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Fast-Track Regulation Agency Background Document

Agency name	Virginia Department of Health
Virginia Administrative Code (VAC) citation(s)	12VAC5-135
Regulation title(s)	Recreational Water Advisories
Action title	Establish Regulations for Recreational Water
Date this document prepared	8/20/18

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 (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

Regulations will be promulgated within the Virginia Administrative Code to establish the Virginia Department of Health's (VDH) role in issuing and lifting recreational water advisories based on the Beach Action Value (BAV). The BAV is the concentration of an indicator organism equal to or above which beach advisories shall be issued and below which beach advisories shall be lifted. The regulation will include procedures for issuing and lifting beach advisories. Currently, beach advisories are issued by VDH, however, the authority lies within the Department of Environmental Quality's (DEQ) regulation 9VAC25-260-170. DEQ is promulgating a revision of this regulation which would remove 9VAC25-260-170(A)(5) which reads:

"For beach advisories or closures, a single sample maximum of 235 E. coli CFU/100 ml in freshwater and a single sample maximum of 104 enterococci CFU/100 ml in saltwater and transition zones shall apply." In order for VDH to continue to manage beach advisories in recreational water, promulgation of the proposed regulation is necessary in the VDH section of the Virginia Administrative Code. The proposed regulation will be promulgated in 12VAC5-135. Substantive changes include the removal of individual

reference values for the single sample maximum (235 *E. coli* CFU/100 ml in freshwater and 104 enterococci CFU/100 ml in saltwater and transition zones) and establishing in the new regulation reference to a BAV. The BAV will be maintained in the VDH Beach Monitoring and Notification Protocol. The BAV threshold is set at 104 enterococci CFU/100 ml in salt water and transition zones. There is no established VDH monitoring protocol for *E. coli* in recreational fresh water for the issuance of advisories.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

- VDH – Virginia Department of Health
- DEQ – Department of Environmental Quality
- BAV – Beach Action Value
- VAC – Virginia Administrative Code
- CFU – Colony Forming Units

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

Mandate and Impetus

Please 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, board decision, etc.). 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."

As required by Virginia Code § 2.2-4012.1, please also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.

This regulatory action was initiated as the result of a board decision in response to an action by DEQ. The DEQ Regulatory Advisory Panel (RAP), which included representatives of VDH, other local and state agencies, and non-profit organizations, reached consensus on the removal of the beach advisory and closure language provided VDH promulgated regulations in the Virginia Administrative Code to manage beach advisories in recreational water. VDH does not expect this rulemaking to be controversial. Further, promulgation of this regulation will not result in any changes to the current practice of issuing and lifting recreational water advisories, other than it is moving from one VAC chapter to another and adding procedures for issuing and lifting beach advisories.

Legal Basis

Please identify (1) the agency or other promulgating entity, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of

Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity's overall regulatory authority.

Statutory authority to promulgate these regulations is granted to the State Board of Health pursuant to Va. Code §§ 32.1-2, 32.1-12, and 32.1-23 of the Code of Virginia.

Purpose

Please explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

This regulation is necessary to ensure the continued public notification whenever there is a higher risk of illness when swimming in public beach water. VDH participated in a RAP with DEQ to amend regulations in 9VAC25-260-170. The RAP participants came to the consensus that DEQ would eliminate regulatory language related to issuing beach advisories and closures, given this is a primary function of VDH's Beach Monitoring and Notification Program. In order for VDH to continue to manage beach advisories in recreational water, promulgation of the proposed regulation is necessary in the VDH section of the Virginia Administrative Code. The proposed regulation will be promulgated in 12VAC5-135.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

DEQ is promulgating a revision to repeal 9VAC25-260-170(A)(5) which reads:

*"For beach advisories or closures, a single sample maximum of 235 *E. coli* CFU/100 ml in freshwater and a single sample maximum of 104 enterococci CFU/100 ml in saltwater and transition zones shall apply."*

In order for VDH to continue to manage beach advisories in recreational water, promulgation of the proposed regulation is necessary in the VDH section of the Virginia Administrative Code. While VDH is maintaining the principle of the DEQ regulation, there are some minor differences as well as the establishment of procedures for issuing and lifting beach advisories. Substantive changes include the removal of individual reference values for the single sample maximum (235 *E. coli* CFU/100 ml in freshwater and 104 enterococci CFU/100 ml in saltwater and transition zones). The VDH regulation will instead use a BAV. The BAV is set at 104 enterococci CFU/100 ml in salt water and transition zones. There is no established VDH monitoring protocol for *E. coli* in recreational fresh water for the issuance of advisories. Further, through promulgation of this regulation, VDH will establish procedures for issuing and lifting beach advisories. The VDH Beach Monitoring and Notification Program, funded by the United State Environmental Protection Agency BEACH Act Grant, requires the use of a BAV. The BAV is contained within the VDH Beach Monitoring and Notification Protocol. The proposed regulation will direct readers to the Protocol.

Issues

Please identify the issues associated with the regulatory change, 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 there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

- 1) The primary advantage to the public is that VDH currently has this authority through 9VAC25-260-170(A)(5) and therefore, there will be no additional impact to the management of recreational water advisories.
- 2) There are no known disadvantages to promulgating this regulation.
- 3) There are no other pertinent matters of interest to the regulated community, government officials, and the public.

Requirements More Restrictive than Federal

Please identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.

There are no requirements in this proposal that that more restrictive than applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected

None

Localities Particularly Affected

Currently, localities that participate in the VDH Beach Monitoring and Notification Program are provided guidance on the procedures of issuing and lifting beach advisories. The establishment of this regulation will require those same actions by law. Localities which participate in the program include Gloucester, Mathews, Hampton, Newport News, York, Norfolk, Virginia Beach, Northumberland, and Accomack.

Other Entities Particularly Affected

None

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, please identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic

impact, specify which new requirement or change in requirement creates the anticipated economic impact. Please keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources</p>	<p>There will be no fiscal impact.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>There will be no fiscal impact.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>Continued management of beach advisories in recreational water.</p>

Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>There will be no fiscal impact.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>Continued management of beach advisories in recreational water.</p>

Impact on Other Entities

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>There will be no individuals, businesses, or other entities affected by the new regulation.</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: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>Zero.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees;</p>	<p>VDH projects no additional costs as a result of this regulation. Changes will not place any additional reporting or record keeping requirements upon individuals, businesses, or other entities.</p>

d) purchases of equipment or services; and e) time required to comply with the requirements.	
Benefits the regulatory change is designed to produce.	The agency that is responsible for administering recreational water advisories will maintain the authority for the regulation and will have greater flexibility in the management of advisory thresholds within programmatic protocols.

Alternatives

Please 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.

There is no alternative given that VDH is the sole administrator of the Beach Monitoring and Notification Program.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

The Commonwealth has no other authority or alternatives present to manage recreational water advisories given the pending removal of DEQ’s 9VAC25-260-170(A)(5). This regulation is necessary to ensure the continued public notification whenever there is a higher risk of illness when swimming in public beach water.

Public Participation

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Detail of Changes

Please list all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation.

If the regulatory change will be a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory change. Delete inapplicable tables.

If the regulatory change is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below. Please include citations to the specific section(s) of the regulation that are changing.

If a new regulation is being promulgated, that is not replacing an existing regulation, please use this chart:

New chapter-section number	New requirements	Other regulations and law that apply	Intent and likely impact of new requirements
135-10	Establish definitions section for recreational advisories	None.	To define words and terms used in the chapter. No economic or family impact is anticipated.
135-20	Establish the application section for recreational advisories.	None.	To establish that this chapter applies to the issuance of beach advisories and beach warnings for public beach water. No economic or family impact is anticipated.
135-30	Establish who can issue and lift beach advisories and how that occurs in practice.	None.	To establish what the threshold is for beach advisories and warnings, who has the authority to issue, and acceptable means of public notification. No economic or family impact is anticipated.
135-40	Require that advisories to protect recreational uses in coastal public beach water be issued and lifted in accordance with the VDH Beach Monitoring and Notification Protocol.	None.	<p>Currently, localities that participate in the VDH Beach Monitoring and Notification Program are provided guidance on the procedures of issuing and lifting beach advisories. The promulgation of this regulation will require those same actions by law.</p> <p>This regulation will provide greater flexibility for the management of advisory thresholds under programmatic protocols. No economic or family impact is anticipated.</p>