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**SENATE BILL NO. 1139**

Offered January 10, 2007

Prefiled January 10, 2007

A *BILL to amend and reenact §§ 2.2-4001, 2.2-4003, 2.2-4006, 2.2-4007, 2.2-4007.1, 2.2-4009, 2.2-4011, 2.2-4012, 2.2-4012.1, 2.2-4013, 2.2-4014, 2.2-4015, 2.2-4027, 2.2-4031, 3.1-398, 28.2-1507, 32.1-325, 35.1-14, 59.1-153, 62.1-44.15, 62.1-246, and 63.2-217 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 2.2-4007.01 through 2.2-4007.07, relating to the Administrative Process Act.*

Patron—Wagner

Referred to Committee on General Laws and Technology

**Be it enacted by the General Assembly of Virginia:**

1. That §§ 2.2-4001, 2.2-4003, 2.2-4006, 2.2-4007, 2.2-4007.1, 2.2-4009, 2.2-4011, 2.2-4012, 2.2-4012.1, 2.2-4013, 2.2-4014, 2.2-4015, 2.2-4027, 2.2-4031, 3.1-398, 28.2-1507, 32.1-325, 35.1-14, 59.1-153, 62.1-44.15, 62.1-246, and 63.2-217 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding sections numbered 2.2-4007.01 through 2.2-4007.07 as follows:

§ 2.2-4001. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Agency" means any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases.

"Agency action" means either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency or court.

"Basic law" or "basic laws" means provisions of the Constitution and statutes of the Commonwealth authorizing an agency to make regulations or decide cases or containing procedural requirements therefor.

"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

"Guidance document" means any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations, excluding agency minutes or documents that pertain only to the internal management of agencies. Nothing in this definition shall be construed or interpreted to expand the identification or release of any document otherwise protected by law.

"Hearing" means agency processes other than those informational or factual inquiries of an informal nature provided in §§ ~~2.2-4007~~ 2.2-4007.01 and 2.2-4019 and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § 2.2-4009 in connection with the making of regulations or (ii) a similar right of private parties or requirement of public agencies as provided in § 2.2-4020 in connection with case decisions.

"Hearing officer" means an attorney selected from a list maintained by the Executive Secretary of the Supreme Court in accordance with § 2.2-4024.

"Public assistance and social services programs" means those programs specified in § 63.2-100.

"Rule" or "regulation" means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.

"Subordinate" means (i) one or more but less than a quorum of the members of a board constituting an agency, (ii) one or more of its staff members or employees, or (iii) any other person or persons designated by the agency to act in its behalf.

§ 2.2-4003. Venue.

~~Unless the parties otherwise agree, in~~ In all proceedings under §§ 2.2-4019, or 2.2-4020 or ~~§ 2.2-4026 the venue for agency or court proceedings shall be in the city or county where the administrative agency maintains its principal office or as the parties may otherwise agree as specified in subdivision 1 of § 8.01-261. In all proceedings under § 2.2-4026, venue shall be as specified in~~

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59 *subdivision 1 of § 8.01-261.*

60 § 2.2-4006. Exemptions from requirements of this article.

61 A. The following agency actions otherwise subject to this chapter and § 2.2-4103 of the Virginia  
62 Register Act shall be exempted from the operation of this article:

63 1. Agency orders or regulations fixing rates or prices.

64 2. Regulations that establish or prescribe agency organization, internal practice or procedures,  
65 including delegations of authority.

66 3. Regulations that consist only of changes in style or form or corrections of technical errors. Each  
67 promulgating agency shall review all references to sections of the Code of Virginia within their  
68 regulations each time a new supplement or replacement volume to the Code of Virginia is published to  
69 ensure the accuracy of each section or section subdivision identification listed.

70 4. Regulations that are:

71 a. Necessary to conform to changes in Virginia statutory law or the appropriation act where no  
72 agency discretion is involved;

73 b. Required by order of any state or federal court of competent jurisdiction where no agency  
74 discretion is involved; or

75 c. Necessary to meet the requirements of federal law or regulations, provided such regulations do not  
76 differ materially from those required by federal law or regulation, and the Registrar has so determined in  
77 writing. Notice of the proposed adoption of these regulations and the Registrar's determination shall be  
78 published in the Virginia Register not less than 30 days prior to the effective date of the regulation.

79 5. Preliminary program permit fees of the Department of Environmental Quality assessed pursuant to  
80 subsection C of § 10.1-1322.2.

81 6. Regulations of the Pesticide Control Board adopted pursuant to subsection B of § 3.1-249.51 or  
82 clause (v) or (vi) of subsection C of § 3.1-249.53 after having been considered at two or more Board  
83 meetings and one public hearing.

84 7. Regulations of the regulatory boards served by (i) the Department of Labor and Industry pursuant  
85 to Title 40.1 and (ii) the Department of Professional and Occupational Regulation or the Department of  
86 Health Professions pursuant to Title 54.1 that are limited to reducing fees charged to regulants and  
87 applicants.

88 8. The development and issuance of procedural policy relating to risk-based mine inspections by the  
89 Department of Mines, Minerals and Energy authorized pursuant to §§ 45.1-161.82 and 45.1-161.292:55.

90 9. General permits issued by the (a) State Air Pollution Control Board pursuant to Chapter 13  
91 (§ 10.1-1300 et seq.) of Title 10.1 or (b) State Water Control Board pursuant to the State Water Control  
92 Law (§ 62.1-44.2 et seq.), Chapter 24 (§ 62.1-242 et seq.) of Title 62.1 and Chapter 25 (§ 62.1-254 et  
93 seq.) of Title 62.1, (c) Virginia Soil and Water Conservation Board pursuant to the Virginia Stormwater  
94 Management Act (§ 10.1-603.1 et seq.) of Title 10.1, and (d) the development and issuance of general  
95 wetlands permits by the Marine Resources Commission pursuant to subsection B of § 28.2-1307, if the  
96 respective Board or Commission (i) provides a Notice of Intended Regulatory Action in conformance  
97 with the provisions of ~~subsection B of § 2.2-4007~~ § 2.2-4007.01, (ii) following the passage of 30 days  
98 from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee  
99 composed of relevant stakeholders, including potentially affected citizens groups, to assist in the  
100 development of the general permit, (iii) provides notice and receives oral and written comment as  
101 provided in ~~subsection F of § 2.2-4007~~ § 2.2-4007.03, and (iv) conducts at least one public hearing on  
102 the proposed general permit.

103 10. The development and issuance by the Board of Education of guidelines on constitutional rights  
104 and restrictions relating to the recitation of the pledge of allegiance to the American flag in public  
105 schools pursuant to § 22.1-202.

106 11. Regulations of the Board of the Virginia College Savings Plan adopted pursuant to § 23-38.77.

107 12. Regulations of the Marine Resources Commission.

108 13. Regulations adopted by the Board of Housing and Community Development pursuant to (i)  
109 Statewide Fire Prevention Code (§ 27-94 et seq.), (ii) the Industrialized Building Safety Law (§ 36-70 et  
110 seq.), (iii) the Uniform Statewide Building Code (§ 36-97 et seq.), and (iv) § 36-98.3, provided the  
111 Board (a) provides a Notice of Intended Regulatory Action in conformance with the provisions of  
112 ~~subsection B of § 2.2-4007~~ § 2.2-4007.01, (b) publishes the proposed regulation and provides an  
113 opportunity for oral and written comments as provided in ~~subsection F of § 2.2-4007~~ § 2.2-4007.03, and  
114 (c) conducts at least one public hearing as provided in §§ 2.2-4009 and 36-100 prior to the publishing of  
115 the proposed regulations. Notwithstanding the provisions of this subdivision, any regulations  
116 promulgated by the Board shall remain subject to the provisions of ~~subsection K of~~  
117 ~~§ 2.2-4007~~ § 2.2-4007.06 concerning public petitions, and §§ 2.2-4013 and 2.2-4014 concerning review  
118 by the Governor and General Assembly.

119 14. Amendments to the list of drugs susceptible to counterfeiting adopted by the Board of Pharmacy  
120 pursuant to subsection B of § 54.1-3307.

B. Whenever regulations are adopted under this section, the agency shall state as part thereof that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision. The effective date of regulations adopted under this subsection shall be in accordance with the provisions of § 2.2-4015, except in the case of emergency regulations, which shall become effective as provided in subsection B of § 2.2-4012.

C. A regulation for which an exemption is claimed under this section or § 2.2-4002, or 2.2-4011 and that is placed before a board or commission for consideration shall be provided at least two days in advance of the board or commission meeting to members of the public that request a copy of that regulation. A copy of that regulation shall be made available to the public attending such meeting.

§ 2.2-4007. Notice of intended regulatory action and opportunity to comment.

A. Any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation. The petition shall state (i) the substance and purpose of the rulemaking that is requested, including reference to any applicable Virginia Administrative Code sections, and (ii) reference to the legal authority of the agency to take the action requested.

B. Within 14 days of receiving a petition, the agency shall send a notice identifying the petitioner, the nature of the petitioner's request and the agency's plan for disposition of the petition to the Registrar for publication in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 2.2-4031.

C. A 21-day period for acceptance of written public comment on the petition shall be provided after publication in the Virginia Register. The agency shall issue a written decision to grant or deny the petitioner's request within 90 days following the close of the comment period. However, if the rulemaking authority is vested in an entity that has not met within that 90-day period, the entity shall issue a written decision no later than 14 days after it next meets. The written decision issued by the agency shall include a statement of its reasons and shall be submitted to the Registrar for publication in the Virginia Register of Regulations. Agency decisions to initiate or not initiate rulemaking in response to petitions shall not be subject to judicial review.

B. In the case of all regulations, except those regulations exempted by § 2.2-4002, 2.2-4006, 2.2-4011, or 2.2-4012.1, an agency shall provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation. At least 30 days shall be provided for public comment after publication of the Notice of Intended Regulatory Action. An agency shall not file proposed regulations with the Registrar until the public comment period on the Notice of Intended Regulatory Action has closed.

C. Agencies shall state in the Notice of Intended Regulatory Action whether they plan to hold a public hearing on the proposed regulation after it is published. Agencies shall hold such public hearings if required by basic law. If the agency states an intent to hold a public hearing on the proposed regulation in the Notice of Intended Regulatory Action, then it shall hold the public hearing. If the agency states in its Notice of Intended Regulatory Action that it does not plan to hold a hearing on the proposed regulation, then no public hearing is required unless, prior to completion of the comment period specified in the Notice of Intended Regulatory Action (i) the Governor directs the agency to hold a public hearing or (ii) the agency receives requests for a public hearing from at least 25 persons.

D. Public participation guidelines for soliciting the input of interested parties in the formation and development of its regulations shall be developed, adopted and utilized by each agency pursuant to the provisions of this chapter. The guidelines shall set out any methods for the identification and notification of interested parties, and any specific means of seeking input from interested persons or groups that the agency intends to use in addition to the Notice of Intended Regulatory Action. The guidelines shall set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering interest in working with the agency. Such policy shall address the circumstances in which the agency considers the panels or consultation appropriate and intends to make use of the panels or consultation.

E. In formulating any regulation, including but not limited to those in public assistance and social services programs, the agency pursuant to its public participation guidelines shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency or its specially designated subordinate. However, the agency may begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit comments.

F. In the case of all regulations, except those regulations exempted by § 2.2-4002, 2.2-4006, or 2.2-4011, the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be published in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 2.2-4031. In addition, the agency may, in its discretion, (i) publish the notice in any newspaper and (ii) publicize the notice through press releases and such other media as will best serve the purpose and subject involved. The Register and any newspaper publication shall be made at least 60 days in advance of the last date prescribed in the notice for such submittals. All notices,

182 written submittals, and transcripts, summaries or notations of oral presentations, as well as any agency  
183 action thereon, shall be matters of public record in the custody of the agency.

184 G. If an agency wishes to change a proposed regulation before adopting it as a final regulation, it  
185 may choose to publish a revised proposed regulation provided the latter is subject to a public comment  
186 period of at least 30 additional days and the agency complies in all other respects with this section.

187 H. Before delivering any proposed regulation under consideration to the Registrar as required in  
188 subsection I, the agency shall deliver a copy of that regulation to the Department of Planning and  
189 Budget. In addition to determining the public benefit, the Department of Planning and Budget in  
190 coordination with the agency, shall, within 45 days, prepare an economic impact analysis of the  
191 proposed regulation, as follows:

192 1. The economic impact analysis shall include, but need not be limited to, the projected number of  
193 businesses or other entities to whom the regulation would apply; the identity of any localities and types  
194 of businesses or other entities particularly affected by the regulation; the projected number of persons  
195 and employment positions to be affected; the impact of the regulation on the use and value of private  
196 property; and the projected costs to affected businesses, localities or entities to implement or comply  
197 with the regulations, including the estimated fiscal impact on such localities and sources of potential  
198 funds to implement and comply with such regulation; and

199 2. If the regulation may have an adverse effect on small businesses, the economic impact analysis  
200 shall also include (i) an identification and estimate of the number of small businesses subject to the  
201 regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small  
202 businesses to comply with the regulation, including the type of professional skills necessary for  
203 preparing required reports and other documents; (iii) a statement of the probable effect of the regulation  
204 on affected small businesses; and (iv) a description of any less intrusive or less costly alternative  
205 methods of achieving the purpose of the regulation. As used in this subdivision, "small business" has the  
206 same meaning as provided in subsection A of § 2.2-4007.1.

207 Agencies shall provide the Department with such estimated fiscal impacts on localities and sources of  
208 potential funds. The Department may request the assistance of any other agency in preparing the  
209 analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation,  
210 which shall comment thereon as provided in subsection I, and a copy to the Registrar for publication  
211 with the proposed regulation. No regulation shall be promulgated for consideration pursuant to  
212 subsection I until the impact analysis has been received by the Registrar. For purposes of this section,  
213 the term "locality, business, or entity particularly affected" means any locality, business, or entity that  
214 bears any identified disproportionate material impact that would not be experienced by other localities,  
215 businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of  
216 public review and comment on the proposed regulation. The accuracy of the estimate shall in no way  
217 affect the validity of the regulation, nor shall any failure to comply with or otherwise follow the  
218 procedures set forth in this subsection create any cause of action or provide standing for any person  
219 under Article 5 (§ 2.2-4025 et seq.) of this chapter or otherwise to challenge the actions of the  
220 Department hereunder or the action of the agency in adopting the proposed regulation.

221 I. Before promulgating any regulation under consideration, the agency shall deliver a copy of that  
222 regulation to the Registrar together with a summary of the regulation and a separate and concise  
223 statement of (i) the basis of the regulation, defined as the statutory authority for promulgating the  
224 regulation, including an identification of the section number and a brief statement relating the content of  
225 the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as  
226 the rationale or justification for the new provisions of the regulation, from the standpoint of the public's  
227 health, safety or welfare; (iii) the substance of the regulation, defined as the identification and  
228 explanation of the key provisions of the regulation that make changes to the current status of the law;  
229 (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public, and  
230 as applicable for the agency or the state, of implementing the new regulatory provisions; and (v) the  
231 agency's response to the economic impact analysis submitted by the Department of Planning and Budget  
232 pursuant to subsection H. Any economic impact estimate included in the agency's response shall  
233 represent the agency's best estimate for the purposes of public review and comment, but the accuracy of  
234 the estimate shall in no way affect the validity of the regulation. Staff as designated by the Code  
235 Commission shall review proposed regulation submission packages to ensure the requirements of this  
236 subsection are met prior to publication of the proposed regulation in the Register. The summary, the  
237 statement of the basis, purpose, substance, and issues; the economic impact analysis; and the agency's  
238 response shall be published in the Virginia Register of Regulations, together with the notice of  
239 opportunity for oral or written submittals on the proposed regulation.

240 J. When an agency formulating regulations in public assistance and social services programs cannot  
241 comply with the public comment requirements of subsection F due to time limitations imposed by state  
242 or federal laws or regulations for the adoption of such regulation, the Secretary of Health and Human  
243 Resources may shorten the time requirements of subsection F. If, in the Secretary's sole discretion, such

time limitations reasonably preclude any advance published notice, he may waive the requirements of subsection F. However, the agency shall, as soon as practicable after the adoption of the regulation in a manner consistent with the requirements of subsection F, publish notice of the promulgation of the regulation and afford an opportunity for public comment. The precise factual basis for the Secretary's determination shall be stated in the published notice.

K. If one or more changes with substantial impact are made to a proposed regulation from the time that it is published as a proposed regulation to the time it is published as a final regulation, any person may petition the agency within 30 days from the publication of the final regulation to request an opportunity for oral and written submittals on the changes to the regulation. If the agency receives requests from at least 25 persons for an opportunity to submit oral and written comments on the changes to the regulation, the agency shall (i) suspend the regulatory process for 30 days to solicit additional public comment and (ii) file notice of the additional 30-day public comment period with the Registrar of Regulations, unless the agency determines that the changes made are minor or inconsequential in their impact. The comment period, if any, shall begin on the date of publication of the notice in the Register. Agency denial of petitions for a comment period on changes to the regulation shall be subject to judicial review.

L. In no event shall the failure to comply with the requirements of subsection F be deemed mere harmless error for the purposes of § 2.2-4027.

M. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

§ 2.2-4007.01. Notice of intended regulatory action; public hearing.

A. In the case of all regulations, except those regulations exempted by § 2.2-4002, 2.2-4006, 2.2-4011, or 2.2-4012.1, an agency shall provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation. At least 30 days shall be provided for public comment after publication of the Notice of Intended Regulatory Action. An agency shall not file proposed regulations with the Registrar until the public comment period on the Notice of Intended Regulatory Action has closed.

B. Agencies shall state in the Notice of Intended Regulatory Action whether they plan to hold a public hearing on the proposed regulation after it is published. Agencies shall hold such public hearings if required by basic law. If the agency states an intent to hold a public hearing on the proposed regulation in the Notice of Intended Regulatory Action, then it shall hold the public hearing. If the agency states in its Notice of Intended Regulatory Action that it does not plan to hold a hearing on the proposed regulation, then no public hearing is required unless, prior to completion of the comment period specified in the Notice of Intended Regulatory Action, (i) the Governor directs the agency to hold a public hearing or (ii) the agency receives requests for a public hearing from at least 25 persons.

§ 2.2-4007.02. Public participation guidelines.

A. Public participation guidelines for soliciting the input of interested parties in the formation and development of its regulations shall be developed, adopted, and used by each agency pursuant to the provisions of this chapter. The guidelines shall set out any methods for the identification and notification of interested parties and any specific means of seeking input from interested persons or groups that the agency intends to use in addition to the Notice of Intended Regulatory Action. The guidelines shall set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering interest in working with the agency. Such policy shall address the circumstances in which the agency considers the panels or consultation appropriate and intends to make use of the panels or consultation.

B. In formulating any regulation, including but not limited to those in public assistance and social services programs, the agency pursuant to its public participation guidelines shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency or its specially designated subordinate. However, the agency may begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit comments.

§ 2.2-4007.03. Informational proceedings; effect of noncompliance.

A. In the case of all regulations, except those regulations exempted by § 2.2-4002, 2.2-4006, or 2.2-4011, the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be published in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 2.2-4031. In addition, the agency may, in its discretion, (i) publish the notice in any newspaper and (ii) publicize the notice through press releases and such other media as will best serve the purpose and subject involved. The Register and any newspaper publication shall be made at least 60 days in advance of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts and summaries or notations of oral presentations, as well as any agency action thereon, shall be matters of public record in the custody of the agency.

B. If an agency wishes to change a proposed regulation before adopting it as a final regulation, it

305 may choose to publish a revised proposed regulation, provided the latter is subject to a public comment  
306 period of at least 30 additional days and the agency complies in all other respects with this section.

307 C. In no event shall the failure to comply with the requirements of this section be deemed mere  
308 harmless error for the purposes of § 2.2-4027.

309 § 2.2-4007.04. Economic impact analysis.

310 A. Before delivering any proposed regulation under consideration to the Registrar as required in  
311 § 2.2-4007.05, the agency shall deliver a copy of that regulation to the Department of Planning and  
312 Budget. In addition to determining the public benefit, the Department of Planning and Budget in  
313 coordination with the agency shall, within 45 days, prepare an economic impact analysis of the  
314 proposed regulation, as follows:

315 1. The economic impact analysis shall include but need not be limited to the projected number of  
316 businesses or other entities to whom the regulation would apply; the identity of any localities and types  
317 of businesses or other entities particularly affected by the regulation; the projected number of persons  
318 and employment positions to be affected; the impact of the regulation on the use and value of private  
319 property; and the projected costs to affected businesses, localities, or entities of implementing or  
320 complying with the regulations, including the estimated fiscal impact on such localities and sources of  
321 potential funds to implement and comply with such regulation; and

322 2. If the regulation may have an adverse effect on small businesses, the economic impact analysis  
323 shall also include (i) an identification and estimate of the number of small businesses subject to the  
324 regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small  
325 businesses to comply with the regulation, including the type of professional skills necessary for  
326 preparing required reports and other documents; (iii) a statement of the probable effect of the  
327 regulation on affected small businesses; and (iv) a description of any less intrusive or less costly  
328 alternative methods of achieving the purpose of the regulation. As used in this subdivision, "small  
329 business" has the same meaning as provided in subsection A of § 2.2-4007.1.

330 3. In the event the Department cannot complete an economic impact statement within the 45-day  
331 period, it shall advise the agency and the Joint Commission on Administrative Rules as to the reasons  
332 for the delay. In no event shall the delay exceed 30 days beyond the original 45-day period.

333 B. Agencies shall provide the Department with such estimated fiscal impacts on localities and  
334 sources of potential funds. The Department may request the assistance of any other agency in preparing  
335 the analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation,  
336 which shall comment thereon as provided in § 2.2-4007.05, and a copy to the Registrar for publication  
337 with the proposed regulation. No regulation shall be promulgated for consideration pursuant to  
338 § 2.2-4007.05 until the impact analysis has been received by the Registrar. For purposes of this section,  
339 the term "locality, business, or entity particularly affected" means any locality, business, or entity that  
340 bears any identified disproportionate material impact that would not be experienced by other localities,  
341 businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of  
342 public review and comment on the proposed regulation. The accuracy of the estimate shall in no way  
343 affect the validity of the regulation, nor shall any failure to comply with or otherwise follow the  
344 procedures set forth in this subsection create any cause of action or provide standing for any person  
345 under Article 5 (§ 2.2-4025 et seq.) or otherwise to challenge the actions of the Department hereunder  
346 or the action of the agency in adopting the proposed regulation.

347 § 2.2-4007.05. Submission of proposed regulations to the Registrar.

348 Before promulgating any regulation under consideration, the agency shall deliver a copy of that  
349 regulation to the Registrar together with a summary of the regulation and a separate and concise  
350 statement of (i) the basis of the regulation, defined as the statutory authority for promulgating the  
351 regulation, including an identification of the section number and a brief statement relating the content of  
352 the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as  
353 the rationale or justification for the new provisions of the regulation, from the standpoint of the public's  
354 health, safety, or welfare; (iii) the substance of the regulation, defined as the identification and  
355 explanation of the key provisions of the regulation that make changes to the current status of the law;  
356 (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public,  
357 and as applicable for the agency or the state, of implementing the new regulatory provisions; and (v)  
358 the agency's response to the economic impact analysis submitted by the Department of Planning and  
359 Budget pursuant to § 2.2-4007.04. Any economic impact estimate included in the agency's response shall  
360 represent the agency's best estimate for the purposes of public review and comment, but the accuracy of  
361 the estimate shall in no way affect the validity of the regulation. Staff as designated by the Code  
362 Commission shall review proposed regulation submission packages to ensure that the requirements of  
363 this subsection are met prior to publication of the proposed regulation in the Register. The summary;  
364 the statement of the basis, purpose, substance, and issues; the economic impact analysis; and the  
365 agency's response shall be published in the Virginia Register of Regulations, together with the notice of  
366 opportunity for oral or written submittals on the proposed regulation.

§ 2.2-4007.06. *Changes between proposed and final regulations.*

If one or more changes with substantial impact are made to a proposed regulation from the time that it is published as a proposed regulation to the time it is published as a final regulation, any person may petition the agency within 30 days from the publication of the final regulation to request an opportunity for oral and written submittals on the changes to the regulation. If the agency receives requests from at least 25 persons for an opportunity to submit oral and written comments on the changes to the regulation, the agency shall (i) suspend the regulatory process for 30 days to solicit additional public comment and (ii) file notice of the additional 30-day public comment period with the Registrar of Regulations, unless the agency determines that the changes made are minor or inconsequential in their impact. The comment period, if any, shall begin on the date of publication of the notice in the Register. Agency denial of petitions for a comment period on changes to the regulation shall be subject to judicial review.

§ 2.2-4007.07. *State Air Pollution Control Board; variances.*

The provisions of §§ 2.2-4007 through 2.2-4007.06 shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

§ 2.2-4007.1. Regulatory flexibility for small businesses; periodic review of regulations.

A. As used in this section, "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.

B. In addition to the requirements of §§ 2.2-4007 through 2.2-4007.06, prior to the adoption of any proposed regulation, the agency proposing a regulation shall prepare a regulatory flexibility analysis in which the agency shall consider utilizing 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 businesses. The agency shall consider, at a minimum, each of the following methods of reducing the effects of the proposed regulation on small businesses:

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.

C. Prior to the adoption of any proposed regulation that may have an adverse effect on small businesses, each agency shall notify the Joint Commission on Administrative Rules of its intent to adopt the proposed regulation. The Joint Commission on Administrative Rules shall advise and assist agencies in complying with the provisions of this section.

D. In addition to the requirements of § 2.2-4017, on or before July 1, 2009, an agency shall review its existing regulations to determine whether they should be continued without change or be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses. If an agency head determines that completion of the review of existing regulations is not feasible by July 1, 2009, that agency shall publish a statement certifying that determination. An agency may extend the date required by this subsection in increments of one year, not to exceed a total of five years.

E. In addition to other requirements of § 2.2-4017, all final regulations adopted after July 1, 2005, shall be reviewed every five years to ensure that they minimize the economic impact on small businesses in a manner consistent with the stated objectives of applicable law.

F. The regulatory review required by this section shall include consideration of:

1. The continued need for the rule;
2. The nature of complaints or comments received concerning the regulation from the public;
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.

§ 2.2-4009. Evidentiary hearings on regulations.

Where an agency proposes to consider the exercise of authority to promulgate a regulation, it may conduct or give interested persons an opportunity to participate in a public evidentiary proceeding; and the agency shall always do so where the basic law requires a hearing. Evidentiary hearings may be limited to the trial of factual issues directly related to the legal validity of the proposed regulation in any of the relevant respects outlined in § 2.2-4027 of this chapter.

General notice of the proceedings shall be published as prescribed in § ~~2.2-4007~~ 2.2-4007.01. In addition, where the proposed regulation is to be addressed to named persons, the latter shall also be given the same notice individually by mail or otherwise if acknowledged in writing. The proceedings may be conducted separately from, and in any event the record thereof shall be separate from, any other or additional proceedings the agency may choose or be required to conduct for the reception of general data, views, and argument pursuant to § ~~2.2-4007~~ 2.2-4007.02 or otherwise. Any probative evidence may be received except that the agency shall as a matter of efficiency exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, and may deny rebuttal, or cross-examination. Testimony may be admitted in written form provided those who have prepared it are made available for examination in person.

The agency or one or more of its subordinates specially designated for the purpose shall preside at the taking of evidence and may administer oaths and affirmations. The proceedings shall be recorded verbatim and the record thereof shall be made available to interested persons for transcription at their expense or, if transcribed by or for the agency, for inspection or purchase at cost.

Where subordinates preside at the taking of the evidence, they shall report their recommendations and proposed findings and conclusions that shall be made available upon request to the participants in the taking of evidence as well as other interested persons and serve as a basis for exceptions, briefs, or oral argument to the agency itself. Whether or not subordinates take the evidence, after opportunity for the submittal of briefs on request and such oral argument as may be scheduled, the agency may settle the terms of the regulation and shall promulgate it only upon (i) its findings of fact based upon the record of evidence made pursuant to this section and facts of which judicial notice may be taken, (ii) statements of basis and purpose as well as comment upon data received in any informational proceedings held under § ~~2.2-4007~~ 2.2-4007.01 and (iii) the conclusions required by the terms of the basic law under which the agency is operating.

§ 2.2-4011. Emergency regulations; publication; exceptions.

A. Regulations that an agency finds are necessitated by an emergency situation *may be adopted by an agency upon consultation with the Attorney General, which approval shall be granted only after the agency has submitted a request stating in writing the nature of the emergency, and the necessity for such action shall be at the sole discretion of the Governor.*

B. *Agencies may also adopt emergency regulations* For the purposes of this subsection, "emergency situation" means a situation (i) involving an imminent threat to public health or safety or (ii) in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006. In such cases, the agency shall state in writing the nature of the emergency and of the necessity for such action and may adopt the regulations. Pursuant to § 2.2-4012, such regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations.

C. *All emergency* The regulations shall be limited to no more than twelve months in duration. During the twelve-month period, an agency may issue additional emergency regulations as needed addressing the subject matter of the initial emergency regulation, but any such additional emergency regulations shall not be effective beyond the twelve-month period from the effective date of the initial emergency regulation. If the agency wishes to continue regulating the subject matter governed by the emergency regulation beyond the twelve-month limitation, a regulation to replace the emergency regulation shall be promulgated in accordance with this article. The Notice of Intended Regulatory Action to promulgate a replacement regulation shall be filed with the Registrar within sixty days of the effective date of the emergency regulation and published as soon as practicable, and the proposed replacement regulation shall be filed with the Registrar within 180 days after the effective date of the emergency regulation and published as soon as practicable.

D. *In the event that an agency concludes that despite its best efforts, a replacement regulation cannot be adopted before expiration of the 12-month period described in subsection C, it may seek the prior written approval of the Governor to extend the duration of the emergency regulation for a period of not more than six additional months. Any such request must be submitted to the Governor at least 30 days prior to the scheduled expiration of the emergency regulation and shall include a description of the agency's efforts to adopt a replacement regulation together with the reasons that a replacement regulation cannot be adopted before the expiration of the emergency regulation. Upon approval of the Governor, the duration of the emergency regulation shall be extended for a period of no more than 12 months. Such approval shall be in the sole discretion of the Governor and shall not be subject to judicial review. Agencies shall notify the Registrar of Regulations of the new expiration date of the emergency regulation as soon as practicable.*

B-E. Emergency regulations shall be published as soon as practicable in the Register.

C-F. The Regulations of the Marine Resources Commission shall be excluded from the provisions of this section.



§ 2.2-4012. Purpose; adoption; effective date; filing; duties of Registrar of Regulations.

A. The purpose of the regulatory procedures shall be to provide a regulatory plan that is predictable, based on measurable and anticipated outcomes, and is inclined toward conflict resolution.

B. Subject to the provisions of §§ 2.2-4013 and 2.2-4014, all regulations, including those that agencies, pursuant to §§ 2.2-4002, 2.2-4006, or § 2.2-4011, may elect to dispense with the public procedures provided by §§ ~~2.2-4007~~ 2.2-4007.01 and 2.2-4009, may be formally and finally adopted by the signed order of the agency so stating. No regulation except an emergency regulation or a noncontroversial regulation promulgated pursuant to § 2.2-4012.1 shall be effective until the expiration of the applicable period as provided in § 2.2-4015. In the case of an emergency regulation filed in accordance with § 2.2-4011, the regulation shall become effective upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. The originals of all regulations shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies. They, or facsimiles thereof, shall be made available for public inspection or copying. Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as required by other laws.

C. Prior to the publication for hearing of a proposed regulation, copies of the regulation and copies of the summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget and the agency's response thereto as required by § ~~2.2-4007~~ 2.2-4007.04 shall be transmitted to the Registrar of Regulations, who shall retain these documents.

D. All regulations adopted pursuant to this chapter shall contain a citation to the section of the Code of Virginia that authorizes or requires the regulations and, where the regulations are required to conform to federal law or regulation in order to be valid, a citation to the specific federal law or regulation to which conformity is required.

E. Immediately upon the adoption by any agency of any regulation in final form, a copy of (i) the regulation, (ii) a then current summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget, and (iii) the agency's summary description of the nature of the oral and written data, views, or arguments presented during the public proceedings and the agency's comments thereon shall be transmitted to the Registrar of Regulations, who shall retain these documents as permanent records and make them available for public inspection. A draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation.

§ 2.2-4012.1. Fast-track rulemaking process.

Notwithstanding any other provision, rules that are expected to be noncontroversial may be promulgated *or repealed* in accordance with the process set out in this section. With the concurrence of the Governor, and after written notice to the applicable standing committees of the Senate of Virginia and the House of Delegates, and to the Joint Commission on Administrative Rules, the agency may submit a fast-track regulation without having previously published a Notice of Intended Regulatory Action. The fast-track regulation shall *be published in the Virginia Register of Regulations along with an agency statement setting out the reasons for using the fast-track rulemaking process. Such regulations shall* be subject to the requirements set out in ~~subsections F, H, and I of § 2.2-4007~~ §§ 2.2-4007.03, 2.2-4007.04, and 2.2-4007.05, *except that the time for receiving public comment need not exceed 30 days after publication of the regulation in the Virginia Registrar of Regulations and the time for preparation of the economic impact analysis shall not exceed 21 days. The failure of the Department of Planning and Budget to deliver an economic impact analysis to the Registrar within 21 days of receipt of the proposed regulation under consideration shall be deemed a determination that the proposed regulation under consideration has minimal economic impact and no adverse effect on small business. and shall be published in the Virginia Register of Regulations along with an agency statement setting out the reasons for using the fast-track rulemaking process.* If an objection to the use of the fast-track process is received within the 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 set out in this article with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action. Otherwise, the regulation will become effective *or shall be repealed as appropriate*, 15 days after the close of the comment period, unless the regulation *or repeal* is withdrawn or a later effective date is specified by the agency.

§ 2.2-4013. Executive review of proposed and final regulations; changes with substantial impact.

A. The Governor shall adopt and publish procedures by executive order for review of all proposed regulations governed by this chapter by June 30 of the year in which the Governor takes office. The

551 procedures shall include (i) review by the Attorney General to ensure statutory authority for the  
552 proposed regulations; and (ii) examination by the Governor to determine if the proposed regulations are  
553 (a) necessary to protect the public health, safety and welfare and (b) clearly written and easily  
554 understandable. The procedures may also include review of the proposed regulation by the appropriate  
555 Cabinet Secretary.

556 The Governor shall transmit his comments, if any, on a proposed regulation to the Registrar and the  
557 agency no later than fifteen days following the completion of the public comment period provided for in  
558 § ~~2.2-4007~~2.2-4007.01. The Governor may recommend amendments or modifications to any regulation  
559 that would bring that regulation into conformity with statutory authority or state or federal laws,  
560 regulations or judicial decisions.

561 Not less than fifteen days following the completion of the public comment period provided for in  
562 § ~~2.2-4007~~2.2-4007.01, the agency may (i) adopt the proposed regulation if the Governor has no  
563 objection to the regulation; (ii) modify and adopt the proposed regulation after considering and  
564 incorporating the Governor's objections or suggestions, if any; or (iii) adopt the regulation without  
565 changes despite the Governor's recommendations for change.

566 B. Upon final adoption of the regulation, the agency shall forward a copy of the regulation to the  
567 Registrar of Regulations for publication as soon as practicable in the Register. All changes to the  
568 proposed regulation shall be highlighted in the final regulation, and substantial changes to the proposed  
569 regulation shall be explained in the final regulation.

570 C. If the Governor finds that one or more changes with substantial impact have been made to the  
571 proposed regulation, he may require the agency to provide an additional thirty days to solicit additional  
572 public comment on the changes by transmitting notice of the additional public comment period to the  
573 agency and to the Registrar within the thirty-day adoption period described in subsection D, and  
574 publishing the notice in the Register. The additional public comment period required by the Governor  
575 shall begin upon publication of the notice in the Register.

576 D. A thirty-day final adoption period for regulations shall commence upon the publication of the  
577 final regulation in the Register. The Governor may review the final regulation during this thirty-day final  
578 adoption period and if he objects to any portion or all of a regulation, the Governor may file a formal  
579 objection to the regulation, suspend the effective date of the regulation in accordance with subsection B  
580 of § 2.2-4014, or both.

581 If the Governor files a formal objection to the regulation, he shall forward his objections to the  
582 Registrar and agency prior to the conclusion of the thirty-day final adoption period. The Governor shall  
583 be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he fails to  
584 suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014 during the  
585 thirty-day final adoption period. The Governor's objection, or the suspension of the regulation, or both if  
586 applicable, shall be published in the Register.

587 A regulation shall become effective as provided in § 2.2-4015.

588 E. This section shall not apply to the issuance by the State Air Pollution Control Board of variances  
589 to its regulations.

590 § 2.2-4014. Legislative review of proposed and final regulations.

591 A. After publication of the Register pursuant to § 2.2-4031, the standing committee of each house of  
592 the General Assembly to which matters relating to the content of the regulation are most properly  
593 referable or the Joint Commission on Administrative Rules may meet and, during the promulgation or  
594 final adoption process, file with the Registrar and the promulgating agency an objection to a proposed or  
595 final adopted regulation. The Registrar shall publish any such objection received by him as soon as  
596 practicable in the Register. Within 21 days after the receipt by the promulgating agency of a legislative  
597 objection, that agency shall file a response with the Registrar, the objecting legislative committee or the  
598 Joint Commission on Administrative Rules, and the Governor. If a legislative objection is filed within  
599 the final adoption period, subdivision A 1 of § 2.2-4015 shall govern.

600 B. In addition or as an alternative to the provisions of subsection A, the standing committee of both  
601 houses of the General Assembly to which matters relating to the content are most properly referable or  
602 the Joint Commission on Administrative Rules may suspend the effective date of any portion or all of a  
603 final regulation with the Governor's concurrence. The Governor and (i) the applicable standing  
604 committee of each house or (ii) the Joint Commission on Administrative Rules may direct, through a  
605 statement signed by a majority of their respective members and by the Governor, that the effective date  
606 of a portion or all of the final regulation is suspended and shall not take effect until the end of the next  
607 regular legislative session. This statement shall be transmitted to the promulgating agency and the  
608 Registrar within the 30-day adoption period, and shall be published in the Register.

609 If a bill is passed at the next regular legislative session to nullify a portion but not all of the  
610 regulation, then the promulgating agency (i) may promulgate the regulation under the provision of  
611 subdivision A 4 a of § 2.2-4006, if it makes no changes to the regulation other than those required by  
612 statutory law or (ii) shall follow the provisions of ~~§ 2.2-4007~~§§ 2.2-4007.01 through 2.2-4007.06, if it

wishes to also make discretionary changes to the regulation. If a bill to nullify all or a portion of the suspended regulation, or to modify the statutory authority for the regulation, is not passed at the next regular legislative session, then the suspended regulation shall become effective at the conclusion of the session, unless the suspended regulation is withdrawn by the agency.

C. A regulation shall become effective as provided in § 2.2-4015.

D. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

§ 2.2-4015. Effective date of regulation; exception.

A. A regulation adopted in accordance with this chapter and the Virginia Register Act (§ 2.2-4100 et seq.) shall become effective at the conclusion of the thirty-day final adoption period provided for in subsection D of § 2.2-4013, or any other later date specified by the agency, unless:

1. A legislative objection has been filed in accordance with § 2.2-4014, in which event the regulation, unless withdrawn by the agency, shall become effective on a date specified by the agency that shall be after the expiration of the applicable twenty-one-day extension period provided in § 2.2-4014;

2. The Governor has exercised his authority in accordance with § 2.2-4013 to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn by the agency, shall become effective on a date specified by the agency that shall be after the period for which the Governor has provided for additional public comment;

3. The Governor and (i) the appropriate standing committees of each house of the General Assembly or (ii) the Joint Commission on Administrative Rules have exercised their authority in accordance with subsection B of § 2.2-4014 to suspend the effective date of a regulation until the end of the next regular legislative session; or

4. The agency has suspended the regulatory process in accordance with ~~subsection K of § 2.2-4007~~ § 2.2-4007.06, or for any reason it deems necessary or appropriate, in which event the regulation, unless withdrawn by the agency, shall become effective in accordance with subsection B.

B. Whenever the regulatory process has been suspended for any reason, any action by the agency that either amends the regulation or does not amend the regulation but specifies a new effective date shall be considered a readoption of the regulation for the purposes of appeal. If the regulation is suspended under ~~subsection K of § 2.2-4007~~ § 2.2-4007.06, such readoption shall take place after the thirty-day public comment period required by that subsection. Suspension of the regulatory process by the agency may occur simultaneously with the filing of final regulations as provided in subsection B of § 2.2-4013.

When a regulation has been suspended, the agency must set the effective date no earlier than fifteen days from publication of the readoption action and any changes made to the regulation. During that fifteen-day period, if the agency receives requests from at least twenty-five persons for the opportunity to comment on new substantial changes, it shall again suspend the regulation pursuant to ~~subsection K of § 2.2-4007~~ § 2.2-4007.06.

C. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

§ 2.2-4027. Issues on review.

The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 or, as to subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for opportunity for an agency record of and decision upon the evidence therein.

In addition to any other judicial review provided by law, a small business, as defined in subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision H 2A 2 of § ~~2.2-4007~~ 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action.

When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did.

Where there is no agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency file, minutes, and records of its proceedings under

§ ~~2.2-4007~~2.2-4007.01 or 2.2-4019 as augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within the scope of the legal authority of the agency.

Whether the fact issues are reviewed on the agency record or one made in the review action, the court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.

§ 2.2-4031. Publication of Virginia Register of Regulations; exceptions; notice of meetings of executive branch agencies.

A. The Registrar shall publish every two weeks a Virginia Register of Regulations that shall include (i) proposed and final regulations; (ii) emergency regulations; (iii) executive orders; (iv) notices of all public meetings and public hearings of state agencies, legislative committees and study subcommittees; (v) petitions for rulemaking made in accordance with ~~subsection A of~~ § 2.2-4007; and (vi) tax bulletins. The entire proposed regulation shall be published in the Register; however, if an existing regulation has been previously published in the Virginia Administrative Code, then only those sections of regulations to be amended need to be published in the Register. If the length of the regulation falls within the guidelines established by the Registrar for the publication of a summary in lieu of the full text of the regulation, then, after consultation with the promulgating agency, the Registrar may publish only the summary of the regulation. In this event, the full text of the regulation shall be available for public inspection at the office of the Registrar and the promulgating agency.

If a proposed regulation is adopted as published or, in the sole discretion of the Registrar of Regulations, the only changes that have been made are those that can be clearly and concisely explained, the adopted regulation need not be published at length. Instead, the Register shall contain a notation that the proposed regulation has been adopted as published as a proposed regulation without change or stating the changes made. The proposed regulation shall be clearly identified with a citation to the issue and page numbers where published.

A copy of all reporting forms the promulgating agency anticipates will be incorporated into or be used in administering the regulation shall be published with the proposed and final regulation in the Register.

B. Each regulation shall be prefaced with a summary explaining that regulation in plain and clear language. Summaries shall be prepared by the promulgating agency and approved by the Registrar prior to their publication in the Register. The notice required by § ~~2.2-4007~~2.2-4007.01 shall include (i) a statement of the date, time and place of the hearing at which the regulation is to be considered; (ii) a brief statement as to the regulation under consideration; (iii) reference to the legal authority of the agency to act; and (iv) the name, address and telephone number of an individual to contact for further information about that regulation. Agencies shall present their proposed regulations in a standardized format developed by the Virginia Code Commission in accordance with subdivision 1 of § 2.2-4104 of the Virginia Register Act (§ 2.2-4100 et seq.). Notwithstanding the exemptions allowed under §§ 2.2-4002, 2.2-4006 or § 2.2-4011, the proposed and final regulations of all agencies shall be published in the Register. However, proposed regulations of the Marine Resources Commission and regulations exempted by subject from the provisions of this chapter by subsection B of § 2.2-4002 shall be exempt from this section.

C. Notwithstanding the definition of "agency," notices for all meetings of state agencies required to be open pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), except for legislative meetings held during regular and special sessions, shall be published in the Register. Each notice shall include (i) the date, time and place of the meeting; (ii) a brief general description of the nature of the meeting and the business to be conducted; and (iii) the name, address and telephone number of an individual who may be contacted for additional information about the meeting. Failure to publish in the Register the notice for such a meeting or any inadequacies in the information contained in the notice shall not affect the legality of actions taken at that meeting.

D. The Virginia Register of Regulations shall be published by posting the Register on the Virginia Code Commission's website. The Virginia Code Commission may arrange for the printing of the Virginia Register as provided in § 30-146.

§ 3.1-398. Authority to make regulations; conformity with federal regulations; hearings; enforcement of article; review of regulations.

A. The authority to promulgate regulations for the efficient enforcement of this article is hereby vested in the Board, unless specially conferred on the Commissioner. The Board is hereby authorized to make the regulations promulgated under this article conform, insofar as practicable with those promulgated under the federal act. Notwithstanding any other requirement under the Administrative Process Act (§ 2.2-4000 et seq.) to the contrary, the Commissioner may adopt any regulation under the federal act without public hearing. Such regulation shall be effective upon filing with the Registrar of Regulations. The Board, at its next regular meeting, shall adopt the regulation after notice but without

public hearing unless a petition is filed in accordance with subsection F.

B. The Board may adopt any edition of the Food and Drug Administration's Food Code, or supplement thereto, or any portion thereof, as regulations, with any amendments as it deems appropriate. In addition, the Board may repeal or amend any regulation adopted pursuant to this subsection. No regulations adopted or amended by the Board pursuant to this subsection, however, shall establish requirements for any license, permit or inspection unless such license, permit or inspection is otherwise provided for in this title. The provisions of the Food and Drug Administration's Food Code shall not apply to farmers selling their own farm-produced products directly to consumers for their personal use, whether such sales occur on such farmer's farm or at a farmers' market, unless such provisions are adopted in accordance with the Administrative Process Act (§ 2.2-4000 et seq.).

C. The provisions of the Administrative Process Act (§ 2.2-4000 et seq.) shall not apply to the adoption of any regulation pursuant to subsection B if the Board of Health adopts the same edition of the Food Code, or the same portions thereof, pursuant to subsection C of § 35.1-14 and the regulations adopted by the Board and the Board of Health have the same effective date. In the event that the Board of Health adopts regulations pursuant to § 2.2-4012.1, the effective date of the Board's regulations may be any date on or after the effective date of the regulations adopted by the Board of Health.

Notwithstanding any exemption to the contrary, a regulation promulgated pursuant to subsection B shall be subject to the requirements set out in ~~subsections F, H, and I of § 2.2-4007~~ §§ 2.2-4007.03, 2.2-4007.04, and 2.2-4007.05, and shall be published in the Virginia Register of Regulations. After the close of the 60-day comment period, the Board may adopt a final regulation, with or without changes. Such regulation shall become effective 15 days after publication in the Virginia Register, unless the Board has withdrawn or suspended the regulation, or a later date has been set by the Board. The Board shall also hold at least one public hearing on the proposed regulation during the 60-day comment period. The notice for such public hearing shall include the date, time and place of the hearing.

D. Hearings authorized or required by this article shall be conducted by the Board, the Commissioner or such officer, agent, or employee as the Board may designate for the purpose.

E. It shall be the duty of the Commissioner to coordinate enforcement of this article with the applicable federal agencies charged with enforcement of the federal act, in order to avoid unnecessary or unjustified conflict between enforcement of this article and the federal act as to Virginia food manufacturers, processors, packers and retailers.

F. It shall be the duty of the Board or Commissioner from time to time for good cause shown to review the regulations and enforcement guidelines promulgated pursuant to this article. If the Commissioner finds that any federal regulation or enforcement guideline which shall include any tolerance or action level is not in consonance with the health and welfare of the citizens of the Commonwealth, he shall petition the appropriate federal agency or agencies to change the federal regulation or enforcement guideline.

G. The Commissioner or any interested party for good cause shown may request the Board to hold a public hearing concerning any regulation or enforcement guideline. If the Board after hearing finds that the regulation or enforcement guideline is not in consonance with the health and welfare of the citizens of this Commonwealth, it shall adopt a new regulation or enforcement guideline that is in consonance with the health and welfare of the citizens of this Commonwealth. Within the limits of personnel and funds available all state agencies and institutions shall cooperate and assist in furnishing information and data as to whether the regulations or enforcement guidelines in question are in consonance with the health and welfare of the citizens of this Commonwealth.

§ 28.2-1507. Notice of filing of inventories.

A. The Commission shall cause to be published, within ninety days following the effective date of this section, in a newspaper of general circulation published at the state capital, in a newspaper having general circulation in the counties where the initial inventories have been filed, and in such other newspapers in the Commonwealth as the Commission generally publishes notices pursuant to ~~subsection F of § 2.2-4007~~ § 2.2-4007.03, a notice of the filing of the initial inventories. The notice shall state that any person claiming ownership of an interest in lands designated in an initial inventory as ungranted shores of the sea, marsh or meadowlands is required to assert the claim as provided in § 28.2-1509 within two years following the effective date of this section, or any action to assert such claim shall be barred.

B. The Commission shall cause to be published a notice of the filing of any amended or supplemental inventory in a newspaper having general circulation in the county for which such amended or supplemental inventory applies. The notice shall refer to the initial inventory and any previous amended or supplemental inventory with respect thereto, and shall state that any person claiming ownership of an interest in lands designated therein as ungranted shores of the sea, marsh or meadowlands is required to assert the claim as provided in § 28.2-1509 within two years following the filing of the amended or supplemental inventory, or any action to assert such claim shall be barred.

797 C. The failure of the Commission to comply with the requirements of this section shall not impair  
798 the Commonwealth's rights of ownership in any ungranted shores of the sea, marsh, or meadowlands.

799 § 32.1-325. Board to submit plan for medical assistance services to Secretary of Health and Human  
800 Services pursuant to federal law; administration of plan; contracts with health care providers.

801 A. The Board, subject to the approval of the Governor, is authorized to prepare, amend from time to  
802 time and submit to the Secretary of the United States Department of Health and Human Services a state  
803 plan for medical assistance services pursuant to Title XIX of the United States Social Security Act and  
804 any amendments thereto. The Board shall include in such plan:

805 1. A provision for payment of medical assistance on behalf of individuals, up to the age of 21,  
806 placed in foster homes or private institutions by private, nonprofit agencies licensed as child-placing  
807 agencies by the Department of Social Services or placed through state and local subsidized adoptions to  
808 the extent permitted under federal statute;

809 2. A provision for determining eligibility for benefits for medically needy individuals which  
810 disregards from countable resources an amount not in excess of \$3,500 for the individual and an amount  
811 not in excess of \$3,500 for his spouse when such resources have been set aside to meet the burial  
812 expenses of the individual or his spouse. The amount disregarded shall be reduced by (i) the face value  
813 of life insurance on the life of an individual owned by the individual or his spouse if the cash surrender  
814 value of such policies has been excluded from countable resources and (ii) the amount of any other  
815 revocable or irrevocable trust, contract, or other arrangement specifically designated for the purpose of  
816 meeting the individual's or his spouse's burial expenses;

817 3. A requirement that, in determining eligibility, a home shall be disregarded. For those medically  
818 needy persons whose eligibility for medical assistance is required by federal law to be dependent on the  
819 budget methodology for Aid to Families with Dependent Children, a home means the house and lot used  
820 as the principal residence and all contiguous property. For all other persons, a home shall mean the  
821 house and lot used as the principal residence, as well as all contiguous property, as long as the value of  
822 the land, exclusive of the lot occupied by the house, does not exceed \$5,000. In any case in which the  
823 definition of home as provided here is more restrictive than that provided in the state plan for medical  
824 assistance services in Virginia as it was in effect on January 1, 1972, then a home means the house and  
825 lot used as the principal residence and all contiguous property essential to the operation of the home  
826 regardless of value;

827 4. A provision for payment of medical assistance on behalf of individuals up to the age of 21, who  
828 are Medicaid eligible, for medically necessary stays in acute care facilities in excess of 21 days per  
829 admission;

830 5. A provision for deducting from an institutionalized recipient's income an amount for the  
831 maintenance of the individual's spouse at home;

832 6. A provision for payment of medical assistance on behalf of pregnant women which provides for  
833 payment for inpatient postpartum treatment in accordance with the medical criteria outlined in the most  
834 current version of or an official update to the "Guidelines for Perinatal Care" prepared by the American  
835 Academy of Pediatrics and the American College of Obstetricians and Gynecologists or the "Standards  
836 for Obstetric-Gynecologic Services" prepared by the American College of Obstetricians and  
837 Gynecologists. Payment shall be made for any postpartum home visit or visits for the mothers and the  
838 children which are within the time periods recommended by the attending physicians in accordance with  
839 and as indicated by such Guidelines or Standards. For the purposes of this subdivision, such Guidelines  
840 or Standards shall include any changes thereto within six months of the publication of such Guidelines  
841 or Standards or any official amendment thereto;

842 7. A provision for the payment for family planning services on behalf of women who were  
843 Medicaid-eligible for prenatal care and delivery as provided in this section at the time of delivery. Such  
844 family planning services shall begin with delivery and continue for a period of 24 months, if the woman  
845 continues to meet the financial eligibility requirements for a pregnant woman under Medicaid. For the  
846 purposes of this section, family planning services shall not cover payment for abortion services and no  
847 funds shall be used to perform, assist, encourage or make direct referrals for abortions;

848 8. A provision for payment of medical assistance for high-dose chemotherapy and bone marrow  
849 transplants on behalf of individuals over the age of 21 who have been diagnosed with lymphoma, breast  
850 cancer, myeloma, or leukemia and have been determined by the treating health care provider to have a  
851 performance status sufficient to proceed with such high-dose chemotherapy and bone marrow transplant.  
852 Appeals of these cases shall be handled in accordance with the Department's expedited appeals process;

853 9. A provision identifying entities approved by the Board to receive applications and to determine  
854 eligibility for medical assistance;

855 10. A provision for breast reconstructive surgery following the medically necessary removal of a  
856 breast for any medical reason. Breast reductions shall be covered, if prior authorization has been  
857 obtained, for all medically necessary indications. Such procedures shall be considered noncosmetic;

858 11. A provision for payment of medical assistance for annual pap smears;

859 12. A provision for payment of medical assistance services for prostheses following the medically  
860 necessary complete or partial removal of a breast for any medical reason;

861 13. A provision for payment of medical assistance which provides for payment for 48 hours of  
862 inpatient treatment for a patient following a radical or modified radical mastectomy and 24 hours of  
863 inpatient care following a total mastectomy or a partial mastectomy with lymph node dissection for  
864 treatment of disease or trauma of the breast. Nothing in this subdivision shall be construed as requiring  
865 the provision of inpatient coverage where the attending physician in consultation with the patient  
866 determines that a shorter period of hospital stay is appropriate;

867 14. A requirement that certificates of medical necessity for durable medical equipment and any  
868 supporting verifiable documentation shall be signed, dated, and returned by the physician, physician  
869 assistant, or nurse practitioner and in the durable medical equipment provider's possession within 60  
870 days from the time the ordered durable medical equipment and supplies are first furnished by the  
871 durable medical equipment provider;

872 15. A provision for payment of medical assistance to (i) persons age 50 and over and (ii) persons  
873 age 40 and over who are at high risk for prostate cancer, according to the most recent published  
874 guidelines of the American Cancer Society, for one PSA test in a 12-month period and digital rectal  
875 examinations, all in accordance with American Cancer Society guidelines. For the purpose of this  
876 subdivision, "PSA testing" means the analysis of a blood sample to determine the level of prostate  
877 specific antigen;

878 16. A provision for payment of medical assistance for low-dose screening mammograms for  
879 determining the presence of occult breast cancer. Such coverage shall make available one screening  
880 mammogram to persons age 35 through 39, one such mammogram biennially to persons age 40 through  
881 49, and one such mammogram annually to persons age 50 and over. The term "mammogram" means an  
882 X-ray examination of the breast using equipment dedicated specifically for mammography, including but  
883 not limited to the X-ray tube, filter, compression device, screens, film and cassettes, with an average  
884 radiation exposure of less than one rad mid-breast, two views of each breast;

885 17. A provision, when in compliance with federal law and regulation and approved by the Centers  
886 for Medicare & Medicaid Services (CMS), for payment of medical assistance services delivered to  
887 Medicaid-eligible students when such services qualify for reimbursement by the Virginia Medicaid  
888 program and may be provided by school divisions;

889 18. A provision for payment of medical assistance services for liver, heart and lung transplantation  
890 procedures for individuals over the age of 21 years when (i) there is no effective alternative medical or  
891 surgical therapy available with outcomes that are at least comparable; (ii) the transplant procedure and  
892 application of the procedure in treatment of the specific condition have been clearly demonstrated to be  
893 medically effective and not experimental or investigational; (iii) prior authorization by the Department of  
894 Medical Assistance Services has been obtained; (iv) the patient selection criteria of the specific  
895 transplant center where the surgery is proposed to be performed have been used by the transplant team  
896 or program to determine the appropriateness of the patient for the procedure; (v) current medical therapy  
897 has failed and the patient has failed to respond to appropriate therapeutic management; (vi) the patient is  
898 not in an irreversible terminal state; and (vii) the transplant is likely to prolong the patient's life and  
899 restore a range of physical and social functioning in the activities of daily living;

900 19. A provision for payment of medical assistance for colorectal cancer screening, specifically  
901 screening with an annual fecal occult blood test, flexible sigmoidoscopy or colonoscopy, or in  
902 appropriate circumstances radiologic imaging, in accordance with the most recently published  
903 recommendations established by the American College of Gastroenterology, in consultation with the  
904 American Cancer Society, for the ages, family histories, and frequencies referenced in such  
905 recommendations;

906 20. A provision for payment of medical assistance for custom ocular prostheses;

907 21. A provision for payment for medical assistance for infant hearing screenings and all necessary  
908 audiological examinations provided pursuant to § 32.1-64.1 using any technology approved by the  
909 United States Food and Drug Administration, and as recommended by the national Joint Committee on  
910 Infant Hearing in its most current position statement addressing early hearing detection and intervention  
911 programs. Such provision shall include payment for medical assistance for follow-up audiological  
912 examinations as recommended by a physician, physician assistant, nurse practitioner, or audiologist and  
913 performed by a licensed audiologist to confirm the existence or absence of hearing loss;

914 22. A provision for payment of medical assistance, pursuant to the Breast and Cervical Cancer  
915 Prevention and Treatment Act of 2000 (P.L. 106-354), for certain women with breast or cervical cancer  
916 when such women (i) have been screened for breast or cervical cancer under the Centers for Disease  
917 Control and Prevention (CDC) Breast and Cervical Cancer Early Detection Program established under  
918 Title XV of the Public Health Service Act; (ii) need treatment for breast or cervical cancer, including  
919 treatment for a precancerous condition of the breast or cervix; (iii) are not otherwise covered under

920 creditable coverage, as defined in § 2701 (c) of the Public Health Service Act; (iv) are not otherwise  
921 eligible for medical assistance services under any mandatory categorically needy eligibility group; and  
922 (v) have not attained age 65. This provision shall include an expedited eligibility determination for such  
923 women;

924 23. A provision for the coordinated administration, including outreach, enrollment, re-enrollment and  
925 services delivery, of medical assistance services provided to medically indigent children pursuant to this  
926 chapter, which shall be called Family Access to Medical Insurance Security (FAMIS) Plus and the  
927 FAMIS Plan program in § 32.1-351. A single application form shall be used to determine eligibility for  
928 both programs; and

929 24. A provision, when authorized by and in compliance with federal law, to establish a public-private  
930 long-term care partnership program between the Commonwealth of Virginia and private insurance  
931 companies that shall be established through the filing of an amendment to the state plan for medical  
932 assistance services by the Department of Medical Assistance Services. The purpose of the program shall  
933 be to reduce Medicaid costs for long-term care by delaying or eliminating dependence on Medicaid for  
934 such services through encouraging the purchase of private long-term care insurance policies that have  
935 been designated as qualified state long-term care insurance partnerships and may be used as the first  
936 source of benefits for the participant's long-term care. Components of the program, including the  
937 treatment of assets for Medicaid eligibility and estate recovery, shall be structured in accordance with  
938 federal law and applicable federal guidelines.

939 B. In preparing the plan, the Board shall:

940 1. Work cooperatively with the State Board of Health to ensure that quality patient care is provided  
941 and that the health, safety, security, rights and welfare of patients are ensured.

942 2. Initiate such cost containment or other measures as are set forth in the appropriation act.

943 3. Make, adopt, promulgate and enforce such regulations as may be necessary to carry out the  
944 provisions of this chapter.

945 4. Examine, before acting on a regulation to be published in the Virginia Register of Regulations  
946 pursuant to § ~~2.2-4007~~2.2-4007.05, the potential fiscal impact of such regulation on local boards of  
947 social services. For regulations with potential fiscal impact, the Board shall share copies of the fiscal  
948 impact analysis with local boards of social services prior to submission to the Registrar. The fiscal  
949 impact analysis shall include the projected costs/savings to the local boards of social services to  
950 implement or comply with such regulation and, where applicable, sources of potential funds to  
951 implement or comply with such regulation.

952 5. Incorporate sanctions and remedies for certified nursing facilities established by state law, in  
953 accordance with 42 C.F.R. § 488.400 et seq. "Enforcement of Compliance for Long-Term Care Facilities  
954 With Deficiencies."

955 6. On and after July 1, 2002, require that a prescription benefit card, health insurance benefit card, or  
956 other technology that complies with the requirements set forth in § 38.2-3407.4:2 be issued to each  
957 recipient of medical assistance services, and shall upon any changes in the required data elements set  
958 forth in subsection A of § 38.2-3407.4:2, either reissue the card or provide recipients such corrective  
959 information as may be required to electronically process a prescription claim.

960 C. In order to enable the Commonwealth to continue to receive federal grants or reimbursement for  
961 medical assistance or related services, the Board, subject to the approval of the Governor, may adopt,  
962 regardless of any other provision of this chapter, such amendments to the state plan for medical  
963 assistance services as may be necessary to conform such plan with amendments to the United States  
964 Social Security Act or other relevant federal law and their implementing regulations or constructions of  
965 these laws and regulations by courts of competent jurisdiction or the United States Secretary of Health  
966 and Human Services.

967 In the event conforming amendments to the state plan for medical assistance services are adopted, the  
968 Board shall not be required to comply with the requirements of Article 2 (§ 2.2-4006 et seq.) of Chapter  
969 40 of Title 2.2. However, the Board shall, pursuant to the requirements of § 2.2-4002, (i) notify the  
970 Registrar of Regulations that such amendment is necessary to meet the requirements of federal law or  
971 regulations or because of the order of any state or federal court, or (ii) certify to the Governor that the  
972 regulations are necessitated by an emergency situation. Any such amendments that are in conflict with  
973 the Code of Virginia shall only remain in effect until July 1 following adjournment of the next regular  
974 session of the General Assembly unless enacted into law.

975 D. The Director of Medical Assistance Services is authorized to:

976 1. Administer such state plan and receive and expend federal funds therefor in accordance with  
977 applicable federal and state laws and regulations; and enter into all contracts necessary or incidental to  
978 the performance of the Department's duties and the execution of its powers as provided by law.

979 2. Enter into agreements and contracts with medical care facilities, physicians, dentists and other  
980 health care providers where necessary to carry out the provisions of such state plan. Any such agreement  
981 or contract shall terminate upon conviction of the provider of a felony. In the event such conviction is



reversed upon appeal, the provider may apply to the Director of Medical Assistance Services for a new agreement or contract. Such provider may also apply to the Director for reconsideration of the agreement or contract termination if the conviction is not appealed, or if it is not reversed upon appeal.

3. Refuse to enter into or renew an agreement or contract with any provider who has been convicted of a felony.

4. Refuse to enter into or renew an agreement or contract with a provider who is or has been a principal in a professional or other corporation when such corporation has been convicted of a felony.

E. In any case in which a Medicaid agreement or contract is denied to a provider on the basis of his interest in a convicted professional or other corporation, the Director shall, upon request, conduct a hearing in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) regarding the provider's participation in the conduct resulting in the conviction.

The Director's decision upon reconsideration shall be consistent with federal and state laws. The Director may consider the nature and extent of any adverse impact the agreement or contract denial or termination may have on the medical care provided to Virginia Medicaid recipients.

F. When the services provided for by such plan are services which a marriage and family therapist, clinical psychologist, clinical social worker, professional counselor, or clinical nurse specialist is licensed to render in Virginia, the Director shall contract with any duly licensed marriage and family therapist, duly licensed clinical psychologist, licensed clinical social worker, licensed professional counselor or licensed clinical nurse specialist who makes application to be a provider of such services, and thereafter shall pay for covered services as provided in the state plan. The Board shall promulgate regulations which reimburse licensed marriage and family therapists, licensed clinical psychologists, licensed clinical social workers, licensed professional counselors and licensed clinical nurse specialists at rates based upon reasonable criteria, including the professional credentials required for licensure.

G. The Board shall prepare and submit to the Secretary of the United States Department of Health and Human Services such amendments to the state plan for medical assistance services as may be permitted by federal law to establish a program of family assistance whereby children over the age of 18 years shall make reasonable contributions, as determined by regulations of the Board, toward the cost of providing medical assistance under the plan to their parents.

H. The Department of Medical Assistance Services shall:

1. Include in its provider networks and all of its health maintenance organization contracts a provision for the payment of medical assistance on behalf of individuals up to the age of 21 who have special needs and who are Medicaid eligible, including individuals who have been victims of child abuse and neglect, for medically necessary assessment and treatment services, when such services are delivered by a provider which specializes solely in the diagnosis and treatment of child abuse and neglect, or a provider with comparable expertise, as determined by the Director.

2. Amend the Medallion II waiver and its implementing regulations to develop and implement an exception, with procedural requirements, to mandatory enrollment for certain children between birth and age three certified by the Department of Mental Health, Mental Retardation and Substance Abuse Services as eligible for services pursuant to Part C of the Individuals with Disabilities Education Act (20 U.S.C. § 1471 et seq.).

I. The Director is authorized to negotiate and enter into agreements for services rendered to eligible recipients with special needs. The Board shall promulgate regulations regarding these special needs patients, to include persons with AIDS, ventilator-dependent patients, and other recipients with special needs as defined by the Board.

J. Except as provided in subdivision A 1 of § 2.2-4345, the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.) shall not apply to the activities of the Director authorized by subsection I of this section. Agreements made pursuant to this subsection shall comply with federal law and regulation.

§ 35.1-14. Regulations governing restaurants; advisory standards for exempt entities.

A. Regulations of the Board governing restaurants shall include but not be limited to the following subjects: (i) a procedure for obtaining a license; (ii) the safe and sanitary maintenance, storage, operation, and use of equipment; (iii) the sanitary maintenance and use of a restaurant's physical plant; (iv) the safe preparation, handling, protection, and preservation of food, including necessary refrigeration or heating methods; (v) procedures for vector and pest control; (vi) requirements for toilet and cleansing facilities for employees and customers; (vii) requirements for appropriate lighting and ventilation not otherwise provided for in the Uniform Statewide Building Code; (viii) requirements for an approved water supply and sewage disposal system; (ix) personal hygiene standards for employees, particularly those engaged in food handling; and (x) the appropriate use of precautions to prevent the transmission of communicable diseases.

B. In its regulations, the Board may classify restaurants by type and specify different requirements for each classification.

C. The Board may adopt any edition of the Food and Drug Administration's Food Code, or supplement thereto, or any portion thereof, as regulations, with any amendments as it deems appropriate. In addition, the Board may repeal or amend any regulation adopted pursuant to this subsection. No regulations adopted or amended by the Board pursuant to this subsection, however, shall establish requirements for any license, permit or inspection unless such license, permit or inspection is otherwise provided for in this title. The provisions of the Food and Drug Administration's Food Code shall not apply to farmers selling their own farm-produced products directly to consumers for their personal use, whether such sales occur on such farmer's farm or at a farmers' market, unless such provisions are adopted in accordance with the Administrative Process Act (§ 2.2-4000 et seq.).

D. The Board may issue advisory standards for the safe preparation, handling, protection, and preservation of food by entities exempt from the provisions of this title pursuant to § 35.1-25 or § 35.1-26.

E. The provisions of the Administrative Process Act (§ 2.2-4000 et seq.) shall not apply to the adoption of any regulation pursuant to subsection C if the Board of Agriculture and Consumer Services adopts the same edition of the Food Code, or the same portions thereof, pursuant to subsection B of § 3.1-398 and the regulations adopted by the Board and the Board of Agriculture and Consumer Services have the same effective date. In the event that the Board of Agriculture and Consumer Services adopts regulations pursuant to § 2.2-4012.1, the effective date of the Board's regulations may be any date on or after the effective date of the regulations adopted by the Board of Agriculture and Consumer Services.

Notwithstanding any exemption to the contrary, a regulation promulgated pursuant to subsection C shall be subject to the requirements set out in subsections F, H, and I of § ~~2.2-4007~~ §§ 2.2-4007.03, 2.2-4007.04, and 2.2-4007.05, and shall be published in the Virginia Register of Regulations. After the close of the 60-day comment period, the Board may adopt a final regulation, with or without changes. Such regulation shall become effective 15 days after publication in the Virginia Register, unless the Board has withdrawn or suspended the regulation, or a later date has been set by the Board. The Board shall also hold at least one public hearing on the proposed regulation during the 60-day comment period. The notice for such public hearing shall include the date, time and place of the hearing.

§ 59.1-153. Methods of making inspection.

In making any inspection and test of a motor fuel or lubricating oil under this chapter, the Commissioner shall follow the specifications for the inspection and testing of that motor fuel or for the lubricating oil established by the American Society for Testing and Materials, as the same now are or may be hereafter amended. For cause after an informational proceeding under § ~~2.2-4007~~ 2.2-4007.01, such specifications may be amended by the Board of Agriculture and Consumer Services.

§ 62.1-44.15. Powers and duties; civil penalties.

It shall be the duty of the Board and it shall have the authority:

(1) [Repealed.]

(2) To study and investigate all problems concerned with the quality of state waters and to make reports and recommendations.

(2a) To study and investigate methods, procedures, devices, appliances, and technologies that could assist in water conservation or water consumption reduction.

(2b) To coordinate its efforts toward water conservation with other persons or groups, within or without the Commonwealth.

(2c) To make reports concerning, and formulate recommendations based upon, any such water conservation studies to ensure that present and future water needs of the citizens of the Commonwealth are met.

(3a) To establish such standards of quality and policies for any state waters consistent with the general policy set forth in this chapter, and to modify, amend or cancel any such standards or policies established and to take all appropriate steps to prevent quality alteration contrary to the public interest or to standards or policies thus established, except that a description of provisions of any proposed standard or policy adopted by regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed, shall be provided to the standing committee of each house of the General Assembly to which matters relating to the content of the standard or policy are most properly referable. The Board shall, from time to time, but at least once every three years, hold public hearings pursuant to subsection B of § ~~2.2-4007~~ § 2.2-4007.01 but, upon the request of an affected person or upon its own motion, hold hearings pursuant to § 2.2-4009, for the purpose of reviewing the standards of quality, and, as appropriate, adopting, modifying, or canceling such standards. Whenever the Board considers the adoption, modification, amendment or cancellation of any standard, it shall give due consideration to, among other factors, the economic and social costs and benefits which can reasonably be expected to obtain as a consequence of the standards as adopted, modified, amended or cancelled. The Board shall also give due consideration to the public health standards issued by the Virginia Department of Health with respect to issues of public health policy and

protection. If the Board does not follow the public health standards of the Virginia Department of Health, the Board's reason for any deviation shall be made in writing and published for any and all concerned parties.

(3b) Except as provided in subdivision (3a), such standards and policies are to be adopted or modified, amended or cancelled in the manner provided by the Administrative Process Act (§ 2.2-4000 et seq.).

(4) To conduct or have conducted scientific experiments, investigations, studies, and research to discover methods for maintaining water quality consistent with the purposes of this chapter. To this end the Board may cooperate with any public or private agency in the conduct of such experiments, investigations and research and may receive in behalf of the Commonwealth any moneys that any such agency may contribute as its share of the cost under any such cooperative agreement. Such moneys shall be used only for the purposes for which they are contributed and any balance remaining after the conclusion of the experiments, investigations, studies, and research, shall be returned to the contributors.

(5) To issue, revoke or amend certificates under prescribed conditions for: (a) the discharge of sewage, industrial wastes and other wastes into or adjacent to state waters; (b) the alteration otherwise of the physical, chemical or biological properties of state waters; (c) excavation in a wetland; or (d) on and after October 1, 2001, the conduct of the following activities in a wetland: (i) new activities to cause draining that significantly alters or degrades existing wetland acreage or functions, (ii) filling or dumping, (iii) permanent flooding or impounding, or (iv) new activities that cause significant alteration or degradation of existing wetland acreage or functions.

(5a) All certificates issued by the Board under this chapter shall have fixed terms. The term of a Virginia Pollution Discharge Elimination System permit shall not exceed five years. As of December 31, 2004, any Department personnel conducting inspections for compliance with stormwater management permits shall hold a certificate of competence pursuant to § 10.1-561. The term of a Virginia Water Protection Permit shall be based upon the projected duration of the project, the length of any required monitoring, or other project operations or permit conditions; however, the term shall not exceed 15 years. The term of a Virginia Pollution Abatement permit shall not exceed 10 years, except that the term of a Virginia Pollution Abatement permit for confined animal feeding operations shall be 10 years. The Department of Environmental Quality shall inspect all facilities for which a Virginia Pollution Abatement permit has been issued at least once every five years, except that the Department shall inspect all facilities covered by the Virginia Pollution Abatement permit for confined animal feeding operations annually. Department personnel performing inspections of confined animal feeding operations shall be certified under the voluntary nutrient management training and certification program established in § 10.1-104.2. The term of a certificate issued by the Board shall not be extended by modification beyond the maximum duration and the certificate shall expire at the end of the term unless an application for a new permit has been timely filed as required by the regulations of the Board and the Board is unable, through no fault of the permittee, to issue a new permit before the expiration date of the previous permit.

(5b) Any certificate issued by the Board under this chapter may, after notice and opportunity for a hearing, be amended or revoked on any of the following grounds or for good cause as may be provided by the regulations of the Board:

1. The owner has violated any regulation or order of the Board, any condition of a certificate, any provision of this chapter, or any order of a court, where such violation results in a release of harmful substances into the environment or poses a substantial threat of release of harmful substances into the environment or presents a hazard to human health or the violation is representative of a pattern of serious or repeated violations which, in the opinion of the Board, demonstrates the owner's disregard for or inability to comply with applicable laws, regulations, or requirements;

2. The owner has failed to disclose fully all relevant material facts or has misrepresented a material fact in applying for a certificate, or in any other report or document required under this law or under the regulations of the Board;

3. The activity for which the certificate was issued endangers human health or the environment and can be regulated to acceptable levels by amendment or revocation of the certificate; or

4. There exists a material change in the basis on which the permit was issued that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the certificate necessary to protect human health or the environment.

(5c) Any certificate issued by the Board under this chapter relating to dredging projects governed under Chapter 12 (§ 28.2-1200 et seq.) or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 may be conditioned upon a demonstration of financial responsibility for the completion of compensatory mitigation requirements. Financial responsibility may be demonstrated by a letter of credit, a certificate of deposit or a performance bond executed in a form approved by the Board. If the U.S. Army Corps of Engineers requires demonstration of financial responsibility for the completion of compensatory

1166 mitigation required for a particular project, then the mechanism and amount approved by the U.S. Army  
1167 Corps of Engineers shall be used to meet this requirement.

1168 (6) To make investigations and inspections, to ensure compliance with any certificates, standards,  
1169 policies, rules, regulations, rulings and special orders which it may adopt, issue or establish and to  
1170 furnish advice, recommendations, or instructions for the purpose of obtaining such compliance. In  
1171 recognition of §§ 32.1-164 and 62.1-44.18, the Board and the State Department of Health shall enter into  
1172 a memorandum of understanding establishing a common format to consolidate and simplify inspections  
1173 of sewage treatment plants and coordinate the scheduling of the inspections. The new format shall  
1174 ensure that all sewage treatment plants are inspected at appropriate intervals in order to protect water  
1175 quality and public health and at the same time avoid any unnecessary administrative burden on those  
1176 being inspected.

1177 (7) To adopt rules governing the procedure of the Board with respect to: (a) hearings; (b) the filing  
1178 of reports; (c) the issuance of certificates and special orders; and (d) all other matters relating to  
1179 procedure; and to amend or cancel any rule adopted. Public notice of every rule adopted under this  
1180 section shall be by such means as the Board may prescribe.

1181 (8a) To issue special orders to owners (i) who are permitting or causing the pollution, as defined by  
1182 § 62.1-44.3, of state waters to cease and desist from such pollution, (ii) who have failed to construct  
1183 facilities in accordance with final approved plans and specifications to construct such facilities in  
1184 accordance with final approved plans and specifications, (iii) who have violated the terms and provisions  
1185 of a certificate issued by the Board to comply with such terms and provisions, (iv) who have failed to  
1186 comply with a directive from the Board to comply with such directive, (v) who have contravened duly  
1187 adopted and promulgated water quality standards and policies to cease and desist from such  
1188 contravention and to comply with such water quality standards and policies, (vi) who have violated the  
1189 terms and provisions of a pretreatment permit issued by the Board or by the owner of a publicly owned  
1190 treatment works to comply with such terms and provisions or (vii) who have contravened any applicable  
1191 pretreatment standard or requirement to comply with such standard or requirement; and also to issue  
1192 such orders to require any owner to comply with the provisions of this chapter and any decision of the  
1193 Board. Orders issued pursuant to this subsection may include civil penalties of up to \$32,500 per  
1194 violation, not to exceed \$100,000 per order. The Board may assess penalties under this subsection if (a)  
1195 the person has been issued at least two written notices of alleged violation by the Department for the  
1196 same or substantially related violations at the same site, (b) such violations have not been resolved by  
1197 demonstration that there was no violation, by an order issued by the Board or the Director, or by other  
1198 means, (c) at least 130 days have passed since the issuance of the first notice of alleged violation, and  
1199 (d) there is a finding that such violations have occurred after a hearing conducted in accordance with  
1200 subdivision (8b). The actual amount of any penalty assessed shall be based upon the severity of the  
1201 violations, the extent of any potential or actual environmental harm, the compliance history of the  
1202 facility or person, any economic benefit realized from the noncompliance, and the ability of the person  
1203 to pay the penalty. The Board shall provide the person with the calculation for the proposed penalty  
1204 prior to any hearing conducted for the issuance of an order that assesses penalties pursuant to this  
1205 subsection. The issuance of a notice of alleged violation by the Department shall not be considered a  
1206 case decision as defined in § 2.2-4001. Any notice of alleged violation shall include a description of  
1207 each violation, the specific provision of law violated, and information on the process for obtaining a  
1208 final decision or fact finding from the Department on whether or not a violation has occurred, and  
1209 nothing in this section shall preclude an owner from seeking such a determination. Such civil penalties  
1210 shall be paid into the state treasury and deposited by the State Treasurer into the Virginia Environmental  
1211 Emergency Response Fund (§ 10.1-2500 et seq.), except that civil penalties assessed for violations of  
1212 Article 9 (§ 62.1-44.34:8 et seq.) or Article 11 (§ 62.1-44.34:14 et seq.) of this chapter shall be paid into  
1213 the Virginia Petroleum Storage Tank Fund in accordance with § 62.1-44.34:11.

1214 (8b) Such special orders are to be issued only after a hearing before a hearing officer appointed by  
1215 the Supreme Court in accordance with § 2.2-4020 or, if requested by the person, before a quorum of the  
1216 Board with at least 30 days' notice to the affected owners, of the time, place and purpose thereof, and  
1217 they shall become effective not less than 15 days after service as provided in § 62.1-44.12; provided that  
1218 if the Board finds that any such owner is grossly affecting or presents an imminent and substantial  
1219 danger to (i) the public health, safety or welfare, or the health of animals, fish or aquatic life; (ii) a  
1220 public water supply; or (iii) recreational, commercial, industrial, agricultural or other reasonable uses, it  
1221 may issue, without advance notice or hearing, an emergency special order directing the owner to cease  
1222 such pollution or discharge immediately, and shall provide an opportunity for a hearing, after reasonable  
1223 notice as to the time and place thereof to the owner, to affirm, modify, amend or cancel such emergency  
1224 special order. If an owner who has been issued such a special order or an emergency special order is not  
1225 complying with the terms thereof, the Board may proceed in accordance with § 62.1-44.23, and where  
1226 the order is based on a finding of an imminent and substantial danger, the court shall issue an injunction  
1227 compelling compliance with the emergency special order pending a hearing by the Board. If an

emergency special order requires cessation of a discharge, the Board shall provide an opportunity for a hearing within 48 hours of the issuance of the injunction.

(8c) The provisions of this section notwithstanding, the Board may proceed directly under § 62.1-44.32 for any past violation or violations of any provision of this chapter or any regulation duly promulgated hereunder.

(8d) With the consent of any owner who has violated or failed, neglected or refused to obey any regulation or order of the Board, any condition of a permit or any provision of this chapter, the Board may provide, in an order issued by the Board against such person, for the payment of civil charges for past violations in specific sums not to exceed the limit specified in § 62.1-44.32 (a). Such civil charges shall be instead of any appropriate civil penalty which could be imposed under § 62.1-44.32 (a) and shall not be subject to the provisions of § 2.2-514. Such civil charges shall be paid into the state treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response Fund (§ 10.1-2500 et seq.), excluding civil charges assessed for violations of Article 9 (§ 62.1-44.34:8 et seq.) or 10 (§ 62.1-44.34:10 et seq.) of Chapter 3.1 of this title, or a regulation, administrative or judicial order, or term or condition of approval relating to or issued under those articles.

The amendments to this section adopted by the 1976 Session of the General Assembly shall not be construed as limiting or expanding any cause of action or any other remedy possessed by the Board prior to the effective date of said amendments.

(8e) The Board shall develop and provide an opportunity for public comment on guidelines and procedures that contain specific criteria for calculating the appropriate penalty for each violation based upon the severity of the violations, the extent of any potential or actual environmental harm, the compliance history of the facility or person, any economic benefit realized from the noncompliance, and the ability of the person to pay the penalty.

(9) To make such rulings under §§ 62.1-44.16, 62.1-44.17 and 62.1-44.19 as may be required upon requests or applications to the Board, the owner or owners affected to be notified by certified mail as soon as practicable after the Board makes them and such rulings to become effective upon such notification.

(10) To adopt such regulations as it deems necessary to enforce the general water quality management program of the Board in all or part of the Commonwealth, except that a description of provisions of any proposed regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed, shall be provided to the standing committee of each house of the General Assembly to which matters relating to the content of the regulation are most properly referable.

(11) To investigate any large-scale killing of fish.

(a) Whenever the Board shall determine that any owner, whether or not he shall have been issued a certificate for discharge of waste, has discharged sewage, industrial waste, or other waste into state waters in such quantity, concentration or manner that fish are killed as a result thereof, it may effect such settlement with the owner as will cover the costs incurred by the Board and by the Department of Game and Inland Fisheries in investigating such killing of fish, plus the replacement value of the fish destroyed, or as it deems proper, and if no such settlement is reached within a reasonable time, the Board shall authorize its executive secretary to bring a civil action in the name of the Board to recover from the owner such costs and value, plus any court or other legal costs incurred in connection with such action.

(b) If the owner is a political subdivision of the Commonwealth, the action may be brought in any circuit court within the territory embraced by such political subdivision. If the owner is an establishment, as defined in this chapter, the action shall be brought in the circuit court of the city or the circuit court of the county in which such establishment is located. If the owner is an individual or group of individuals, the action shall be brought in the circuit court of the city or circuit court of the county in which such person or any of them reside.

(c) For the purposes of this subsection the State Water Control Board shall be deemed the owner of the fish killed and the proceedings shall be as though the State Water Control Board were the owner of the fish. The fact that the owner has or held a certificate issued under this chapter shall not be raised as a defense in bar to any such action.

(d) The proceeds of any recovery had under this subsection shall, when received by the Board, be applied, first, to reimburse the Board for any expenses incurred in investigating such killing of fish. The balance shall be paid to the Board of Game and Inland Fisheries to be used for the fisheries' management practices as in its judgment will best restore or replace the fisheries' values lost as a result of such discharge of waste, including, where appropriate, replacement of the fish killed with game fish or other appropriate species. Any such funds received are hereby appropriated for that purpose.

(e) Nothing in this subsection shall be construed in any way to limit or prevent any other action which is now authorized by law by the Board against any owner.

1289 (f) Notwithstanding the foregoing, the provisions of this subsection shall not apply to any owner who  
1290 adds or applies any chemicals or other substances that are recommended or approved by the State  
1291 Department of Health to state waters in the course of processing or treating such waters for public water  
1292 supply purposes, except where negligence is shown.

1293 (12) To administer programs of financial assistance for planning, construction, operation, and  
1294 maintenance of water quality control facilities for political subdivisions in the Commonwealth.

1295 (13) To establish policies and programs for effective area-wide or basin-wide water quality control  
1296 and management. The Board may develop comprehensive pollution abatement and water quality control  
1297 plans on an area-wide or basin-wide basis. In conjunction with this, the Board, when considering  
1298 proposals for waste treatment facilities, is to consider the feasibility of combined or joint treatment  
1299 facilities and is to ensure that the approval of waste treatment facilities is in accordance with the water  
1300 quality management and pollution control plan in the watershed or basin as a whole. In making such  
1301 determinations, the Board is to seek the advice of local, regional, or state planning authorities.

1302 (14) To establish requirements for the treatment of sewage, industrial wastes and other wastes that  
1303 are consistent with the purposes of this chapter; however, no treatment shall be less than secondary or  
1304 its equivalent, unless the owner can demonstrate that a lesser degree of treatment is consistent with the  
1305 purposes of this chapter.

1306 (15) To promote and establish requirements for the reclamation and reuse of wastewater that are  
1307 protective of state waters and public health as an alternative to directly discharging pollutants into waters  
1308 of the state. The requirements shall address various potential categories of reuse and may include  
1309 general permits and provide for greater flexibility and less stringent requirements commensurate with the  
1310 quality of the reclaimed water and its intended use. The requirements shall be developed in consultation  
1311 with the Department of Health and other appropriate state agencies. This authority shall not be construed  
1312 as conferring upon the Board any power or duty duplicative of those of the State Board of Health.

1313 (16) To establish and implement policies and programs to protect and enhance the Commonwealth's  
1314 wetland resources. Regulatory programs shall be designed to achieve no net loss of existing wetland  
1315 acreage and functions. Voluntary and incentive-based programs shall be developed to achieve a net  
1316 resource gain in acreage and functions of wetlands. The Board shall seek and obtain advice and  
1317 guidance from the Virginia Institute of Marine Science in implementing these policies and programs.

1318 § 62.1-246. When Board may initiate a surface water management area study proceeding; hearing  
1319 required.

1320 A. The Board upon its own motion or, in its discretion, upon receipt of a petition therefor by any  
1321 county, city or town within the surface water management area in question, or any state agency, may  
1322 initiate a surface water management area proceeding whenever in its judgment there is evidence to  
1323 indicate that:

1324 1. A stream has substantial instream values as indicated by evidence of fishery, recreation, habitat,  
1325 cultural or aesthetic properties; and

1326 2. Historical records or current conditions indicate that a low flow condition could occur which  
1327 would threaten important instream uses; and

1328 3. Current or potential offstream uses contribute to or are likely to exacerbate natural low flow  
1329 conditions to the detriment of instream values.

1330 B. If, after a public hearing held pursuant to § ~~2.2-4007~~2.2-4007.01, or at the request of an affected  
1331 person or on the Board's motion, a hearing shall be held under § 2.2-4009, and the Board finds that the  
1332 conditions required above exist and further finds that the public welfare, health and safety require that  
1333 regulatory efforts be initiated, the Board shall declare the area in question to be a surface water  
1334 management area. The Board shall cause notice of the surface water management area to be published in  
1335 a newspaper of general circulation throughout the area, and shall mail a copy of its decision to the  
1336 mayor or chairman of the governing body of each county, city or town within which any part of the  
1337 area lies, or which is known by the Board to make offstream use of water from the area, and to the  
1338 chief administrative officer of any federal facility known by the Board to be using water from within the  
1339 area. The Board shall include in its decision a definition of the boundaries of the water management  
1340 area.

1341 § 63.2-217. Board to adopt regulations.

1342 The Board shall adopt such regulations, not in conflict with this title, as may be necessary or  
1343 desirable to carry out the purpose of this title. Before the Board acts on a regulation to be published in  
1344 the Virginia Register of Regulations pursuant to § ~~2.2-4007~~2.2-4007.05, the Board shall examine the  
1345 potential fiscal impact of such regulation on local boards. For regulations with potential fiscal impact,  
1346 the Board shall share copies of the fiscal analysis with local boards prior to submission of the regulation  
1347 to the Department of Planning and Budget for purposes of the economic impact analysis under  
1348 subsection H of § ~~2.2-4007~~ § 2.2-4007.04. The fiscal impact analysis shall include the projected costs  
1349 and savings to the local boards to implement or comply with such regulation and, where applicable,  
1350 sources of potential funds to implement or comply with such regulation.

**1351** The Board also may adopt such regulations to authorize local boards to destroy or otherwise dispose  
**1352** of such records as the local boards in their discretion deem are no longer necessary in such offices and  
**1353** that serve no further administrative, historical or financial purpose.

**INTRODUCED**

SB1139