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## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	Virginia Department of Health
<b>Virginia Administrative Code (VAC) Chapter citation(s)</b>	12 VAC 5-600
<b>VAC Chapter title(s)</b>	<i>Waterworks Operation Fee</i> regulations
<b>Action title</b>	Amend and update the <i>Waterworks Operation Fee</i> regulations
<b>Date this document prepared</b>	September 1, 2021

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

### Brief Summary

*Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).*

The State Board of Health (the "Board") intends to amend the *Waterworks Operation Fee* regulation as a result of the periodic review that concluded in March 2021. The Board's intent is to review (1) how the Virginia Department of Health (VDH), through the Office of Drinking Water (ODW), provides technical and regulatory assistance to different types (community, nontransient noncommunity (NTNC), transient noncommunity (TNC), and wholesale) and sizes of waterworks, including those serving disadvantaged communities and (2) how waterworks support that assistance through operation fees. VDH will also consider equity and environmental justice issues as they relate to the operation fees waterworks pay.

Currently, NTNC waterworks and community waterworks with fewer than roughly 30 service connections pay lower operation fees than most community waterworks serving localities. TNC and wholesale waterworks pay no operation fees. However, historically, very small community waterworks (defined by the U.S. Environmental Protection Agency as serving 500 or fewer persons), TNC waterworks, and NTNC waterworks require more technical assistance and/or enforcement from ODW to maintain compliance with

drinking water and operational standards in Virginia’s *Waterworks Regulations* (compared to larger community waterworks and wholesale waterworks serving most localities in Virginia).

VDH intends to amend the *Waterworks Operation Fee* regulation so that fees more accurately reflect the benefit members of the regulated community receive from the agency through technical and regulatory assistance.

## Acronyms and Definitions

*Define all acronyms or technical definitions used in this form.*

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“Board” means the State Board of Health.

“Community waterworks” means a waterworks that serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.

“Department” and “VDH” mean the Virginia Department of Health.

“Noncommunity waterworks” means a waterworks that is not a community waterworks, but operates at least 60 days out of the year.

“Nontransient noncommunity waterworks” or “NTNC” means a waterworks that is not a community waterworks and that regularly serves at least 25 of the same persons over six months out of the year. When used in the context of an NTNC, “regularly serves” means four or more hours per day, for four or more days per week, for 26 or more weeks per year.

“ODW” means the Office of Drinking Water, an operational unit in the Virginia Department of Health.

“Transient noncommunity waterworks” or “TNC” means a noncommunity waterworks that is not an NTNC. A TNC serves at least 25 persons daily for at least 60 days out of the year.

“Wholesale waterworks” means a waterworks that treats source water as necessary to produce potable water and then delivers some or all of that potable water to another waterworks. Delivery may be through a direct connection or through the distribution system of one or more consecutive waterworks.

## Mandate and Impetus

*Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”*

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This regulatory action under the standard rulemaking process is based in large part on conclusions VDH reached as a result of the periodic review process, following the public comment period that ended in March 2021. It is also based on feedback VDH received from members of the regulated community at meetings of the Waterworks Advisory Committee (WAC) during 2019 and 2020. The WAC is established in the Waterworks Regulations (12VAC5-590-45, formerly 12VAC5-590-40) to make recommendations to the State Health Commissioner regarding waterworks and water supply policies, procedures and programs of the ODW.

This effort is intended to address the following changes since the *Waterworks Operation Fee* regulation was last amended in 2014:

- Commenters (members of the WAC and periodic review) noted that VDH does not charge an operation fee to TNC owners; and
- Large community waterworks (those serving more than 10,000 persons) pay the largest percentage of fees but assert they do not receive an equivalent amount of technical assistance, while very small community waterworks, wholesale waterworks, and TNCs pay minimal or no

operation fees and receive a disproportionate amount of technical assistance and regulatory oversight from VDH.

There are not any federal mandates associated with the *Waterworks Operation Fee* regulation, but the funds generated are essential for VDH to operate the drinking water program in Virginia and provide technical and regulatory assistance to all waterworks across the Commonwealth.

### Legal Basis

*Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.*

The Virginia *Waterworks Operation Fee* regulations, 12VAC5-600, are mandated by Article 2, Chapter 6, Title 32.1 of the *Code of Virginia* titled "Public Water Supplies" (§ 32.1-167 *et seq.*), which empowers and directs the Board to adopt and promulgate regulations governing waterworks, water supplies and pure water to protect the public health and promote the public welfare.

*Code of Virginia* § 32.1-167 defines a "waterworks" as "a system that serves piped water for human consumption to at least 15 service connections or 25 or more individuals for at least 60 days out of the year. 'Waterworks' includes all structures, equipment, and appurtenances used in the storage, collection, purification, treatment, and distribution of pure water except the piping and fixtures inside the building where such water is delivered."

*Code of Virginia* § 32.1-169 provides that the Board (acting though VDH, see *Code of Virginia* § 32.1-16) "shall have general supervision and control over all water supplies and waterworks in the Commonwealth insofar as the bacteriological, chemical, radiological, and physical quality of waters furnished for human consumption may affect the public health and welfare and may require that all water supplies be pure water."

*Code of Virginia* § 32.1-171.1. A. states that "[e]very owner of a waterworks shall pay to the Department a waterworks operation fee of no more than \$160,000 per year. Based upon the number of persons served, the number of connections, or the classification of the waterworks, the Board shall, pursuant to its regulations, establish the fee to be charged each such owner and may exempt sizes and classes from the required fee." *Code of Virginia* § 32.1-171.1. C. states that revenues from the operation fees shall be used "to conduct the Waterworks Technical Assistance Program which shall include, but need not be limited to: (i) training for operator certification, (ii) engineering evaluation and advice, (iii) sample collection for laboratory analysis, and (iv) educational seminars."

*Code of Virginia* § 32.1-171.1 B. establishes a Waterworks Technical Assistance Fund which is to be used by the Department to conduct the Waterworks Technical Assistance Program.

### Purpose

*Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.*

The intent of the regulatory action is to amend and update the *Waterworks Operation Fee* regulation to ensure it is clear, concise, and more accurately reflects the benefit members of the regulated community receive through the technical and regulatory assistance ODW provides.

The goal of the regulatory action is to establish operation fees for all waterworks, whether community, NTNC, TNC, or wholesale waterworks, that fairly distribute the costs of the drinking water program among all beneficiaries, taking equity and environmental justice issues as they relate to the fees waterworks pay, into consideration to ensure fairness. The amendments will also help to ensure ODW has sufficient funds to conduct the Waterworks Technical Assistance Program established in *Code of Virginia* § 32.1-171.1 B.

## Substance

*Briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.*

Amendments to the regulation will include:

1. Amending 12VAC5-600-10 as needed to define terms used in the chapter.
2. Amending 12VAC5-600-20 to expand the purpose of the regulation to include TNCs, wholesale waterworks, fair distribution of the costs of the drinking water program among all beneficiaries, and considerations of equity and environmental justice as they relate to fees waterworks pay.
3. Amending section 12VAC5-600-50 to establish a minimum annual operation fee for all community waterworks, adjust the fee for each customer account, and adjust the schedule for charges and payment of fees.
4. Amending section 12VAC5-600-60 to adjust the NTNC operation fee and the schedule for payment of fees.
5. Adding a section that establishes an operation fee and schedule for payment of fees for TNC.
6. Adding a section that establishes an operation fee and schedule payment of fees for wholesale waterworks.
7. Amending section 12VAC5-600-90 to distinguish between wholesale waterworks and community waterworks that have service connections (which serve as the basis for their operation fees) and also sell or deliver water to another waterworks.
8. Make other amendments as necessary to consider equity and environmental justice issues as they relate to the fees waterworks pay.

## Alternatives to Regulation

*Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.*

The General Assembly established the waterworks operation fee in 1992 (Acts of Assembly Chapter 804), creating a funding source for the drinking water program separate from its general fund allocation in the state budget.

The *Waterworks Operation Fee* regulation represents a fee-for-service funding model. Under this model, the waterworks help support the drinking water program and receive the benefit of the technical services and regulatory assistance VDH provides. The operation fee has provided a consistent, reliable source of funding support for VDH to provide technical and regulatory assistance to waterworks.

However, in 2012, the General Assembly amended the Budget to allow VDH to increase the operation fee from \$2.05 per service connection to a maximum level of \$3.00 per service connection to offset a corresponding reduction of approximately \$800,000 in ODW's general fund allocation. While ODW's program and operational costs have increased over time due to inflation, new technological needs, salary adjustments, and other factors, revenue from operation fees and the general fund allocation have been consistent.

Without an increase in ODW's general fund allocation or another funding source, the waterworks operation fee remains an essential part of ODW's operating budget and enables staff to provide technical and regulatory assistance to waterworks on a regular, recurring basis.

If all of the more than 2,800 waterworks in the Commonwealth share the burden of the waterworks operation fees, instead of only the approximately 1,600 community and NTNC waterworks, it will provide more resources to ODW, which can then be reinvested in technical and regulatory assistance for the waterworks, and the burden on each waterworks will be more equitable.

### Periodic Review and Small Business Impact Review Announcement

*If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and Executive Order 14 (as amended, July 16, 2018)), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify as necessary for your agency. Otherwise, delete the paragraph below and insert "This NOIRA is not being used to announce a periodic review or a small business impact review."*

This NOIRA is not being used to announce a periodic review or a small business impact review.

### Public Participation

*Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.*

The Virginia Department of Health is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email, or fax to:

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(804) 864-7210  
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In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.