proposed regulations through an ad hoc advisory committee and is satisfied that, with the suggested modifications, the regulation is clearly written and easily understandable by the affected entities and individuals.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

No later than January 3, 2004, VDH will initiate a review of the regulation to determine whether it should be continued, amended, or terminated. This review will include inquiries to local governments to assess the effectiveness of the program and to highlight any unresolved conflicts with local ordinances and procedures. Also included in the review will be an assessment and summary of all instances statewide where VDH review of an AOSE/PE certified site resulted in subsequent revocation or modification of VDH approval. The results of that assessment will be compared to VDH's own history as a benchmark for determining whether the private AOSE/PEs are able to provide protection of public health and the environment at levels similar to those provided by VDH. An essential part of the review will also be a summary and assessment of disciplinary actions taken against AOSEs and any complaints registered concerning PEs to determine whether training and testing, certification, education, or experience requirements should be changed.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential 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. To the extent that the proposed regulations will serve to expedite the approval process, they may offer an indirect benefit to the family by promoting the availability of single family dwellings.