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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Department of Health
Virginia Administrative Code (VAC) citation	12 VAC 5-612
Regulation title	Regulations for the Onsite Sewage Indemnification Fund
Action title	Implement Title 32.1-164.1:01 of the Code of Virginia, the Onsite Sewage Indemnification Fund.
Date this document prepared	January 7, 2008

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

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The Virginia Department of Health ("VDH") proposes regulations to administer the onsite sewage indemnification fund ("Fund"). The Fund assists any Virginia real property owner holding a valid septic tank or other onsite sewage system permit when the system fails within three years of its construction due to the negligence of the Virginia Department of Health. The regulations will (1) provide notice of the Fund, (2) establish the procedure for Virginia real property owners to apply for assistance from the Fund, and (3) establish the procedure for investigating and processing requests for assistance from the Fund.

Legal basis

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

Title 32.1-164.1:01 of the Code of Virginia gives the Board of Health authority to adopt regulations and administer Virginia's onsite indemnification fund program. The Code states that "the Board may

promulgate regulations pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) for the administration of the Fund consistent with this chapter.”

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

Owners should have access to the rules, investigation process, and legal basis for decision-making before claims are filed. Owners should also have an opportunity to be heard before regulations are administered. The regulatory adoption process will allow stakeholders and citizens to comment on and influence how the Board of Health administers the program to implement Title 32.1-164.1:01 of the Code of Virginia.

With the statutory guidelines, the VDH and Commissioner can implement, through regulation, a fair, consistent, and predictable procedure for owners who seek assistance from the Fund. Regulations will assure that binding legal requirements are in place to administer the program.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

Title 32.1-164.1:01 of the Code of Virginia creates the Onsite Sewage Indemnification Fund to assist Virginia real property owners whose onsite sewage systems fail within three years of construction from the negligence of the VDH. In order to receive assistance from the Fund, the Commissioner must find that the real property owner: 1) meets the statutory requirements (valid permit, failure three years from installation, negligent actions by VDH caused failure); 2) files a complete application within one year of the date of failure; 3) follows the requirements in the Sewage Handling and Disposal Regulations (12 VAC 5-610) or the Alternative Discharging Sewage Treatment Regulations (12 VAC 6-640) to repair or replace the failed system; and 4) executes a release of claims against the Commonwealth related to the failed system. The statute also allows the Commissioner to use the Fund to support the program for training and recognition of authorized onsite soil evaluators and to assist owners in seeking redress from the system's builder or other private party.

On July 26, 2007, Dr. Robert Stroube, M.D., MPH, State Health Commissioner adopted Guidance Memorandum, and Policy #123.A (GMP #123.A) to explain how VDH would accept, process, and decide requests for indemnification under Title 32.1-164.1:01 of the Code of Virginia. The policy can be viewed at: <http://www.vdh.state.va.us/onsite/GMPs/GMP123.A.pdf>. The policy provides notice of the Fund, establishes the application procedure for Virginia real property owners to apply for assistance from the Fund, and establishes the procedure for investigating and processing requests for assistance from the Fund. The regulations will codify the substance of GMP #123.A by specifying what information must be included and which actions the owner must take in order to file a complete application for assistance from the Fund. The regulations will establish the conditions when a real property owner may, in cases of demonstrated financial hardship, apply for assistance from the Fund before the failing system has been repaired or replaced in accordance with applicable regulations. In addition the regulations will include guidelines for appealing a decision by the Commissioner and clarify the authority of the Sewage Handling and Disposal Appeal Review Board.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

The VDH and State Health Commissioner have administered the Fund since its creation in 1994 (Acts of Assembly Chapter 747 (2004)). In that time, the VDH has processed over 195 claims for indemnification. Because policies do not have the same binding legal authority as laws or regulations, real property owners seeking assistance from the Fund have, in some cases, endured a long, unpredictable review process. Similarly, cases with similar facts have had different outcomes depending on the trier of fact's willingness to adhere to a policy that did not carry the force of law or regulation.

Continuing to use a policy to implement the Fund would most likely result in long processes and unpredictable results for owners seeking assistance. The VDH believes regulations are the best way to ensure consistent and fair administration of the Fund. In addition, the regulatory process gives the public an opportunity to comment on the Commissioner's current policy to implement the Fund.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.

The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist owners in filing complete applications and developing requests for assistance, 2) the costs and benefits of the alternatives stated in this background document or other alternatives, and, 3) potential impacts of the regulation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Donald J. Alexander, Director, Division of Onsite Sewage and Water Services, 109 Governor Street, 5th floor, Richmond, Virginia 23219, (Fax: 804-864-7476, Email: Don.Alexander@vdh.virginia.gov). Written comments must include the name and address of the commenter. In order to be considered, comments must be received by the last day of the public comment period.

In addition, the agency is seeking information on 1) the need for the regulation, 2) the complexity of the regulation, 3) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation, and 4) the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

A public hearing will not be held unless public comments received indicate a need for such action.

Participatory approach

Please indicate, to the extent known, if advisers (e.g., ad hoc advisory committees, technical advisory committees) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The agency is inviting comment on whether to use the participatory approach in the development of a proposal.

Family impact

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

The proposed regulatory action will have no anticipated or associated impacts on family rights to educate and supervise children. It will not discourage economic self-sufficiency and family responsibilities and commitments or decrease disposable family income.