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Periodic Review and Small Business Impact Review Report of Findings

Agency name	Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals
Virginia Administrative Code (VAC) Chapter citation(s)	18 VAC160-40
VAC Chapter title(s)	Onsite Sewage System Professionals Licensing Regulations
Date this document prepared	January 22, 2021

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 (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Acronyms and Definitions

Define all acronyms used in this Report, and any technical terms that are not also defined in the "Definitions" section of the regulation.

"DPOR" means the Department of Professional and Occupational Regulation.

"VDH" means the Virginia Department of Health.

"WWWOSSP Board" means the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals.

Legal Basis

Identify (1) the promulgating agency, 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 agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

The agency is the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals (“Board”). Chapter 23 of Title 54.1 of the Code of Virginia enumerates the legal authority for the Board to administer the licensure program for onsite sewage system professionals. Section 54.1-2301 of the Code of Virginia states, in part:

C. The Board shall establish a program for licensing individuals as onsite soil evaluators, onsite sewage system installers, and onsite sewage system operators.

D. The Board, in consultation with the Board of Health, shall adopt regulations for the licensure of (i) onsite soil evaluators; (ii) installers of alternative onsite sewage systems, as defined in § 32.1-163; and (iii) operators of alternative onsite sewage systems, as defined in § 32.1-163. Such regulations shall include requirements for (a) minimum education and training, including approved training courses; (b) relevant work experience; (c) demonstrated knowledge and skill; (d) application fees to cover the costs of the program, renewal fees, and schedules; (e) the division of onsite soil evaluators into classes, one of which shall be restricted to the design of conventional onsite sewage systems; and (f) other criteria the Board deems necessary.

In addition, § 54.1-201 of the Code of Virginia states, in part:

A. The powers and duties of regulatory boards shall be as follows:

1. To establish the qualifications of applicants for certification or licensure by any such board, provided that all qualifications shall be necessary to ensure either competence or integrity to engage in such profession or occupation.

5. To promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer the regulatory system administered by the regulatory board. The regulations shall not be in conflict with the purposes and intent of this chapter or of Chapters 1 (§ 54.1-100 et seq.) and 3 (§ 54.1-300 et seq.) of this title.

Alternatives to Regulation

Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

No viable alternatives for achieving the purpose of the existing regulation could be determined. The regulation enables the Board to fulfill the statutory mandates established in Chapter 23 of Title 54.1 of the Code of Virginia. Further, the regulation is necessary to ensure that the Board’s statutory requirements are executed in the least burdensome and most efficient and cost effective manner possible while protecting the welfare of the citizens of Virginia.

Public Comment

Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Commenter	Comment	Agency response
<p>Mike Lynn – SES Mid-Atlantic LLC</p>	<p>Commenter requests there be clarification between VDH and DPOR as to the requirements for master licensees regarding supervision of journeyman licensees and laborers who are onsite performing evaluations, inspections, operation, and installation of onsite sewage systems. Many master licensees do not understand current requirements and have unlicensed or unsupervised workers performing regulated work.</p> <p>The level of supervision required in the regulations exceeds that required for plumbers, electricians, and gas fitters. The level of supervision for onsite sewage professionals should be comparable to other trades.</p>	<p>The Board thanks the commenter.</p> <p>The Board’s authority to develop licensing requirements does not expand to the processes employed by the Virginia Department of Health (VDH). The regulations provide the definition of direct supervision (160-40-10) and the master licensee’s responsibilities (160-40-510). In addition, the Board adopted guidance in April of 2017 that further clarified the responsibilities of journeyman and master licensees in the provision of regulated work. If master licensees have unlicensed individuals or unsupervised journeyman performing regulated work, then that could be cause for disciplinary action by the Board. If master licensees do not understand the regulatory requirements for their licenses, that is an education and compliance issue, not necessarily an issue that necessitates amendment of the regulations.</p> <p>Regarding the differences between the supervision requirements for tradesman licensees under the Board for Contractors and journeyman licensees under the WWOOSSP Board, it should be noted that the entry requirements for journeyman tradesman exceed those of journeyman licensees under the WWOOSSP Board. Journeyman tradesman licensees are required, in most cases, to take an examination, have up to 240 hours of training, and four years of experience. Journeyman applicants under the WWOOSSP Board can qualify for licensure with no examination and as few as six months of experience.</p> <p>During its initial development of the regulation, the Board considered the supervision requirements appropriate to fulfill its statutory obligation to protect the public health and welfare, while doing so in the least burdensome and most cost efficient manner.</p>

		<p>The Board elects to retain the regulation in its current form without amendment at this time. The decision to retain a regulation in its current form does not prevent the Board from initiating action to review or amend the regulation in the future.</p>
<p>Mike Lynn – SES Mid-Atlantic LLC</p>	<p>The commenter states that it is not clear to licensed plumbers that plumbers are not allowed to perform maintenance and replace pumps and floats on septic systems without a wastewater operator or installer license. It is not clear that conventional operators are not allowed pump out alternative systems. It is not clear what electrical work may be performed by operators and installers, and what must be performed by a licensed electrician.</p> <p>Commenter noted that it takes a lot of time, training, and money to keep properly licensed staff employed and on jobs to meet the requirements of the regulations, and VDH and DPOR have not made this clear to the industry. Other licensed operators should not be the only form of policing competitors and other practitioners.</p>	<p>The Board thanks the commenter.</p> <p>Chapter 23 of Title 54.1 provides the licensing authority for those engaging in regulated work as onsite sewage system professionals. If individuals who are not licensed as the appropriate onsite sewage system professionals license type to engage in regulated services are engaging in such services, that is a compliance issue and/or an area for increased education for those other license types.</p> <p>The Board adopted guidance in April 2017 with the limited circumstance in which a conventional operator can pump an alternative system. Otherwise, the definitions (160-40-10) provide that conventional operators are licensed to operate and maintain conventional onsite sewage systems whereas alternative operators are licensed to operate and maintain conventional and alternative onsite sewage systems.</p> <p>The Board's regulatory authority extends only to those who are onsite sewage system installers, operators, and soil evaluators.</p> <p>The Board elects to retain the regulation in its current form without amendment at this time. The decision to retain a regulation in its current form does not prevent the Board from initiating action to review or amend the regulation in the future.</p>
<p>Mike Lynn – SES Mid-Atlantic LLC</p>	<p>Commenter suggests there should be a process for practitioners who do not have a master licensee to work under to become licensed instead of “operating under the radar.”</p> <p>DPOR and VDH must work together to rid the Commonwealth of unlicensed practitioners who have no desire to become licensed and compete fairly with those who play by the rules.</p>	<p>The Board thanks the commenter.</p> <p>One of the requirements to qualify for licensure for any professional regulatory program is experience. In order to gain such qualifying experience, an individual must work under the direction of a licensed professional in order to become minimally competent to engage in the profession. To accomplish this, some employers and other entities establish apprenticeship programs to aide unlicensed individuals in</p>

		<p>obtaining the necessary experience and training to become licensed and the Board’s regulations do not prohibit gaining experience through such programs. The establishment and development of an apprenticeship program is administered by the Department of Labor and Industry should an entity wish to pursue this as an option to help train up-and-coming professionals.</p> <p>While the Board agrees that unlicensed individuals are prohibited by law from engaging in activities requiring a license, such activities do not fall under the jurisdiction of the Board as they are criminal violations and must be adjudicated through the criminal prosecution process.</p> <p>The Board elects to retain the regulation in its current form without amendment at this time. The decision to retain a regulation in its current form does not prevent the Board from initiating action to review or amend the regulation in the future.</p>
<p>Mike Lynn – SES Mid-Atlantic LLC</p>	<p>Commenter states master plumbers and master electricians are allowed to self-certify some things in some counties, but master septic system installers are not.</p>	<p>The Board thanks the commenter.</p> <p>The Board does not have authority over the permitting or certification processes exercised by localities.</p>
<p>Mike Lynn – SES Mid-Atlantic LLC</p>	<p>Commenter states homeowners should be permitted to perform work on their own septic systems such as replacing pumps, compressors, or floats without a license as long as the work is inspected.</p>	<p>The Board thanks the commenter.</p> <p>The Board does not have the authority to make the change the commenter seeks. The licensure requirement was established by the General Assembly and does not include an exemption for homeowners performing regulated work on their own onsite sewage systems. Only the General Assembly can amend the statute to create such an exemption.</p>

Effectiveness

Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

The General Assembly has charged the Board with the responsibility for regulating those who install or operate onsite sewage systems, and those who perform the duties of an onsite soil evaluator, by

requiring that such individuals obtain a license in order to engage in these occupations. Residences that do not have access to public water systems must rely on onsite septic systems to properly and safely dispose of wastewater they produce. Installation and operation of onsite septic systems by those who lack sufficient expertise in these tasks poses a risk to the public health. Soil evaluators are responsible for testing soils to determine whether sites are appropriate for installation of a disposal system, designing such systems, and certifying that such systems comply with applicable state regulations and local ordinances. Soil evaluators who lack sufficient expertise to perform these duties may pose a risk to the public health. In addition, the improper installation or operation of an onsite septic system can pose a substantial risk of financial harm to homeowners who will be responsible for assuming the costs to remediate damage and repair/replace defective systems.

The regulation meets the criteria set forth in Executive Order 14 (2018). The regulation contains the requirements for licensure of onsite sewage system installers, onsite sewage system operators, and onsite soil evaluators. The regulation is necessary to interpret and apply the requirements imposed upon the Board by Chapter 23 of the Code of Virginia, and to protect the public welfare, in part by ensuring those who install and operate onsite sewage systems. The regulation is clearly written and understandable. The regulation is designed to achieve its objective in the most efficient and cost effective manner.

Decision

Explain the basis for the promulgating agency’s decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

The agency is recommending that the regulation stay in effect without change.

The regulation is necessary to interpret and apply the requirements imposed upon the Board by Chapter 23 of the Code of Virginia, and to protect the public welfare, in part by ensuring those who install and operate onsite sewage systems. The regulation is clearly written and understandable. The regulation is designed to achieve its objective in the most efficient and cost effective manner.

Based on the comments received during the public comment period, there does not appear to be a reason to repeal the regulation. There also does not appear to be a reason to amend the regulation at this time. However, the decision to retain a regulation in its current form does not prevent the Board from conducting review or amendment of the regulation in the future.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency’s decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

Onsite sewage system installer, onsite sewage system operator, and onsite soil evaluator licenses are issued to individuals. These individuals do not fall within the meaning of the term “small business” as defined in § 2.2-4007.1. Individuals who are required to be licensed may be owners or employees of business entities that fall within the meaning of “small business.”

Business entities that perform installation, repair, improvement, or removal of septic tanks, septic systems, and other onsite sewage disposal systems annexed to real property are subject to regulation by the Board for Contractors as contractors, and are required to have a contractor license issued by that agency. Some of these business entities may fall within the meaning of the term “small business.” The Board for Contractors requires contractors that offer and engage in this type of contracting work to have a specialty designation on the contractor license for sewage disposal systems contracting. The Board for Contractors requires certain personnel of the contractor to be licensed as an onsite sewage system installer in order for the business entity to qualify for a contractor license with such designation.

Section 54.1-2301 of the Code of Virginia mandates the Board license and regulate onsite sewage system professionals in order to protect the public health and welfare. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation.

The Board provides protection to the public welfare of the citizens of the Commonwealth by ensuring that those who receive a license from the Board meet minimum requirements for education and experience, and competency in order to install or operate onsite septic systems, or perform the duties of an onsite soil evaluator.

The regulation is clearly written, easily understandable, and does not overlap, duplicate or conflict with federal or state law or regulation. Based on the comment received during the public comment period, there does not appear to be a reason to repeal the regulation. There also does not appear to be a reason to amend the regulation at this time. However, the decision to retain a regulation in its current form does not prevent the Board from conducting review or amendment of the regulation in the future.

This is the first periodic review of this regulation since it became effective in 2017. On January 14, 2021, the Board discussed the regulation and, for the reasons stated in this section, determined that the regulation should not be amended or repealed, but should be retained in its current form.