



Virginia
Regulatory
Town Hall

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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Department of General Services, Division of Consolidated Laboratory Services
Virginia Administrative Code (VAC) citation	1VAC30-40
Regulation title	Certification of Laboratories Analyzing Drinking Water
Action title	Revise regulation to meet current guidance under the federal Safe Drinking Water Act and to update fees
Date this document prepared	November 11, 2009

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.

This regulation sets out the requirements to certify laboratories that analyze drinking water samples used to determine compliance with federal Safe Drinking Water Act (SDWA) contaminant limits. The purpose of the proposed action is to update the regulation to incorporate the most recent federal guidance used to certify drinking water laboratories, the Environmental Protection Agency's (EPA's) *Manual for the Certification of Laboratories Analyzing Drinking Water*, Fifth Edition (January 2005) and *Supplement 1 to the Fifth Edition* (June 2008). The proposed action will also revise the fees charged under the regulation. These fees have not changed since 1994 and need to be brought in line with the current costs of the program.

This action will complete the process to revise 1VAC30-40 to meet current federal requirements. This process began with the recent exempt action final regulation that updates 1VAC30-40 to incorporate by reference current federal requirements for analytical test methods. EPA requires states holding primacy under the SDWA to meet current federal requirements for the certification of drinking water laboratories.

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.

Federal Legal Authority

Under the federal SDWA (42 USC 300f *et seq.*), EPA sets national limits on contaminant levels in drinking water to ensure that the water is safe for human consumption. The federal regulations at 40 CFR 142.10 (b)(3)(i) require the establishment and maintenance of a State program for the certification of laboratories conducting analytical measurements of drinking water contaminants pursuant to the requirements of the State primary drinking water regulations. To determine compliance under the SDWA, EPA at 40 CFR 141.28 requires that the analysis of samples must be made by certified laboratories.

Virginia Legal Authority

Section 2.2-1102 A 1 of the *Code of Virginia* authorizes the Department of General Services (DGS) to prescribe regulations necessary or incidental to the performance of the Department's duties or execution of powers conferred by the *Code*. The statutory authority to promulgate regulations is discretionary based on whether the proposed regulation is "necessary or incidental to the performance of the Department's duties or execution of powers conferred" by the *Code of Virginia*.

Section 2.2-1102 A 2 of the *Code of Virginia* authorizes DGS to establish fee schedules that may be collectible from users when general fund appropriations are not applicable to the services rendered.

Section 2.2-1104 A 4 of the *Code of Virginia* authorizes the Division of Consolidated Laboratory Services (DCLS) to establish and conduct programs of inspection and certification of other laboratories in the Commonwealth as mandated by the federal Safe Drinking Water Act (SDWA) and state requirements pursuant to the Act.

Promulgating Entity

The promulgating entity for this regulation is the Division of Consolidated Laboratory Services of the Department of General Services.

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.

The SDWA is carried out in Virginia by the Department of Health. The Waterworks Regulation (12VAC5-590) promulgated by the Department of Health sets standards for the maximum permissible level of contaminants in water that will be used as drinking water. The regulation at 12VAC5-590-340 requires all analyses for the purpose of demonstrating compliance with the primary and secondary maximum contaminant levels or action levels be performed by DCLS or by laboratories certified by DCLS for such purposes. The Department of Health is the agency with the primary enforcement authority (primacy) to carry out the SDWA in Virginia. To maintain primacy it is necessary to keep the regulation to certify drinking water laboratories up-to-date.

The proposed regulatory action is necessary to keep the drinking water laboratory certification regulation up-to-date and to maintain primacy. The proposed regulatory action is necessary to (a) incorporate the

latest EPA guidance on the certification of drinking water laboratories and (b) revise the fees charged for the certification so that the fees will be in line with current agency costs of 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.

The following revisions to 1VAC30-40 are being considered:

1. Remove the references to outdated versions of the EPA *Manual for the Certification of Laboratories Analyzing Drinking Water (Manual)*. Incorporate by reference the most recent version of the *Manual* and any supplements.
2. Remove provisions from the regulation that were included verbatim from outdated versions of the *Manual*. Replace these provisions with the requirements from the most recent version of the *Manual*.
3. Revise the fee provisions of 1VAC30-40-60 so that the fees more closely cover the costs of the program.
4. Add a provision allowing drinking water laboratories to obtain certification by meeting the requirements of 1VAC30-46, *Accreditation for Commercial Environmental Laboratories*. EPA allows drinking water laboratories to substitute accreditation under the requirements of the national standards incorporated in 1VAC30-46 for the certification requirements under the SDWA.

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.

Two alternatives pertain to updating the regulation to meet current federal guidance used to certify drinking water laboratories. The first is to revise the regulation so that it conforms to current federal guidance. The second is not to do so. The agency believes the first alternative is appropriate and meets the purpose of this proposed action to help maintain SDWA primacy in Virginia.

Revising the fee provisions presents a number of alternatives. In general, the fees may be left at the current levels or raised to bring them into line with current costs. The agency believes that the fees need to be brought in line with current costs. The fees are charged only to private (commercial or industrial) laboratories at present. Government laboratories are exempt from fees. This exemption for government laboratories could be continued or alternatively government laboratories could also be charged a fee to be certified under the program. Government laboratories are approximately one-quarter of the total laboratories currently certified under the program. The agency believes that charging a fee to all laboratories applying for certification under this regulation would be the preferred approach.

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 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 via the Regulatory Townhall website, www.townhall.virginia.gov, or by mail, email or fax to Nancy S. Saylor, in c/o DCLS, 600 North 5th Street, Richmond, VA, 23219, nssaylor@verizon.net, 804-231-7980 (phone) or 804-371-7973 (fax). 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 to receive comments on this notice.

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 does not intend to use a regulatory advisory panel (RAP) in the development of a proposal. The agency will consider the use of a RAP in response to requests received during the NOIRA public comment period. Any person requesting the use of a RAP must indicate whether he or she wishes to participate in the RAP. If so, their name, address, phone number, e-mail address, and organization must be included in the request. This request must be received by the end of the public comment period.

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.

It is not anticipated that the proposal will have a direct impact on families. There will be a positive indirect impact on families in that the proposal will ensure that the Commonwealth's requirements for the determination of compliance under the federal SDWA will be made current.