

December 15, 2008

MEMORANDUM

TO: All VDH Office Directors and
Program Directors
who Administer Agency Regulations

FROM: Douglas R. Harris
Adjudication Officer and Adviser
to the Commissioner

SUBJECT: ***Culmination of a State-Wide Initiative;
New Public Participation Guidelines (“PPGs”)
Effective January 1***

A 2008 change in Virginia law¹ requires all executive agencies that administer regulations to adopt revised public participation guidelines (“PPGs”). The law directed the Department of Planning and Budget (“DPB”) to develop model PPGs. Agencies may veer somewhat from the model PPGs, but agency-specific approaches to citizen involvement in government implicates basic democratic rights of citizens, and would meet close review. All agencies had to adopt their new PPGs by December 1. VDH commented actively on the model PPGs as DPB developed them, and VDH adopted its new PPGs in September.² VDH’s PPGs will be codified at 12 VAC 5-11 *et seq.*

VDH’s PPGs will become effective January 1, 2009. **In all agency regulatory actions for which a notice of intended regulatory action (“NOIRA”) will be published in the *Virginia Register* after January 1, VDH must follow its new PPGs.**³

¹ House Bill 1167 (Saxman, patron).

² VDH concurrently repealed a set of PPGs it last amended in 1994.

³ Reasonable adherence to all requirements is expected. If in actual operation, our new PPGs prove to entail unnecessary administrative costs, VDH could begin a regulatory adoption process to amend them. This would occur only after a reasonable period of operationalization and internal agency discussion.

As you read this, consider how you can help the agency meet its obligation by:

- 1. Finding our new PPGs attached (as a Word file) to the email from me that distributes this memorandum;**
- 2. Have all staff involved with making strategic decisions on regulations (*i.e.*, those decisions impinging on the adoption or amendment of any regulation) read them closely; and**
- 3. Ensure that, starting in 2009, all regulatory actions comply with VDH's new PPGs.**

In summary,⁴ major new requirements of VDH's new PPGs include:

- (i) Each office or program will need to maintain a list of persons interested in regulatory actions. Lists might be organized around communities or otherwise relate to a certain area of regulatory activity or set of regulations (chapter of the VAC). An initial list ought to be readily compiled from available agency data. The additions to initial lists will come about through electronically-relayed requests from interested persons (via the Town Hall). These requests should come to (or will be directed to) those VDH staff members who are listed as agency contacts in connection with past regulatory actions. (In the new PPGs, *see* 12 VAC 5-11-30 for more details about keeping these lists.);
- (ii) Each office or program will need to provide, routinely, the information listed in the new PPGs (*e.g.*, a NOIRA or a proposed stage) to interested persons. The bulk of the task of providing this information will occur via the Town Hall, as VDH staff go through the regulatory process, but paper mailings may be necessary if interested persons elect not to be informed via the Town Hall. (*See* 12 VAC 5-11-40);
- (iii) Each office or program will need to provide interested persons, *i.e.*, citizens, an ample opportunity to comment, *i.e.*, to provide "data, views and arguments," in connection with future regulatory actions. Failure to do so may delay regulatory adoption. At VDH staff election (and at my urging), this should involve using online public forums that will be created on the Town Hall.⁵ *See* 12 VAC 5-11-50 for more details;

⁴ This list of new requirements is provided for your convenience; please see the full text of the PPGs for specific information on these and other requirements (including those relating to petitions for rulemaking, notice of meetings and periodic reviews of regulations).

⁵ About 80 percent of VDH agency staffers (those having password-protected, VDH-managed access to portions of the Town Hall) have been given the specific ability to (i) post notices of meetings on the Town Hall and (ii) gain access to "electronic mailing list information and send out messages or newsletters." *See* Town Hall website (initiating password-protected access) at the government portal:

(iv) With each regulatory action, an office or program will need to consider the opportunities that may lie in appointing a regulatory advisory panel (“RAP”). Doing so is optional and appointment ought to be done by an office director. Appointing an RAP may be a useful mechanism ***if the agency needs technical assistance in developing a regulation***. I envision the requirement here to allow some selection (as needed) when the agency strives to be informed by helpful discussants, *i.e.*, those with track records of promoting problem-solving and policy-formulation. (A separate requirement, below, exists to ensure inclusion of all concerns and viewpoints of citizens.) VDH can dissolve an RAP when it determines that dissolution is appropriate. *See* 12 VAC 5-11-70 for more details on this;

(v) With each regulatory action, an office or program will need to consider the opportunities that may lie in appointing a negotiated rulemaking panel (“NRP”). Doing so is optional and appointment ought to be done by an office director. An NRP can be a useful mechanism ***if an anticipated regulation is likely to be controversial***. When controversy is anticipated, ensuring that agency decisions in formulating regulations come only after getting the full sweep of concerns and viewpoints from citizens is paramount. A decision whether to appoint an NRP should include consideration whether involvement of all affected and interested persons could create a discussive environment leading to the resolution of significant issues.⁶ Ideally, appointment of an NRP, when deemed warranted, should occur early in a regulatory adoption process. *See* 12 VAC 5-11-80 for more details on this; and

(vi) Each office or program will need to post notice of meetings of any RAP or NRP on the Town Hall and in accordance with standing rules. *See* 12 VAC 5-11-90 for more details on this.

Please let me know if you or your staff have questions about VDH’s new PPGs or have ideas about how VDH may promote success in implementing these new guidelines, which are, essentially, regulations on how we adopt regulations.

c: Dr. Remley
Dr. Burns
Joe Hilbert
Rosanne Kolesar
Kim Allan
Jane Chaffin (Registrar)
Melanie West (DPB)

FN 5 (continued): These abilities should allow staff to accomplish certain tasks, tasks that may prove useful in complying with the new PPGs, such as (i) launching regulation-based discussions and (ii) maintaining connectivity with, and informing individuals in, defined groups, *e.g.*, a group of interested persons. Feel free to explore this potential on the Town Hall (I ask that you inform me of your progress here) or ask me about requesting guidance from DPB about it.

⁶ Nothing here should be construed to limit any notice requirements of law, including those in the new PPGs.