

VIRGINIA ACTS OF ASSEMBLY -- 1995 SESSION

CHAPTER 25

An Act to amend and reenact §§ 9-6.14:7.1, 9-6.14:9.1 and 9-6.14:9.3 of the Code of Virginia, relating to the Administrative Process Act; additional public comment.

[H 1472]

Approved February 23, 1995

Be it enacted by the General Assembly of Virginia:

1. That §§ 9-6.14:7.1, 9-6.14:9.1 and 9-6.14:9.3 of the Code of Virginia are amended and reenacted as follows:

§ 9-6.14:7.1. Public participation; informational proceedings; effect of noncompliance.

A. Any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation. The agency receiving the petition shall receive, consider, and respond to the petition within 180 days. Agency decisions to initiate or not initiate rulemaking in response to petitions are not subject to judicial review.

B. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, an agency shall provide the Registrar of Regulations with a Notice of Intended Regulatory Action which describes the subject matter and intent of the planned regulation. At least thirty 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 that the agency shall hold a public hearing or (ii) the agency receives requests for a public hearing from twenty-five persons or more.

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 which 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 such panels or consultation appropriate and intends to make use of such panels or consultation.

E. In formulating any regulation, including but not limited to those in public assistance 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, at its discretion, begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit input.

F. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, 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 § 9-6.14:22 and such notice shall be published in a newspaper of general circulation published at the state capital and, in addition, as the agency may determine, it may be similarly published in newspapers in localities particularly affected, as well as publicized through press releases and such other media as will best serve the purpose and subject involved. The Register and newspaper publication shall be made at least sixty days in advance of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts, 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.

The Registrar shall develop the format for the proper advertisement of proposed regulations in newspapers. The Registrar shall also be responsible for the publication of the newspaper advertising pertaining to proposed regulations. As used in this chapter, "Registrar" means the Registrar of Regulations appointed as provided in § 9-6.17.

G. Before delivering any proposed regulation under consideration to the Registrar as required in subsection H below, the agency shall deliver a copy of that regulation to the Department of Planning

and Budget. In addition to determining the public benefit, the Department of Planning and Budget in coordination with the agency, shall, within 45 days, prepare an economic impact analysis of the proposed regulation. The economic impact analysis shall include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply; the identity of any localities and types of businesses or other entities particularly affected by the regulation; the projected number of persons and employment positions to be affected; and the projected costs to affected businesses or entities to implement or comply with such regulations. The Department may request the assistance of any other agency in preparing the analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation, which shall comment thereon as provided in subsection H, and a copy to the Registrar for publication with the proposed regulation. No regulation shall be promulgated for consideration pursuant to subsection H until such impact analysis has been received by the Registrar. For purposes of this section, the term "particularly affected" locality, business, or entity means any locality, business, or entity which bears any identified disproportionate material impact which would not be experienced by other localities, businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of public review and comment on the proposed regulation. The accuracy of the estimate shall in no way affect the validity of the regulation, nor shall any failure to comply with or otherwise follow the procedures set forth in this subsection create any cause of action or provide standing for any person under Article 4 (§ 9-6.14:15 et seq.) of this Chapter or otherwise to challenge the actions of the Department hereunder or the action of the agency in adopting the proposed regulation.

H. Before promulgating any regulation under consideration, the agency shall deliver a copy of that regulation to the Registrar together with a summary of the regulation and a separate and concise statement of (i) the basis of the regulation, defined as the statutory authority for promulgating the regulation, including an identification of the section number and a brief statement relating the content of the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as the rationale or justification for the new provisions of the regulation, from the standpoint of the public's health, safety or welfare; (iii) the substance of the regulation, defined as the identification and explanation of the key provisions of the regulation that make changes to the current status of the law; (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public, and as applicable for the agency or the state, of implementing the new regulatory provisions; and (v) the agency's response to the economic impact analysis submitted by the Department of Planning and Budget pursuant to subsection G. Any economic impact estimate included in the agency's response shall represent the agency's best estimate for the purposes of public review and comment, but the accuracy of the estimate shall in no way affect the validity of the regulation. Staff as designated by the Code Commission shall review proposed regulation submission packages to ensure the requirements of this subsection are met prior to publication of the proposed regulation in the Register. The summary and the statement of the basis, purpose, substance, issues, estimated impact and identity of any localities affected shall be published in the Virginia Register of Regulations, together with the notice of opportunity for oral or written submittals on the proposed regulation. However, only the summary shall be printed in the newspapers unless the agency requests publication of the statement of basis, purpose, substance, issues, estimated impact and identity of any localities particularly affected. As used in this section, the term "locality particularly affected" means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

I. When an agency formulating regulations in public assistance programs cannot comply with the public comment requirements of subsection F of this section due to time limitations imposed by state or federal laws or regulations for the adoption of such regulation, the Secretary of Health and Human 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.

J. For the purpose of this article, public assistance programs shall consist of those specified in § 63.1-87.

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 thirty 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 twenty-five 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 thirty days to solicit additional public comment, and (ii) file notice of the additional thirty-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 of this section be deemed mere harmless error for the purposes of § 9-6.14:17.

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

§ 9-6.14:9.1. 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 procedures shall include (i) review by the Attorney General to ensure statutory authority for the proposed regulations; (ii) examination by the Governor to determine if the proposed regulations are necessary to protect the public health, safety and welfare; and (iii) examination by the Governor to determine if the proposed regulations are clearly written and easily understandable. The procedures may also include review of the proposed regulation by the appropriate Cabinet Secretary.

The Governor's review of a proposed regulation shall begin upon the publication of that proposed regulation in the Register. The Governor shall transmit his comments on that proposed regulation to the Registrar and the agency prior to the completion of the public comment period provided for in § 9-6.14:7.1. The Governor may recommend amendments or modifications to any regulation which would bring that regulation into conformity with statutory authority or state or federal laws, regulations or judicial decisions.

Upon receipt of the Governor's comments on the proposed regulation, the agency (i) may adopt the proposed regulation if the Governor has no objection to the regulation; (ii) may modify and adopt the proposed regulation after considering and incorporating the Governor's objections or suggestions; or (iii) may adopt the regulation without changes despite the Governor's recommendations for change.

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

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

D. A thirty-day final adoption period for regulations shall commence upon the publication of the final regulation in the Register. The Governor shall review the final regulation during this thirty-day final adoption period and if he objects to any portion or all of a regulation, the Governor may file a formal objection to the regulation, suspend the effective date of the regulation in accordance with subsection B of § 9-6.14:9.2, or both.

If the Governor files a formal objection to the regulation, he shall forward his objections to the Registrar and agency prior to the conclusion of the thirty-day final adoption period. The Governor shall be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he fails to suspend the effective date of the regulation in accordance with subsection B of § 9-6.14:9.2 during the thirty-day final adoption period. The Governor's objection, or the suspension of the regulation, or both if applicable, shall be published in the Register.

A regulation shall become effective as provided in § 9-6.14:9.3.

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

§ 9-6.14:9.3. Effective date of regulation.

A regulation adopted in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) and the Virginia Register Act (§ 9-6.15 et seq.), shall become effective at the conclusion of the thirty-day final adoption period provided for in subsection D of § 9-6.14:9.1, or any other later date specified by the promulgating agency, unless:

1. A legislative objection has been filed in accordance with § 9-6.14:9.2, in which event the regulation, unless withdrawn by the promulgating agency, shall become effective on a date specified by the promulgating agency which shall be after the expiration of the applicable twenty-one-day extension period provided in § 9-6.14:9.2;

2. The Governor has exercised his authority in accordance with § 9-6.14:9.1 to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn by the promulgating agency, shall become effective on a date specified by the promulgating agency which shall be after the period for which the Governor has provided for additional public comment; or

3. The Governor and the General Assembly have exercised their authority in accordance with subsection B of § 9-6.14:9.2 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 § 9-6.14:7.1,

in which event the regulation, unless withdrawn by the agency, shall become effective on the date specified by the agency which shall be after the thirty-day public comment period required by subsection K of § 9-6.14:7.1.

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