

Virginia Regulatory Town Hall

Emergency Regulation Agency Background Document

Agency Name:	Department of Health (State Board of)
VAC Chapter Number:	12 VAC 5-615
Regulation Title:	Emergency Regulations for Authorized Onsite Soil Evaluators
Action Title:	Implementation of emergency regulations pursuant to Acts of Assembly, 1999, Chapter 871, cl. 2
Date:	11/10/99

Section 9-6.14:4.1(C)(5) of the Administrative Process Act allows for the adoption of emergency regulations. Please refer to the APA, Executive Order Twenty-Four (98), and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the emergency regulation submission package.

Emergency Preamble

Please provide a statement that the emergency is necessary and detail the nature of the emergency. Section 9-6.14:4.1(C)(5) of the Administrative Process Act states that an "emergency situation" means: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date. The statement should also identify that the regulation is not otherwise exempt under the provisions of § 9-6.14:4.1(C)(4).

The statement also should include a brief summary of the emergency regulation or emergency amendments to an existing regulation. There is no need to state each provision or amendment, instead give a summary of the emergency action.

This emergency regulation is a requirement of Virginia statutory law requiring regulations within 280 days and it is not exempt, under subsection C4 of § 9-6.14:4.1 of the Code of Virginia, from the provisions of Article 2 (§ 9-6.14:7.1 et seq.) of the Administrative Process Act.

These regulations establish a program for qualifying individuals as authorized onsite soil evaluators (AOSEs) and for devising a procedure by which such individuals may provide letters recognizing the appropriateness of onsite sewage site conditions.

Basis

Please identify the state and/or federal source of legal authority to promulgate the emergency regulation. The discussion of this emergency statutory authority should: 1) describe its scope; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. Full citations of legal authority and web site addresses, if available for locating the text of the cited authority, shall be provided.

Please provide a statement that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the emergency regulation and that it comports with applicable state and/or federal law.

These emergency regulations are being promulgated pursuant to action of the 1999 General Assembly (Acts of Assembly, 1999, 871, cl. 2) requiring the Board of Health to promulgate regulations to implement the provisions of the act within 280 days.

Substance

Please detail any changes, other than strictly editorial changes, that would be implemented. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Include citations to the specific sections of an existing regulation being amended and explain the differences that would be the effect of the proposed changes. The statement shall 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. The statement should also delineate any potential issues that may need to be addressed as a permanent final regulation is developed.

These regulations have never existed before, so there would be no specific changes to existing regulations, per se.

The 1994 General Assembly required, among other things, that the Board of Health establish a program for qualifying individuals as authorized onsite soil evaluators (AOSEs). In addition, the Board was required to establish and implement procedures for issuing letters recognizing the appropriateness of onsite sewage site conditions. The Board's AOSE program must include approved training courses, written and field tests, application fees, renewal fees and schedules, and procedures for listing, removing from the list, and reinstating individuals as AOSEs. The 1994 legislation further provided that until July 1, 1996, a person holding a certificate as a Virginia certified professional soil scientist (CPSS) was qualified, upon application and demonstration of the knowledge, skills, and abilities necessary to conduct onsite soil evaluations, as an AOSE without completing the Board's training courses and taking the written and field tests. (§ § 32.1-164.G and H). The 1994 amendments were intended to reduce application backlogs and required the Department to hire an AOSE if application backlogs exceed 15 working days. (§ 32.1-163.4).

In 1999 the General Assembly, in two separate acts, further modified the provisions of the AOSE program and required the Department to accept private evaluations from an AOSE and from a professional engineer in consultation with an AOSE. Chapter 871 of the 1999 Acts of Assembly contains amendments to § 32.1-164 that require the Department to accept private evaluations from AOSEs for the issuance of letters, if they are produced in accordance with the Board's established procedures. The Department must issue such letters within twenty working days of the application date. The Department is not required to do a field check of the evaluation prior to issuing a letter or a permit based on a letter; however, the Department may conduct such field analyses as deemed necessary to protect the integrity of the Commonwealth's environment. Because the Department had not implemented a training and testing program for AOSEs as required under the 1994 legislation, chapter 871 contained a provision to extend to July 1, 2001, the date until which a CPSS may be deemed qualified to be an AOSE upon demonstration of the knowledge, skills, and abilities necessary to conduct onsite soil evaluations.

Chapter 1038 of the 1999 Acts of Assembly contains § 32.1-163.5, a new section that requires the Department to accept private site evaluations and designs, in compliance with the Board's regulations for septic systems and other on-site sewage systems, designed and certified by a licensed professional engineer in consultation with an AOSE, or by an AOSE. Under this statute, the Department is required to accept private evaluations for letters, permits, and subdivision reviews in similar fashion to Chapter 871. Certain time restrictions are imposed on the processing of applications for permits, multiple letters, and subdivision review and applications are deemed approved if the Department fails to issue or deny the requested approval within the established time limit.

Chapter 871, cl. 2 of the 1999 Acts of Assembly requires that the Board of Health promulgate regulations within 280 days to implement the provisions of that act. The scope of that authority is necessarily broad because its implementation must incorporate the provisions of the 1994 legislation as well as the 1999 Acts. The 1999 Acts (1999 Acts of Assembly 871 and 1038) contain overlapping requirements for AOSEs and for the acceptance by the Department of private evaluations from an AOSE and from a professional engineer in consultation with an AOSE. For these reasons, and because both of the 1999 Acts contemplate and depend upon a Department-operated program for AOSEs, the 1999 Acts and the 1994 legislation are integrally related and are inseparable. These emergency regulations implement the requirements of Chapter 871 and Chapter 1038 of the 1999 Acts of Assembly as well as the Department's program for AOSEs.

In 1998 the Department contracted the Institute for Environmental Negotiation to convene a stakeholder's advisory group to make recommendations for regulations regarding the Department's program for Authorized Onsite Soil Evaluators. This emergency regulation is based, in part, upon the recommendations of the Institute for Environmental Negotiation which were published February 10, 1999.

Alternatives

Please describe the specific alternatives that were considered and the rationale used by the agency to select the least burdensome or intrusive method to meet the essential purpose of the action.

In light of the clear directives in the 1999 law, there are no alternatives to promulgation of the emergency regulations. The Department has drafted the minimum elements of regulation it believes are necessary to comply with the statutory provisions of the *Code of Virginia*. The emergency regulations to be promulgated are, in the agency's opinion, the least burdensome and the least intrusive alternatives to accomplish this non-discretionary action.