



Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Department of Health (VDH)
Virginia Administrative Code (VAC) citation	12 VAC 5-590 et seq.
Regulation title	Waterworks Regulations
Action title	Provides discretionary authority to require certain permitted waterworks owners to post a bond or deposit funds in escrow.
Date this document prepared	October 19, 2011

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) 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 planned regulatory action, based upon legislative changes, gives VDH authority to require permitted waterworks owners to post a bond or deposit funds in escrow, subject to forfeiture should the waterworks fail to perform. One of the major reasons that small rural waterworks fail is because of a lack of funding to maintain, repair, or replace the aging waterworks system infrastructure. Thus, the goal of the new regulation is to use the forfeited funds to maintain, repair, or replace an aging waterworks infrastructure to sustain water service to the customers and protect public health.

No state, local or other governmental agency is required to post a bond or deposit funds, and VDH may, by regulation, exempt certain classes of waterworks owners from these requirements if such classes present no significant risk to public health and safety.

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.

§ 32.1-174.1 of the *Code of Virginia* as amended [Chapter 502 of the Virginia Acts of Assembly—2011 Session] gives the Board of Health (BOH) the discretionary authority to adopt a regulation to require permitted owners of waterworks to post bonds or deposit funds to be placed in escrow.”

§ 32.1-170 of the *Code of Virginia* empowers the BOH to promulgate regulations governing waterworks, water supplies, and pure water... designed to protect the public health and promote the public welfare and shall include criteria and procedures to accomplish these purposes.

§ 32.1-12 of the *Code of Virginia* provides that the BOH make, adopt, promulgate and enforce such regulations and provide for reasonable variances and exemptions therefrom as may be necessary to carry out the provisions of this title and other laws of the Commonwealth administered by it, the Commissioner or the Department.

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.

One of the major reasons waterworks fail is because of a lack of funding to maintain, repair, or replace the aging waterworks system infrastructure. Revocation of a Waterworks Operation Permit is typically the result of a failure of a waterworks owner to continuously provide safe drinking water to the consumers, even after various enforcement actions have been taken against the owner by VDH. The planned regulatory action gives VDH the discretionary authority to require permitted waterworks owners to post a bond or deposit funds in escrow, subject to forfeiture, should the waterworks fail to perform. The goal is for the forfeited funds to be used to maintain operation of the waterworks to sustain water service to the customers.

One potential issue to be addressed in the implementation of the proposed regulation would be the criteria upon which the amount of acceptable bond is to be set. Variables include, but are not limited to: (1) the number of persons served by the waterworks; (2) the number of connections served; (3) the age and condition of the waterworks infrastructure; (4) the cost of maintaining, repairing, or replacing the waterworks infrastructure; and, (5) the water supply capacity of the permit holder.

Another issue to be addressed is determining if a bonding company willing to issue a bond to a waterworks owner. In the 1980s when § 32.1-174.1 of the *Code of Virginia* was first enacted, the Office of the Attorney General advised VDH that it would be difficult for VDH to find a bonding company willing to issue forfeiture bonds to a waterworks because of the high risk. VDH also received information at that time that the home building industry would oppose a requirement to bond a waterworks. VDH still has no clear indication that bonding for small waterworks can be accomplished through normal financial institutions. Consequently, VDH has not promulgated regulations as authorized by the original bonding statute since it was adopted in the 1980s.

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.

VDH has been granted the discretionary authority to adopt a new regulation requiring permitted waterworks owners to post a bond or deposit funds in escrow, subject to forfeiture, should the waterworks fail to perform. If eminent domain or receivership proceedings are initiated within one year of the forfeiture, the funds forfeited would be paid to the county, city or town in which the waterworks is located. The goal of the regulation is to use the funds to maintain operation of the waterworks and continue water service to the customers. No state, local, or other governmental agency is required to post a bond or deposit funds, and VDH may, by regulation, exempt certain classes of waterworks owners from these requirements, if such classes present no significant risk to public health and safety.

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.

Section 32.1-174.1 of the *Code of Virginia* states that the Board “may” adopt regulations requiring permitted waterworks owners to post bonds or place funds in escrow and thus, an alternative would be not to adopt regulations addressing the issue. There exists the challenge of finding a bonding company that will issue a high risk forfeiture bond to waterworks owners. Additionally, since small rural waterworks that serve fewer than 100 persons represent the majority of the waterworks with serious, ongoing compliance problems mainly because of the lack of financial capabilities, the imposition of a bonding requirement may prove ineffective. In fact, the additional financial burden could force small waterworks owners with compliance and funding issues to abandon the waterworks.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including 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 in the development of a proposal, 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 comments may do so during the comment period via the Regulatory Town Hall website at www.townhall.virginia.gov, or by mail, email, or fax to: **Cathy Hanchey, Virginia Department of Health Office of Drinking Water; Address: 109 Governor Street, Richmond, VA 23219; Email: Cathy.Hanchey@vdh.virginia.gov; Telephone: 804-864-7506; Fax: 804-864-7521.** 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.

A public hearing will not be held.

Participatory approach

Please indicate, to the extent known, if advisers (e.g., ad hoc advisory committees, regulatory advisory panels) 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 Waterworks Advisory Committee (WAC) will be utilized to assist in the drafting of the proposed regulation being considered. The WAC consists of thirteen appointed members and three ex officio members. All members of the WAC represent some specific discipline of the water supply industry.

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.

Diverging potential impacts could result from this proposed regulatory action. Owners of small, investor-owned waterworks will experience an increased cost in providing drinking water if required to post bonds or place funds in escrow. The increased cost will be passed on to the waterworks customers who will likely decrease disposable family income. Conversely, some consumers served by a waterworks whose ownership has been assumed through the bond forfeiture process by a county, city or town or public service authority could experience an increase in their disposable family income due to improved health from the waterworks being operated in compliance with the *Waterworks Regulations*.