



Proposed Regulation 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	September 22, 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*.

Brief summary

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

The regulations administer § 32.1-164.1:01 of the *Code of Virginia*, which creates the Onsite Sewage Indemnification Fund (the "Fund"). The Fund reimburses Virginia real property owners whose onsite sewage systems fail within three years of construction from the negligence of the Virginia Department of Health (VDH). In order to receive assistance, the commissioner must find that the Virginia real property owner:

- 1) Meets the statutory requirements specified in the Code of Virginia (i.e., valid permit, failure of onsite sewage system within three years from installation, negligent actions by VDH caused failure);
- 2) Submits a complete application within one year of the date of failure;
- 3) Follows the requirements to repair or replace the failed system; and
- 4) Executes a release of claims against the Commonwealth related to the failed system.

If the commissioner finds that the onsite sewage system failed within three years from faulty construction or other private party error, then the commissioner may assist the owner in seeking redress from the system's builder or other private party.

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.

- 1) 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 sewage indemnification fund program.
- 2) The Code of Virginia states that the Board of Health "may promulgate regulations pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) for the administration of the Fund consistent with this chapter." The authority is discretionary.

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.

- 1) The VDH proposes regulations to administer the Fund. The regulation is essential because implementing the code through policy has led to uncertain outcomes, inconsistent results, and lengthy decision processes. The regulations will encourage owners to repair failing systems as quickly as possible.
- 2) The goals of the regulations will be to provide notice of the Fund, establish the application for reimbursement from the *Fund*, and establish the procedure for investigating and processing requests for assistance.

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 regulations will require all provisions and mandates in § 32.1-164.1:01 of the Code of Virginia. The regulations will require owners to submit complete applications within one year of the date of first failure. The regulations will specify the requirements for a complete application, which will include the actual cost of reimbursement. In cases of demonstrated financial hardship, the regulations will provide an opportunity for partial reimbursement before the complete system is actually installed. Before receiving payment, an owner must sign a release and hold harmless agreement. The regulations will include requirements for decisions and how owners may challenge decisions. The regulations will also state that the commissioner may assist owners whose sewage systems fail within three years of construction from private party error.

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 public's primary advantage is getting a clear and simple application to seek reimbursement. The public will also have a clearly outlined evaluation process for considering reimbursement requests. Owners can anticipate consistent and fair outcomes with the regulations. In cases of financial hardship, the public will have opportunity for reimbursement before the failing system is repaired. Because the regulation reimburses qualified owners, has financial hardship allowances, and provides an appeal process for unwanted outcomes, the agency does not foresee a disadvantage to the public, private citizens, or businesses.

2) The primary advantage to the agency is getting an established process with public input. An established process by regulation will assure that decisions are fair and consistent with the mandates of the Code of Virginia. The agency does not foresee any disadvantage with the regulations.

3) No other pertinent matter of interest is anticipated.

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 is no federal requirement.

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.

No locality is affected by the regulation.

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 of Health is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the Board of Health 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 facsimile to Dwayne Roadcap, Program Manager, Division of Onsite Sewage and Water Services, 109 Governor Street, 5th Floor, Richmond, Virginia 23219, facsimile: (804) 864-7476, email: Dwayne.Roadcap@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 date of the public comment period.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

<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 expenditures</p>	<p>(a) The Fund receives ten (10) dollars of each fee collected by the Department of Health pursuant to subsections C and E of § 32.1-164 of the Code of Virginia. VDH estimates annual revenue of about \$250,000 to \$300,000 per year (25,000 to 30,000 applications).</p> <p>(b) On-going administrative expenses are expected to be as follows:</p> <p>0.5 FTE (mean salary for 5-C position plus benefits) = \$47,058.00. The 5-C position will accept the applications, process the requests, and administer the code, the regulations, and appeal process. The agency believes about 10 claims per year will be paid with an average payment of \$20,000 per claim. The on-going charge to reimburse qualifying owners is expected to be \$200,000 per year (10 claims times \$20,000 per claim). Total yearly costs are estimated to be \$247,058.00 per year.</p>
<p>Projected cost of the regulation on localities</p>	<p>\$0.00</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the regulation</p>	<p>Virginia real property owners with an onsite sewage system that fails within three years of its construction date.</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>Twenty-four (24) to 30 Virginia real property owners per year and zero (0) small business entities.</p>
<p>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the</p>	<p>\$0.00 There is no financial cost to submit the required application. The agency believes the application</p>

<p>projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>can be completed within a few minutes once the information for reimbursement is gathered.</p>
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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 VDH and State Health Commissioner have administered the Fund since its creation in 1994 (Acts of Assembly Chapter 747 (2004)). 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>. Since 1994, the VDH has processed over 225 claims for indemnification.

Because policies do not have the same binding legal authority as laws or regulations, 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.

Given the difficulties and uncertain outcomes in administering the Code of Virginia through a policy, the agency believes that simple and concise regulations are the least burdensome alternative. Owners can expect a more consistent, fairer, and quicker decision making process with regulations.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

1) The agency does not foresee a less stringent compliance or reporting requirement. The VDH believes the application requirements are not burdensome and can be completed within a few minutes. No fee is charged to submit an application.

2) The deadlines specified in the regulations are required by § 32.1-164.1:01 of the Code of Virginia; hence, the agency has not considered other deadlines.

3) The VDH believes its application cannot be further simplified.

- 4) No performance standard is required of small businesses.
- 5) Small business owners, if they are Virginia real property owners, may receive reimbursement from the Fund if the statutory requirements for payment are met. To determine whether a Virginia real property owner qualifies for reimbursement, an appropriate and complete application is needed. Of the more than 225 claims for reimbursement processed since 1994, no small business has requested reimbursement for a failed onsite sewage system.

Public comment

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

No comments were received during the public comment period following the NOIRA's publication.

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.

The regulation will not impact the institution of the family and family stability since it reimburses qualified Virginia real property owners for failed onsite sewage systems.

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.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
Not applicable	12 VAC 5 612-10	Not applicable	Specifies the purpose of the regulations. Administers requests for reimbursement when owners believe health department negligence caused their onsite sewage system to fail within three years of its construction date.
Not applicable	12 VAC 5 612-20	Not applicable	Provides definitions so that similar

			understanding can be reached when certain terms and phrases are used.
Not applicable	12 VAC 5 612-30	Not applicable	Notifies stakeholders how the regulations will interact with the Sewage Handling and Disposal Regulations.
Not applicable	12 VAC 5 612-40	Not applicable	Defines the contents of a complete application. Requires owners to submit a complete application within one year of the date that the system or components thereof failed. The requirements reflect legislative mandates in the <i>Code of Virginia</i> .
Not applicable	12 VAC 5 612-50	Not applicable	Provides opportunity for review of incomplete applications based on financial hardship. The agency believes owners in financial need should have an allowance for review.
Not applicable	12 VAC 5 612-60	Not applicable	Provides opportunity for owners to seek an informal fact-finding conference. This consideration will assure owners have due process and can present all information they believe is important in making a decision.
Not applicable	12 VAC 5 612-70	Not applicable	Outlines the procedures and conditions for making a decision so that owners understand the criteria and process for evaluating claims for reimbursement. States the commissioner can assist owners in seeking redress from private parties if private party error caused the system to fail within three years of its construction date. This section conforms to requirements of the Code of Virginia.
Not applicable	12 VAC 5 612-80	Not applicable	Requires owners to sign a release and hold harmless agreement before reimbursement is disbursed. This mandate is a requirement of the Code of Virginia.
Not applicable	12 VAC 5 612-90	Not applicable	Specifies the procedures and process to appeal a reimbursement decision. This section gives owners notice of their rights to due process.
Not applicable	12 VAC 5 612-100	Not applicable	Outlines prohibitions and limitations of reimbursement as required by the Code of Virginia.