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**HOUSE BILL NO. 1472**

Offered January 11, 1995

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*A BILL 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.*

Patrons—Murphy and Cohen; Senators: Gartlan and Reasor

Referred to Committee on General Laws

**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

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60 pertaining to proposed regulations. As used in this chapter, "Registrar" means the Registrar of  
61 Regulations appointed as provided in § 9-6.17.

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

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

107 I. When an agency formulating regulations in public assistance programs cannot comply with the  
108 public comment requirements of subsection F of this section due to time limitations imposed by state or  
109 federal laws or regulations for the adoption of such regulation, the Secretary of Health and Human  
110 Resources may shorten the time requirements of subsection F. If, in the Secretary's sole discretion, such  
111 time limitations reasonably preclude any advance published notice, he may waive the requirements of  
112 subsection F. However, the agency shall, as soon as practicable after the adoption of the regulation in a  
113 manner consistent with the requirements of subsection F, publish notice of the promulgation of the  
114 regulation and afford an opportunity for public comment. The precise factual basis for the Secretary's  
115 determination shall be stated in the published notice.

116 J. For the purpose of this article, public assistance programs shall consist of those specified in  
117 § 63.1-87.

118 K. If one or more changes with substantial impact are made to a proposed regulation from the time  
119 that it is published as a proposed regulation to the time it is published as a final regulation, any person  
120 may petition the agency within thirty days from the publication of the final regulation to request an  
121 opportunity for oral and written submittals on the changes to the regulation. If the agency receives

122 requests from at least twenty-five persons for an opportunity to submit oral and written comments on the  
 123 changes to the regulation, the agency shall (i) suspend the regulatory process for thirty days to solicit  
 124 additional public comment, and (ii) file notice of the additional thirty-day public comment period with  
 125 the Registrar of Regulations, unless the agency determines that the changes made are minor or  
 126 inconsequential in their impact. *The comment period, if any, shall begin on the date of publication of the*  
 127 *notice in the Register.* Agency denial of petitions for a comment period on changes to the regulation  
 128 shall be subject to judicial review.

129 L. In no event shall the failure to comply with the requirements of subsection F of this section be  
 130 deemed mere harmless error for the purposes of § 9-6.14:17.

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

133 § 9-6.14:9.1. Executive review of proposed and final regulations; changes with substantial impact.

134 A. The Governor shall adopt and publish procedures by executive order for review of all proposed  
 135 regulations governed by this chapter by June 30 of the year in which the Governor takes office. The  
 136 procedures shall include (i) review by the Attorney General to ensure statutory authority for the  
 137 proposed regulations; (ii) examination by the Governor to determine if the proposed regulations are  
 138 necessary to protect the public health, safety and welfare; and (iii) examination by the Governor to  
 139 determine if the proposed regulations are clearly written and easily understandable. The procedures may  
 140 also include review of the proposed regulation by the appropriate Cabinet Secretary.

141 The Governor's review of a proposed regulation shall begin upon the publication of that proposed  
 142 regulation in the Register. The Governor shall transmit his comments on that proposed regulation to the  
 143 Registrar and the agency prior to the completion of the public comment period provided for in  
 144 § 9-6.14:7.1. The Governor may recommend amendments or modifications to any regulation which  
 145 would bring that regulation into conformity with statutory authority or state or federal laws, regulations  
 146 or judicial decisions.

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

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

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

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

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

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

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

175 § 9-6.14:9.3. Effective date of regulation.

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

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

183 period provided in § 9-6.14:9.2;

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

188 3. The Governor and the General Assembly have exercised their authority in accordance with  
189 subsection B of § 9-6.14:9.2 to suspend the effective date of a regulation until the end of the next  
190 regular legislative session; *or*

191 4. *The agency has suspended the regulatory process in accordance with subsection K of § 9-6.14:7.1,*  
192 *in which event the regulation, unless withdrawn by the agency, shall become effective on the date*  
193 *specified by the agency which shall be after the thirty-day public comment period required by subsection*  
194 *K of § 9-6.14:7.1.*

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