



Fast Track Proposed Regulation Agency Background Document

Agency name	Department of Forensic Science
Virginia Administrative Code (VAC) citation	6 VAC 40-20
Regulation title	Regulations for Breath Alcohol Testing
Action title	Changes to provide for new breath alcohol testing equipment and to monitor the licensure process more effectively.
Date this document prepared	June 2, 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

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes.

These proposed amendments clarify the use of non-Department of Forensic Science repair facilities. In addition, the amendments provide that the Department of Forensic Science may revoke or deny an instructor certificate for good cause shown. Due to the nature of the new breath alcohol instrumentation a preventive maintenance checklist may not be necessary and the changes will allow for this option.

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.

On January 9, 2008, the Forensic Science Board adopted these amendments to the "Regulations for Breath Alcohol Testing" in their public meeting.

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 General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the scope of the legal authority and the extent to which the authority is mandatory or discretionary.

The Code of Virginia directs the Department of Forensic Science to establish a training program, approve equipment, and establish methods to conduct chemical analyses of a person's breath, either to obtain a preliminary analysis of alcoholic content for the purposes of 18.2-267, 29.1-738.1 and 46.2-341.25 pursuant to 18.2-268.9, 29.1-738.2 and 46.2-341.26:9, to obtain an analysis that can be considered valid as evidence in a prosecution under 18.2-266, 18.2-266.1, 29.1-738 or 46.2-341.24. These regulations describe the process for approval of breath test devices, general methods of conducting breath tests, training and licensing procedures for operators, required forms and records, and the use of preliminary breath test devices.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The Department of Forensic Science has contracted to purchase new breath alcohol instrumentation and these amendments are necessary for the implementation of this instrumentation.

The new instrumentation and the amended regulations are necessary to protect the health, safety or welfare of citizens in the Commonwealth by assisting in the detection and prosecution of drunk drivers. The amended regulations will further this protection by only having instrumentation repaired by the manufacturer and by allowing the Department of Forensic Science to revoke or deny an instructor certificate upon good cause shown.

Rationale for using fast track process

Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

Please note: If an objection to the use of the fast-track process is received within the 60-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 (i) file notice of the objection with the Registrar of Regulations for publication in the Virginia Register, and (ii)

proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

The amendments proposed by the Department of Forensic Science will be noncontroversial because they will refine the repair process of the breath alcohol instrumentation and the proposed amendments discuss the denial and/or termination of instructor certificates upon good cause shown. In addition, these amendments will allow the Department of Forensic Science the discretion of a preventive maintenance checklist which may or may not be necessary with the new instrumentation. The Department of Forensic Science has terminated and denied licenses previously for these reasons and therefore, they should be noncontroversial.

These amendments are as a result of the contract to purchase new breath alcohol instrumentation and will further improve the health, safety and welfare of the citizens of the Commonwealth.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)

There are no new substantive provisions in these proposed amendments.

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 there are no disadvantages to the public or the Commonwealth, please indicate.

These proposed amendments will assist the Commonwealth in the detection and prosecution of persons driving while under the influence of drugs or alcohol by allowing for the Department of Forensic Science to revoke or deny instructor certificates upon good cause shown and having only the manufacturer of the new breath alcohol instrumentation conduct repairs.

The advantages of these proposals is to clarify who can repair the new breath alcohol instrumentation other than the Department of Forensic Science. In addition, Instructors of the Breath Alcohol classes will have a documented protocol for the revocation or denial of a certificate.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is 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 are no applicable federal requirements.

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 will be particularly affected by these 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.

The Department of Forensic Science without these proposed amendments will not be able to further the procurement of new breath alcohol instrumentation because the maintenance as currently listed in the regulations will not be applicable. In addition, these proposed amendments will assist instructors in understanding when their certificates could be revoked or denied.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

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	There should be no economic impact.
Projected cost of the regulation on localities	There should be no economic impact.
Description of the individuals, businesses or other entities likely to be affected by the regulation	There should be no economic impact.
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses	There should be no economic impact.

<p>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>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>There should be no economic impact.</p>

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 alternative to these proposed regulations is to continue to maintain ten-year old breath alcohol instrumentation and to have an unwritten procedure to revoke or deny instructor certificates.

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.

These proposed amendments will improve families of the Commonwealth by protecting them with new breath alcohol instrumentation against drunk drivers.

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
6 VAC 40-20-30		“.....All new breath test devices or those having been repaired by the manufacturer or the manufacturer’s authorized repair service.....”	<p>“.....All new breath test devices or those having been repaired by the manufacturer or the manufacturer’s authorized repair service.....”</p> <p>This change clarifies the use of non Department repair facilities.</p>
6 VAC 40-20-130		<p>“1.....The department may issue instructor certificates to persons who have acquired the necessary ability by past experience or formal education.”</p> <p>“2....shall be limited in scope to the methods or devices for which the individual has demonstrated competence”</p> <p>“4. Instructor certificates shall be terminated or revoked by the department upon its finding that the instructor no longer meets the necessary qualifications.</p>	<p>“1.....The department may issue instructor certificates to persons who have acquired the <u>necessary ability knowledge, skills and abilities</u> by past experience or formal education. DFS has the authority to <u>deny issuance of a certificate upon good cause shown.</u></p> <p>“2....shall be limited in scope to the methods or devices <u>breath test devices</u> for which the individual has demonstrated competence”</p> <p>“4. Instructor certificates shall be <u>may be</u> terminated or revoked by the department upon its finding that the instructor no longer meets the necessary qualifications. <u>upon good cause shown.</u></p> <p>These changes will provide written clarification to instructors who are or persons who wish to become certified as instructors.</p>
6 VAC 40-20-160		“A preventive maintenance checklist provided by the department shall be completed at least once each month for each breath test device assigned to an agency.”	<p>“A preventive maintenance checklist <u>if applicable, shall be</u> provided by the department shall be <u>and</u> completed at least once each month for each breath test device assigned to an agency.....”</p> <p>This will allow the Department of Forensic Science to use a preventive maintenance checklist only if necessary with the new instrumentation.</p>