



Proposed Regulation Agency Background Document

Agency name	Board of Funeral Directors and Embalmers, Department of Health Professions
Virginia Administrative Code (VAC) citation	18VAC65-20-10 et seq.
Regulation title	Regulations of the Board of Funeral Directors and Embalmers
Action title	Requirements for crematories
Date this document prepared	2/5/07

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

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The Board is proposing standards for crematories that are registered or are a part of a licensed funeral establishment to include requirements for: 1) a manager of record who is a certified crematory operator and who is responsible for compliance with state and federal rules for crematories; 2) certification of all persons who operate a retort; 3) due diligence in the identification of the remains and authorization to cremate; 4) safe and ethical operation of a crematory; 5) handling of human remains; and 6) recordkeeping.

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., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility of the Board of Funeral Directors and Embalmers to promulgate regulations, levy fees, administer a registration and renewal program, and discipline regulated professionals.

§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*
- 4. To establish schedules for renewals of registration, certification and licensure.*
- 5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.*
- 7. To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations...*

In addition to the general powers and duties of a health regulatory board, the Board of Funeral Directors and Embalmers has specific statutory authority as follows:

§ 54.1-2803. Specific powers and duties of Board.

In addition to the general powers and duties conferred in this subtitle, the Board shall have the following specific powers and duties to:

- 1. Establish standards of service and practice for the funeral service profession in the Commonwealth.***
- 2. Regulate and inspect funeral service establishments, their operation and licenses.***
- 3. Require licensees and funeral service interns to submit all information relevant to their practice or business.*
- 4. Enforce the relevant regulations of the Board of Health.*
- 5. Enforce local ordinances relating to funeral service establishments.*
- 6. Advise the Department of Health Professions of any training appropriate for inspectors serving as the Board's agents.*
- 7. Establish, supervise, regulate and control, in accordance with the law, programs for funeral service interns.*
- 8. Establish standards for and approve schools of mortuary science or funeral service.*

9. Regulate preneed funeral contracts and preneed funeral trust accounts as prescribed by this chapter, including, but not limited to, the authority to prescribe preneed contract forms, disclosure requirements and disclosure forms and to require reasonable bonds to insure performance of preneed contracts.

10. **Inspect crematories and their operations.**

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

As a result of the work of a Task Force on Cremation laws and regulations, the Board has amended its regulations for the practice of funeral services to establish standards for crematories and the persons who operate them. While the Board has authority to oversee and inspect crematories, it has not had regulatory standards by which to determine that a facility is not operating in a manner that ensures the integrity of the cremation process and protects those who may come in contact with dead human remains. The goal of the regulatory action is to establish some accountability for the facility, standards for clear identification of remains and authorization to cremate, acceptable and safe cremation practices, and appropriate training for operators to protect the health, safety and welfare of the consuming public.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

The Board has amended existing regulations to establish the following requirements in regulations governing crematories:

- Crematory to name a manager of record
- Training for operators of the crematory, including OSHA standards
- A funeral service licensee to obtain authorization to cremate and the content of an authorization form
- A method for positive identification of remains
- Maintenance of documentation
- Standards for proper storage of remains prior to cremation
- A permit to operate the crematory for agencies such as the Department of Environmental Quality
- Acceptable cremation practices, including prohibition on multiple cremations at one time
- A preclusion of the cremation of non-human remains in same retort
- Removal and disposal of radioactive devices and other non-biological materials and devices

- Certification of crematory operators

The Board is acting within its statutory authority to establish standards for the practice of funeral service, including cremation and to determine the qualifications to enable any person to engage in the practice of funeral service and the operation of a funeral service establishment, including a crematory. Standards are necessary to ensure that there is a responsible party for the operation of the crematory and that operators are properly trained for the safe operation of the retort, including meeting OSHA and DEQ standards to protect the employees of the establishment but also persons in the community. Other requirements will ensure that cremation is not performed on the wrong remains or against the wishes of the next-of-kin. With additional regulatory standards, inspectors will be able to ensure cremation is practiced in a manner that respects the dignity of human remains, provides assurance to families, and protects the health and safety of those who may be affected by the practices of a crematory.

Issues

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

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

- 1) The primary advantage to the public would be greater assurance that a cremation would be handled properly, that human remains would not be mixed with non-human, that due diligence would be taken to ensure the correct remains are cremated, and that operators would be adequately trained and crematories accountable. There are no disadvantages because the cost of certifying operators (approx. \$500) should not increase the cost of cremations.
- 2) The primary advantage to the Commonwealth and the agency would be the establishment of standards by which a crematory can be judged. The Board currently has statutory authority to inspect crematories but no regulatory standards by which to base a finding or require a correction. There are no disadvantages to the agency.
- 3) There are no other pertinent matters of interest.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no requirements more restrictive than federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities particularly affected by the proposed regulations.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is 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:

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Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

A public hearing will be held and notice of the public hearing will appear on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov). Both oral and written comments may be submitted at that time. Electronic comment may be sent by email or entered on the Regulatory Townhall.

Economic impact

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going</p>	<p>a) As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and</p>
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<p>expenditures</p>	<p>application fees it charges to practitioners for necessary functions of regulation; b) The agency will incur some one-time costs (less than \$1,000) for mailings to the Public Participation Guidelines mailing lists, conducting a public hearing, and sending notice of final regulations to regulated entities. Every effort will be made to incorporate those into anticipated mailings and Board meetings already scheduled. There will be some on-going costs to the agency for enforcement of new requirements through inspections of funeral establishments and crematories or by complaints filed by consumers. Enforcement costs are borne by fees paid by the regulants to the agency.</p>
<p>Projected cost of the regulation on localities</p>	<p>None</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the regulation</p>	<p>The individuals and businesses that are likely to be affected by the regulation are funeral establishments that operate crematories and crematories registered with the Board.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>There are currently 507 licensed funeral establishments; of that number approximately 350 would be considered small businesses. The rest are establishments that are owned by large, national or international corporations. The Board does not have a record of how many of those establishments operate a crematory. There are 76 “stand-alone” crematories registered with the Board. They do business with funeral establishments but not with the general public.</p>
<p>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>Attendance at a CANA operators certification program organized by CANA costs \$495 for a non-member (\$100 can be applied to CANA membership) and \$395 for a member. Someone who has been trained by a CANA-certified trainer may apply for a crematory operators test with a payment of \$175.</p>

Alternatives

Please describe any viable 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. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

The Board appointed a Task Force on Cremation to look at the issues and problems with cremation and crematories, not only in Virginia but nationally. There have been some egregious and well-publicized examples of the failure of crematories and their operators to act in an ethical and appropriate manner. Bodies have been left uncremated, animal remains have been mixed

with human remains and the wrong body has been cremated. The Task Force consisted on four board members, representatives of the Virginia Cemetery Association, the Virginia Morticians Association, the Virginia Funeral Director's Association, the Independent Funeral Directors of Virginia, and persons who own crematories and funeral establishments with crematories.

To attempt to protect the public in Virginia from such incidences, the Board believes it must be proactive in establishing standards. The Task Force has met on five occasions to review the model regulations of the Cremation Association of North America (CANA) and to look at laws and regulations in other states, such as Maryland and North Carolina.

In a letter dated April 23, 2007, the Senior Policy Analyst for the Department of Health Professions inquired of the Board's Counsel whether it had statutory authority to regulate certain aspects of the identification and cremation process. In a response from the Assistant Attorney General, the Board was advised that it did not have authority to establish a next-of-kin hierarchy for the disposition of remains nor the authority to grant a limitation on liability for cremation-related activities. Both matters are statutory and would need to be dealt with through introduction of legislation. Therefore, the proposed regulations are limited in scope to those requirements which the Office of the Attorney General has advised are within the legal authority of the Board.

There were two regulatory changes identified in the Notice of Intended Regulatory Action that were not included in the proposed regulations:

- Standards for disposal of unclaimed remains – In response to the NOIRA, the Board received a letter from Dr. Fierro, the Chief Medical Examiner for the Commonwealth. She asked that the proposed standards require return of cremains of unclaimed and unidentified bodies to the Sheriff of a locality to be retrievable at some later date if kin appear. She also requested for a prohibition on the cremation of unidentified bodies that are victims of homicide since the remains may need to be retrieved if there is dispute over the original autopsy findings. The Board determined that the issue raised by the ME were beyond the scope of its regulatory action, would require further consultation with local law enforcement agencies and medical examiners, and may necessitate changes to the Code.
- A waiting period after death prior to cremation (with religious practice exception) – Following the model rules on cremation, the Board originally intended to include a 48-hour waiting period for cremation to ensure proper identification, etc. There would be an exemption for religious groups in which immediate burial or disposition is required. In discussion of the rule, the consensus was that a regulation was unnecessary since the process of obtaining a death certificate and authorization to cremate typically takes at least 48 hours.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

The Board published a Notice of Intended Regulatory Action on September 17, 2007 with comment until October 17, 2007. No comment was received during that period, but the intended parties who represent cemeteries, funeral establishments and crematories were participants in the Task Force that developed and recommended regulations.

Family impact

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

There is no impact on the institution of the family and family stability.

Detail of changes

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

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
10	n/a	Sets definitions for words and terms used in regulations	Adds a definition for the term “cremation container” as used in the standards for crematories.
60	n/a	Sets out requirements for accuracy of information	Includes crematories in the requirements for informing the Board of changes of address, and in the provision that notices required to be mailed to any registrant are validly given when sent to the address on file.
435	n/a	Sets out requirements for registration of a crematory	<p>Amended regulations require the owner of a crematory to designate a manager of record for the facility on the application.</p> <p><i>As with funeral establishments, it is essential to have <u>a</u> person designated as the responsible party. If an owner meets the qualifications of a manager, he may designate himself or herself, rather than an employee.</i></p> <p>The regulation further specifies that the owner of the crematory cannot abridge the authority of the manager of record relating to compliance with the laws governing the practice of funeral services and regulations of the board.</p> <p><i>Since the manager of record is accountable to the</i></p>

		<p><i>Board for compliance with law and regulation, regulations would prohibit the owner from setting policies or giving instruction that would result in non-compliance.</i></p> <p>B. Every crematory, regardless of how owned, shall have a manager of record who has achieved certification by the Cremation Association of North America (CANA), the International Cemetery, Cremation and Funeral Association (ICCFA), or other certification recognized by the board and who has received training in compliance with requirements of the Occupational Health and Safety Administration (OSHA). Every manager of record registered by the board prior to (the effective date of this section) shall have one year from that date to obtain such certification.</p> <p><i>Certification will ensure that a manager is properly trained in all aspects of operating a crematory in compliance with law and regulation. The only certifications that the Board is currently aware of are CANA and ICCFA. Most crematory operators obtain CANA certification, but the ICCFA is another option. OSHA training is essential to ensure that the crematory is operating and dead human remains are being handled in compliance with occupational health and safety rules.</i></p> <p>C. The manager shall be fully accountable for the operation of the crematory as it pertains to the laws and regulations governing the practice of funeral services, to include but not be limited to:</p> <ol style="list-style-type: none"> 1. Maintenance of the facility within standards established in this chapter; 2. Retention of reports and documents as prescribed by the board in 18VAC65-20-436 during the period in which he serves as manager of record; and 3. Reporting to the board of any changes in information as required by 18VAC65-20-60. <p><i>The manager of record is held accountable for compliance with laws and regulations pertaining to the operation of the crematory. The regulations in subsection C specifically list maintenance of the facility, retention of records and reporting to the Board.</i></p> <p>D. All persons who operate the retort in a crematory shall have certification by the Cremation Association of North America (CANA), the</p>
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			<p>International Cemetery, Cremation and Funeral Association (ICCFA), or other certification recognized by the board. Every operator in a crematory registered by the board prior to (the effective date of this section) shall have one year from that date to obtain such certification. Persons receiving training toward certification to operate a retort shall be allowed to work under the supervision of an operator who holds certification for a period not to exceed six months.</p> <p><i>Certification is necessary to ensure that everyone who is an operator in a crematory is properly trained on identification of the remains, proper handling of remains, operation of the retort, etc. The Cremation Association of North American will come to Virginia and conduct training sessions throughout the state in order to get operators certified, once certification is a requirement. They will also conduct training in funeral facilities that operate crematories to continue providing opportunities for certification. Persons who hold CANA certification and have attended CANA operator training within the last five years are allowed to train others for certification. Regulations would allow all operators one year to become certified and would allow a person to work for up to six months while receiving training toward certification.</i></p> <p><i>CANA has been providing crematory operator certification for industry personnel for many years. They have developed a core curriculum, and have added modules to the program based on the specific regulatory requirements of individual states. The program is scheduled in various locations around the country, and this year CANA has begun offering the training at select mortuary schools throughout the United States. They also have partnered with state regulatory boards to offer the certification program in a specific state which has recently adopted certification regulations. The most current example of such a partnership occurred in New York State, where CANA certified hundreds of crematory operators in four locations in NY state following a regulatory change which called for mandatory training of all operators statewide. The CANA Certification Committee can evaluate the Virginia regulations and create a program that will addresses specific requirements.</i></p>
n/a	436	n/a	Sets the standards for registered crematories or

			<p>funeral establishments that operate a crematory</p> <p>A. Authorization to cremate. In accordance with § 54.1-2818.1, a crematory shall require a cremation authorization form executed in person or electronically in a manner that provides a copy of an original signature of the next-of-kin or the person designated pursuant to § 54.1-2825. The cremation authorization form shall include an attestation of visual identification of the deceased from a viewing of the remains or a photograph signed by the person making the identification. The identification attestation shall either be given on the cremation authorization form or on an identification form attached to the cremation authorization form. <i>One of the most critical aspects of cremation is the assurance that the remains are properly identified and that cremation has been appropriately authorized. The law requires “visual identification” before a cremation can be carried out, so the authorization to cremate must include an attestation that the identification has been carried out. Identification attestation can be on a separate form or can be a part of the cremation authorization form signed by the next-of-kin or person designated to make final arrangements for disposition of the body. Having written authorization is essential to provide a record that the cremation was legally authorized and that the correct remains have been cremated.</i></p> <p>B. Standards for cremation. The following standards shall be required for every crematory:</p> <ol style="list-style-type: none"> 1. Every crematory shall provide evidence at the time of an inspection of a permit to operate issued by the Department of Environmental Quality (DEQ). 2. A crematory shall not knowingly cremate a body with a pacemaker, defibrillator or other potentially hazardous implant in place. 3. A crematory shall not cremate the human remains of more than one person simultaneously in the same retort, unless the crematory has received specific written authorization to do so from the person signing the cremation authorization form. 4. A crematory shall not cremate non-human remains in a retort permitted by DEQ for cremation of human remains. 5. Whenever a crematory is unable to cremate the remains immediately upon taking custody thereof, the crematory shall maintain the remains in refrigeration at 40 degrees Fahrenheit or less, unless the remains have been embalmed.
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