

# Virginia Regulatory Town Hall

## Proposed Regulation Agency Background Document

<b>Agency Name:</b>	State Water Control Board
<b>Regulation Title:</b>	Regulation for Dispute Resolution
<b>Primary Action:</b>	9 VAC 25-15-10 through -160
<b>Secondary Action(s):</b>	none
<b>Action Title:</b>	Dispute Resolution
<b>Date:</b>	

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

### Summary \*

*Please provide a brief summary of the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation.*

The proposed regulation encourages the fair, expeditious, voluntary, consensual resolution of disputes by providing an alternative to administrative hearings and litigation. The disputes eligible for referral to voluntary dispute resolution are those relating to the issuance of a permit or to the adoption of a regulation. The decision to employ dispute resolution is in the board's sole discretion, and the outcome of any dispute resolution procedure does not bind the board but may be considered by the board in issuing a permit or promulgating a regulation. The proposed regulation contains provisions addressing situations appropriate for the use of dispute resolution, costs, confidentiality of proceedings, public participation, the use of neutral facilitators, and procedures for mediation.

### Basis \*

*Please identify the section number and provide a brief statement relating the content of the statutory authority to the specific regulation proposed. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.*

Section 62.1-44.15 of the Virginia Water Control Law (Title 62.1, Chapter 3.1 of the Code of Virginia) authorizes the State Water Control Board to promulgate regulations abating, controlling and prohibiting water pollution in order to protect public health and welfare. Written assurance from the Office of the Attorney General that (i) the board possesses the statutory authority to promulgate the proposed regulation and that (ii) the proposed regulation comports with the applicable state law is available upon request.

### Purpose \*

*Please provide a statement explaining the rationale or justification of the proposed regulation as it relates to the health, safety or welfare of citizens.*

The purpose of the regulation is to provide alternatives which reduce the need for formal administrative actions in resolving environmental disputes. The regulation will enhance public health and welfare by expediting the resolution of environmental disputes in a manner that is faster, more accessible to the public, less adversarial, and less costly than are formal administrative methods of resolving such disputes. The regulation is being proposed to comply with the mandate of §10.1-1186.3 of the Code of Virginia that requires the adoption of regulations for the use of alternative dispute resolution in the development of a regulation or in the issuance of a permit.

### Substance \*

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.*

1. The regulation allows the board, at its discretion and pursuant to the situations outlined in § 10.1-1186.3 A of the Code of Virginia, to use a dispute resolution procedure in order to resolve significant areas of disagreement among interested parties to a permit issuance or to the promulgation of a regulation.
2. The outcome of the procedure shall not bind the board but may be considered by the board in issuing a permit or promulgating a regulation.
3. In the case of a dispute over the issuance of a permit, the procedure may be used only with the consent and participation of the permit applicant.

4. The regulation specifies which information resulting from the procedure shall be held confidential and which shall be subject to disclosure.
5. The regulation also specifies how the impending procedure will be advertised to the public and how interested parties may opt to participate in the procedure.
6. The regulation also specifies the function of the third-party neutral in facilitating the procedure.

### Issues \*

*Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public of implementing the new or amended provisions; and 2) the primary advantages and disadvantages to the agency or the Commonwealth. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.*

1. Public: The primary advantages to the public are (1) significant savings in state litigation costs and therefore tax dollars, (2) increased access to and opportunities for participation in the decision-making process, (3) an acceleration of the decision-making process, (4) satisfactory results for all parties rather than just one. There are no disadvantages to the public.
2. Department: The primary advantages to the department are the same as advantages (1), (3), and (4) listed for the public. The only disadvantage to the department is the need to assign staff to administer the regulation.

### Localities Particularly Affected \*

*Please provide the identity of any localities particularly affected by the proposed regulation.*

There is no locality which will bear any identified disproportionate material environmental impact due to the proposed regulation which would not be experienced by other localities.

### Public Participation \*

*Please indicate the nature of the comments the Department is soliciting pursuant to this notice.*

The Department is seeking comment on the proposed regulation and the costs and benefits of the proposal.

### Impact

*Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-*

*going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and (e) the projected cost of the regulation for affected individuals, businesses, or other entities. Include a description of the beneficial impact the regulation is designed to produce.*

1. Entities Affected

Permittees and other interested parties to a permit issuance or to a regulation development.

2. Fiscal Impact

a. Costs to Affected Entities

Costs to affected entities should be lower than current costs. This regulation provides for less costly alternatives to the currently available administrative options. The financial advantages of this regulation are articulated in the "Statement of Conclusions and Need" above.

b. Costs to Localities

The projected cost of the regulation on localities is not expected to be beyond that of other affected entities and is addressed in paragraph 2a above.

c. Costs to Agency

No funds have been appropriated for the administration of this regulation. The bulk of the expense of administering the regulation will be borne by the parties to the dispute. The agency's minor administrative costs will be paid from the general fund. With the use of this regulation, the agency's legal fees and other costs related to formal administrative proceedings should decrease.

d. Benefits

The primary benefits of this regulation are as follows: (1) it achieves results satisfactory to all parties; (2) it saves money; (3) it accelerates the decision-making process; (4) it decreases the load on the court system; and (5) it is politically advantageous to the involved parties by enhancing their reputation for consensus-building and problem-solving. See "Statement of Conclusions and Need" above.

e. Small Business Impact

The impact upon facilities that meet the definition of small business provided in § 9-199 of the Code of Virginia is addressed in paragraph 2a above.

### Legal Requirements

*Please identify the state and/or federal source of the legal requirements that necessitate promulgation of the contemplated regulation. The discussion of these requirements should include a description of their scope and the extent to which the requirements are mandatory or discretionary. Full citations for the legal requirements and web site addresses, if available, for locating the text of the cited legal provisions should be provided.*

Code of Virginia:

<http://leg1.state.va.us/000/cod/codec.htm>

Virginia Administrative Code (VAC):

<http://leg1.state.va.us/000/reg/toc.htm>

If the board wishes to be able to use mediation or other forms of dispute resolution, the contemplated regulation is mandated by state law. Section 10.1-1186.3 A of the Code of Virginia allows the board to use dispute resolution to resolve underlying issues, to reach a consensus, or to compromise on contested issues related to the development of a regulation or to the issuance of a permit. Section 10.1-1186.3 D specifies that the board shall adopt regulations in accordance with the Administrative Process Act for the implementation of §10.1-1186.3. These regulations are to include (i) standards and procedures for the conduct of mediation and dispute resolution, (ii) the appointment and function of a neutral; and (iii) procedures to protect the confidentiality of papers, work product, or other materials.

### Comparison with Federal Requirements

*Please describe the provisions of the proposed regulation which are more restrictive than applicable federal requirements together with the reason why the more restrictive provisions are needed.*

There are no applicable federal requirements.

### Need

*Please provide an explanation of the need for the proposed regulation and potential consequences that may result in the absence of the regulation. Also set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of citizens or would be essential for the efficient and economical performance of an important governmental function. Include a discussion of the problems the regulation's provisions are intended to solve.*

Beginning in the early 1970s, federal, state, and local governments have increasingly used mediation and other consensus-building tools as an alternative to more traditional means of resolving disputes. These consensus-building tools are intended to supplement, not

replace, conventional legislative, judicial, administrative, or regulatory mechanisms. The benefits of dispute resolution are many:

(1) Dispute resolution achieves results satisfactory to all parties. Since each party learns to search for common ground and to recognize similar interests in the other parties, the traditional "hero vs. villain" illusion of adversarial disputes is avoided. Because the eventual solution is beneficial to all parties rather than to only one, the process produces mutual satisfaction in all parties, rather than winners and losers. Studies by the American Arbitration Association show that 80% of participants were satisfied with their dispute resolution programs regardless of process or outcome.

(2) Dispute resolution saves money. For instance, a single mediation undertaken by the New Jersey Center for Public Dispute resolution to settle a dispute with the federal government over the state's emergency transport system avoided a potential loss of twenty million dollars in federal funds.

(3) Dispute resolution accelerates the decision-making process. Because the concerned parties have a vested interest in achieving a speedy settlement, resolutions are generally reached in much less time through dispute resolution than is required for resolutions to be reached through more traditional means.

(4) Dispute resolution decreases the load on the court system. For instance, Cincinnati's Institute of Justice Private Complaint Program has reduced the municipal court's caseload by a third every year since 1974, with nearly half of the referred cases settled out of court and others being referred to non-court agencies. Government decision-makers sometimes perceive litigation as a politically safer option than dispute resolution since the court can be blamed for any undesirable outcome. These decision-makers, however, have much more control over the outcome through dispute resolution than through litigation. Furthermore, they can still exercise their right to a court settlement if dispute resolution fails.

(5) Dispute resolution is politically advantageous to the involved parties by enhancing their reputation for consensus-building and problem-solving. Because dispute resolution has developed only over the course of the past two decades, some local government officials and other small-group representatives are unaware of its existence or question its legitimacy as a problem-solving tool appropriate to the inherently conservative atmosphere of government. But dispute resolution is not the same as binding arbitration: its use is neither an admission of failure nor an abdication of authority, but a demonstration that the involved parties are sufficiently dedicated to the public good to be willing to compromise in order to reach a solution.

A large number of the issues settled through dispute resolution are environmental ones. Dispute resolution centers in New Jersey, Massachusetts, Minnesota, New York, New Mexico, Georgia, Florida, and many other states have initiated important discussions and facilitated agreements involving complex and controversial issues like the establishment of

regional sewage treatment facilities, the siting of solid waste disposal facilities, the disposal of hazardous waste, the clean-up of a Superfund site, the spraying of herbicides, the adoption of environmental standards, and the siting of underground storage tanks. A well-known example of the successful use of mediation to address an environmental problem is the decade-long public battle over the development of Hawaii's first state water code, which pitted developers against environmentalists, large landowners against small ones, and the counties against the state. This battle produced one legislative stalemate after another to the frustration of all parties but was finally resolved through mediation conducted by Hawaii's Program on Alternative Dispute resolution.

An example of what happens without dispute resolution is the case of the Hampton-Roads refinery in Virginia. The refinery was proposed in 1970 and discussed for over a decade but was never built. Contributing to the failure of the project were badly timed changes in the permitting process, understaffing of the State Air Pollution Control Board, statutory vagueness, siting disagreements, lack of communication within the Army Corps of engineers, angry citizens, gubernatorial dissatisfaction with the progress of the project, the involvement of the federal government through both the Department of the Interior and the military, and the expiration of the initially issued permits. At the end of the failed project, the company's expenses were over six million dollars, with about half of that in legal fees. The Army Corps of Engineers' bill for legal fees was at least that amount. This case is a good example of the many such environmental disputes which die of exhaustion rather than being settled fairly and thoughtfully. Millions of dollars and thousands of labor years were squandered without an equitable settlement.

One way for Virginia to avoid this situation in the future is to adopt regulations that enable it to implement Code of Virginia § 10.1-1186.3.

### Detail of Changes

*Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description of changes implemented by the proposed regulatory action. Where applicable, include cross-referenced citations when the proposed regulation is intended to replace an existing regulation.*

The proposed provisions are listed below by their regulatory citations.

#### Part I. Definitions.

9 VAC 25-15-10. Use of terms.

9 VAC 25-15-20. Terms defined.

#### Part II. General Provisions.

9 VAC 25-15-30. Applicability.

9 VAC 25-15-40. Purpose and scope.

9 VAC 25-15-50. Costs.

9 VAC 25-15-60. Date, time, and place.

9 VAC 25-15-70. Attendance at the dispute resolution procedure.

9 VAC 25-15-80. Confidentiality.

9 VAC 25-15-90. Public participation.

9 VAC 25-15-100. Appointment and function of neutral.

9 VAC 25-15-110. Resumes of neutrals and descriptions of dispute resolution programs.

9 VAC 25-15-120. Enforcement of written settlement agreement.

9 VAC 25-15-130. Referral of disputes to dispute resolution.

### Part III. Mediation Procedures.

9 VAC 25-15-140. Appointment of mediator.

9 VAC 25-15-150. Evaluation session.

9 VAC 25-15-160. Continuation, termination, and resolution of mediation.

## Alternatives

*Please describe the process by which the agency has considered less burdensome and less intrusive alternatives for achieving the need. Also describe, to the extent known, the specific alternatives to the proposal that have been considered to meet the need, and the reasoning by which the agency has rejected any of the alternatives considered.*

As provided in the public participation procedures of the board, the department included, in the Notice of Intended Regulatory Action, a description of the department's alternatives and a request for comments on other alternatives and the costs and benefits of the department's alternatives or any other alternatives that the commenters provided.

Following the above, alternatives to the proposed regulation were considered by the department. The department determined that the first alternative is appropriate, as it is the least burdensome and least intrusive alternative that fully meets the purpose of the regulation. The alternatives considered by the department, along with the reasoning by



which the department has rejected any of the alternatives being considered, are discussed below.

1. Propose a new regulation to satisfy the provisions of the law. This option was chosen because it meets the stated purpose of the regulatory action: to comply with the mandate of § 10.1-1186.3 of the Code of Virginia that requires the adoption of regulations for the use of dispute resolution in the development of a regulation or in the issuance of a permit.
2. Make alternative regulatory changes to those required by the provisions of the law. This option was not chosen because it does not meet the stated purpose of the regulatory action.
3. Take no action. This option was not chosen because it does not meet the stated purpose of the regulatory action.

### Public Comment

*Please summarize all public comment received during the NOIRA comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.*

**1. SUBJECT:** Support for contemplated regulation

**COMMENTER:** James D. Phillips; Shuford, Rubin & Gibney, P.C.

**TEXT:** I strongly support the invocation of alternative dispute resolution in this area of regulatory promulgation.

**RESPONSE:** Support for the proposal is appreciated.

**2. SUBJECT:** Discretion of neutral and manner of procedure

**COMMENTER:** James D. Phillips; Shuford, Rubin & Gibney, P.C.

**TEXT:** It is critical for the third party neutral to have some discretion as to how the process is convened and the guidelines by which the process is conducted. Moreover, providing for a distinction between a mediation or other ADR process involved in regulation development as compared to one relating to the issuing of a permit is an immediate issue. The distinction requires a different process for each; the promulgation of the regulation would require a potentially larger number of participants and the building of consensus around content standards, while the permit issuance process would require a decision regarding the suitability of an applicant to be issued a permit.

**RESPONSE:** The contemplated regulation affords the neutral much discretion in determining the schedule and procedure for a dispute resolution. Whether the subject of

the dispute is a regulation or a permit, the neutral has considerable latitude to design the procedure in the manner most conducive to settlement.

**3. SUBJECT:** Standards for neutral

**COMMENTER:** James D. Phillips; Shuford, Rubin & Gibney, P.C.

**TEXT:** There should be minimum standards required for the third party neutral. Requiring certification from the Virginia Supreme Court might be one standard, as would the requirement of a certain level of training in the content areas of the respective agency might be another. There should be general guidelines, but the neutral should have some discretion to design a process appropriate to the issues and the context.

**RESPONSE:** The contemplated regulation requires the neutral to comply with pertinent laws and regulations and with the Judicial Council of Virginia's Standards and Ethics and Professional Responsibility for Certified Mediators but otherwise allows the parties to the dispute to determine their own neutral.

**4. SUBJECT:** Confidentiality

**COMMENTER:** James D. Phillips; Shuford, Rubin & Gibney, P.C.

**TEXT:** There needs to be clear requirements that all work product from the ADR process is not subject to the discovery process attendant to a court proceeding or a Freedom of Information Act inquiry. Parties are very reluctant to submit to an ADR process without some confidence that the proceedings are not "fishing expeditions" that can be used against them later if the ADR effort is not successful.

**RESPONSE:** The provisions of Code of Virginia § 8.01-576.10 shall govern the confidentiality of materials pertaining to a dispute resolution held pursuant to the contemplated regulation. With a few specified exceptions, most of the materials and communications pertaining to a dispute resolution may be held in confidence.

**5. SUBJECT:** Authority and schedule for process

**COMMENTER:** James D. Phillips; Shuford, Rubin & Gibney, P.C.

**TEXT:** A major issue in ADR cases is who has the authority to invoke the process and the necessary timetable for doing so. Many times there is no clear protocol for a determination of which agency official should invoke the ADR process and when it should be invoked. The regulation must clearly articulate who in the agency has the authority to contact a third party and when the neutral party should enter the dispute.

**RESPONSE:** The contemplated regulation clearly articulates the authority and schedule for a dispute resolution as well as the duties and responsibilities of board, neutral, and parties.

### Clarity of the Regulation

*Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.*

The department, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

### Periodic Review

*Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.*

The department will initiate a review and re-evaluation of the regulation to determine if it should be continued, amended, or terminated within three years after its effective date.

The specific and measurable goals the proposed regulation is intended to achieve are as follows:

1. To reduce the number of environmental disputes resolved through formal administrative actions.
2. To reduce the amount of time necessary to resolve environmental disputes.
3. To reduce the amount of money necessary to resolve environmental disputes.

### Family Impact Statement

*Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which 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 these regulation will have a direct impact on families. However, there will be positive indirect impacts in that the regulation will ensure that the Commonwealth's environmental regulations will function as effectively as possible, thus contributing to reductions in fertility disorders, fetal mutation and deformity, chronic and acute illness, premature death, and property damage.

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