

**State Board of Health  
Minutes  
September 14, 2012 – 9:00 a.m.  
Perimeter Center, 9960 Mayland Drive  
Richmond, Virginia 23233**

Members present: Bruce Edwards, Chair; Paul Clements; Kay Curling; Eric Deaton; Dr. John deTriquet; Jim Edmondson; Dr. Steven Escobar; Dr. Anna Jeng; Dr. Charles Johnson; Dr. Bennie Marshall; Dr. Mary McCluskey; Dr. John Seeds; Dr. Cathy Slusher; Gail Taylor; and Amy Vest

VDH staff present: Dr. Karen Remley, State Health Commissioner; Dr. Maureen Dempsey, Chief Deputy for Public Health; Jeff Lake, Deputy Commissioner for Community Health Services; Dr. Marissa Levine, Deputy Commissioner for Public Health and Preparedness; Joe Hilbert, Director of Governmental and Regulatory Affairs; Catherine West, Administrative Assistant; Donna Tiller, Administrative Assistant; Susan Horn, Research Assistant; Maribeth Brewster, Risk Communications Manager; Matt LiPani, Public Information Officer; Erik Bodin, Director, Office of Licensure and Certification; and Mike Welling, Director, Radioactive Materials Program

Others Present: Allyson Tysinger, Robin Kurz, and Rita Beale, Office of the Attorney General

Call to Order

Mr. Edwards convened the meeting at 9:00 a.m.

Welcome and Introduction

Mr. Edwards welcomed the public to the meeting. Mr. Edwards stated that the Board encourages public comment as it is a critical part to the Board meeting. Mr. Edwards informed the public that anyone wishing to speak before the Board during the public comment period is required to sign the sign-up sheet with their name and the topic they wish to discuss. He also reminded the public to maintain appropriate decorum during the meeting. In particular, Mr. Edwards asked the audience to be polite during the meeting, and to please refrain from waving of hands and signs. Mr. Edwards said that members of the audience would be given an opportunity to display their signs during the public comment period.

Mr. Edwards asked the Board members and staff to introduce themselves. Mr. Edwards also recognized Dr. Seeds, in attendance for his first meeting as a Board member.

Mr. Hilbert reviewed the agenda. There was a motion and second to approve the agenda. The agenda was approved by unanimous consent.

### Approval of Minutes

A motion was made and seconded to approve the draft minutes of the June 15, 2012 Board meeting. No corrections were noted. The minutes were approved by unanimous consent.

### Commissioner's Report

Dr. Remley gave the commissioner's report. She began by informing the Board that Jeff Lake will be retiring from VDH after 31 years of service. She publically thanked Mr. Lake for his exemplary service to VDH and to the Commonwealth. The first item in the Commissioner's report pertained to Tdap vaccination. Dr. Remley briefed the Board on VDH's efforts to promote and administer this vaccine, and briefed the Board on the number of dose of vaccine administered during the past year. Dr. Remley then briefed the board on the upcoming influenza season, and VDH's efforts to promote and administer flu vaccine. Next, Dr. Remley, briefed the Board concerning the AIDS drug assistance program (ADAP). Dr. Remley described VDH's successful efforts to increase program efficiencies and eliminate the program's waiting list. Dr. Remley told the Board that VDH's ADAP program has been recognized nationally for the manner in which the program is administered and managed. The next item of the Commissioner's report concerned West Nile virus (WNV). Dr. Remley briefed the Board on the number of confirmed WNV cases and deaths in Virginia, and reminded the Board of key messages concerning WNV prevention. Dr. Remley then briefed the Board concerning VDH's response to the DERECHO that occurred during June and July. Incorporating lessons learned from prior natural disasters, VDH and Virginia were better prepared to respond to this event. She shared with the Board key metrics related to the storm's impact, including the number of hospitals and long term care facilities using alternate sources of power, and the number of boil water notices that were issued. Next, Dr. Remley told the Board that for the third year in a row VDH has received a 100% score from the U.S. Centers for Disease Control and Prevention for its management of the Strategic National Stockpile. Virginia is the only state to have achieved this distinction. In addition, for the fourth year in a row, VDH has received a 100% score from the Virginia Department of Emergency Management for its Continuity of Operations Plan. Finally, Dr. Remley told the Board that the VDH Office of the Chief Medical Examiner has received the Governor's Public Service award, in the workplace safety and health category, for its successful efforts to establish and implement a biosafety level 3 autopsy suite.

### Matrix of Pending Regulatory Actions

Dr. Remley reviewed the summary of all pending VDH regulatory actions. Since the June 2012 meeting, there have been two regulatory actions that Dr. Remley approved on the Board's behalf while the Board was not in session. The first was a Notice of Intended Regulation Action for the Regulations for Conduct of Human Research (12VAC5-20); and the second was proposed amendments for the Regulation Implementing Virginia Organ and Tissue Donor Registry (12VAC5-475). In addition to those two regulatory items, Dr. Remley also approved the following items on behalf of the Board: the Trauma Center Designation Criteria and the Emergency Medical Services Data Set. Dr. Remley told the Board that both of these action items were carefully vetted by all relevant stakeholders prior to her approval.

Public Comment

After a short break, Mr. Edwards began the public comment period by stating that the Board encourages public participation. Mr. Edwards said that the chair would entertain a motion to extend the time for the public comment period in order for the Board to hear from all that have signed up to speak. Dr. McCluskey moved that the comment period be extended from the standard 20 minutes to one hour. Mr. Deaton seconded the motion. Mr. Edmondson commented that one hour would limit the number of speakers to 30. He further noted that there is a great deal of passion surrounding the proposed Regulations for Licensure of Abortion Facilities. Mr. Edmondson said that a number of people that have signed up to speak include attorneys and physicians who have particular information to provide to the Board, and that not hearing from those individuals would be to the Board's disadvantage. Mr. Edwards asked why the time limit for the public comment period should be one hour. Dr. McCluskey responded that the Board had gone beyond the standard public comment period protocol at the June 15 meeting, and that one hour is adequate time to hear public comment. Dr. Marshall stated that the time limit is two minutes for each speaker. Dr. Slusher commented that the Board has previously heard the emotional comments and appealed to the audience to provide comments that are different from the ones already provided. Mr. Edmondson asked if it is within the Board's purview to hear from speakers with some level of authoritativeness. Mr. Edwards responded that the Board cannot make any determination of authoritativeness since it follows the list of speakers signed up for public comment. Mr. Edmondson then encouraged the individuals who had signed up to speak during the public comment period to defer to those physicians and attorneys who have important information to provide to the Board. The Board voted by show of hands on the motion to extend the public comment period to one hour. The motion passed 14-1, with Mr. Edmondson voting no.

The following individuals addressed the Board during the public comment period:

Delegate Kathy Byron – She spoke of the legislative intent of Senate Bill 924 not to exempt any facility, and to ensure the safety and health of all women. She said that SB924 had support from legislators of both parties. She told the Board that there was nothing vague as to the intent of the legislation. She urged the Board to fulfill its duty.

Pam Sjolinder – She told the Board she is a strong pro-choice advocate, and is fighting for the safety of women in the commonwealth. She is committed to the health and safety of women, and told the Board that it is common sense to offer highest safety standards possible.

Kathy Brown – She stated that the regulations need to protect all women and is against “grandfathering” clinics.

Kirsten Ball – She is concerned about the safety of women entering abortion facilities. She asked the Board, if abortion facilities are well run, what do clinics fear from regulation.

Angela Clark – She said that there is no way to know if Virginia abortion facilities are safe without inspection and regulation. Women deserve at least minimal safety standards. She urged the Board to include building requirements in the proposed regulations.

Ruby Nicdao – She spoke against abortion. She said that the proposed regulations are the least that can be in place, and urged the Board to adopt the proposed regulations.

Tom West – He stated that SB924 of 2012 was extensively debated and passed by legislators.

The proposed regulations are “common sense” but “grandfather” clause will nullify the law. He

told the Board that it would be outside of its authority to “grandfather”, or exempt, existing facilities.

Victoria Cobb – She urged the Board to amend the proposed regulations to include building standards that do not “grandfather” existing facilities. That would meet the demand of the legislature. She said that the abortion industry has no credibility to self-regulate, and does not deserve to be listened to.

Julia Kiewit – She said the Board should adopt regulations that are consistent with the statute that was passed, including building guidelines that do not “grandfather” existing facilities. Abortion facilities should be as safe as a veterinarian clinic or beauty salon.

Leslie Rubio deferred her time to speak to Dr. Stephen Benheim. He stated that abortion facilities need to be regulated but do not need strict building guidelines.

Jeff Caruso – Abortion is not health care. The abortion industry should meet common sense regulations and reasonable standards.

Whitney Whiting – Architectural requirements will shut down many clinics and take away services for women. She said that the Board can keep them open and regulated without burdensome building requirements. She supports the “grandfathering” of existing clinics.

William Carino deferred his time to speak to Dr. Ken Olshansky. He stated that the medical community holds the Board with utmost respect. He said that on June 15 Board voted on proposed regulations based on medical guidance and not politics. He asked the Board to put politics aside, and to use medical evidence as a resource.

Kelsea Jeter deferred her time to speak to Kathy Greenier. She stated that the Board has been told that its action on June 15 was outside of its authority, but that is not true. The Office of the Attorney General is incorrect about the Board’s legal obligations. She said that the 2010 Guidelines for Design and Construction of Health Care Facilities are not intended for existing structures. The guidelines should be applied only to alterations or new buildings. She told the Board that the Guidelines state that they are intended for new construction. She said that the proposed regulations approved by the Board on June 15 was consistent with the guidelines. She said that the Board has adequate legal authority and is not bound to follow the Attorney General’s legal advice.

Elizabeth Remick deferred her time to speak to Dr. Wendy Klein. She stated she is not opposed to regulations for safety, but she is opposed to regulations that limit access and close clinics. She said that the current Administration has sidestepped medical policy. Oversight of abortion facilities is needed, but not unreasonable building guidelines.

Pam Pouchot – She stated that there is no medical reasons for architectural changes. Clinics that offer abortions also offer other services. Regulation does not improve the health of women.

Rita Dunaway – She discussed legal issues concerning the “grandfather” of the proposed regulations approved by the Board on June 15. The Board can classify hospitals by type of service. The U.S. Court of Appeals for the Fourth Circuit has upheld South Carolina’s regulations. Abortion providers may be treated differently. The Board has the authority to have broader building guidelines.

Margaret Doyle deferred her time to speak to John Paul Jones. He stated Virginia law allows the Board authority to make regulations and to make exceptions within those regulations. He said that SB924 did not specifically prohibit the “grandfathering” of existing clinics. He also said that the Office of the Attorney General cannot drop its legal defense of the Board.

Molly Vick – She said the Board needs to stand strong in support of the proposed regulations that it approved on June 15. She supports the “grandfathering” of existing clinics. She said that the Board should regulate, but not close, abortion facilities.

Graham Evans told the Board that there are about 200 people outside of the building who were unable to get into the meeting room, and that most of them are in favor of the “grandfather” clause. He then deferred his time to speak to Elizabeth Musselman. She thanked the Board for adopting the “grandfather” clause earlier. She said that if existing clinics are not “grandfathered”, this would be the first time that Board of Health regulations did not “grandfather” existing facilities.

Camille Rudney – She asked the Board members to put aside their personal feelings. Do not let Attorney General bully you into harming your client. She urged the Board to keep the “grandfather” clause.

Shelley Abrams – She stated that the Board has been threatened by the Attorney General, and been given long talks by Matt Cobb. She said that Dr. Seeds was appointed to the Board by the Administration in order to outlaw abortion. She said that the Board’s mandate is to protect health. She said that the purpose of the architectural requirements is to close clinics. She said that clinics should be licensed, but they do not need to be rebuilt.

Abby Guskin deferred her time to speak to Jules Irvin Rooney. She stated that these regulations would be most onerous in nation. The Board was within its authority to “grandfather” existing clinics. The 2010 Guidelines for Design and Construction of Health Care Facilities are intended for only new structures and not existing structures. The amended regulations approved by the Board on June 15 are based on the recommendations of medical experts. The Attorney General’s advice should not decide the Board’s action.

Stephanie Arnold – She stated that one group is here to tell you that abortion is not safe. They seek to impose their religious beliefs on others. The other group that is here supports medical evidence. There is no need for regulations since abortion is a safe procedure. She supports the “grandfather” clause.

Debra Van Putten – She stated that hospitals need to be brought to the same standards that the Board is trying to impose on abortion facilities. She described the poor care her mother had received in a hospital.

Eddy Aliff – He urged the Board to follow the spirit and intent of the legislation.

Vicki Yeroian deferred her time to speak to Freeda Cathcart. She stated that she is stunned by the Attorney General’s rejection of the proposed regulations approved by the Board on June 15. She said that has never happened in Virginia. She said that the Board members have each taken an oath to uphold the constitution. She said that the Board should make evidence-based decisions. She urged the Board to keep the “grandfather” clause

Jeff Winder – He said that the “grandfather” clause is legally and medically appropriate. He said that the Governor and the Attorney General are promoting a right wing, religious agenda.

Cianti Stewart-Reid – She stated that the regulations are a solution in search of a problem. Without the “grandfather” clause, the proposed regulations threaten access to care for women. She told the Board that SB924 has a limited scope, and charges the Board to promulgate regulations that include minimum standards. She expressed support for the “grandfather” clause for existing facilities.

Mr. Edwards invited those members of the audience who had signs to raise them at this point during the public comment period. He then declared the public comment period to be ended and

asked that the signs be put back down. He further stated that members of the public who were observing the meeting via videoconference in Board Room 1 could submit written comments to the Board to be included in the record. Forty statements were received from members of the public seated in Board Room 1.

### Lunch

The Board recessed for lunch. Mr. Edwards announced that the lunch would not be a working one, that no action items would be discussed during the lunch period.

When the Board returned from lunch Mr. Edwards asked Dr. Levine to speak about the complaint process for facilities regulated through the Office of Licensure and Certification in response to Ms. VanPutten's remarks during the public comment period. Dr. Levine discussed the complaint and inspection process.

### Regulatory Action Items

#### *Regulations for Licensure of Abortion Facilities (12VAC5-412) – Proposed Regulations*

Mr. Edwards indicated that the Office of the Attorney General did not certify the proposed Regulations for Licensure of Abortion Facilities as adopted by the Board during its June 15, 2012 meeting. He encouraged the Board to focus on section 370 of the proposed regulations. He told the Board that Dr. Remley and Joe Hilbert will present the proposed regulations. Mr. Edwards noted that the Board would operate pursuant to Roberts Rules of Order.

Dr. Remley briefed the Board concerning the status of VDH's licensure and inspection program for abortion facilities. She told the Board that all 20 facilities that VDH expected to apply for licensure have applied and have had an on-site survey conducted by staff from VDH's Office of Licensure and Certification. In each case, the facility has been required to submit a plan of correction to VDH. Twelve of those facilities have already submitted an acceptable plan of correction, while eight facilities have submitted plans that are still under review by VDH. The most common deficiencies have been related to:

- Patient care (e.g., multiple use of a single dose medication vial)
- Infection prevention (e.g., inadequate safeguards to prevent contamination)
- Functional safety and maintenance (e.g., absence of preventive maintenance policies and procedures for equipment)
- Design and construction (e.g., no verification of adequate air flow)
- Personnel and administrative (e.g., staff criminal background check not conducted in accordance with regulation)
- Medical records (e.g., medical records incomplete).

Mr. Edmondson asked if these types of deficiencies are different from what VDH finds when it inspects other types of health care facilities. Dr. Remley responded no, they are not different. Dr. Remley told the Board that VDH facility inspectors always seek to educate facility staff concerning the gap between the regulatory requirement and the facility's performance, and what changes the facility needs to make in order to come into compliance with the requirement.

Dr. Marshall asked if, as part of the licensure application process, any of the facilities has expressed any opposition to the licensure requirements. Dr. Remley explained that under the law, a facility must be licensed in order to operate. In order to remain in operation, each facility has had to go through the licensure process. VDH expected 20 facilities to apply for licensure and all 20 have submitted an application. Mr. Edmondson asked if VDH has an estimate as to the cost to each facility to come into compliance with the regulations. Dr. Remley responded that VDH is not authorized to require or even request facilities to provide the type of financial information that would be necessary in order to develop such an estimate. Dr. Remley did tell the Board that the abortion facilities may decide to voluntarily share such data with VDH in the future. Mr. Edmondson said that it remains an open question as to whether or not the facilities will be able to obtain the financing necessary in order to comply with the regulations. There was a brief discussion concerning the issuance of variances. Dr. Remley told the Board that, if a facility has an impractical hardship, and chooses to request a variance to a particular regulatory provision, whatever documentation might be appropriate to that discussion – including financial information – would be provided to VDH.

Mr. Hilbert then presented the proposed regulations by reviewing certain documents that were contained in the Board's meeting notebook. These documents included: 1) a cover memo that provided a high-level summary of the proposed regulatory provisions, and a description of next steps in the regulatory process; 2) the Agency Background Document which provides a detailed summary of the proposed regulatory provisions and a summary of the comments that were received during the public comment period on the Emergency Regulations/Notice of Intended Regulatory Action; 3) the proposed regulatory text; and 4) an Addendum, the purpose of which is to clearly identify provisions of 12VAC5-412-370 as approved by Board on June 15, 2012 and to present VDH's proposed amendment to 12 VAC5-412-370.

Mr. Hilbert reminded the Board that the proposed regulations as approved by the Board on June 15, 2012 were not certified by the Office of the Attorney General. Mr. Hilbert then presented the Board with the following proposed amending language for 12 VAC5-412-370:

“Abortion facilities shall comply with state and local codes, zoning and building ordinances, and the Uniform Statewide Building Code. In addition, abortion facilities shall comply with Part 1 and sections 3.1-1 through 3.1-8 and section 3.7 of Part 3 of the 2010 Guidelines for Design and Construction of Health Care Facilities of the Facilities Guidelines Institute, which shall take precedence over the Uniform Statewide Building Code pursuant to Virginia Code § 32.1-127.001.

Entities operating as of the effective date of these regulations as identified by the department through submission of Reports of Induced Termination of Pregnancy pursuant to 12VAC5-550-120 or other means and that are now subject to licensure may be licensed in their current buildings if such entities submit a plan with the application for licensure that will bring them into full compliance with this provision within two years from the date of licensure.

In order to determine whether the abortion facility is in compliance with this provision, the commissioner may obtain additional information from the facility or its architect concerning the design and construction of the facility.”

A paper copy of the above language was distributed to the Board for their review.

Mr. Edwards reviewed Robert’s Rules of Order with the Board and reminded Board members that according to Robert’s Rules, a member cannot amend an amendment to an amendment. Mr. Edwards also reminded the Board that a second to a motion should only be made if appropriate (i.e., if the member intends to vote for the motion). Mr. Edwards also advised the Board that upon a motion to call the pending question, a two-thirds vote can stop any further discussion on a pending matter.

Mr. Edwards explained that, in order to ensure that any amendment language is clear before a motion is made and seconded, VDH staff will display the proposed regulatory language on the screen. The updated language will be read to the Board and any corrections will be made before proceeding to a motion, second, and subsequent discussion.

Mr. Deaton moved to adopt 12VAC5-412 with section 370 amended as recommended by VDH staff. The motion was seconded by Ms. Vest. There was a brief discussion between Mr. Edmondson and Mr. Deaton concerning the motion.

Mr. Edmondson suggested alternative language for 12VAC5-412-370 to conform the regulatory language for that section to what was approved by the Board on June 15. Specifically, Mr. Edmondson moved to replace all of the recommended language by VDH with the following language:

“Abortion facilities shall comply with state and local building codes, zoning and building ordinances, and the Uniform Statewide Building Code. In addition, all construction of new buildings for abortion facilities, or additions or substantial renovations or alterations of existing abortion facilities shall substantially comply with Part 1 and sections 3.1-1 through 3.1.8 and section 3.7 of Part 3 of the 2010 Guidelines for Design and Construction of Health Care Facilities Guidelines Institute, which shall take precedence over the Uniform Statewide Building Code pursuant to Virginia Code Section 32.1-127.001.

To determine whether the abortion facility is in compliance with this provision, the Commissioner may obtain additional information from the facility and its architect concerning the design and construction of the facility.”

Mr. Edwards pointed out that the word “3.1.8” should be “3.1-8,” replacing the dot between the 1 and eight with a dash. Mr. Edmondson agreed that would be correct. Dr. Jeng seconded the motion.

Ms. Tysinger advised the Board that the first sentence of the suggested language was fine but that the rest of the suggested language would create a “grandfather” clause for existing facilities. She said that exceeds the Board’s statutory authority.

Dr. Jeng stated that VDH started regulating health care facilities in 1977. She said further that the Code of Virginia distinguishes between new and existing structures, and that VDH has always distinguished between new and existing structures. Dr. Jeng told the Board that the 2010

Guidelines for Design and Construction of Health Care Facilities are intended to apply only to new construction. Dr. Jeng also told the Board that in 2005, the Office of then-Attorney General McDonnell certified amendments to the hospital and nursing home licensure regulations, approved by the State Health Commissioner, that specified that the guidelines applied only to new construction. Mr. Edwards then stated to Dr. Jeng that she was re-stating the argument that she had presented at the June 15 Board meeting.

Dr. Slusher then asked Ms. Tysinger to explain to the Board why Dr. Jeng’s assertion is faulty with regard to SB924. Ms. Tysinger responded by stating that, back in 2005, VDH and the Board were dealing with health care facilities that were already licensed. Today, however, the Board and VDH are dealing with entities that are newly licensed. Moreover, the General Assembly did not “grandfather,” or exempt abortion facilities from the requirements of §32.1-127.001 of the Code of Virginia. Because the General Assembly did not specify that existing facilities were exempt from the statutory provisions, the Board cannot exempt them either. Dr. Jeng responded that she did not agree with that interpretation.

Dr. McCluskey called the pending question. Mr. Edwards explained that once a call for pending question has been made, under Robert’s Rules, the debate must stop and go directly to a vote. For this vote, two-thirds of the Board is required for the question to be called. The Board voted by show of hands, 13 in favor (Mr. Clements, Ms. Curling, Mr. Deaton, Dr. deTriquet, Mr. Edwards, Dr. Escobar, Dr. Johnson, Dr. Marshall, Dr. McCluskey, Dr. Seeds, Dr. Slusher, Ms. Taylor, and Ms. Vest), 2 opposed (Mr. Edmondson and Dr. Jeng). The motion to call the pending question was approved.

The Chair then called for a roll-call vote on the amendment on the floor. The vote was 2 in favor (Mr. Edmondson and Dr. Jeng), 13 opposed (Mr. Clements, Ms. Curling, Mr. Deaton, Dr. deTriquet, Mr. Edwards, Dr. Escobar, Dr. Johnson, Dr. Marshall, Dr. McCluskey, Dr. Seeds, Dr. Slusher, Ms. Taylor, and Ms. Vest). The motion failed.

Mr. Edmondson then proposed a different alternative to the language as recommended by VDH for 12VAC5-412-370, so that the section would conform to language in the current licensure regulations for hospitals and nursing homes. He moved to replace the entire section with the following language:

“All construction of new buildings for abortion facilities and additions, renovations or alterations of existing buildings for occupancy as an abortion facility shall conform to state and local codes, zoning and building ordinances, and the Uniform Statewide Building Code.

In addition, abortion facilities shall be designed and constructed according to Part 1 and sections 3.1-1 through 3.1.8 and section 3.7 of Part 3 of the 2010 Guidelines for Design and Construction of Health Care Facilities Guidelines Institute, However, the requirements of the Uniform Statewide Building Code and local zoning and building ordinances shall take precedence.

To determine whether the abortion facility is in compliance with this provision, the Commissioner may obtain additional information from the facility and its architect concerning the design and construction of the facility.”

Mr. Edwards pointed out that the word “3.1.8” should be “3.1-8,” replacing the dot between the 1 and eight with a dash. Mr. Edmondson agreed that would be correct. Dr. Jeng seconded the motion.

Ms. Tysinger advised the Board that the first paragraph of the proposed amendment contains an exemption for existing facilities, which constitutes a “grandfathering” provision. However, if the words “new construction” were removed from the proposed amendment, that part of the amendment would be fine. Ms. Tysinger advised the Board further that, in the second paragraph, what is missing is the two year period for the facility to come into compliance with the regulatory provisions. Finally, Ms. Tysinger stated that the last sentence of the second paragraph conflicts with § 32.1-127.001 and therefore exceeds the Board’s statutory authority.

Mr. Edmondson responded by saying that, based on the presentations that the Board heard during the public comment period, and all documents and advice that the Board has received, we know what the Attorney General wants. Mr. Edmondson stated further that, the assertion that we lack authority as a Board ignores a fundamental issue that Delegate Byron did acknowledge. Specifically, Mr. Edmondson said that § 32.1-12 of the Code of Virginia instills in the Board significant and broad authority, and that the General Assembly did not tell the Board that it had to abandon § 32.1-12. He said that the Board should listen to medical advice and use that broad authority to protect public health. At its June 15 meeting, according to Mr. Edmondson, the Board seemed to take into account that responsibility. Mr. Edmondson said that, while the Attorney General can advise the Board, the Attorney General has been wrong in the past and is wrong in this instance. He reminded the Board of the comments provided by John Paul Jones during the public comment period. Mr. Edmondson said that the Board has the ability to do this correctly. He stated that another state board, the Board of Juvenile Justice, was advised by the Office of the Attorney General that it had exceeded its statutory authority in adopting a regulation. However, that board stood firm and that regulation was adopted. Mr. Edmondson urged the Board to not be cowed by the assertion that it lacks the authority to do the job it is supposed to do. He told the Board that he is concerned about the lack of access to non-abortion women’s health services should any of these facilities have to close.

Dr. Marshall stated that she has served on the Board for many years, has dealt with many issues that have sometimes been confusing and conflicting, and believes that the Board has always received appropriate guidance from the Office of the Attorney General’s. In this instance, Dr. Marshall said that the Board needs to give serious consideration to the advice that has been provided by the Office of the Attorney General. Dr. Marshall would hesitate to have it seem that this advice is something to be ignored. She said that Dr. Remley’s presentation had made clear that licensure is required and that the affected facilities recognize that fact.

Mr. Clements stated that at no time during this process has he felt that he has been pushed to make a decision by the Administration or anyone else.

Dr. Jeng said that the Board may not clearly understand the proposed regulation. She told the Board that she has researched the underlying issues, and believes that the Board’s decision should be based on medical evidence. She said that this decision should not be left to the Attorney General or anyone else.

Dr. Slusher stated that she appreciates the opportunity to re-visit the proposed regulations. She explained that at the June 15 meeting she was operating under some confusion, and there were some questions that she needed to ask, but did not. Dr. Slusher stated the proposed regulations do not involve Board members' personal preferences. Rather, the General Assembly enacted legislation, and the Board is responsible pursuant to the law for promulgating regulations. Dr. Slusher said that the Board also has an obligation to do no harm to Virginians. She said that she totally disagrees with the notion that the proposed regulations will limit access to care. Even if some clinics stop offering abortion services, there is nothing in the proposed regulations that would prohibit them from continuing to offer other health care services. Dr. Slusher then cited from Dr. Remley's presentation, in which it was reported that none of the clinics have been closed by VDH, and that none of the clinics have indicated that they plan to cease operations.

Mr. Edmondson responded that he hopes Dr. Slusher is correct that none of clinics will be closed. He told the Board that the tactics that the clinics have had to adopt is that they are going to attempt to comply with the regulations. However, Mr. Edmondson said it is unknown how many of the clinics can raise the amount of money necessary for required improvements. Dr. Slusher responded that if a clinic is attempting to comply with the regulations, but does not have enough funding at present to comply, therein is the opportunity to request and issue a variance.

Dr. Seeds stated that the American College of Obstetricians and Gynecologists (ACOG) support the 2010 Guidelines for Design and Construction of Health Care Facilities. Dr. Seeds also told the Board that he was a member of the medical panel convened by the State Health Commissioner to provide advice during the development of the emergency regulations, and that he attended every meeting of the panel. He stated that the panel did not reach conclusion concerning whether or not existing clinics should be "grandfathered" from any of the regulatory provisions. Mr. Edmondson responded that while ACOG does support the guidelines, the guidelines are not designed for existing facilities. He also told the Board that he is not opposed to regulating clinics but the issue at hand is whether existing facilities should be exempt from the provisions of section 370.

The Chair called for a roll-call vote on the motion. The vote was 2 in favor (Mr. Edmondson and Dr. Jeng), and 13 opposed (Mr. Clements, Ms. Curling, Mr. Deaton, Dr. deTriquet, Mr. Edwards, Dr. Escobar, Dr. Johnson, Dr. Marshall, Dr. McCluskey, Dr. Seeds, Dr. Slusher, Ms. Taylor, and Ms. Vest). The motion failed.

Mr. Edmondson then proposed an amendment to 12VAC5-412-80 with regard to variances. The intent of his proposed amendment is to make the ability to grant variances more explicit. His proposed amendment would be a complete substitution for the existing section. Dr. Marshall asked if it was appropriate to make a motion for an amendment to any section of the proposed regulation other than 12VAC5-412-370 at this time. Mr. Edwards indicated that the motion on the floor at this time was to adopt the entire regulation of 12VAC5-412, and therefore Mr. Edmondson's motion was in order. Mr. Edmondson moved that 12VAC5-412-80 be amended as follows:

- “A. Upon the finding that the enforcement of one or more of these regulations would be impractical for an individual clinic, then the Commissioner may waive the enforcement

of one or more of these regulations related to that clinic, provided that safety and patient care and services are not adversely affected.

- B. Modification of its facility by any individual clinic, which is operating under a variance or without a variance, shall require advance written approval by the Commissioner.”

Dr. Remley asked if it was correct that this language is to replace the entire existing section, as it would also delete the current sub-sections C and D. Mr. Edmondson responded that that was correct. Dr. Jeng seconded the motion.

Ms. Tysinger advised the Board that the issues surrounding the proposed amendment were somewhat complicated, and that it would be important to understand the intent of the proposed amendment. She said that § 32.1-12 of the Code of Virginia authorizes the Board to provide for reasonable variances. However, the proposed amendment focuses on the waiver of enforcement of the regulations. Ms. Tysinger would not want the regulatory language to allow the State Health Commissioner to undermine the intent of the General Assembly or the Board. She asked Mr. Edmondson if he would consider changing the wording of the proposed amendment, to focus it back on the issuance of variances. Ms. Tysinger also advised the Board that the wording in subsection B should be changed from “individual clinic” to “abortion facility.” She also told the Board that she was not sure of the intent of subsection B. For example, any time a facility wanted to modify its physical plant would it have to get written approval from the Commissioner? Mr. Edmondson responded by saying that he was willing to make the type of change suggested by Ms. Tysinger, in terms of refocusing the language on the issuance of variances rather than on the waiver of enforcement. Dr. Slusher asked how the intent of Mr. Edmondson’s proposed amendment differs, if at all, from the intent of the current provisions of 12 VAC5-412-80. Mr. Edmondson replied that his intent is to make the proposed regulatory provisions simpler. Dr. Slusher said that the proposed regulatory provision is already very straightforward.

Dr. McCluskey called the pending question. The Board voted by show of hands, 13 in favor (Mr. Clements, Ms. Curling, Mr. Deaton, Dr. deTriquet, Mr. Edwards, Dr. Escobar, Dr. Johnson, Dr. Marshall, Dr. McCluskey, Dr. Seeds, Dr. Slusher, Ms. Taylor, and Ms. Vest), and 2 opposed (Mr. Edmondson and Dr. Jeng). The motion to call the pending question was approved.

The Chair then called for a roll-call vote on the amendment on the floor. The vote was 2 in favor (Mr. Edmondson and Dr. Jeng), and 13 opposed (Mr. Clements, Ms. Curling, Mr. Deaton, Dr. deTriquet, Mr. Edwards, Dr. Escobar, Dr. Johnson, Dr. Marshall, Dr. McCluskey, Dr. Seeds, Dr. Slusher, Ms. Taylor, and Ms. Vest). This motion failed.

There being no further discussion, the Chair called for a roll-call vote on the motion to adopt 12VAC5-412, including the amended section 370 as recommended by VDH. The vote was 13 in favor (Mr. Clements, Ms. Curling, Mr. Deaton, Dr. deTriquet, Mr. Edwards, Dr. Escobar, Dr. Johnson, Dr. Marshall, Dr. McCluskey, Dr. Seeds, Dr. Slusher, Ms. Taylor, and Ms. Vest), and 2 in opposition (Mr. Edmondson and Dr. Jeng). The proposed regulations were adopted.

There was an outburst from the audience, resulting in some members of the audience being escorted from the room. Mr. Edwards called a suspension of the rules to take a short break, which was approved by unanimous consent.

#### Update on Uranium Mining and Milling

Dr. Dempsey provided the update to the Board. Governor McDonnell created the Uranium Working Group (UWG), which consists of staff from VDH, the Department of Environmental Quality (DEQ), and the Department of Mines, Minerals and Energy (DMME). Dr. Dempsey is the lead VDH representative on the UWG. The Governor charged the UWG with 18 specific research tasks, pertaining to a wide range of issues. Many of these issues are interrelated. For example, Dr. Dempsey explained that while VDH responsible for drinking water, DEQ is responsible for surface and ground water. There is significant interplay between protecting sources of drinking water, and protecting the health of people who consume drinking water. DMME interested in these issues from a mining standpoint.

Overall, the responsibility of the UWG is to compile and present, by December 1, 2012, relevant information in a useable, cohesive format to support decision making by policy makers in the Commonwealth. Pursuant to a Request for Proposals, VDH awarded a contract to Wright Environmental Services (WES) to provide consulting services. VDH has been in constant contact with WES since the award of the contract. The public has been very engaged with the UWG, and a series of public meetings have been held to obtain input. The public has been contributing a wealth of information for consideration. Public comment has been posted on the UWG website.

Dr. Dempsey explained that VDH has been working to identify what needs to be considered in order to keep the residents of the Commonwealth safe and healthy. For example, are existing regulations sufficient? In addition, should Virginia become an agreement state with the U.S. Nuclear Regulatory Commission for purposes of the milling of uranium? Furthermore, is regulatory oversight of private wells sufficient? While VDH issues permits for private well construction and requires a bacteriological sample, there is no regulatory requirement for ongoing monitoring of water quality. VDH has held a series of public meetings focused exclusively on issues pertaining to private wells. Dr. Dempsey also said that VDH is examining what parameters should be established for a full environmental impact analysis. Best management practices are also being examined.

There was a brief discussion among the Board members concerning the effect of geology and topography on background radon levels in different parts of the state. There was additional discussion concerning differences in mining and milling practices in various states. There was also discussion concerning the potential impact of a catastrophic event (e.g., hurricane) on the safety of uranium mining and milling in Virginia.

Following Dr. Dempsey's presentation, Dr. Remley suggested to the Board that, with its permission, she would send a letter of thanks to the Henrico County Police and to the Security group for the Perimeter Center for all of their work to ensure that today's Board meeting was a

safe and productive meeting. The board, by unanimous consent, approved Dr. Remley sending such a letter.

### Member Reports

*Dr. Mary McCluskey – Managed Care Health Insurance Plans.* She told the Board that her employer, Amerigroup, has been purchased by WellPoint. Amerigroup provides WellPoint with extensive Medicaid experience, which will prove valuable with the implementation of health benefit exchange as well with providing care for “dual eligibles” under Medicare and Medicaid..

*Dr. Catherine Slusher – Medical Society of Virginia.* She briefed the Board on how the medical community is responding to the new statutory requirement to provide additional information to patients concerning breast density, as part of standard mammogram reports. Implementation has gone well, and there is a productive, useful flow of information and communication between physicians and their patients.

*Dr. John Seeds – Medical Society of Virginia.* No report. He told the Board he will make every attempt to contribute at upcoming meetings.

*Amy Vest – Virginia Pharmacists Association.* She briefed the Board on efforts among pharmacists to promote blood pressure screening as part of the “Million Hearts” campaign. She also briefed the Board concerning the “Vote and Vax” initiative, in which flu vaccine will be available at many polling places. Also, the next prescription drug take back day will be on September 29. Specific take-back locations can be found on the U.S. Drug Enforcement Agency website.

*Dr. Bennie Marshall – Virginia Nurses Association.* The VNA’s annual meeting will be held at the end of September. VNA is still involved in the Virginia Action Coalition, in order to implement the recommendations contained in the Institute of Medicine report on the Future of Nursing.

*Eric Deaton – Hospital Industry.* – Hospitals have also been working to ensure smooth implementation of the new statutory requirement to provide additional information to patients concerning breast density, as part of standard mammogram reports. Hospitals remain concerned about litigation that has been filed to invalidate Virginia’s certificate of public need statute. Hospitals are also concerned about the impact of a sequester at the federal level, particularly the impact on CMS and the Medicare program. He also briefed the Board on a provision of the Affordable Care Act, involving a rebasing of the wage index which would have a \$15 million impact on Virginia.

*Kay Curling – Corporate Purchaser of Health Care.* She briefed the Board on trends in health care costs. Also, as a result of the Affordable Care Act, corporations will have to begin reporting health care costs on W-2 forms.

*Paul Clements – Nursing Home Industry Representative.* He briefed the Board on provision of long term care services for “dual eligibles,” as well as on dental and mental health services. The

long term care industry in Virginia has an initiative to decrease the use of narcotics by 15%, which is an aggressive goal. Long term care providers are working closely with acute care providers in order to evaluate and improve readmission processes. Long term care providers are also gearing up for flu vaccine season, with the goal to maximize immunization for residents and employees.

*Dr. Charles Johnson – Virginia Dental Association.* He briefed the Board on Mission of Mercy dental clinics that have been held recently, including those at Virginia State University and in Wise County.

*Dr. John deTriquet – Local Government.* He told the Board that he appreciated the presentation on uranium, as that is an issue of considerable concern to localities in South Hampton Roads. He said that he found it reassuring that the Board of Health is involved in the process, and participating in proactive manner. He also briefed the Board on Chesapeake's recent opening of a new animal control facility.

*Gail Taylor – Consumer Representative.* – She told the Board that she appreciates the efforts of VDH to provide information concerning use of epi-pens in advance of the new school year.

*Dr. Steven Escobar – Virginia Veterinary Medical Association.* No report.

Dr. Escobar made a motion that the State Health Commissioner provide a licensing report regarding abortion facilities to the Board on a quarterly basis for a period of three years. Dr. deTriquet seconded. Motion was adopted by unanimous consent.

*Bruce Edwards – Emergency Medical Services Representative.* He told the Board that the Governor recently signed a comprehensive set of final amendments to the EMS regulations. He also said that he will be rotating off of the State EMS Advisory Board, although he will remain an ex-officio representative.

#### Other Business

Mr. Edwards asked for an update on the proposal from the Board concerning electronic meetings under the Virginia Freedom of Information Action. Mr. Hilbert indicated that there had been no response from the FOIA Council to the letter that the Board submitted them on this subject. Mr. Hilbert indicated that VDH would follow-up on the status.

Mr. Hilbert presented the proposed Board meeting schedule for 2013. There was a brief discussion about the proposed schedule, specifically should the Board meetings be on Fridays as proposed or another day, such as Thursday. There was a motion by Mr. Deaton to approve the proposed 2013 meeting schedule (March 14, 2013; June 6, 2013; September 19, 2013; December 5, 2013). The motion was seconded by Dr. Slusher and approved by unanimous consent.

#### Adjourn

The meeting adjourned at approximately 2:45 p.m.