http://register.dls.virginia.gov Virginia Code Commission

Virginia Register of Regulations

VOL. 26 ISS. 8 PUBLISHED EVERY OTHER WEEK BY THE VIRGINIA CODE COMMISSION DECEMBER 21, 2009

TABLE OF CONTENTS

THE VIRGINIA REGISTER OF REGULATIONS (USPS-001831) is published biweekly, with quarterly cumulative indices published in January, April, July and October, for $179.00 per year by LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204. Periodical postage is paid at Albany, NY and at additional mailing offices. POSTMASTER: Send address changes to LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204.

THE VIRGINIA REGISTER INFORMATION PAGE

THE VIRGINIA REGISTER OF REGULATIONS is an official state publication issued every other week throughout the year. Indexes are published quarterly, and are cumulative for the year. The *Virginia Register* has several functions. The new and amended sections of regulations, both as proposed and as finally adopted, are required by law to be published in the *Virginia Register*. In addition, the *Virginia Register* is a source of other information about state government, including petitions for rulemaking, emergency regulations, executive orders issued by the Governor, the Virginia Tax Bulletin issued periodically by the Department of Taxation, and notices of public hearings and open meetings of state agencies.

ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS

An agency wishing to adopt, amend, or repeal regulations must first publish in the *Virginia Register* a notice of intended regulatory action; a basis, purpose, substance and issues statement; an economic impact analysis prepared by the Department of Planning and Budget; the agency's response to the economic impact analysis; a summary; a notice giving the public an opportunity to comment on the proposal; and the text of the proposed regulation.

Following publication of the proposal in the Virginia Register, the promulgating agency receives public comments for a minimum of 60 days. The Governor reviews the proposed regulation to determine if it is necessary to protect the public health, safety and welfare, and if it is clearly written and easily understandable. If the Governor chooses to comment on the proposed regulation, his comments must be transmitted to the agency and the Registrar no later than 15 days following the completion of the 60-day public comment period. The Governor's comments, if any, will be published in the *Virginia Register*. Not less than 15 days following the completion of the 60-day public comment period, the agency may adopt the proposed regulation.

The Joint Commission on Administrative Rules (JCAR) or the appropriate standing committee of each house of the General Assembly may meet during the promulgation or final adoption process and file an objection with the Registrar and the promulgating agency. The objection will be published in the *Virginia Register*. Within 21 days after receipt by the agency of a legislative objection, the agency shall file a response with the Registrar, the objecting legislative body, and the Governor.

When final action is taken, the agency again publishes the text of the regulation as adopted, highlighting all changes made to the proposed regulation and explaining any substantial changes made since publication of the proposal. A 30-day final adoption period begins upon final publication in the *Virginia Register*.

The Governor may review the final regulation during this time and, if he objects, forward his objection to the Registrar and the agency. In addition to or in lieu of filing a formal objection, the Governor may suspend the effective date of a portion or all of a regulation until the end of the next regular General Assembly session by issuing a directive signed by a majority of the members of the appropriate legislative body and the Governor. The Governor's objection or suspension of the regulation, or both, will be published in the *Virginia Register*. If the Governor finds that changes made to the proposed regulation have substantial impact, he may require the agency to provide an additional 30-day public comment period on the changes. Notice of the additional public comment period required by the Governor will be published in the *Virginia Register*.

The agency shall suspend the regulatory process for 30 days when it receives requests from 25 or more individuals to solicit additional public comment, unless the agency determines that the changes have minor or inconsequential impact.

A regulation becomes effective at the conclusion of the 30-day final adoption period, or at any other later date specified by the promulgating agency, unless (i) a legislative objection has been filed, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 21-day objection period; (ii) the Governor exercises his authority to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the period for which the Governor has provided for additional public comment; (iii) the Governor and the General Assembly exercise their authority to suspend the effective date of a regulation until the end of the next regular legislative session; or (iv) the agency suspends the regulatory process, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 30-day public comment period and no earlier than 15 days from publication of the readopted action.

Proposed regulatory action may be withdrawn by the promulgating agency at any time before the regulation becomes final.

FAST-TRACK RULEMAKING PROCESS

Section 2.2-4012.1 of the Code of Virginia provides an exemption from certain provisions of the Administrative Process Act for agency regulations deemed by the Governor to be noncontroversial. To use this process, Governor's concurrence is required and advance notice must be provided to certain legislative committees. Fast-track regulations will become effective on the date noted in the regulatory action if no objections to using the process are filed in accordance with § 2.2-4012.1.

EMERGENCY REGULATIONS

Pursuant to § 2.2-4011 of the Code of Virginia, an agency, upon consultation with the Attorney General, and at the discretion of the Governor, may adopt emergency regulations that are necessitated by an emergency situation. An agency may also adopt an emergency regulation when 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. The emergency regulation becomes operative upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. Emergency regulations are limited to no more than 12 months in duration; however, may be extended for six months under certain circumstances as provided for in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Register*.

During the time the emergency status is in effect, the agency may proceed with the adoption of permanent regulations through the usual procedures. To begin promulgating the replacement regulation, the agency must (i) file the Notice of Intended Regulatory Action with the Registrar within 60 days of the effective date of the emergency regulation and (ii) file the proposed regulation with the Registrar within 180 days of the effective date of the emergency regulation. If the agency chooses not to adopt the regulations, the emergency status ends when the prescribed time limit expires.

STATEMENT

The foregoing constitutes a generalized statement of the procedures to be followed. For specific statutory language, it is suggested that Article 2 (§ 2.2-4006 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia be examined carefully.

CITATION TO THE *VIRGINIA REGISTER*

The *Virginia Register* is cited by volume, issue, page number, and date. **23:7 VA.R. 1023-1140 December 11, 2006,** refers to Volume 23, Issue 7, pages 1023 through 1140 of the *Virginia Register* issued on December 11, 2006.

The Virginia Register of Regulations is published pursuant to Article 6 (§ 2.2-4031 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia.

PUBLICATION SCHEDULE AND DEADLINES

This schedule is available on the *Register*'s Internet home page (http://register.state.va.us).

December 2009 through October 2010

Volume: Issue	Material Submitted By Noon*	Will Be Published On
INDEX 1 Volume 26		**January 2010**
26:8	December 2, 2009	December 21, 2009
26:9	December 15, 2009 **(Tuesday)**	January 4, 2010
26:10	December 29, 2009 **(Tuesday)**	January 18, 2010
26:11	January 13, 2010	February 1, 2010
26:12	January 27, 2010	February 15, 2010
26:13	February 10, 2010	March 1, 2010
26:14	February 24, 2010	March 15, 2010
INDEX 2 Volume 26		**April 2010**
26:15	March 10, 2010	March 29, 2010
26:16	March 24, 2010	April 12, 2010
26:17	April 7, 2010	April 26, 2010
26:18	April 21, 2010	May 10, 2010
26:19	May 5, 2010	May 24, 2010
26:20	May 19, 2010	June 7, 2010
INDEX 3 Volume 26		**July 2010**
26:21	June 2, 2010	June 21, 2010
26:22	June 16, 2010	July 5, 2010
26:23	June 30, 2010	July 19, 2010
26:24	July 14, 2010	August 2, 2010
26:25	July 28, 2010	August 16, 2010
26:26	August 11, 2010	August 30, 2010
FINAL INDEX Volume 26		**October 2010**
27:1	August 25, 2010	September 13, 2010
27:2	September 8, 2010	September 27, 2010
27:3	September 22, 2010	October 11, 2010
27:4	October 6, 2010	October 25, 2010

*Filing deadlines are Wednesdays unless otherwise specified.

TITLE 9. ENVIRONMENT

STATE AIR POLLUTION CONTROL BOARD

Initial Agency Notice

Titles of Regulations: **9VAC5-40. Existing Stationary Sources.**

9VAC5-50. New and Modified Stationary Sources.

Statutory Authority: §§ 10.1-1307 and 10.1-1308 of the Code of Virginia.

Name of Petitioner: Southern Appalachia Mountain Stewards and the Sierra Club.

Nature of Petitioner's Request: The Southern Appalachia Mountain Stewards and the Sierra Club have petitioned the State Air Pollution Control Board to amend the fugitive dust emissions standards for existing and new and modified stationary sources. The petitioners have requested that additional language be added to the fugitive dust standards to clarify what is meant by "reasonable precautions" and that the fugitive dust standard provide additional examples of reasonable precautions specific to the type of activities that contributed to the documented dust problem in Roda. Further, the petitioners state that the proposed amendments would strengthen and clarify the fugitive dust standard without imposing significant burdens on regulators or on the facilities subject to the regulations.

The specific requested amendments are identical for both Chapter 40 and Chapter 50. The full text follows and are the addition of the 2nd sentence in the first paragraph and the addition of numbered items 6, 7 and 8:

No owner or other person shall cause or permit any materials or property to be handled, transported, stored, used, constructed, altered, repaired, or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. In determining what is reasonable, consideration will be given to factors such as the proximity of dust emitting operations to human habitations and/or activities, and to atmospheric conditions which might affect the movement of particulate matter. Such reasonable precautions may include, but are not limited to, the following:

1. Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;

2. Application of asphalt, water, or suitable chemicals on dirt roads, materials stockpiles and other surfaces which may create airborne dust; the paving of roadways and the maintaining of them in a clean condition;

3. Installation and use of hoods, fans and fabric filters to enclose and vent the handling of dusty materials. Adequate containment methods shall be employed during sandblasting or other similar operations;

4. Open equipment for conveying or transporting materials likely to create objectionable air pollution when airborne shall be covered, or treated in an equally effective manner at all times when in motion;

5. The prompt removal of spilled or tracked dirt or other materials from paved streets and of dried sediments resulting from soil erosion;

6. The use of water to wash the wheels, undercarriage, and other parts of every vehicle that hauls coal or other materials before or immediately after the vehicle leaves a dusty, dirty, or muddy surface, including but not limited to haul roads at a mining or processing facility;

7. Cleaning the empty bed and/or any other part of a vehicle that had recent contact with material capable of emitting dust; and

8. Installation and use of rumble strips, speed bumps, or other devices designed to reduce vehicle speed and to dislodge mud and other materials from tires and vehicle bodies before vehicles enter public roads.

Agency's Plan for Disposition of the Request: Receive comments on the petition for 21 days and present petition and comments to State Air Pollution Control Board for a decision on whether or not to initiate a rulemaking.

Public comments may be submitted until January 11, 2010.

Agency Contact: Karen G. Sabasteanski, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4426, FAX (804) 698-4510, or email karen.sabasteanski@deq.virginia.gov.

VA.R. Doc. No. R10-27; Filed November 30, 2009, 1:39 p.m.

Agency Decision

Titles of Regulations: **9VAC5-40. Existing Stationary Sources.**

9VAC5-50. New and Modified Stationary Sources.

Statutory Authority: §§ 10.1-1307 and 10.1-1308 of the Code of Virginia.

Name of Petitioner: Metropolitan Washington Air Quality Committee (MWAQC).

Nature of Petitioner's Request: MWAQC is concerned that the opacity standards for new and existing facilities in Virginia are set at a level that is too high to be sufficiently protective of human health. On March 7, 2008, MWAQC adopted a resolution to petition the State Air Pollution Control Board to revise the opacity standard. The District of Columbia and Maryland have much stricter opacity standards (0-10%) for emissions from point sources in the metropolitan

Washington, D.C. nonattainment area. In contrast, Virginia's opacity standard at 20% is the least stringent of the three jurisdictions. MWAQC requests that the State Air Pollution Control Board lower the Virginia opacity standard from 20% to 10%, at least in the Northern Virginia region, to be more consistent with those of the District of Columbia and Maryland. MWAQC believes that such action could help to improve air quality in the metropolitan Washington, D.C. area.

Agency Decision: Request denied.

Statement of Reasons for Decision: After a presentation by staff on the results of the public comment period on the petition and staff analysis of those comments and receipt of comments from the petitioner and other interested persons, the board voted to accept staff recommendations to not initiate rulemaking at this time. The recommendation was based on the following: the benefit of new opacity limits were difficult to quantify and impacted entities commented on the significant costs to retrofit, upgrade and/or replace equipment; PM2.5 air quality is good with trends showing improvement and inventory estimates showing large expected reductions in precursor pollutants in coming years; and the limited agency resources for regulation development were better used on other air quality improvement programs.

Agency Contact: Doris A. McLeod, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4197, or email damcleod@deq.virginia.gov.

VA.R. Doc. No. R09-03; Filed November 30, 2009, 1:37 p.m.

TITLE 8. EDUCATION

STATE BOARD OF EDUCATION

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Education intends to consider promulgating the following regulations: **8VAC20-730, Regulations Governing Unexcused Absences and Truancy.** The purpose of the proposed action is to establish regulations that govern the collection and reporting of truancy-related data to include guidance on school attendance policy and a standard definition of "unexcused absence."

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 22.1-16 and 22.1-258 of the Code of Virginia.

Public Comment Deadline: January 25, 2010.

Agency Contact: Dr. Margaret N. Roberts, Office of Policy & Communications, Department of Education, P.O. Box 2120, 101 North 14th Street, 25th Floor, Richmond, VA 23219, telephone (804) 225-2540, FAX (804) 225-2524, or email margaret.roberts@doe.virginia.gov.

VA.R. Doc. No. R10-2154; Filed November 25, 2009, 10:25 a.m.

TITLE 9. ENVIRONMENT

STATE WATER CONTROL BOARD

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Water Control Board intends to consider amending the following regulations: **9VAC25-260, Water Quality Standards.** The purpose of the proposed action is to amend 9VAC25-260-450 of the Water Quality Standards by designating as public water supply (9VAC25-260-380 D 1) an approximately one mile segment of the Dan River in Virginia downriver of Danville near the VA/NC state line and any tributaries within the segment as public water supply (PWS).

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 62.1-44.15 of the Code of Virginia; Clean Water Act (33 USC § 1251 et seq.); 40 CFR 131.

Public Comment Deadline: January 27, 2010.

Agency Contact: David C. Whitehurst, Department of Environmental Quality, P.O. Box 1105, 629 East Main Street, Richmond, VA 23218, telephone (804) 698-4121, FAX (804) 698-4116, or email david.whitehurst@deq.virginia.gov.

VA.R. Doc. No. R09-24; Filed November 30, 2009, 1:42 p.m.

TITLE 22. SOCIAL SERVICES

STATE BOARD OF SOCIAL SERVICES

Withdrawal of Notice of Intended Regulatory Action

The State Board of Social Services has WITHDRAWN the Notices of Intended Regulatory Action for **22VAC40-180, Voluntary Registration of Family Day Homes--Requirements for Providers** and **22VAC40-181, Voluntary Registration of Family Day Homes--Requirements for Providers** that was published in 20:2 VA.R. 87 October 5, 2003.

Agency Contact: L. Richard Martin, Jr., Manager, Department of Social Services, Office of Legislative and Regulatory Affairs, 7 North Eighth Street, Room 5214, Richmond, VA 23219, telephone (804) 726-7902, FAX (804) 726-7906, TTY (800) 828-1120, or email richard.martin@dss.virginia.gov.

VA.R. Doc. Nos. R04-12 and R04-13; Filed November 19, 2009, 11:12 a.m.

TITLE 4. CONSERVATION AND NATURAL RESOURCES

MARINE RESOURCES COMMISSION

Final Regulation

REGISTRAR'S NOTICE: The following regulation filed by the Marine Resources Commission is exempt from the Administrative Process Act in accordance with § 2.2-4006 A 12 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

Title of Regulation: **4VAC20-252. Pertaining to the Taking of Striped Bass (amending 4VAC20-252-55, 4VAC20-252-150, 4VAC20-252-155).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: January 1, 2010.

Agency Contact: Jane Warren, Agency Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, FAX (757) 247-2002, or email betty.warren@mrc.virginia.gov.

Summary:

The amendments (i) establish the 2010 striped bass quota for the Chesapeake Area by providing 1,538,022 pounds to both the recreational fishery and the commercial fishery and (ii) change individual transferable shares monitoring and penalties from a matrix based upon an individual harvester's overage by percentages to a matrix based upon discrete values in pounds.

4VAC20-252-55. Recreational harvest quota.

The total allowable level of all recreational harvest of striped bass for all open seasons and for all legal gear shall be ~~1,642,242~~ 1,538,022 pounds of whole fish. At such time as the total recreational harvest of striped bass is projected to reach ~~1,642,242~~ 1,538,022 pounds, and announced as such, it shall be unlawful for any person to land or possess striped bass caught for recreational purposes.

4VAC20-252-150. Individual commercial harvest quota.

A. The commercial harvest quota for the Chesapeake area shall be determined annually by the Marine Resources Commission. The total allowable level of all commercial harvest of striped bass from the Chesapeake Bay and its tributaries and the Potomac River tributaries of Virginia for all open seasons and for all legal gear shall be ~~1,642,242~~ 1,538,022 pounds of whole fish. At such time as the total commercial harvest of striped bass from the Chesapeake area is projected to reach ~~1,642,242~~ 1,538,022 pounds, and announced as such, it shall be unlawful for any person to land or possess striped bass caught for commercial purposes from the Chesapeake area.

B. The commercial harvest quota for the coastal area of Virginia shall be determined annually by the Marine Resources Commission. The total allowable level of all commercial harvest of striped bass from the coastal area for all open seasons and for all legal gear shall be 184,853 pounds of whole fish. At such time as the total commercial harvest of striped bass from the coastal area is projected to reach 184,853 pounds, and announced as such, it shall be unlawful for any person to land or possess striped bass caught for commercial purposes from the coastal area.

C. For the purposes of assigning an individual's tags for commercial harvests in the Chesapeake area as described in 4VAC20-252-160, the individual commercial harvest quota of striped bass in pounds shall be converted to an estimate in numbers of fish per individual harvest quota based on the average weight of striped bass harvested by the permitted individual during the previous fishing year. The number of striped bass tags issued to each individual will equal the estimated number of fish to be landed by that individual harvest quota, plus a number of striped bass tags equal to 10% of the total allotment determined for each individual.

D. For the purposes of assigning an individual's tags for commercial harvests in the coastal area of Virginia as described in 4VAC20-252-160, the individual commercial harvest quota of striped bass in pounds shall be converted to a quota in numbers of fish per individual commercial harvest quota, based on the estimate of the average weight of striped bass harvested by the permitted individual during the previous fishing year. The number of striped bass tags issued to each individual will equal the estimated number of fish to be landed by that individual harvest quota, plus a number of striped bass tags equal to 10% of the total allotment determined for each individual.

4VAC20-252-155. Individual transferable shares monitoring and penalties.

A. Any initial overage by any person of an individual commercial harvest quota during any calendar year shall be considered a first offense, with penalties prescribed according to the severity of the overage as described in subdivisions 1 through 5 of this subsection.

1. Any ~~overage in pounds that ranges from zero to 3.0% or less than 200 pounds, whichever is lower,~~ overages that are less than 76 pounds shall result in a warning being issued.

2. Any ~~overage in pounds that ranges from 4.0% to 10%~~ overages that range from 76 to 250 pounds shall result in a one year deduction of that overage from that individual commercial harvest quota during the following calendar year.

3. Any ~~overage in pounds that ranges from 11% to 20%~~ overages that range from 251 to 475 pounds shall result in a one year deduction of two times that overage from that individual commercial harvest quota during the following calendar year.

4. Any ~~overage in pounds that ranges from 21% to 30%~~ overages that range from 476 to 725 pounds shall result in that overage being permanently deducted from that individual commercial harvest quota and a one year suspension of that individual from the commercial fishery for striped bass.

5. Any ~~overage in pounds that is greater than 30%~~ overages that are greater than 725 pounds shall result in the revocation of that individual striped bass permit, and that person shall not be eligible to apply for a like permit for a period of two years from the date of revocation.

B. Any second overage by any person of an individual commercial harvest quota within five years of a previous offense shall result in penalties prescribed according to the severity of the overage as described in subdivisions 1 through 4 of this subsection.

1. Any ~~overage in pounds that ranges from zero to 3.0% or less than 200 pounds, whichever is lower,~~ overages that are less than 76 pounds shall result in a one year deduction of the overage from that individual commercial harvest quota during the following calendar year.

2. Any ~~overage in pounds that ranges from 4.0% to 10%~~ overages that range from 76 to 250 pounds shall result in a one year deduction of two times the overage from that individual commercial harvest quota during the following calendar year.

3. Any ~~overage in pounds that ranges from 11% to 20%~~ overages that range from 251 to 475 pounds shall result in the overage being permanently deducted from the individual commercial harvest quota and a one year suspension of that individual from the commercial fishery for striped bass.

4. Any ~~overage in pounds that is greater than 20%~~ overages that are greater than 475 pounds shall result in the revocation of that individual striped bass permit, and that individual shall not be eligible to apply for a like permit for a period of two years from the date of revocation.

C. Any third overage by any person of an individual commercial harvest quota within five years of two previous offenses shall result in penalties prescribed according to the severity of the overage as described in subdivisions 1 through 3 of this subsection.

1. Any ~~overage in pounds that ranges from zero to 3.0% or less than 200 pounds, whichever is lower,~~ overages that are less than 76 pounds shall result in a one year deduction of two times the overage from that individual commercial harvest quota during the following calendar year.

2. Any ~~overage in pounds that ranges from 4.0% to 10%~~ overages that range from 76 to 250 pounds shall result in the overage being permanently deducted from that individual commercial harvest quota and a one year suspension of the individual from the commercial fishery for striped bass.

3. Any ~~overage in pounds that is greater than 10%~~ overages that are greater than 250 pounds shall result in the revocation of that individual striped bass permit, and that person shall not be eligible to apply for a like permit for a period of two years from the date of revocation.

D. Any fourth overage by any person of an individual commercial harvest quota within five years of three previous offenses shall result in penalties prescribed according to the severity of the overage as described in subdivisions 1 and 2 of this subsection.

1. Any ~~overage in pounds that ranges from zero to 3.0% or less than 200 pounds, whichever is lower,~~ overages that are less than 76 pounds shall result in the overage being permanently deducted from that individual commercial harvest quota and a one year suspension of the individual from the commercial fishery for striped bass.

2. Any ~~overage in pounds that is greater than 3.0%~~ overages that are greater than 75 pounds shall result in the revocation of that individual striped bass permit, and that individual shall not be eligible to apply for a like permit for a period of two years from the date of revocation.

VA.R. Doc. No. R10-2241; Filed November 30, 2009, 12:35 p.m.

Emergency Regulation

Title of Regulation: **4VAC20-490. Pertaining to Sharks (amending 4VAC20-490-44).**

Statutory Authority: §§ 28.2-201, 28.2-204, and 28.2-210 of the Code of Virginia.

Effective Dates: November 25, 2009, through December 24, 2009.

Agency Contact: Jane Warren, Agency Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, FAX (757) 247-2002, or email betty.warren@mrc.virginia.gov.

Preamble:

This amendment prohibits the transfer of any spiny dogfish limited entry permit.

4VAC20-490-44. Spiny dogfish limited entry permit and permit transfers.

A. It shall be unlawful for any person to take, catch, possess, or land any spiny dogfish without first having obtained a spiny dogfish limited entry permit from the Marine Resources Commission. Such permit shall be completed in full by the permittee who shall keep a copy of that permit in his possession while fishing for or selling spiny dogfish. Permits shall only be issued to Virginia registered commercial fishermen meeting either of the following criteria:

1. Shall have documented on Virginia mandatory harvest reporting forms harvest from a legally licensed, movable gill net for an average of at least 60 days from 2006 through 2008, and a minimum harvest of one pound of spiny dogfish at any time from 2006 through 2008.

2. Shall have documented on Virginia mandatory reporting forms harvests that total greater than 10,000 pounds of spiny dogfish in any one year from 2006 through 2008.

B. ~~A spiny dogfish limited entry permittee may only transfer that permit to another Virginia registered commercial fisherman. The transferor and the transferee shall have documented any prior fishing activity on Virginia mandatory reporting forms and shall not be under any sanction by the Marine Resources Commission for noncompliance with the regulation. Transfers must be approved by the commissioner, or his designee, and are permanent. The permanent transfer authorizes the transferee to possess a spiny dogfish limited entry permit, and the transferor shall lose his eligibility for that spiny dogfish limited entry permit.~~ It is unlawful to transfer any spiny dogfish limited entry permit after November 23, 2009.

VA.R. Doc. No. R10-2247; Filed November 25, 2009, 12:07 p.m.

Final Regulation

REGISTRAR'S NOTICE: The following regulation filed by the Marine Resources Commission is exempt from the Administrative Process Act in accordance with § 2.2-4006 A 12 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

Title of Regulation: **4VAC20-620. Pertaining to Summer Flounder (amending 4VAC20-620-30, 4VAC20-620-40).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: November 30, 2009.

Agency Contact: Jane Warren, Agency Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, FAX (757) 247-2002, or email betty.warren@mrc.virginia.gov.

Summary:

These amendments (i) open the late season offshore summer flounder fishery on the last Monday in November and establish a 7,500-pound Virginia landing limit for that season; (ii) lower the early season vessel landing limit in Virginia to 7,500 pounds; and (iii) lower the vessel possession limit to 15,000 pounds for early and late seasons.

4VAC20-620-30. Commercial harvest quota and allowable landings.

A. During each calendar year, allowable commercial landings of Summer Flounder shall be limited to a quota in total pounds calculated pursuant to the joint Mid-Atlantic Fishery Management Council/Atlantic States Marine Fisheries Commission Summer Flounder Fishery Management Plan, as approved by the National Marine Fisheries Service on August 6, 1992 (50 CFR Part 625); and shall be distributed as described in subsections B through G of this section.

B. The commercial harvest of Summer Flounder from Virginia tidal waters for each calendar year shall be limited to 300,000 pounds of the annual quota described in subsection A of this section. Of this amount, 142,114 pounds shall be set aside for Chesapeake Bay-wide harvest.

C. From the first Monday in January through the day preceding the ~~first~~ last Monday in ~~December~~ November allowable landings of Summer Flounder harvested outside of Virginia shall be limited to an amount of pounds equal to 70.7% of the quota described in subsection A of this section after deducting the amount specified in subsection B of this section.

D. From the ~~first~~ last Monday in ~~December~~ November through December 31, allowable landings of Summer Flounder harvested outside of Virginia shall be limited to an amount of pounds equal to 29.3% of the quota, as described in subsection A of this section, after deducting the amount specified in subsection B of this section, and as may be further modified by subsection E.

E. Should landings from the first Monday in January through the day preceding the ~~first~~ last Monday in ~~December~~ November exceed or fall short of 70.7% of the quota described in subsection A of this section, any such excess shall be deducted from allowable landings described in subsection D of this section, and any such shortage shall be added to the allowable landings as described in subsection D of this section. Should the commercial harvest specified in subsection B of this section be projected as less than 300,000 pounds, any such shortage shall be added to the allowable landings described in subsection D of this section.

F. The Marine Resources Commission will give timely notice to the industry of the calculated poundages and any adjustments to any allowable landings described in subsections C and D of this section. It shall be unlawful for any person to harvest or to land Summer Flounder for commercial purposes after the commercial harvest or any allowable landings as described in this section have been attained and announced as such. If any person lands Summer Flounder after the commercial harvest or any allowable landing have been attained and announced as such, the entire amount of Summer Flounder in that person's possession shall be confiscated.

G. It shall be unlawful for any buyer of seafood to receive any Summer Flounder after any commercial harvest or landing quota as described in this section has been attained and announced as such.

4VAC20-620-40. Commercial vessel possession and landing limitations.

A. From January 1 through the day preceding the last Monday in February, it shall be unlawful for any person harvesting Summer Flounder outside of Virginia's waters to possess aboard any vessel in Virginia any amount of Summer Flounder in excess of 10% by weight of all other landed species on board the vessel.

B. From the last Monday in February through the day preceding the ~~first~~ last Monday in ~~December~~ November, it shall be unlawful for any person harvesting Summer Flounder outside of Virginia waters to do any of the following:

1. Possess aboard any vessel in Virginia waters any amount of Summer Flounder in excess of ~~25,000~~ 15,000 pounds.

2. Land Summer Flounder in Virginia for commercial purposes more than twice during each consecutive 12-day period, with the first 12-day period beginning on the last Monday in February.

3. Land in Virginia more than ~~12,500~~ 7,500 pounds of Summer Flounder during each consecutive 12-day period, with the first 12-day period beginning on the last Monday in February.

4. Land in Virginia any amount of Summer Flounder more than once in any consecutive five-day period.

5. Possess aboard any vessel in Virginia any amount of Summer Flounder, in excess of 10%, by weight, of all other landed species on board the vessel once it has been projected and announced that 85% of the allowable landings have been taken. The Marine Resources Commission will give timely notice of any changes in possession limits.

C. From the ~~first~~ last Monday in ~~December~~ November through December 31 of each year, it shall be unlawful for any person harvesting Summer Flounder outside of Virginia waters to do any of the following:

1. Possess aboard any vessel in Virginia waters any amount of Summer Flounder in excess of ~~20,000~~ 15,000 pounds.

2. Land Summer Flounder in Virginia for commercial purposes more than twice during each consecutive 12-day period, with the first 12-day period beginning on the ~~first~~ last Monday in ~~December~~ November.

3. Land in Virginia more than a total of ~~10,000~~ 7,500 pounds of Summer Flounder during each consecutive 12-day period, with the first 12-day period beginning on the ~~first~~ last Monday in ~~December~~ November.

4. Land in Virginia any amount of Summer Flounder more than once in any consecutive five-day period.

5. Possess aboard any vessel in Virginia any amount of Summer Flounder, in excess of 10%, by weight, of all other landed species on board the vessel once it has been projected and announced that 85% of the allowable landings described in 4VAC20-620-30 D have been taken, except as described in subdivision 6 of this subsection. The Marine Resources Commission will give timely notice of any changes in possession limits.

6. Possess aboard any vessel in Virginia any amount of Summer Flounder once it has projected and announced that 100% of the quota described in 4VAC20-620-30 A, has been taken.

D. Upon request by a marine police officer, the seafood buyer or processor shall offload and accurately determine the total weight of all Summer Flounder aboard any vessel landing Summer Flounder in Virginia.

E. Any possession limit described in this section shall be determined by the weight in pounds of Summer Flounder as customarily packed, boxed and weighed by the seafood buyer or processor. The weight of any Summer Flounder in pounds found in excess of any possession limit described in this section shall be prima facie evidence of violation of this chapter. Persons in possession of Summer Flounder aboard any vessel in excess of the possession limit shall be in violation of this chapter unless that vessel has requested and been granted safe harbor. Any buyer or processor offloading or accepting any quantity of Summer Flounder from any vessel in excess of the possession limit shall be in violation of this chapter, except as described by subsection H of this section. A buyer or processor may accept or buy Summer Flounder from a vessel that has secured safe harbor, provided that vessel has satisfied the requirements described in subsection H of this section.

F. If a person violates the possession limits described in this section, the entire amount of Summer Flounder in that person's possession shall be confiscated. Any confiscated Summer Flounder shall be considered as a removal from the

appropriate commercial harvest or landings quota. Upon confiscation, the marine police officer shall inventory the confiscated Summer Flounder and, at a minimum, secure two bids for purchase of the confiscated Summer Flounder from approved and licensed seafood buyers. The confiscated fish will be sold to the highest bidder and all funds derived from such sale shall be deposited for the Commonwealth pending court resolution of the charge of violating the possession limits established by this chapter. All of the collected funds will be returned to the accused upon a finding of innocence or forfeited to the Commonwealth upon a finding of guilty.

G. It shall be unlawful for a licensed seafood buyer or federally permitted seafood buyer to fail to contact the Marine Resources Commission Operation Station prior to a vessel offloading Summer Flounder harvested outside of Virginia. The buyer shall provide to the Marine Resources Commission the name of the vessel, its captain, an estimate of the amount in pounds of Summer Flounder on board that vessel, and the anticipated or approximate offloading time. Once offloading of any vessel is complete and the weight of the landed Summer Flounder has been determined, the buyer shall contact the Marine Resources Commission Operations Station and report the vessel name and corresponding weight of Summer Flounder landed. It shall be unlawful for any person to offload from a boat or vessel for commercial purposes any Summer Flounder during the period of 6 p.m. to 7 a.m.

H. Any boat or vessel that has entered Virginia waters for safe harbor shall only offload Summer Flounder when the state that licenses that vessel requests to transfer quota to Virginia, in the amount that corresponds to that vessel's possession limit, and the commissioner agrees to accept that transfer of quota.

I. After any commercial harvest or landing quota as described in 4VAC20-620-30 has been attained and announced as such, any boat or vessel possessing Summer Flounder on board may enter Virginia waters for safe harbor but shall contact the Marine Resources Commission Operation Center in advance of such entry into Virginia waters.

VA.R. Doc. No. R10-2242; Filed November 25, 2009, 12:02 p.m.

Final Regulation

REGISTRAR'S NOTICE: The following regulation filed by the Marine Resources Commission is exempt from the Administrative Process Act in accordance with § 2.2-4006 A 12 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

Title of Regulation: **4VAC20-1190. Pertaining to Gill Net Control Date (amending 4VAC20-1190-40).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: January 1, 2010.

Agency Contact: Jane Warren, Agency Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, FAX (757) 247-2002, or email betty.warren@mrc.virginia.gov.

Summary:

The amendments establish a gill net vessel limit whereby only one Class A gill net permittee or only one Class B gill net permittee per vessel may harvest by gill net.

4VAC20-1190-40. Permit limitations.

A. Class A resident gill net permittees or Class A nonresident gill net permittees shall be authorized to purchase any number of gill net licenses provided the maximum footage associated with all purchased gill net licenses does not exceed 12,000 feet.

B. Class B gill net permittees shall be authorized to purchase any number of gill net licenses provided the maximum footage associated with all purchased gill net licenses does not exceed 6,000 feet.

C. A person who does not qualify for either a Class A resident gill net permit, Class A nonresident gill net permit or Class B gill net permit shall not be authorized to purchase any gill net license.

D. A legal gill net permit shall be in the possession of any gill net permittee or his agent who is placing, setting, or fishing that permittee's gill net.

E. It shall be unlawful for more than one gill net limited entry permittee aboard any vessel at any time to set, place, or fish any gill nets, except those gill nets legally licensed to only one gill net permittee.

VA.R. Doc. No. R10-2240; Filed November 30, 2009, 12:37 p.m.

TITLE 6. CRIMINAL JUSTICE AND CORRECTIONS

STATE BOARD OF CORRECTIONS

Proposed Regulation

Title of Regulation: **6VAC15-28. Regulations for Public/Private Joint Venture Work Programs Operated in A State Correctional Facility (amending 6VAC15-28-10, 6VAC15-28-30, 6VAC15-28-40).**

Statutory Authority: §§ 53.1-5 and 53.1-45.1 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: February 19, 2010.

Agency Contact: Janice Dow, Policy and Initiatives Unit Manager, Department of Corrections, 6900 Atmore Drive, Richmond, VA 23261, telephone (804) 674-3303 ext 1128, FAX (804) 674-3017, or email janice.dow@vadoc.virginia.gov.

Basis: The Board of Corrections has the statutory authority to promulgate regulations that are necessary to carry out the laws of Virginia administered by the Department of Corrections (DOC) or its Director, pursuant to § 53.1-5 of the Code of Virginia. Section 53.1-45.1 of the Code of Virginia allows the DOC Director, with the prior approval of the Governor, to enter into an agreement with a public or private entity to operate a work program in a state correctional facility for prisoners confined therein.

Purpose: The joint venture programs review process provides an orderly system for proposed agreements to be received and approved, increasing DOC's visibility within the community and private sector. In turn, opportunities for individuals to obtain post-incarceration employment are improved, which may ultimately lead to enhanced community public safety and welfare. Since this regulation was promulgated, §§ 53.1-45.2 through 53.1-45.5 of the Code of Virginia (creation of the Virginia Correctional Enterprises Advisory Board and appointment of Advisory) has been repealed by Chapters 94 and 854 of the 2003 Acts of Assembly. The amendments to this regulation will delete references to this committee and assign approval power to the Director of the Department of Corrections.

Substance: Amendments to this regulation delete requirements for committee review of proposed agreements between the DOC and a public or private entity as the committee was abolished by statute. The application and approval process for submission of proposed agreements between the DOC and public or private entities is delegated to the DOC Director. Additionally, the Proposed Joint Venture Application Form incorporated by reference is deleted. All current criteria for approval of proposed agreements remain in place.

Issues: This action poses no disadvantages to the public or the Commonwealth. The amendments affect internal operational practices and serve to make the regulations more consistent with the Code of Virginia. These regulations should prove advantageous to DOC and participating private entities because the programs allow DOC to have access to external resources in order to expand facilities, enter new markets, or develop new products. In turn private entities benefit through utilization of manpower resources from DOC.

The Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapters 94 and 854 of the 2003 Acts of the Assembly, the Board of Corrections (Board) proposes to amend its regulations governing the approval of joint venture work programs so that it is clear that the Director of the Department of Corrections (DOC) has the power to approve these work programs that operate within state correctional facilities.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Prior to 2003, Virginia Code § 53.1-45.1 required that any proposed joint venture work program agreements be submitted for review to the Virginia Correctional Enterprises Advisory Board. In 2003, the General Assembly repealed the statutory language that instituted this advisory board. The Director of DOC retained the power to enter into work program agreements with the concurrence of the Governor.

The Board now proposes to amend its regulations that govern work program agreements to account for this statutory change. Specifically the Board proposes to replace all instances of the word "committee" (referring to the now defunct advisory board), and insert the word "director" so that the regulations accurately state who has the power to review and approve work program agreements. Since this action will not change how work programs are currently approved, no affected entity is likely to incur any additional costs on account of these proposed regulations. To the extent that the divergence between statutory and regulatory language may have made the process by which work programs are approved opaque, these regulatory changes will provide the benefit of clarity.

Businesses and Entities Affected. DOC reports that these regulations affect all public and private entities that current have, or seek to have, work programs in correctional facilities. Currently, approximately 175 civilians and 1,500 inmates are employed in joint venture work programs.

Localities Particularly Affected. No locality will be particularly affected by this proposed regulatory action.

Projected Impact on Employment. This regulatory action will likely have no impact on employment in the Commonwealth.

Effects on the Use and Value of Private Property. This regulatory action will likely have no effect on the use or value of private property in the Commonwealth.

Small Businesses: Costs and Other Effects. Small businesses in the Commonwealth are unlikely to incur any costs on account of this regulatory action.

Small Businesses: Alternative Method that Minimizes Adverse Impact. Small businesses in the Commonwealth are unlikely to incur any costs on account of this regulatory action.

Real Estate Development Costs. This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 36 (06). Section 2.2-4007.04 requires that such economic impact analyses 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, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to the Department of Planning and Budget's Economic Impact Analysis: The Virginia Department of Corrections has reviewed the Department of Planning and Budget's (DPB) economic impact analysis for 6VAC15-28, Regulations for Public/Private Joint Venture Work Programs Operated in a State Correctional Facility. The agency concurs with DPB's analysis.

Summary:

This regulation governs the form and review process for proposed agreements between the Director of the Department of Corrections (DOC) and a public or private entity to operate a work program in a state correctional facility. These regulations have been in place in their current form since 1995. Since that time there have been several changes to the Code of Virginia related to "work programs and agreements with other entities." The proposed amendments affect internal operational practices for the review of proposed agreements between the DOC and public or private entities. The proposed changes delete the requirement for an appointed committee to approve any contractual documents implementing an agreement prior to forwarding it to the Office of the Attorney General to ensure compliance with state statutes and to the Governor. There is no change to the criteria listed in 6VAC15-28-40; all current criteria shall continue to be met before the director approves a proposed agreement.

Part I
General Provisions

6VAC15-28-10. Definitions.

The following words and terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

"Agreement" means a legal arrangement between the Director of the Department of Corrections and a public or private entity to operate a work program in a state correctional facility for prisoners confined in it.

"Board" means the Board of Corrections.

~~"Committee" means the group appointed by the governor which reviews any proposed agreement between the Director of the Department of Corrections and a public or private entity to operate a work program in a state correctional facility for prisoners confined tn it. The committee consists of representatives from an employee association or organization, the business community, a chamber of commerce, an industry association, the Office of the Secretary of Commerce and Trade, and the Office of the Secretary of Public Safety.~~

"Department" means the Department of Corrections.

"Director" means the Director of the Department of Corrections.

"Prevailing wage" means a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed.

Part II
Review Process

6VAC15-28-30. Review process.

A. Any proposed agreement between the department and the public or private entity shall consist of a Proposed Joint Venture Application Form which shall be completed by the public or private entity. The completed application form shall be submitted directly to the department, which shall then forward the application to the appropriate organizational unit for initial research and evaluation of the proposed agreement. This initial research and evaluation shall be completed in a timely manner, not to exceed 30 calendar days from the receipt of the completed application from the public or private entity.

B. The department shall submit the proposed agreement with a submission package to the board. The submission package shall include, at a minimum:

1. A prospectus of the public or private entity.

2. A description of the size and scope of the proposed operation.

3. An assessment of the project's financial viability.

4. A recommendation for entering or not entering into the proposed agreement.

5. Draft formal agreement papers, if the department recommends entering into the agreement.

C. The board shall review the proposed agreement and submission package and submit the package to the ~~committee~~ director with a recommendation for entering or not entering into the agreement.

D. The ~~committee~~ director shall evaluate the proposed agreement according to the criteria listed under 6VAC15-28-40.

E. Upon approval by the ~~committee~~ director, any contractual documents implementing the agreement shall be forwarded to the Office of the Attorney General to ensure compliance with state statutes.

F. ~~Upon the assurance of the~~ The Office of the Attorney General will assure that the agreement is in compliance with state statutes~~, the~~ . The governor shall review the agreement.

G. Upon the governor's authorization, the director and the public or private entity may sign the agreement.

Part III
Criteria

6VAC15-28-40. Criteria.

A. The ~~committee~~ director shall review the provisions of any proposed agreement according to the following criteria:

1. The proposed agreement shall provide adequate job skills to inmate participants. Any proposed agreement which requires relatively unskilled labor may be acceptable providing the work project establishes good work habits.

2. The public or private entity shall be environmentally sound, with appropriate certification, as required by applicable state and federal regulations.

3. The public or private entity shall provide prevailing or minimum wage, whichever is applicable.

4. The public or private entity shall provide Equal Employment Opportunity for all inmates involved in the proposed agreement.

5. The proposed agreement shall demonstrate financial viability.

a. If the department acts as a subcontractor in the proposed agreement, the proposed agreement shall be evaluated by its capability both to meet the required goods or services as well as to provide an acceptable rate of return to the department.

b. If the department acts as a supplier of labor in the proposed agreement, the proposed agreement shall be evaluated upon its capability to provide a gross margin both to cover the expenses of the department as well as to generate a sufficient return on investment to the department.

6. The proposed agreement shall not displace civilian workers.

7. Any rent paid to the department for space occupied by the participating public or private entity shall be at a reasonable rate.

8. The product produced by the proposed agreement may be sold on the open market.

9. The proposed agreement shall meet any provisions listed in §§ 53.1-41 through 53.1-62 of the Code of Virginia pertaining to "Employment and Training of Prisoners."

B. All criteria listed in 6VAC15-28-40 A shall be met before the ~~committee~~ director approves a proposed agreement.

FORMS (6VAC15-28) (Repealed.)

~~Proposed Joint Venture Application Form.~~

VA.R. Doc. No. R09-1544; Filed November 24, 2009, 12:52 p.m.

TITLE 8. EDUCATION

STATE BOARD OF EDUCATION

Final Regulation

REGISTRAR'S NOTICE: The following regulatory action is exempt from the Administrative Process Act in accordance with (i) § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved and (ii) § 2.2-4006 A 4 c of the Code of Virginia, which excludes regulations that are necessary to meet the requirements of federal law or regulations provided such regulations do not differ materially from those required by federal law or regulation. The State Board of Education will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **8VAC20-81. Regulations Governing Special Education Programs for Children with Disabilities in Virginia (amending 8VAC20-81-10, 8VAC20-81-20, 8VAC20-81-30, 8VAC20-81-70, 8VAC20-81-80, 8VAC20-81-90, 8VAC20-81-170, 8VAC20-81-210, 8VAC20-81-220, 8VAC20-81-240, 8VAC20-81-270, 8VAC20-81-340).**

Statutory Authority: §§ 22.1-16 and 22.1-214 of the Code of Virginia; 34 CFR Part 300.

Effective Date: January 25, 2010.

Agency Contact: Melissa Smith, Coordinator of Administrative Services, Department of Education, 101 North 14th Street, P.O. Box 2120, Richmond, VA 23218, telephone (804) 371-0524, FAX (804) 225-2524, or email melissa.smith@doe.virginia.gov.

Summary:

The amendments comply with federal and state laws and regulations regarding special education, including changes in the federal regulations implementing the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 34 CFR Part 300, effective December 31, 2008, and changes in the Code of Virginia that became effective July 1, 2009. These revisions do not differ materially from the requirements of federal and state laws or regulations and impact the following provisions: the definition of "Parent"; the definition of "Level II services"; the parent's right to revoke consent for a child's participation in special education and related services; the requirements regarding the approval process for a local education agency's special education policies and procedures; and the timeline for a parent to appeal a due process hearing decision to Virginia Circuit Court.

Part I
Definitions

8VAC20-81-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Act" means the Individuals with Disabilities Education Improvement Act, P.L. 108-446, December 3, 2004, § 1400 et seq. (34 CFR 300.4)

"Age of eligibility" means all eligible children with disabilities who have not graduated with a standard or advanced studies high school diploma who, because of such disabilities, are in need of special education and related services, and whose second birthday falls on or before September 30, and who have not reached their 22nd birthday on or before September 30 (two to 21, inclusive) in accordance with the Code of Virginia. A child with a disability whose 22nd birthday is after September 30 remains eligible for the remainder of the school year. (§ 22.1-213 of the Code of Virginia; 34 CFR 300.101(a) and 34 CFR 300.102(a)(3)(ii))

"Age of majority" means the age when the procedural safeguards and other rights afforded to the parent(s) of a student with a disability transfer to the student. In Virginia, the age of majority is 18. (§ 1-204 of the Code of Virginia; 34 CFR 300.520)

"Agree or Agreement" – see the definition for "consent."

"Alternate assessment" means the state assessment program, and any school divisionwide assessment to the extent that the school division has one, for measuring student performance against alternate achievement standards for students with significant intellectual disabilities who are unable to participate in statewide Standards of Learning testing, even with accommodations. (34 CFR 300.320(a)(2)(ii) and 34 CFR 300.704(b)(4)(x))

"Alternative assessment" means the state assessment program for measuring student performance on grade level standards for students with disabilities who are unable to participate in statewide Standards of Learning testing, even with accommodations.

"Assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of that device. (34 CFR 300.5)

"Assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes: (34 CFR 300.6)

1. The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

2. Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

3. Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

4. Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

5. Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

6. Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to employ or are otherwise substantially involved in the major life functions of that child.

"At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to students without disabilities or their parent(s) as part of the regular education program. (34 CFR 300.39(b)(1))

"Audiology" means services provided by a qualified audiologist licensed by the Board of Audiology and Speech-Language Pathology and includes: (Regulations Governing the Practice of Audiology and Speech-Language Pathology, 18VAC30-20; 34 CFR 300.34(c)(1))

1. Identification of children with hearing loss;

2. Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

3. Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

4. Creation and administration of programs for prevention of hearing loss;

5. Counseling and guidance of children, parents, and teachers regarding hearing loss; and

6. Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

"Autism" means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in this definition are satisfied. (34 CFR 300.8(c)(1))

"Behavioral intervention plan" means a plan that utilizes positive behavioral interventions and supports to address behaviors that interfere with the learning of students with disabilities or with the learning of others or behaviors that require disciplinary action.

"Business day" means Monday through Friday, 12 months of the year, exclusive of federal and state holidays (unless holidays are specifically included in the designation of business days, as in 8VAC20-81-150 B 4 a (2)). (34 CFR 300.11)

"Calendar days" means consecutive days, inclusive of Saturdays and Sundays. Whenever any period of time fixed by this chapter shall expire on a Saturday, Sunday, or federal or state holiday, the period of time for taking such action under this chapter shall be extended to the next day, not a Saturday, Sunday, or federal or state holiday. (34 CFR 300.11)

"Career and technical education" means organized educational activities that offer a sequence of courses that: (20 USC § 2301 et seq.)

1. Provides individuals with the rigorous and challenging academic and technical knowledge and skills the individuals need to prepare for further education and for careers (other than careers requiring a master's or doctoral degree) in current or emerging employment sectors;

2. May include the provision of skills or courses necessary to enroll in a sequence of courses that meet the requirements of this subdivision; or

3. Provides, at the postsecondary level, for a one-year certificate, an associate degree, or industry-recognized credential and includes competency-based applied learning that contributes to the academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, technical skills, and occupational-specific skills.

"Caseload" means the number of students served by special education personnel.

"Change in identification" means a change in the categorical determination of the child's disability by the group that determines eligibility.

"Change in placement" or "change of placement" means when the local educational agency places the child in a setting that is distinguishable from the educational environment to which the child was previously assigned and includes: (34 CFR 300.102(a)(3)(iii), 34 CFR 300.532(b)(2)(ii) and 34 CFR 300.536)

1. The child's initial placement from general education to special education and related services;

2. The expulsion or long-term removal of a student with a disability;

3. The placement change that results from a change in the identification of a disability;

4. The change from a public school to a private day, residential, or state-operated program; from a private day, residential, or state-operated program to a public school; or to a placement in a separate facility for educational purposes;

5. Termination of all special education and related services; or

6. Graduation with a standard or advanced studies high school diploma.

A "change in placement" also means any change in the educational setting for a child with a disability that does not

replicate the elements of the educational program of the child's previous setting.

"Change in placement" or "change of placement," for the purposes of discipline, means: (34 CFR 300.536)

1. A removal of a student from the student's current educational placement is for more than 10 consecutive school days; or

2. The student is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as:

a. The length of each removal;

b. The child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals;

c. The total amount of time the student is removed; or

d. The proximity of the removals to one another.

"Chapter" means these regulations.

"Charter schools" means any school meeting the requirements for charter as set forth in the Code of Virginia. (§§ 22.1-212.5 through 22.1-212.16 of the Code of Virginia; 34 CFR 300.7)

"Child" means any person who shall not have reached his 22nd birthday by September 30 of the current year.

"Child with a disability" means a child evaluated in accordance with the provisions of this chapter as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disability (referred to in this part as "emotional disability"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities who, by reason thereof, needs special education and related services. This also includes developmental delay if the local educational agency recognizes this category as a disability in accordance with 8VAC20-81-80 M 3. If it is determined through an appropriate evaluation that a child has one of the disabilities identified but only needs a related service and not special education, the child is not a child with a disability under this part. If the related service required by the child is considered special education rather than a related service under Virginia standards, the child would be determined to be a child with a disability. (§ 22.1-213 of the Code of Virginia; 34 CFR 300.8(a)(1) and 34 CFR 300.8(a)(2)(i) and (ii))

"Collaboration" means interaction among professionals as they work toward a common goal. Teachers do not necessarily have to engage in co-teaching in order to collaborate.

"Complaint" means a request that the Virginia Department of Education investigate an alleged violation by a local educational agency of a right of a parent(s) of a child who is eligible or suspected to be eligible for special education and related services based on federal and state law and regulations governing special education or a right of such child. A complaint is a statement of some disagreement with procedures or process regarding any matter relative to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education. (34 CFR 300.151)

"Comprehensive Services Act" (CSA) means the Comprehensive Services Act for At-Risk Youth and Families that establishes the collaborative administration and funding system for services for certain at-risk youths and their families. (Chapter 52 (§ 2.2-5200 et seq.) of Title 2.2 of the Code of Virginia)

"Consent" means: (34 CFR 300.9)

1. The parent(s) or eligible student has been fully informed of all information relevant to the activity for which consent is sought in the parent's(s') or eligible student's native language, or other mode of communication;

2. The parent(s) or eligible student understands and agrees, in writing, to the carrying out of the activity for which consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

3. The parent(s) or eligible student understands that the granting of consent is voluntary on the part of the parent(s) or eligible student and may be revoked any time.

a. If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked. Revocation ceases to be relevant after the activity for which consent was obtained was completed.)

b. If a parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the local educational agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

The meaning of the term "consent" is not the same as the meaning of the term "agree" or "agreement." "Agree" or "agreement" refers to an understanding between the parent and the local educational agency about a particular matter and as required in this chapter. There is no requirement that an agreement be in writing, unless stated in this chapter. The local educational agency and parent(s) should document their agreement.

"Controlled substance" means a drug or other substance identified under schedules I, II, or III, IV, or V in § 202(c) of the Controlled Substances Act, 21 USC § 812(c). (34 CFR 300.530(i)(1))

"Core academic subjects" means English, reading or language arts, mathematics, science, foreign languages, civics, and government, economics, arts, history, and geography. (34 CFR 300.10)

"Correctional facility" means any state facility of the Virginia Department of Corrections or the Virginia Department of Juvenile Justice, any regional or local detention home, or any regional or local jail. (§§ 16.1-228 and 53.1-1 of the Code of Virginia)

"Coteaching" means a service delivery option with two or more professionals sharing responsibility for a group of students for some or all of the school day in order to combine their expertise to meet student needs.

"Counseling services" means services provided by qualified visiting teachers, social workers, psychologists, guidance counselors, or other qualified personnel. (34 CFR 300.34(c)(2); Licensure Regulations for School Personnel (8VAC20-22))

"Dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for or is readily capable of, causing death or bodily injury, except that such term does not include a pocket knife with a blade of less than three inches in length. (18 USC § 930(g)(2); § 18.2-308.1 of the Code of Virginia)

"Day" means calendar day unless otherwise indicated as business day or school day. (34 CFR 300.11)

"Deaf-blindness" means simultaneous hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness. (34 CFR 300.8(c)(2))

"Deafness" means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects the child's educational performance. (34 CFR 300.8(c)(3))

"Destruction of information" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable. (34 CFR 300.611(a))

"Developmental delay" means a disability affecting a child ages two by September 30 through six, inclusive: (34 CFR 300.8(b); 34 CFR 300.306(b))

1. (i) Who is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development, or (ii) who has an established physical or mental condition that has a high probability of resulting in developmental delay;

2. The delay(s) is not primarily a result of cultural factors, environmental or economic disadvantage, or limited English proficiency; and

3. The presence of one or more documented characteristics of the delay has an adverse affect on educational performance and makes it necessary for the student to have specially designed instruction to access and make progress in the general educational activities for this age group.

"Direct services" means services provided to a child with a disability directly by the Virginia Department of Education, by contract, or through other arrangements. (34 CFR 300.175)

"Due process hearing" means an administrative procedure conducted by an impartial special education hearing officer to resolve disagreements regarding the identification, evaluation, educational placement and services, and the provision of a free appropriate public education that arise between a parent(s) and a local educational agency. A due process hearing involves the appointment of an impartial special education hearing officer who conducts the hearing, reviews evidence, and determines what is educationally appropriate for the child with a disability. (34 CFR 300.507)

"Early identification and assessment of disabilities in children" means the implementation of a formal plan for identifying a disability as early as possible in a child's life. (34 CFR 300.34(c)(3))

"Education record" means those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term also has the same meaning as "scholastic record." In addition to written records, this also includes electronic exchanges between school personnel and parent(s) regarding matters associated with the child's educational program (e.g., scheduling of meetings or notices). This term also includes the type of records covered under the definition of "education record" in the regulations implementing the Family Education Rights and Privacy Act. (20 USC § 1232g(a)(3); § 22.1-289 of the Code of Virginia; 34 CFR 300.611(b))

"Educational placement" means the overall instructional setting in which the student receives his education including the special education and related services provided. Each local educational agency shall ensure that the parents of a child with a disability are members of the group that makes decisions on the educational placement of their child. (34 CFR 300.327)

"Educational service agencies and other public institutions or agencies" include: (34 CFR 300.12)

1. Regional public multiservice agencies authorized by state law to develop, manage, and provide services or programs to local educational agencies;

2. Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the state;

3. Any other public institution or agency having administrative control and direction over a public elementary school or secondary school; and

4. Entities that meet the definition of intermediate educational unit in § 1402(23) of the Act as in effect prior to June 4, 1997.

"Eligible student" means a child with a disability who reaches the age of majority and to whom the procedural safeguards and other rights afforded to the parent(s) are transferred.

"Emotional disability" means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (34 CFR 300.8(c)(4))

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;

2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

3. Inappropriate types of behavior or feelings under normal circumstances;

4. A general pervasive mood of unhappiness or depression; or

5. A tendency to develop physical symptoms or fears associated with personal or school problems.

Emotional disability includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disability as defined in this section.

"Equipment" means machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house machinery, utilities, or equipment and all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices and books, periodicals, documents, and other related materials. (34 CFR 300.14)

"Evaluation" means procedures used in accordance with this chapter to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. (34 CFR 300.15)

"Excess costs" means those costs that are in excess of the average annual per-student expenditure in a local educational agency during the preceding school year for an elementary school or secondary school student, as may be appropriate, and that shall be computed after deducting: (34 CFR 300.16)

1. Amounts received:

a. Under Part B of the Act;

b. Under Part A of Title I of the ESEA; and

c. Under Parts A and B of Title III of the ESEA; and

2. Any state or local funds expended for programs that would qualify for assistance under any of the parts described in subdivision 1 a of this definition, but excluding any amounts for capital outlay or debt service.

"Extended school year services" for the purposes of this chapter means special education and related services that: (34 CFR 300.106(b))

1. Are provided to a child with a disability:

a. Beyond the normal school year of the local educational agency;

b. In accordance with the child's individualized education program;

c. At no cost to the parent(s) of the child; and

2. Meet the standards established by the Virginia Department of Education.

"Federal core academic subjects" means English, reading or language arts, mathematics, science, foreign language (languages other than English), civics and government, economics, arts, history, and geography. (20 USC § 7801(11))

"Federal financial assistance" means any grant, loan, contract or any other arrangement by which the U.S. Department of Education provides or otherwise makes available assistance in the form of funds, services of federal personnel, or real and personal property. (34 CFR 104.3(h))

"Free appropriate public education" or "FAPE" means special education and related services that: (34 CFR 300.17)

1. Are provided at public expense, under public supervision and direction, and without charge;

2. Meet the standards of the Virginia Board of Education;

3. Include an appropriate preschool, elementary school, middle school or secondary school education in Virginia; and

4. Are provided in conformity with an individualized education program that meets the requirements of this chapter.

"Functional behavioral assessment" means a process to determine the underlying cause or functions of a child's behavior that impede the learning of the child with a disability or the learning of the child's peers. A functional behavioral assessment may include a review of existing data or new testing data or evaluation as determined by the IEP team.

"General curriculum" means the same curriculum used with children without disabilities adopted by a local educational agency, schools within the local educational agency or, where applicable, the Virginia Department of Education for all children from preschool through secondary school. The term relates to content of the curriculum and not to the setting in which it is taught.

"Hearing impairment" means an impairment in hearing in one or both ears, with or without amplification, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section. (34 CFR 300.8(c)(5))

"Highly qualified special education teacher" means a teacher has met the requirements as specified in 34 CFR 300.18 for special education teachers in general, for special education teachers teaching core academic subjects, for special education teachers teaching to alternate achievement standards, or for special education teachers teaching multiple subjects as it applies to their teaching assignment. (34 CFR 300.18)

"Home-based instruction" means services that are delivered in the home setting (or other agreed upon setting) in accordance with the child's individualized education program.

"Homebound instruction" means academic instruction provided to students who are confined at home or in a health care facility for periods that would prevent normal school attendance based upon certification of need by a licensed physician or licensed clinical psychologist. For a child with a disability, the IEP team shall determine the delivery of services, including the number of hours of services. (Regulations Establishing Standards for Accrediting Public Schools in Virginia, 8VAC20-131-180)

"Home instruction" means instruction of a child or children by a parent(s), guardian or other person having control or charge of such child or children as an alternative to attendance in a public or private school in accordance with the provisions of the Code of Virginia. This instruction may also be termed home schooling. (§ 22.1-254.1 of the Code of Virginia)

"Homeless children" has the meaning given the term "homeless children and youth" in § 725 (42 USC § 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 USC § 11431 et seq. and listed below: (34 CFR 300.19)

The term "homeless children and youth" means individuals who lack a fixed, regular, and adequate nighttime residence within the meaning of § 103(a)(1) of the McKinney-Vento Homeless Assistance Act and includes the following:

1. Children and youth who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to a lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;

2. Children and youth who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings within the meaning of § 103(a)(2)(C);

3. Children and youth who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

4. Migratory children (as such term is defined in § 1309 of the Elementary and Secondary Education Act of 1965) who qualify as homeless because the children are living in circumstances described in subdivisions 1 through 3 of this definition.

The term "unaccompanied youth" includes a youth not in the physical custody of a parent or guardian.

"Home tutoring" means instruction by a tutor or teacher with qualifications prescribed by the Virginia Board of Education, as an alternative to attendance in a public or private school and approved by the division superintendent in accordance with the provisions of the Code of Virginia. This tutoring is not home instruction as defined in the Code of Virginia. (§ 22.1-254 of the Code of Virginia)

"Illegal drug" means a controlled substance, but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under the Controlled Substances Act, 21 USC § 812(c), or under any other provision of federal law. (34 CFR 300.530(i)(2))

"Impartial special education hearing officer" means a person, selected from a list maintained by the Office of the Executive Secretary of the Supreme Court of Virginia to conduct a due process hearing.

"Implementation plan" means the plan developed by the local educational agency designed to operationalize the decision of the hearing officer in cases that are fully adjudicated.

"Independent educational evaluation" means an evaluation conducted by a qualified examiner or examiners who are not employed by the local educational agency responsible for the education of the child in question. (34 CFR 300.502(a)(3)(i))

"Individualized education program" or "IEP" means a written statement for a child with a disability that is developed, reviewed, and revised in a team meeting in accordance with this chapter. The IEP specifies the individual educational needs of the child and what special education and related services are necessary to meet the child's educational needs. (34 CFR 300.22)

"Individualized education program team" means a group of individuals described in 8VAC20-81-110 that is responsible for developing, reviewing, or revising an IEP for a child with a disability. (34 CFR 300.23)

"Individualized family service plan (IFSP) under Part C of the Act" means a written plan for providing early intervention services to an infant or toddler with a disability eligible under Part C and to the child's family. (34 CFR 303.24; 20 USC § 636)

"Infant and toddler with a disability" means a child, ages birth to two, inclusive, whose birthday falls on or before September 30, or who is eligible to receive services in the Part C early intervention system up to age three, and who: (§ 2.2-5300 of the Code of Virginia; 34 CFR 300.25)

1. Has delayed functioning;

2. Manifests atypical development or behavior;

3. Has behavioral disorders that interfere with acquisition of developmental skills; or

4. Has a diagnosed physical or mental condition that has a high probability of resulting in delay, even though no current delay exists.

"Informed parental consent": see "Consent."

"Initial placement" means the first placement for the child to receive special education and related services in either a local educational agency, other educational service agency, or other public agency or institution for the purpose of providing special education or related services.

"Intellectual disability" means the definition formerly known as "mental retardation" and means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance. (34 CFR 300.8(c)(6))

"Interpreting services" as used with respect to children who are deaf or hard of hearing, means services provided by personnel who meet the qualifications set forth under 8VAC20-81-40 and includes oral transliteration services, cued speech/language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell and interpreting services for children who are deaf-blind. A child who is not deaf or hard of hearing, but who has language deficits, may receive interpreting services as directed by the child's Individualized Education Program. (Regulations Governing Interpreter Services for the Deaf and Hard of Hearing 22VAC20-30; 34 CFR 300.34(c)(4)(i))

"Least restrictive environment" (LRE) means that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (34 CFR 300.114 through 34 CFR 300.120)

"Level I services" means the provision of special education to children with disabilities for less than 50% of their instructional school day (excluding intermission for meals). The time that a child receives special education services is calculated on the basis of special education services described in the individualized education program, rather than the location of services.

"Level II services" means the provision of special education ~~and related services~~ to children with disabilities for 50% or more of the instructional school day (excluding intermission for meals). The time that a child receives special education services is calculated on the basis of special education services described in the individualized education program, rather than the location of services.

"Limited English proficient" when used with respect to an individual means an individual: (20 USC § 7801(25); 34 CFR 300.27)

1. Who is aged 2 through 21;

2. Who is enrolled or preparing to enroll in an elementary school or secondary school; or

3. Who:

a. Was not born in the United States or whose native language is a language other than English;

b. Is a Native American or Alaska Native, or a native resident of the outlying areas, and comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or

c. Is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and

4. Whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual:

a. The ability to meet Virginia's proficient level of achievement on Virginia's assessments;

b. The ability to successfully achieve in classrooms where the language of instruction is English; or

c. The opportunity to participate fully in society.

"Local educational agency" means a local school division governed by a local school board, a state-operated program that is funded and administered by the Commonwealth of Virginia or the Virginia School for the Deaf and the Blind at Staunton. Neither state-operated programs nor the Virginia School for the Deaf and the Blind at Staunton are considered a school division as that term is used in these regulations. (§ 22.1-346 C of the Code of Virginia; 34 CFR 300.28)

"Long-term placement" if used in reference to state-operated programs as outlined in 8VAC20-81-30 H means those hospital placements that are not expected to change in status or condition because of the child's medical needs.

"Manifestation determination review" means a process to review all relevant information and the relationship between the child's disability and the behavior subject to the disciplinary action.

"Medical services" means services provided by a licensed physician or nurse practitioner to determine a child's medically related disability that results in the child's need for special education and related services. (§ 22.1-270 of the Code of Virginia; 34 CFR 300.34(c)(5))

"Mental retardation" - see "Intellectual disability."

"Multiple disabilities" means simultaneous impairments (such as intellectual disability with blindness, intellectual disability with orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness. (34 CFR 300.8(c)(7))

"National Instructional Materials Access Center" or "NIMAC" means the national center established to do the following: (34 CFR 300.172)

1. Receive and maintain a catalog of print instructional materials prepared in the NIMAS, as established by the U.S. Secretary of Education, made available to such center by the textbook publishing industry, state educational agencies, and local educational agencies;

2. Provide access to print instructional materials, including textbooks, in accessible media, free of charge, to blind or other persons with print disabilities in elementary schools and secondary schools, in accordance with such terms and procedures as the NIMAC may prescribe; and

3. Develop, adopt and publish procedures to protect against copyright infringement, with respect to print instructional materials provided in accordance with the Act.

"National Instructional Materials Accessibility Standard" or "NIMAS" means the standard established by the United States Secretary of Education to be used in the preparation of electronic files suitable and used solely for efficient conversion of print instructional materials into specialized formats. (34 CFR 300.172)

"Native language" if used with reference to an individual of limited English proficiency, means the language normally used by that individual, or, in the case of a child, the language normally used by the parent(s) of the child, except in all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment. For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication). (34 CFR 300.29)

"Nonacademic services and extracurricular services" may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the local educational agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the local educational agency and assistance in making outside employment available. (34 CFR 300.107(b))

"Notice" means written statements in English or in the primary language of the home of the parent(s), or, if the language or other mode of communication of the parent(s) is not a written language, oral communication in the primary language of the home of the parent(s). If an individual is deaf or blind, or has no written language, the mode of communication would be that normally used by the individual (such as sign language, Braille, or oral communication). (34 CFR 300.503(c))

"Occupational therapy" means services provided by a qualified occupational therapist or services provided under the direction or supervision of a qualified occupational therapist and includes: (Regulations Governing the Licensure of Occupational Therapists (18VAC85-80-10 et seq.); 34 CFR 300.34(c)(6))

1. Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;

2. Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

3. Preventing, through early intervention, initial or further impairment or loss of function.

"Orientation and mobility services" means services provided to blind or visually impaired children by qualified personnel to enable those children to attain systematic orientation to and safe movement within their environments in school, home, and community; and includes travel training instruction, and teaching children the following, as appropriate: (34 CFR 300.34(c)(7))

1. Spatial and environmental concepts and use of information received by the senses (e.g., sound, temperature, and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

2. To use the long cane or service animal to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;

3. To understand and use remaining vision and distance low vision aids; and

4. Other concepts, techniques, and tools.

"Orthopedic impairment" means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures). (34 CFR 300.8(c)(8))

"Other health impairment" means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia and Tourette syndrome that adversely affects a child's educational performance. (34 CFR 300.8(c)(9))

"Paraprofessional," also known as paraeducator, means an appropriately trained employee who assists and is supervised by qualified professional staff in meeting the requirements of this chapter. (34 CFR 300.156(b)(2)(iii))

"Parent" means: (§ 20-124.6 and § 22.1-213.1 of the Code of Virginia; 34 CFR 99.4 and 34 CFR 300.30)

1. Persons who meet the definition of "parent":

a. A biological or adoptive parent of a child;

b. A foster parent~~:~~ , even if the biological or adoptive parent's rights have not been terminated, but subject to subdivision 8 of this definition;

~~(1) If the biological parent(s)' authority to make educational decisions on the child's behalf has been extinguished under § 16.1-283, 16.1-277.01 or 16.1-277.02 of the Code of Virginia or a comparable law in another state;~~

~~(2) The child is in permanent foster care pursuant to Chapter 9 (§ 63.2-900 et seq.) of Title 63.2 of the Code of Virginia or comparable law in another state; and~~

~~(3) The foster parent has an ongoing, long-term parental relationship with the child, is willing to make the educational decisions required of the parent under this chapter, and has no interest that would conflict with the interests of the child;~~

c. A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not a guardian ad litem, or the state if the child is a ward of the state);

d. An individual acting in the place of a ~~natural~~ biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare;

e. ~~A~~ If no party qualified under subdivisions 1 a through 1 d of this definition can be identified, or those parties are unwilling to act as parent, a surrogate parent who has been appointed in accordance with requirements detailed under 8VAC20-81-220; or

f. A minor who is emancipated under § 16.1-333 of the Code of Virginia.

2. If a judicial decree or order identifies a specific person(s) under subdivisions 1 a through 1 e of this subsection to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person(s) shall be determined to be the "parent" for purposes of this definition.

3. "Parent" does not include local or state agencies or their agents, including local departments of social services, even if the child is in the custody of such an agency.

4. The biological or adoptive parent, when attempting to act as the parent under this chapter and when more than one party is qualified under this section to act as a parent, shall be presumed to be the parent for purposes of this section unless the ~~natural~~ biological or adoptive ~~parent does not have legal authority to make educational decisions for the child~~ parent's or parents' authority to make educational decisions on the child's behalf has been extinguished pursuant to §§ 16.1-277.01, 16.1-277.02, or

16.1-283 of the Code of Virginia or a comparable law in another state.

5. Noncustodial parents whose parental rights have not been terminated are entitled to all parent rights and responsibilities available under this chapter, including access to their child's records.

6. Custodial stepparents have the right to access the child's record. Noncustodial stepparents do not have the right to access the child's record.

7. A validly married minor who has not pursued emancipation under § 16.1-333 of the Code of Virginia may assert implied emancipation based on the minor's marriage record and, thus, assumes responsibilities of "parent" under this chapter.

8. The local educational agency shall provide written notice to the biological or adoptive parents at their last known address that a foster parent is acting as the parent under this section, and the local educational agency is entitled to rely upon the actions of the foster parent under this section until such time that the biological or adoptive parent attempts to act as the parent.

"Parent counseling and training" means assisting parents in understanding the special needs of their child, providing parents with information about child development, and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP. (34 CFR 300.34(c)(8))

"Participating agency" means a state or local agency (including a Comprehensive Services Act team), other than the local educational agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student. The term also means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained under Part B of the Act. (34 CFR 300.611(c), 34 CFR 300.324(c) and 34 CFR 300.321(b)(3))

"Personally identifiable" means information that contains the following: (34 CFR 300.32)

1. The name of the child, the child's parent, or other family member;

2. The address of the child;

3. A personal identifier, such as the child's social security number or student number; or

4. A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

"Physical education" means the development of: (34 CFR 300.39(b)(2))

1. Physical and motor fitness;

2. Fundamental motor skills and patterns; and

3. Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports). The term includes special physical education, adapted physical education, movement education, and motor development.

"Physical therapy" means services provided by a qualified physical therapist or under the direction or supervision of a qualified physical therapist upon medical referral and direction. (Regulations Governing the Practice of Physical Therapy, 18VAC112-20; 34 CFR 300.34(c)(9))

"Private school children with disabilities" means children with disabilities enrolled by their parent(s) in private, including religious, schools or facilities that meet the definition of elementary school or secondary school as defined in this section other than children with disabilities who are placed in a private school by a local school division or a Comprehensive Services Act team in accordance with 8VAC20-81-150. (34 CFR 300.130)

"Program" means the special education and related services, including accommodations, modifications, supplementary aids and services, as determined by a child's individualized education program.

"Psychological services" means those services provided by a qualified psychologist or under the direction or supervision of a qualified psychologist, including: (34 CFR 300.34(c)(10))

1. Administering psychological and educational tests, and other assessment procedures;

2. Interpreting assessment results;

3. Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

4. Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;

5. Planning and managing a program of psychological services, including psychological counseling for children and parents; and

6. Assisting in developing positive behavioral intervention strategies.

"Public expense" means that the local educational agency either pays for the full cost of the service or evaluation or ensures that the service or evaluation is otherwise provided at no cost to the parent(s). (34 CFR 300.502(a)(3)(ii))

"Public notice" means the process by which certain information is made available to the general public. Public notice procedures may include, but not be limited to, newspaper advertisements, radio announcements, television features and announcements, handbills, brochures, electronic

means, and other methods that are likely to succeed in providing information to the public.

"Qualified person who has a disability" means a "qualified handicapped person" as defined in the federal regulations implementing the Rehabilitation Act of 1973, as amended. (29 USC § 701 et seq.)

"Recreation" includes: (34 CFR 30.34(c)(11))

1. Assessment of leisure function;

2. Therapeutic recreation services;

3. Recreation program in schools and community agencies; and

4. Leisure education.

"Reevaluation" means completion of a new evaluation in accordance with this chapter. (34 CFR 300.303)

"Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973 (29 USC § 701 et seq.), as amended. (34 CFR 300.34(c)(12))

"Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education and includes speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation counseling; orientation and mobility services; and medical services for diagnostic or evaluation purposes. Related services also includes school health services and school nurse services; social work services in schools; and parent counseling and training. Related services do not include a medical device that is surgically implanted including cochlear implants, the optimization of device functioning (e.g., mapping), maintenance of the device, or the replacement of that device. The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music and dance therapy), if they are required to assist a child with a disability to benefit from special education. (§ 22.1-213 of the Code of Virginia; 34 CFR 300.34(a) and (b))

Nothing in this section:

1. Limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services that are determined by the IEP team to be necessary for the child to receive FAPE;

2. Limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or

3. Prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly.

"School day" means any day, including a partial day, that children are in attendance at school for instructional purposes. The term has the same meaning for all children in school, including children with and without disabilities. (34 CFR 300.11)

"School health services and school nurse services" means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person. (Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia; 34 CFR 300.34(c)(13))

"Scientifically based research" means research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs and includes research that: (20 USC § 9501(18); 34 CFR 300.35)

1. Employs systematic, empirical methods that draw on observation or experiment;

2. Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn;

3. Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators;

4. Is evaluated using experimental or quasi-experimental designs in which individuals, entities, programs, or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls;

5. Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication or, at a minimum, offer the opportunity to build systematically on their findings; and

6. Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.

"Screening" means those processes that are used routinely with all children to identify previously unrecognized needs and that may result in a referral for special education and related services or other referral or intervention.

"Section 504" means that section of the Rehabilitation Act of 1973, as amended, which is designed to eliminate discrimination on the basis of disability in any program or activity receiving federal financial assistance. (29 USC § 701 et seq.)

"Serious bodily injury" means bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty. (18 USC § 1365(h)(3); 34 CFR 300.530(i)(3))

"Services plan" means a written statement that describes the special education and related services the local educational agency will provide to a parentally placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, and is developed and implemented in accordance with 8VAC20-81-150. (34 CFR 300.37)

"Social work services in schools" means those services provided by a school social worker or qualified visiting teacher, including: (Licensure Regulations for School Personnel, 8VAC20-22-660); 34 CFR 300.34(c)(14))

1. Preparing a social or developmental history on a child with a disability;

2. Group and individual counseling with the child and family;

3. Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

4. Mobilizing school and community resources to enable the child to learn as effectively as possible in the child's educational program; and

5. Assisting in developing positive behavioral intervention strategies for the child.

A local educational agency, in its discretion, may expand the role of a school social worker or visiting teacher beyond those services identified in this definition, as long as the expansion is consistent with other state laws and regulations, including licensure.

"Special education" means specially designed instruction, at no cost to the parent(s), to meet the unique needs of a child with a disability, including instruction conducted in a classroom, in the home, in hospitals, in institutions, and in other settings and instruction in physical education. The term includes each of the following if it meets the requirements of the definition of special education: (§ 22.1-213 of the Code of Virginia; 34 CFR 300.39)

1. Speech-language pathology services or any other related service, if the service is considered special education rather than a related service under state standards;

2. Vocational education; and

3. Travel training.

"Special education hearing officer" has the same meaning as the term "impartial hearing officer" as that term is used in the Act and its federal implementing regulations.

"Specially designed instruction" means adapting, as appropriate to the needs of an eligible child under this chapter, the content, methodology, or delivery of instruction: (34 CFR 300.39(b)(3))

1. To address the unique needs of the child that result from the child's disability; and

2. To ensure access of the child to the general curriculum, so that the child can meet the educational standards that apply to all children within the jurisdiction of the local educational agency.

"Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; of intellectual disabilities; of emotional disabilities; of environmental, cultural, or economic disadvantage. (§ 22.1-213 of the Code of Virginia; 34 CFR 300.8(c)(10))

Dyslexia is distinguished from other learning disabilities due to its weakness occurring at the phonological level. Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge.

"Speech or language impairment" means a communication disorder, such as stuttering, impaired articulation, expressive or receptive language impairment, or voice impairment that adversely affects a child's educational performance. (34 CFR 300.8(c)(11))

"Speech-language pathology services" means the following: (34 CFR 300.34(c)(15))

1. Identification of children with speech or language impairments;

2. Diagnosis and appraisal of specific speech or language impairments;

3. Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

4. Provision of speech and language services for the habilitation or prevention of communicative impairments; and

5. Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

"State assessment program" means the state assessment program in Virginia under the Act that is the component of the state assessment system used for accountability.

"State educational agency" means the Virginia Department of Education. (34 CFR 300.41)

"State-operated programs" means programs that provide educational services to children and youth who reside in facilities according to the admissions policies and procedures of those facilities that are the responsibility of state boards, agencies, or institutions. (§§ 22.1-7, 22.1-340 and 22.1-345 of the Code of Virginia)

"Supplementary aids and services" means aids, services, and other supports that are provided in general education classes or other education-related settings to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate in accordance with this chapter. (34 CFR 300.42)

"Surrogate parent" means a person appointed in accordance with procedures set forth in this chapter to ensure that children are afforded the protection of procedural safeguards and the provision of a free appropriate public education. (34 CFR 300.519)

"Timely manner" if used with reference to the requirement for National Instructional Materials Accessibility Standard means that the local educational agency shall take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials. (34 CFR 300.172(b)(4))

"Transition from Part C (Early Intervention Program for Infants and Toddlers with Disabilities) services" means the steps identified in the Individualized Family Services Plan (IFSP) to be taken to support the transition of the child to: (34 CFR 300.124)

1. Early childhood special education to the extent that those services are appropriate; or

2. Other services that may be available, if appropriate.

"Transition services" if used with reference to secondary transition means a coordinated set of activities for a student with a disability that is designed within a results-oriented process that: (34 CFR 300.43)

1. Is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

2. Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests and includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, if appropriate, acquisition of daily living skills and functional vocational evaluation.

Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education.

"Transportation" includes: (34 CFR 300.34(c)(16))

1. Travel to and from school and between schools;

2. Travel in and around school buildings; and

3. Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

"Traumatic brain injury" means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. (34 CFR 300.8(c)(12))

"Travel training" means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to: (34 CFR 300.39(b)(4))

1. Develop an awareness of the environment in which they live; and

2. Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

"Universal design" has the meaning given the term in § 3 of the Assistive Technology Act of 1998, as amended, 29 USC § 3002. The term "universal design" means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly usable (without requiring assistive technologies) and products and services that are made usable with assistive technologies. (34 CFR 300.44)

"Virginia School for the Deaf and the Blind at Staunton" means the Virginia school under the operational control of the Virginia Board of Education. The Superintendent of Public Instruction shall approve the education programs of this school. (§ 22.1-346 of the Code of Virginia)

"Visual impairment including blindness" means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness. (34 CFR 300.8(c)(13))

"Vocational education," for the purposes of special education, means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment or for additional preparation for a career not requiring a baccalaureate or advanced degree, and includes career and technical education. (34 CFR 300.39(b)(5))

"Ward of the state" means a child who, as determined by the state where the child resides is: (34 CFR 300.45)

1. A foster child;

2. A ward of the state; or

3. In the custody of a public child welfare agency.

"Ward of the state" does not include a foster child who has a foster parent who meets the definition of a "parent."

"Weapon" means dangerous weapon under 18 USC § 930(g)(2). (34 CFR 530(i)(4))

Part II
Responsibilities of the State Department of Education

8VAC20-81-20. Functions of the Virginia Department of Education.

The Virginia Department of Education (state educational agency) shall perform the following functions:

1. Ensure that all children with disabilities, aged two to 21, inclusive, residing in Virginia have a right to a free appropriate public education, including, but not limited to, children with disabilities who: (34 CFR 300.2 and 34 CFR 300.101)

a. Are migrant;

b. Are homeless;

c. Have been suspended or expelled from school, in accordance with this chapter;

d. Are incarcerated in a state, regional, or local adult or juvenile correctional facility, with the exception of those provisions identified in 8VAC20-81-110 I;

e. Are receiving special education and related services, even though they have not failed or been retained in a course or grade, and are advancing from grade to grade;

f. Are in state-operated programs; or

g. Are in public charter schools in accordance with the Code of Virginia.

2. Except as provided in 8VAC20-81-170 E 4 b (3), ensure that each local school division develops an IEP for each child with a disability served by that local school division and that an IEP is developed for each child with a disability placed in a private school by a local school division or Comprehensive Services Act team. (34 CFR 300.112 and 34 CFR 300.300(b)(4)(ii))

3. Review and submit to the Virginia Board of Education for approval a plan for the provision of special education and related services from each local educational agency responsible for providing educational services to children with disabilities. (§ 22.1-215 of the Code of Virginia; 34 CFR 300.200)

4. Ensure that each local educational agency includes all children with disabilities in all general Virginia Department of Education and divisionwide assessment programs, including assessments described in § 1111 of ESEA, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective IEPs and in accordance with the provisions of the Act at § 1412. (20 USC § 1412(a)(16)(A))

5. Ensure that each local educational agency takes steps for its children with disabilities to have available to them the variety of educational programs and services available to

nondisabled children in the areas served by the local educational agency, including art, music, industrial arts, consumer and homemaking education, and career and technical education. (34 CFR 300.110)

6. Ensure that each educational program for children with disabilities administered within Virginia: (34 CFR 300.149(a))

a. Is under the general supervision of the persons responsible for educational programs for children with disabilities in Virginia; and

b. Meets the educational standards of the Virginia Department of Education.

In carrying out these requirements with respect to homeless children, the requirements of Subtitle B of Title VII of the McKinney-Vento Homeless Assistance Act (42 USC § 11431 et seq.) are met.

7. Prior to the adoption of any policies and procedures to comply with the Act, or submitting a state plan in accordance with the Act, VDOE shall ensure that public hearings are convened, adequate notice of the hearings are provided, and an opportunity for comment is made available to the public, members of the state special education advisory committee, and private special education schools. (34 CFR 300.165)

8. Develop procedures for implementing state and federal laws and regulations pertaining to the education of children with disabilities. (§ 22.1-214 of the Code of Virginia; 34 CFR 300.199 and 34 CFR 300.129)

9. Assist local educational agencies and other participating state agencies in the implementation of state and federal laws and regulations pertaining to LRE requirements by: (34 CFR 300.119)

a. Ensuring that teachers and administrators are fully informed about their responsibilities for implementing LRE requirements; and

b. Providing them with technical assistance and training necessary to assist them in this effort.

10. Ensure that the requirements for LRE are implemented by each local educational agency. If there is evidence that a local educational agency's placements are inconsistent with LRE requirements, the Virginia Department of Education shall: (34 CFR 300.120)

a. Review the local educational agency's justification for its actions; and

b. Assist in planning and implementing any necessary corrective action.

11. Review and evaluate compliance of local educational agencies with state and federal laws and regulations pertaining to the education of children with disabilities and require corrective actions where needed. (34 CFR 300.149, 34 CFR 300.151 and 34 CFR 300.507)

a. Administer a special education due process hearing system that provides procedures for training of special education hearing officers, evaluating special education hearing officers, and management and monitoring of hearings.

b. Maintain and operate a complaint system that provides for the investigation and issuance of findings regarding alleged violations of the educational rights of parents or children with disabilities. Allegations may be made by public or private agencies, individuals or organizations.

12. Establish and implement a mediation process in accordance with the Act. (§ 22.1-214 of the Code of Virginia; (34 CFR 300.506)

13. Review and evaluate compliance of private nonsectarian special education schools that are licensed or have a certificate to operate in order to ensure that each child with a disability placed in the school by a local school division or Comprehensive Services Act team is provided special education and related services at no cost to the parent(s) in conformance with an IEP that meets the requirements of this chapter and meets the standards that apply to education provided by local educational agencies. (34 CFR 300.129, 34 CFR 300.146 and 34 CFR 300.147)

a. Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

b. Provide copies of all Virginia regulations and standards; and

c. Provide an opportunity for these schools to participate in the development and revision of Virginia's regulations that apply to them.

14. Review and evaluate compliance of the Virginia School for the Deaf and the Blind at Staunton to ensure that each child with a disability placed in the school by a local school division is provided special education and related services at no cost to the parent(s) in accordance with an IEP that meets the requirements of this chapter and meets the standards that apply to education provided by local educational agencies. (34 CFR 300.149)

15. Establish and maintain a state special education advisory committee composed of individuals involved in or concerned with the education of children with disabilities. (34 CFR 300.167 through 34 CFR 300.169)

a. Membership. The membership shall consist of individuals appointed by the Superintendent of Public Instruction or designee who are involved in, or concerned with, the education of children with disabilities. The majority shall be individuals with disabilities or parents

of children with disabilities (ages birth through 26). Membership shall include one or more of the following:

(1) Parents of children with disabilities (ages birth through 26);

(2) Individuals with disabilities;

(3) Teachers;

(4) Representatives of institutions of higher education that prepare special education and related services personnel;

(5) State and local education officials, including officials who carry out activities under Subtitle B of Title VII of the McKinney-Vento Homeless Act (42 USC § 11431 et seq.);

(6) Administrators of programs for children with disabilities;

(7) Representatives of other state agencies involved in the financing or delivery of related services to children with disabilities;

(8) Representatives of private schools and public charter schools;

(9) At least one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

(10) A representative from Virginia's juvenile and adult corrections agencies; and

(11) A representative from Virginia's child welfare agency responsible for foster care.

b. Duties. The state special education advisory committee shall:

(1) Advise the Virginia Department of Education and the Virginia Board of Education of unmet needs within the state in the education of children with disabilities;

(2) Comment publicly on any rules or regulations proposed by the Virginia Board of Education regarding the education of children with disabilities;

(3) Advise the Virginia Department of Education in developing evaluations and reporting on data to the U.S. Secretary of Education under the Act;

(4) Advise the Virginia Department of Education in developing corrective action plans to address findings identified in federal monitoring reports under the Act;

(5) Advise the Virginia Department of Education in developing and implementing policies relating to the coordination of services for children with disabilities; and

(6) Review the annual plan submitted in accordance with 8VAC20-81-230 B 2 submitted by state-operated programs and the Virginia School for the Deaf and the Blind at Staunton.

c. Procedures.

(1) The state special education advisory committee shall meet as often as necessary to conduct its business.

(2) By October 1 of each year, the state special education advisory committee shall submit an annual report of committee activities and suggestions to the Virginia Board of Education. The report shall be made available to the public in a manner consistent with other public reporting requirements of Part B of the Act.

(3) Official minutes shall be kept on all committee meetings and shall be made available to the public on request.

(4) All meetings and agenda items shall be publicly announced enough in advance of the meeting to afford interested parties a reasonable opportunity to attend, and meetings shall be open to the public.

(5) Interpreters and other necessary accommodations shall be provided for advisory committee members or participants.

(6) The advisory committee shall serve without compensation, but the Virginia Department of Education shall reimburse the committee for reasonable and necessary expenses for attending meetings and performing duties.

16. Provide a report annually to the state special education advisory committee on the Virginia Department of Education's dispute resolution systems, including information related to due process hearings and decisions. This report and due process hearing decisions, with all personally identifiable information deleted, are made available to the public on the Virginia Department of Education's website. (34 CFR 300.513(d))

17. Establish goals for the performance of children with disabilities that: (34 CFR 300.157(a))

a. Promote the purposes of the Act;

b. Are the same as Virginia's objectives for progress by children in its definition of adequate yearly progress, including Virginia's objectives for progress by children with disabilities, under § 1111(b)(2)(C) of the ESEA, 20 USC § 6311;

c. Address graduation rates and drop out rates, as well as such other factors as Virginia may determine; and

d. Are consistent, to the maximum extent appropriate, with any other goals and academic standards for children as established by Virginia.

18. Establish performance indicators Virginia will use to assess progress toward achieving the goals in subdivision 17 of this section, including measurable annual objectives for progress by children with disabilities under § 1111(b)(2)(C)(v)(II)(cc) of the ESEA, 20 USC § 6311. Annually report to the public and the United States Secretary of Education on the progress of children with disabilities in Virginia, toward meeting the goals described in subdivision 17 of this section, which may include elements of the reports required under § 1111(h) of the ESEA. (34 CFR 300.157(b) and (c))

19. Establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. These requirements include: (34 CFR 300.156(a) through (d))

a. Related services personnel and paraprofessionals. The qualifications shall:

(1) Be consistent with any Virginia-approved or Virginia-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(2) Ensure that related services personnel who deliver services in their discipline or profession have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(3) Allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with state law, regulation, or written policy, in meeting the requirements of this chapter to be used to assist in the provision of special education and related services to children with disabilities.

b. Ensuring that each person employed as a public school special education teacher in Virginia who teaches in an elementary school, middle school, or secondary school is highly qualified as a special education teacher by the deadline established in § 1119(a)(2) of the ESEA.

c. Requiring local educational agencies to take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services to children with disabilities.

20. Respond to complaints filed by a parent about staff qualifications as provided for under this chapter. Notwithstanding any other individual right of action that a parent or student may maintain under this chapter, nothing in this chapter shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of the Virginia Department of Education or local educational agency employee to be highly qualified. (34 CFR 300.156(e))

21. Secure agreements with state agency heads regarding appropriate roles and responsibilities for the identification, evaluation, placement, and delivery of or payment for educational and related services in order to ensure that a free appropriate public education is provided to all children with disabilities. The agreements shall address financial responsibility for each nonpublic educational agency for the provision of services. The agreements shall include procedures for resolving interagency disputes and for securing reimbursement from other agencies, including procedures under which local educational agencies may initiate proceedings. (34 CFR 300.154)

22. Disburse the appropriated funds for the education of children with disabilities in Virginia to local school divisions and state-operated programs that are in compliance with state and federal laws and regulations pertaining to the education of children with disabilities. (34 CFR 300.705 and 34 CFR 300.816)

23. Ensure that a practical method is developed and implemented to determine which children, including children with disabilities who are homeless or are wards of the state, are currently receiving needed special education and related services. Report and certify annually to the United States Department of Education the number of children with disabilities in local educational agencies who are receiving special education and related services on a date between October 1 and December 1 of each year determined by the Superintendent of Public Instruction or designee. The annual report of children served shall meet the provisions of 34 CFR 300.641 through 34 CFR 300.645. (34 CFR 300.111 and 34 CFR 300.640)

24. Ensure that a practical method is developed and implemented to determine if significant disproportionality based on race and ethnicity is occurring in the local educational agencies. This method shall include the collection and examination of data with respect to: (34 CFR 300.646(a) and 34 CFR 300.173)

a. The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in 8VAC20-81-10, "Child with a disability";

b. The placement in particular educational settings of these children; and

c. The incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

25. Ensure that in the case of the determination of significant disproportionality, as outlined in subdivision 24

of this section, the Virginia Department of Education shall: (34 CFR 300.646(b))

a. Review and, if appropriate, provide for the revision of the policies, procedures, and practices used by the local educational agency in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of this chapter;

b. Require any local educational agency determined to have a significant disproportionality to reserve the maximum amount of funds under this chapter to provide comprehensive coordinated early intervening services to serve children in the local educational agency, particularly, but not exclusively, children in those groups that were significantly overidentified; and

c. Require the local educational agency to publicly report on the revision of policies, practices, and procedures addressing the disproportionality.

26. Establish procedures designed to fully inform parents and children with disabilities of educational rights and due process procedures, and ensure that each local educational agency is informed of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that local educational agency. (34 CFR 300.121 and 34 CFR 300.150)

27. Ensure that requirements regarding use of public or private insurance to pay for services required under this chapter are met. (34 CFR 300.154(d) and (e))

28. Ensure that if the Virginia Department of Education provides direct services to children with disabilities, it complies with state and federal requirements as if it is a local educational agency and uses federal funds under Part B of the Act to provide services. (34 CFR 300.175)

a. The Virginia Department of Education may use payments that would otherwise have been available to a local educational agency under Part B of the Act to provide special education services directly to children with disabilities residing in the local school division or served by a state-operated program in accordance with the conditions of the excess cost requirements as outlined in 8VAC20-81-260.

b. The Virginia Department of Education may provide special education and related services in the manner and at the location it considers appropriate, consistent with least restrictive environment requirements.

29. Ensure that children who participate in early intervention services assisted under Part C of the Act and who will participate in preschool programs assisted under Part B of the Act experience a smooth and effective transition to early childhood special education programs in a manner consistent with the Virginia Part C lead agency's early intervention policies and procedures as follows: (34 CFR 300.124)

a. For those children who at age two (on or before September 30) are found eligible for Part B early childhood special education programs, IEPs are developed and implemented for those children; and

b. The local educational agency will participate in transition planning conferences arranged by the designated local Part C early intervention agency.

30. Ensure the protection of the confidentiality of any personally identifiable information collected, maintained, or used under Part B of the Act. This shall include notice to fully inform parents about the confidentiality of information as specified in 34 CFR 300.612, and policies and procedures that are used in the event that parents refuse to provide consent for disclosure of education records. These policies and procedures shall comply with the provisions of 34 CFR 300.612 through 34 CFR 300.626. (34 CFR 300.123 and 34 CFR 300.610)

31. Ensure that a practical method is developed and implemented to: (34 CFR 300.170)

a. Examine data, including data disaggregated by race and ethnicity, to determine if significant discrepancies occur in the rate of long-term suspensions and expulsions with children with disabilities:

(1) Among local educational agencies in Virginia; or

(2) Compared to the rates for nondisabled children within the local school division.

b. Review discrepancies and, if appropriate, require the local educational agency to revise its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

32. Adopt the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities. (34 CFR 300.172)

a. Ensure that local educational agencies take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials; and

b. In carrying out the provisions of this subsection, to the maximum extent possible, work collaboratively with the state agency responsible for assistive technology programs.

33. Prohibit the Virginia Department of Education and local educational agency personnel from requiring parents to obtain a prescription for substances identified under Schedule I, II, III, IV, or V in § 202(c) of the Controlled Substances Act (21 USC § 812(c)) for a child as a condition of attending school, receiving an evaluation under this chapter, or receiving services under this chapter. (34 CFR 300.174(a))

34. Monitor, enforce, and provide technical assistance regarding the implementation of the requirements under the Act. These actions include: (34 CFR 300.600 through 34 CFR 300.609; 34 CFR 300.640 through 34 CFR 300.645; 34 CFR 300.149(b) and 34 CFR 300.165(b))

a. Providing the Secretary of Education state performance reports and data collections in accordance with the provisions of 34 CFR 300.600 through 34 CFR 300.602.

b. Taking appropriate enforcement and technical assistance measures to assist local educational agencies in complying with the provisions of the Act in accordance with the provisions of 34 CFR 300.600 through 34 CFR 300.602 and 34 CFR 300.608.

c. Establishing that the focus of Virginia's monitoring activities is on:

(1) Improving educational results and functional outcomes for all children with disabilities; and

(2) Ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.

d. Using quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in 34 CFR 300.600(d), and the indicators established by the U.S. Secretary of Education for the state performance plans.

e. Using the targets established in Virginia's performance plan and the priority areas described in 34 CFR 300.600(d) to analyze the performance of each local educational agency.

f. Following all the reporting requirements under 34 CFR 300.602(b).

g. Notifying the public of the pendency of an enforcement action taken by the U.S. Department of Education pursuant to 34 CFR 300.604.

h. Prohibiting the local educational agency from reducing the local educational agency's maintenance of effort under 34 CFR 300.203 for any fiscal year if the Virginia Department of Education determines that a local educational agency is not meeting the requirements of Part B of the Act, including the targets in Virginia's state performance plan.

35. Ensure each recipient of assistance under Part B of the Act makes positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act. (34 CFR 300.177(b))

Part III
Responsibilities of Local School Divisions and State-Operated Programs

8VAC20-81-30. Responsibility of local school divisions and state-operated programs.

A. The requirements set forth in this chapter are applicable to local school divisions and state-operated programs providing education and related services for children with disabilities and are developed in accordance with state and federal laws and regulations.

B. Each local school division shall ensure that all children with disabilities aged two to 21, inclusive, residing in that school division have a right to a free appropriate public education. (§ 22.1-214 of the Code of Virginia; 34 CFR 300.2, 34 CFR 300.101, 34 CFR 300.124 and 34 CFR 300.209)

The children include:

1. Children with disabilities who are migrant;

2. Children with disabilities who are homeless, in accordance with the provisions of the McKinney-Vento Homeless Assistance Act (42 USC § 11431 et seq.);

3. Children with disabilities who are in need of special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade;

4. Children with disabilities who are served in a public nonprofit charter school;

5. Children with disabilities who have been suspended or expelled from school;

6. Children with disabilities who are incarcerated for 10 or more days in a regional or local jail in its jurisdiction, with the exception of those additional provisions identified in 8VAC20-81-110 I;

7. Children with disabilities who are residents of the school division and who are on house arrest, as ordered by a court of competent jurisdiction;

8. Children with disabilities who are in foster care and residents of Virginia;

9. Children with disabilities who are placed for noneducational reasons; and

10. Children with disabilities regardless of citizenship or immigration status.

C. Every child with a disability is deemed to reside in a school division when (§ 22.1-3 of the Code of Virginia):

1. The child is living with a biological parent whose parental rights have not been terminated.

2. The child is living with an adoptive parent.

3. The child is living with an individual:

a. Other than the custodial parent but who is defined as a parent in § 22.1-1 of the Code of Virginia, not solely for school purposes; and

b. Pursuant to a special power of attorney executed under 10 USC § 1044b by the custodial parent while such custodial parent is deployed outside the United States as a member of the Virginia National Guard or as a member of the United States Armed Forces.

4. The parent(s) of the child is deceased and the child is living with a person in loco parentis who resides within the school division.

5. The parents of the child are unable to care for him and he is living, not solely for school purposes, with another person who resides in the school division and is either:

a. The court-appointed guardian, or has legal custody; or

b. Acting in loco parentis pursuant to placement of the child by a person or entity authorized to do so under § 63.2-900 of the Code of Virginia.

6. The child is living in the school division not solely for school purposes, as an emancipated minor pursuant to the provisions of the § 16.1-334 of the Code of Virginia.

7. The child is living in the school division not solely for school purposes, as a validly married minor who has not pursued emancipation under § 16.1-333 of the Code of Virginia but who asserts implied emancipation based on the minor's marriage record.

8. The child is in foster care and a resident of Virginia, but not a resident of the school division, under the following conditions: (§ 22.1-215 of the Code of Virginia)

a. The child has been placed in foster care or other custodial care within the geographical boundaries of the school division, placed by a Virginia agency, whether state or local, that is authorized by the Code of Virginia to place children; or

b. The child has been placed, not solely for school purposes, in a child-caring institution or group home licensed under the provisions of Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia that is located within the geographical boundaries of the school division.

9. The child is in foster care and a resident of Virginia, and a resident of the school division, under the provisions of subdivision 8 of this subsection.

D. If a child with a disability is living with the parent in the residence of the local school division, the local school division is responsible for ensuring that the child receives a free appropriate public education even if the enrollment requirements for the child are not completed within a reasonable period of the parents' request to enroll the child. (34 CFR 300.101)

E. Requirements for children with disabilities who are placed for noneducational reasons:

1. The local school division that is part of the Comprehensive Services Act team that places the child in a private residential placement for noneducational reasons shall ensure that the child's IEP team develops an IEP appropriate for the child's needs while the child is in the residential placement.

2. If a child in foster care is placed in a local school division of nonresidence and the IEP team of the local school division of nonresidence where the child is placed determines that the child needs to be placed in a private day or residential special education facility for educational reasons, the responsibility for a free appropriate public education transfers to the local school division where the Virginia placing agency is located and is a participant in the community policy and management team of that local school division that has responsibility for the child under the Comprehensive Services Act (Chapter 52 (§ 2.2-5200 et seq.) of Title 2.2 of the Code of Virginia).

3. If placed in a nursing facility, a long stay hospital, or an intermediate care facility for people with intellectual disabilities under funding from the Virginia Department of Medical Assistance Services, the child is a resident of the division where the parent(s) resides.

4. If placed in a group home by a community services board, a court service unit, or a court of competent jurisdiction, the child is a resident of the division where the parent(s) resides.

5. If the child is aged 18 or older and placed in a nursing facility, a long stay hospital, or an intermediate care facility for people with intellectual disabilities under funding from the Virginia Department of Medical Assistance Services, and who has been declared legally incompetent or legally incapacitated by a court of competent jurisdiction and for whom the court has appointed a guardian to make decisions, the adult child is a resident of the division where the guardian resides.

6. If the child is aged 18 or older and placed in a group home by a community services board and has been declared legally incompetent or legally incapacitated by a

court of competent jurisdiction and for whom the court has appointed a guardian to make decisions, the adult child is a resident of the division where the guardian resides.

7. If the child is aged 18 or older, who has not been declared legally incompetent or legally incapacitated by a court of competent jurisdiction and for whom the court has not appointed a guardian to make decisions, the adult child's residence is the fixed home to which the adult child will return following the child's return from a facility and at which the adult child intends to stay. No adult child shall have more than one residence at a time.

8. If the child is aged 18 or older, who has been declared legally incompetent or legally incapacitated by a court of competent jurisdiction and for whom the court has appointed a guardian to make decisions, the adult child is a resident of the division where the guardian resides. ~~The adult child's residence shall be the fixed home to which the adult child will return from a facility and at which the adult child intends to stay. No adult child shall have more than one residence at a time.~~

9. If placed in a sponsored residential home, licensed in accordance with 12VAC35-105, the child is a resident of the division where the parent(s) resides.

F. If there is a dispute between local school divisions regarding the parent's or legal guardian's residence, the local school division of the parent's or legal guardian's last known place of residence is responsible until such dispute is resolved or the parent's or legal guardian's residence is established in another local school division.

G. If there is dispute between the parent or legal guardian of a child with a disability and the local school division regarding residency, the local school division of where the child is last enrolled remains responsible for providing the child with a free appropriate public education until resolution of the dispute.

H. Each state-operated program shall ensure that the requirements in this chapter are applied to children with disabilities, aged two to 21, inclusive, in that institution. (§ 22.1-7 of the Code of Virginia)

1. For children with disabilities who are placed in a state-operated program as a long-term placement, the local educational agency of the parent's residence remains responsible for ensuring that the child receives a free appropriate public education.

2. The state-operated program shall ensure that the local educational agency of the parent's residence is advised of the child's admission, status, and meetings associated with the child receiving a free appropriate public education.

I. Children with disabilities who are not residents of Virginia but are living temporarily with adults who do not otherwise meet the definition of parent(s) residing within a school division may, in the discretion of the local school board's policies and procedures, be admitted to the public schools of the school division for special education and related services. Tuition charges associated with this admittance are subject to the provisions of § 22.1-5 of the Code of Virginia.

8VAC20-81-70. Evaluation and reevaluation.

A. Each local educational agency shall establish procedures for the evaluation and reevaluation of referrals of children in accordance with the provisions of this section. (34 CFR 300.122)

B. Determination of needed evaluation data for initial evaluation or reevaluation. (34 CFR 300.305 and 34 CFR 300.507)

1. Review of existing evaluation data. A group that is comprised of the same individuals as an IEP team and other qualified professionals, as appropriate, shall:

a. Review existing evaluation data on the child, including:

(1) Evaluations and information provided by the parent(s) of the child;

(2) Current classroom-based, local, or state assessments and classroom-based observations; and

(3) Observations by teachers and related services providers; and

b. On the basis of that review and input from the child's parent(s), identify what additional data, if any, are needed to determine:

(1) Whether the child is, or continues to be, a child with a disability;

(2) The present educational needs of the child;

(3) The child's present level of academic achievement and related developmental needs;

(4) Whether the child needs or continues to need special education and related services; and

(5) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

2. Conduct of review. The group completing the review may conduct its review without a meeting. The local educational agency shall provide notice to ensure that the parent(s) has the opportunity to participate in the review. If there is a meeting, the local educational agency shall provide notice of the meeting early enough to ensure that the parent(s) will have an opportunity to participate. The notice shall ~~indicate the purpose, date, time, and location of~~

~~the meeting and who will be in attendance~~ meet the requirements of 8VAC20-81-110 E 2 a.

3. Need for additional data. The local educational agency shall administer tests and other evaluation materials as may be needed to produce the data identified in this subsection.

4. Requirements if additional data are not needed:

a. If the team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational agency shall provide the child's parent(s) with prior written notice, including information regarding:

(1) The determination and the reasons for it; and

(2) The right of the parent(s) to request an evaluation to determine whether the child continues to be a child with a disability and to determine the child's educational needs.

b. The local educational agency is not required to conduct the evaluation to gather additional information to determine whether the child continues to have a disability and to determine the child's educational needs, unless the child's parent(s) requests the evaluation for these specific purposes.

c. The child's parent(s) has the right to resolve a dispute through mediation or due process as described in this chapter.

d. This process shall be considered the evaluation if no additional data are needed.

5. If the team determines not to evaluate a child suspected of a disability, prior written notice, in accordance with 8VAC20-81-170, shall be given to the parent(s), including the parent's rights to appeal the decision through due process proceedings.

C. The local educational agency shall establish policies and procedures to ensure that the following requirements are met. (§ 22.1-214 of the Code of Virginia; 34 CFR 300.304 and 34 CFR 300.310)

1. Assessments and other evaluation materials used to assess a child under this chapter are:

a. Selected and administered so as not to be discriminatory on a racial or cultural basis;

b. Provided and administered in the child's native language and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;

c. Used for the purposes for which the assessments or measures are valid and reliable; and

d. Administered by trained and knowledgeable personnel in accordance with the instructions provided by the producer of the assessments.

2. Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.

3. A variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent(s), and information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), that may assist in determining whether the child is a child with a disability and the content of the child's IEP.

4. The assessment tools and strategies used provide relevant information that directly assists persons in determining the educational needs of the child.

5. If an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test or the method of test administration) shall be included in the evaluation report.

6. Any nonstandardized assessment administered by qualified personnel may be used to assist in determining whether the child is a child with a disability and the contents of the child's IEP.

7. Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

8. Assessments are selected and administered so as to best ensure that if an assessment is administered to a child with impaired sensory, motor, or communication skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure rather than reflecting the child's impaired sensory, motor, or communication skills (except where those skills are the factors that the test purports to measure).

9. The evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

10. Technically sound instruments are used that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

11. No single measure or assessment is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for a child.

12. If the evaluation requires assessments in more than one area relating to the suspected disability, a group of persons, including at least one teacher or other specialist with knowledge in the area of the suspected disability, shall complete the assessments.

13. For a child suspected of having a specific learning disability, the evaluation shall include an observation of academic performance in the regular classroom by at least one team member other than the child's regular teacher. In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

14. Each child is assessed by a qualified professional in all areas relating to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, motor abilities, and adaptive behavior. This may include educational, medical, sociocultural, psychological, or developmental assessments.

a. The hearing of each child suspected of having a disability shall be screened during the eligibility process prior to initial determination of eligibility for special education and related services.

b. A complete audiological assessment, including tests that will assess inner and middle ear functioning, shall be performed on each child who is hearing impaired or deaf or who fails two hearing screening tests.

D. The evaluation report(s) shall be available to the parent(s) no later than two business days before the meeting to determine eligibility. (34 CFR 300.306(a)(2))

1. A written copy of the evaluation report(s) shall be provided to the parent(s) prior to or at the meeting where the eligibility group reviews the evaluation report(s) or immediately following the meeting, but no later than 10 days after the meeting.

2. The evaluation report(s) shall be provided to the parent(s) at no cost.

E. Assessments of children with disabilities or suspected of having a disability who transfer from one local educational agency to another local educational agency in the same school year shall be coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with 8VAC20-81-60 B 1 g, to ensure prompt completion of full evaluations. (34 CFR 300.304(c)(5))

F. Reevaluation.

1. A reevaluation shall be conducted: (34 CFR 300.303(a) and (b)(2))

a. If the local educational agency determines that the child's educational or related services needs, including improved academic achievement and functional performance, warrants a reevaluation;

b. If the child's parent(s) or teacher requests a reevaluation; or

c. At least once every three years, unless the parent and local educational agency agree that a reevaluation is unnecessary.

2. The local educational agency shall not conduct a reevaluation more than once a year unless the parent(s) and the local educational agency agree otherwise. If the local educational agency does not agree with the parent's request for a reevaluation, the local educational agency shall provide the parent(s) with prior written notice in accordance with 8VAC20-81-170. (34 CFR 300.303(b)(1))

3. The local educational agency shall conduct a reevaluation in accordance with the requirements of subsection B of this section. (34 CFR 300.305)

G. Parental consent for reevaluation. (34 CFR 300.300(c) and (d))

1. Informed parental consent is required before conducting any reevaluation of a child with a disability.

a. If the local educational agency can demonstrate that it has taken reasonable measures to obtain consent and the child's parent(s) has failed to respond, the local educational agency shall proceed as if consent has been given by the parent(s). Reasonable measures include providing notice to the parent(s) in writing (or by telephone or in person with proper documentation).

b. If the parent(s) refuses consent, the local educational agency may continue to pursue those evaluations by using due process or mediation procedures. The local educational agency does not violate its obligation under this chapter if it declines to pursue the reevaluation.

2. Parental consent is not required before:

a. Review of existing data as part of an evaluation or reevaluation;

b. A teacher's or related service provider's observations or ongoing classroom evaluations; or

c. Administering a test or other evaluation that is administered to all children unless, before administration

of that test or evaluation, consent is required of parents of all children.

3. If a parent of a child who is home-instructed or home-tutored, or who is placed in a private school by the parents at their own expense, does not provide consent for reevaluation, or the parent(s) fails to respond to a request to provide consent, the local educational agency may not use mediation or due process to pursue the reevaluation. In this instance, the local school division is not required to consider the child as eligible for equitable services under the provisions of 8VAC20-81-150 for parentally placed students.

H. Timelines for reevaluations.

1. The reevaluation process, including eligibility determination, shall be initiated in sufficient time to complete the process prior to the third anniversary of the date eligibility was last determined.

2. If a reevaluation is conducted for purposes other than the child's triennial, the reevaluation process, including eligibility determination, shall be completed in 65 business days of the receipt of the referral by the special education administrator or designee for the evaluation.

3. The parent and eligibility group may agree in writing to extend the 65-day timeline to obtain additional data that cannot be obtained within the 65 business days.

I. The local educational agency is not required to evaluate a child with a disability who graduates with a standard diploma or advanced studies diploma. Since graduation is a change in placement, the local educational agency is required to provide the parent with prior written notice in accordance with 8VAC20-81-170. (34 CFR 300.305(e)(2))

8VAC20-81-80. Eligibility.

A. Each local educational agency shall establish procedures to ensure that the decision regarding eligibility for special education and related services and educational needs is made in accordance with the provisions of this section.

B. The determination that a child is eligible for special education and related services shall be made on an individual basis by a group as designated in subdivision C 2 of this section.

C. Upon completion of the administration of assessments and other evaluation materials or after determining that additional data are not needed, a group of qualified professionals and the parent(s) of the child shall determine whether the child is, or continues to be, a child with a disability and the educational needs of the child. If a determination is made that a child has a disability and requires special education and related services, an IEP shall be developed in accordance with the requirements of 8VAC20-81-110. (34 CFR 300.306, 34 CFR 300.308)

1. The determination of whether a child is a child with a disability is made by the child's parent(s) and a group that is collectively qualified to:

a. Conduct, as appropriate, individual diagnostic assessments in the areas of speech and language, academic achievement, intellectual development and social-emotional development;

b. Interpret assessment and intervention data, and apply critical analysis to those data; and

c. Develop appropriate educational and transitional recommendations based on the assessment data.

2. The eligibility group composition.

a. The group may be an IEP team, as defined in 8VAC20-81-110, as long as the above requirements and notice requirements of 8VAC20-81-170 are met.

b. The group shall include, but not be limited to:

(1) Local educational agency personnel representing the disciplines providing assessments;

(2) The special education administrator or designee;

(3) The parent(s);

(4) A special education teacher;

(5) The child's general education teacher or if the child does not have a general education teacher, a general education teacher qualified to teach a child of the child's age; or for a child of less than school age, an individual qualified to teach a child of the child's age; and

(6) At least one person qualified to conduct individual diagnostic examinations of children, such as school psychologist, speech-language pathologist, or remedial reading teacher.

D. Procedures for determining eligibility and educational need. (34 CFR 300.306 through 34 CFR 300.311)

1. In interpreting evaluation data for the purpose of determining if a child is a child with a disability and determining the educational needs of the child, the local educational agency shall:

a. Draw upon information from a variety of sources, including aptitude and achievement tests, parent input and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

b. Ensure that information from all these sources is documented and carefully considered.

2. The group shall provide procedural safeguards in determining eligibility and in ensuring the confidentiality of records.

3. Observation.

a. The local educational agency shall ensure that the child is observed in the child's learning environment (including the general education classroom setting) to document the child's academic performance and behavior in the areas of difficulty.

b. The eligibility group, in determining whether a child is a child with a disability shall:

(1) Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or

(2) Have at least one member of the eligibility group conduct an observation of the child's academic performance in the general education classroom after the child has been referred for an evaluation and parental consent has been obtained consistent with the requirements of 8VAC20-81-170.

c. In the case of a child of less than school age or out of school, a group member shall observe the child in an environment appropriate for a child of that age.

4. A child shall not be determined to be eligible under this chapter if the child does not otherwise meet the eligibility criteria, or the determinant factor is:

a. Lack of appropriate instruction in reading, including the essential components of reading instruction:

(1) Phonemic awareness,

(2) Phonics,

(3) Vocabulary development,

(4) Reading fluency, including oral reading skills, and

(5) Reading comprehension strategies;

b. Lack of appropriate instruction in math; or

c. Limited English proficiency.

5. The local educational agency shall provide the parent with a copy of the documentation of the determination of eligibility at no cost. This documentation shall include a statement of:

a. Whether the child has a specific disability.

b. The basis for making the determination including an assurance that the determination has been made in accordance with the provisions of this section regarding determining eligibility and educational need.

c. The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning.

d. The educationally relevant medical findings, if any.

e. The instructional strategies used and the student-centered data collected if the child has participated in a response to scientific, research-based intervention process. This document shall also include:

(1) The local educational agency's notification to the parent of the Virginia Department of Education's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;

(2) The strategies that were used to increase the child's rate of learning; and

(3) The parent's right to request an evaluation.

f. For identification of a child with a specific learning disability, whether consistent with the requirements of subdivisions T 2 a and T 2 b of this section, the child does not achieve adequately for the child's age or to meet Virginia-approved grade-level standards; and

(1) The child does not make sufficient progress to meet age or Virginia-approved grade-level standards; or

(2) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, Virginia-approved grade-level standards or intellectual development.

g. For identification of a child with a specific learning disability, the group's determination is consistent with the requirements of subdivision T 2 c of this section.

6. The eligibility group shall consider, as part of the evaluation, data that demonstrates that prior to, or as part of the referral process, the child was provided appropriate high-quality, researched-based instruction in general education settings, consistent with § 1111(b)(8)(D) and (E) of the ESEA, including that the instruction was delivered by qualified personnel. There shall be data-based documentation that repeated assessments of achievement at reasonable intervals, reflecting that formal assessment of student progress during instruction was provided to the child's parents.

7. The eligibility group shall work toward consensus. If the group does not reach consensus and the decision does not reflect a particular member's conclusion, then the group member shall submit a written statement presenting that member's conclusions.

8. The local educational agency shall obtain written parental consent for the initial eligibility determination. Thereafter, written parental consent shall be secured for any change in categorical identification in the child's disability.

9. The eligibility group shall have a written summary that consists of the basis for making its determination as to the eligibility of the child for special education and related

services. The written summary shall include any written statement from a member whose conclusion differs from the other members' determination. The summary statement may include other recommendations. The written summary shall be maintained in the child's scholastic record.

10. The written summary shall be forwarded to the IEP team, including the parent, upon determination of eligibility. The summary statement may include other recommendations.

11. With reevaluations, if the eligibility group determines that there is not a change to the child's eligibility for special education and related services, and educational needs, the IEP team is not required to convene, unless the parent requests that the IEP team meets.

E. Nothing in this chapter requires that children be identified by their disability on IEPs, local educational agency communications to parents regarding eligibility determinations, or other similar communications to parents. For such communications, local educational agencies shall identify that each child has a disability under this chapter and by reason of that disability needs special education and related services, and is regarded as a child with a disability.

F. Eligibility for related services. A child with a disability shall be found eligible for special education in order to receive related services. Once a child is found eligible for special education, decisions about the need for related services shall be made by the IEP team. An evaluation may be conducted as determined by the IEP team. (34 CFR 300.34 and 34 CFR 300.306(c)(2))

G. Two-year-old children previously served by Part C. A child, aged two, previously participating in early intervention services assisted under Part C of the Act, shall meet the requirements of this chapter to be determined eligible under Part B of the Act. For a child served by Part C after age two, and whose third birthday occurs during the summer, the child's IEP team shall determine the date when services under the IEP will begin for the child. (34 CFR 300.124)

H. For all children suspected of having a disability, local educational agencies shall:

1. Use the criteria adopted by the Virginia Department of Education, as outlined in this section, for determining whether the child has a disability; and

2. Have documented evidence that, by reason of the disability, the child needs special education and related services. (34 CFR 300.307(b))

I. The Virginia Department of Education permits each local educational agency to use a process for determining whether a child has a disability based on the child's response to scientific, research-based intervention and permits each local educational agency to use other alternative research-based intervention and procedures. (34 CFR 300.307)

J. Eligibility as a child with autism. The group may determine that a child has autism if:

1. There is an adverse effect on the child's educational performance due to documented characteristics of autism, as outlined in this section; and

2. The child has any of the Pervasive Developmental Disorders, also referenced as autism spectrum disorder, such as Autistic Disorder, Asperger's Disorder, Rhett's Disorder, Childhood Disintegrative Disorder, Pervasive Developmental Disorder – Not Otherwise Specified including Atypical Autism as indicated in diagnostic references.

a. Children with Asperger's Disorder demonstrate the following characteristics:

(1) Impairments in social interaction, such as marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction; failure to develop peer relationships appropriate to developmental level; a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (i.e., by a lack of showing, bringing, or pointing out objects of interest); or lack of social or emotional reciprocity are noted; and

(2) Restricted repetitive and stereotyped patterns of behavior, interests, and activities such as encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus, apparently inflexible adherence to specific, nonfunctional routines or rituals, stereotyped and repetitive motor mannerisms, persistent preoccupation with parts of objects.

b. Children with autistic disorder, in addition to the characteristics listed in subdivisions 2 a (1) and 2 a (2) of this subsection, also demonstrate impairments in communication, such as delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime). In individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others, stereotyped and repetitive use of language or idiosyncratic language, or lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level is noted.

c. Children with Pervasive Developmental Disorder - Not Otherwise Specified or Atypical Autism may display any of the characteristics listed in subdivisions 2 a (1), 2 a (2) and 2 b of this subsection without displaying all of the characteristics associated with either Asperger's Disorder or Autistic Disorder.

K. Eligibility as a child with deaf-blindness. The group may determine that a child has deaf-blindness if the definition of "deaf-blindness" as outlined in 8VAC20-81-10 is met.

L. Eligibility as a child with deafness. The group may determine that a child has deafness if:

1. The definition of "deafness" is met in accordance with 8VAC20-81-10;

2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of a deafness, as outlined in subdivision 3 of this subsection; and

3. The child has a bilateral hearing loss (sensorineural, or mixed conductive and sensorineural), a fluctuating or a permanent hearing loss, documented auditory dyssynchrony (auditory neuropathy), and/or cortical deafness.

M. Eligibility as a child with developmental delay. (34 CFR 300.111(b))

1. The group may determine that a child has a developmental delay if the local educational agency permits the use of developmental delay as a disability category when determining whether a preschool child, aged two by September 30 to six, inclusive, is eligible under this chapter, and:

a. The definition of "developmental delay" is met in accordance with 8VAC20-81-10; or

b. The child has a physical or mental condition that has a high probability of resulting in a developmental delay.

2. Eligibility as a child with a disability for children ages two through six shall not be limited to developmental delay if eligibility can be determined under another disability category.

3. A local educational agency is not required to adopt and use developmental delay as a disability category for any children within its jurisdiction. If the local educational agency permits the use of developmental delay as a disability category, it shall comply with the eligibility criteria outlined in this section.

N. Eligibility as a child with an emotional disability. The group may determine that a child has an emotional disability if:

1. The definition of "emotional disability" is met in accordance with 8VAC20-81-10; and

2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of an emotional disability.

O. Eligibility as a child with a hearing impairment.

1. The group may determine that a child has a hearing impairment if:

a. The definition of "hearing impairment" is met in accordance with 8VAC20-81-10; and

b. There is an adverse effect on the child's educational performance due to one or more documented characteristics of a hearing impairment, as outlined in subdivision 2 of this subsection.

2. Characteristics of children with a hearing impairment include unilateral hearing loss (conductive, sensorineural, or mixed), bilateral hearing loss (conductive, sensorineural, or mixed), a fluctuating or permanent hearing loss, and/or auditory dyssynchrony (auditory neuropathy). The hearing loss results in qualitative impairments in communication/educational performance.

3. The term "hard of hearing" may be used in this capacity.

P. Eligibility as a child with an intellectual disability. The group may determine that a child has an intellectual disability if:

1. The definition of "intellectual disability" is met in accordance with 8VAC20-81-10;

2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of an intellectual disability, as outlined in subdivision 3 of this subsection; and

3. The child has:

a. Significantly impaired intellectual functioning, which is two or more standard deviations below the mean, with consideration given to the standard error of measurement for the assessment, on an individually administered, standardized measure of intellectual functioning;

b. Concurrently, significantly impaired adaptive behavior as determined by a composite score on an individual standardized instrument of adaptive behavior that measures two standard deviations or more below the mean; and

c. Developmental history that indicates significant impairment in intellectual functioning and a current demonstration of significant impairment is present.

Q. Eligibility as a child with multiple disabilities. The group may determine that a child has multiple disabilities if the definition of "multiple disabilities" is met in accordance with 8VAC20-81-10.

R. Eligibility as a child with an orthopedic impairment. The group may determine that a child has an orthopedic impairment if:

1. The definition of "orthopedic impairment" is met in accordance with 8VAC20-81-10; and

2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of an orthopedic impairment.

S. Eligibility as a child with other health impairment. The group may determine that a child has an other health impairment if:

1. The definition of "other health impairment" is met in accordance with 8VAC20-81-10; and

2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of the other health impairment.

T. Eligibility of a child with a specific learning disability. (34 CFR 300.307 and 34 CFR 300.309)

1. The group may determine that a child has a specific learning disability if:

a. The definition of "specific learning disability" is met in accordance with 8VAC20-81-10; and

b. The criteria for determining the existence of a specific learning disability are met.

2. The criteria for determining the existence of a specific learning disability are met if:

a. The child does not achieve adequately for the child's age or to meet Virginia-approved grade-level standards in one or more of the following areas when provided with learning experiences and instruction appropriate for the child's age or Virginia-approved grade-level standards:

(1) Oral expression;

(2) Listening comprehension;

(3) Written expression;

(4) Basic reading skills;

(5) Reading fluency skills;

(6) Reading comprehension;

(7) Mathematical calculations; or

(8) Mathematical problem solving.

b. The child does not make sufficient progress to meet age or Virginia-approved grade-level standards in one or more of the areas identified in subdivision 2 a of this subsection when using a process based on the child's response to scientific, research-based intervention; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, Virginia-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 8VAC20-81-70.

c. The group determines that its findings under subdivisions 2 a and b of this subsection are not primarily the result of:

(1) A visual, hearing, or motor impairment;

(2) Intellectual disability;

(3) Emotional disability;

(4) Environmental, cultural, or economic disadvantage; or

(5) Limited English proficiency.

3. The Virginia Department of Education does not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability. (34 CFR 300.307(a))

U. Eligibility as a child with speech or language impairment.

1. The group may determine that a child has a speech or language impairment if:

a. The definition of "speech or language impairment" is met in accordance with 8VAC20-81-10;

b. There is an adverse effect on the child's educational performance due to one or more documented characteristics of speech or language impairment;

c. The child has a significant discrepancy from typical communication skills in one or more of the following areas: fluency, impaired articulation, expressive or receptive language impairment, or voice impairment; and

d. Information from instruments that are culturally and linguistically appropriate, including standardized and criterion-referenced measures, shall be used in conjunction with information from classroom observations to determine the severity of the communication impairment.

2. Children shall not be identified as children having a speech or language impairment if the area of concern is primarily the result of sociocultural dialect, delays/differences associated with acquisition of English as a second language, or within the purview of established norms for articulation and language development.

3. Speech language pathology services may be special education or a related service.

V. Eligibility as a child with a traumatic brain injury. The group may determine that a child has a traumatic brain injury if:

1. The definition of "traumatic brain injury" is met in accordance with 8VAC20-81-10; and

2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of traumatic brain injury.

W. Eligibility as a child with a visual impairment.

1. The group may determine that a child has a visual impairment if:

a. The definition of "visual impairment" is met in accordance with 8VAC20-81-10;

b. There is an adverse effect on the child's educational performance due to one or more documented characteristics of visual impairment; and

c. The child:

(1) Demonstrates the characteristics of blindness or visual impairment, as outlined in subdivisions 2 and 3 of this subsection; or

(2) Has any of the conditions including, but not limited to oculomotor apraxia, cortical visual impairment, and/or a progressive loss of vision, which may in the future, have an adverse effect on educational performance, or a functional vision loss where field and acuity deficits alone may not meet the aforementioned criteria.

2. A child with blindness demonstrates the following:

a. Visual acuity in the better eye with best possible correction of 20/200 or less at distance or near; or

b. Visual field restriction in the better eye of remaining visual field of 20 degrees or less.

3. A child with a visual impairment demonstrates the following:

a. Visual acuity better than 20/200 but worse than 20/70 at distance and/or near; or

b. Visual field restriction in the better eye of remaining visual field of 70 degrees or less but better than 20 degrees.

X. Children found not eligible for special education.

1. Information relevant to instruction for a child found not eligible for special education shall be provided to the child's teachers or any appropriate committee. Parental consent to release information shall be secured for children who are placed by their parents in private schools that are not located in the local educational agency of the parent's residence. (34 CFR 300.622)

2. If the school division decides that a child is not eligible for special education and related services, prior written notice, in accordance with 8VAC20-81-170 shall be given to the parent(s) including the parent(s) right to appeal the decision through the due process hearing procedures. (34 CFR 300.503; 34 CFR 300.507)

8VAC20-81-90. Termination of special education and related services.

A. Termination of a child's eligibility for special education and related services shall be determined by an eligibility group.

1. Termination of special education services occurs if the eligibility group determines that the child is no longer a child with a disability who needs special education and related service.

2. The local educational agency shall evaluate a child with a disability in accordance with 8VAC20-81-70 before determining that the child is no longer a child with a disability under this chapter.

3. Evaluation is not required before the termination of eligibility due to graduation with a standard or advanced studies high school diploma or reaching the age of 22. (34 CFR 300.305(e))

B. The IEP team shall terminate the child's eligibility for a related service without determining that the child is no longer a child with a disability who is eligible for special education and related services. The IEP team shall make this determination based on the current data in the child's education record, or by evaluating the child in accordance with 8VAC20-81-70.

C. Written parental consent shall be required prior to any partial or complete termination of services.

D. Prior to any partial or complete termination of special education and related services, the local educational agency shall comply with the prior written notice requirements of 8VAC20-81-170 C.

E. If the parent(s) revokes consent <u>in writing</u> for the child to continue to receive special education and related services, the local educational agency shall follow the ~~eligibility~~ procedures in ~~8VAC20-81-80~~ <u>8VAC20-81-170 E 3 a</u> to terminate the child's ~~eligibility or use other measures as necessary to ensure that parental revocation of consent will not result in the withdrawal of a necessary free appropriate public education for the child. (34 CFR 300.9 and 34 CFR 300.305(e))~~ <u>receipt of special education and related services. (34 CFR 300.9 and 34 CFR 300.300(b)(4))</u>

F. Summary of academic achievement and functional performance. (34 CFR 300.305(e)(3))

1. For a child whose eligibility terminates due to graduation with a standard or advanced studies high school diploma or reaching the age of 22, the local educational agency shall provide the child with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting the student's postsecondary goals.

2. If a child exits school without graduating with a standard or advanced studies high school diploma or reaching the age of 22, including if the child receives a general educational development (GED) credential or an alternative diploma option, the local educational agency may provide the child with a summary of academic achievement and functional performance when the child exits school. However, if the child resumes receipt of educational services prior to exceeding the age of eligibility, the local educational agency shall provide the child with an updated summary when the child exits, or when the child's eligibility terminates due to graduation with a standard or advanced studies high school diploma or reaching the age of 22.

8VAC20-81-170. Procedural safeguards.

A. Opportunity to examine records; parent participation. (34 CFR 300.322(e), 34 CFR 300.500 and 34 CFR 300.501; 8VAC20-150)

1. Procedural safeguards. Each local educational agency shall establish, maintain, and implement procedural safeguards as follows:

a. The parent(s) of a child with a disability shall be afforded an opportunity to:

(1) Inspect and review all education records with respect to (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of a free appropriate public education to the child.

(2) Participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child.

b. Parent participation in meetings.

(1) Each local educational agency shall provide notice to ensure that the parent(s) of a child with a disability has the opportunity to participate in meetings described in subdivision 1 a (2) of this subsection, including notifying the parent(s) of the meeting early enough to ensure that the parent has an opportunity to participate. The notice shall:

(a) Indicate the purpose, date, time, and location of the meeting and who will be in attendance;

(b) Inform the parent(s) that at their discretion or at the discretion of the local educational agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate, may participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child;

(c) Inform the parent that the determination of the knowledge or special expertise shall be made by the party who invited the individual; and

(d) Inform the parent(s), in the case of a child who was previously served under Part C that an invitation to the initial IEP team meeting shall, at the request of the parent, be sent to the Part C service coordinator or other representatives of Part C to assist with the smooth transition of services.

(2) A meeting does not include informal or unscheduled conversations involving local educational agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that local educational agency personnel engage in to develop a proposal or a response to a parent proposal that will be discussed at a later meeting.

c. Parent involvement in placement decisions.

(1) Each local educational agency shall ensure that a parent(s) of each child with a disability is a member of the IEP team that makes decisions on the educational placement of their child or any Comprehensive Services Act team that makes decisions on the educational placement of their child.

(2) In implementing the requirements of subdivision 1 c (1) of this subsection, the local educational agency shall provide notice in accordance with the requirements of 8VAC20-81-110 E.

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the local educational agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by the IEP or Comprehensive Services Act team without the involvement of the parent(s) if the local educational agency is unable to obtain the parents' participation in the decision. In this case, the local educational agency shall have a record of its attempt to ensure the parents' involvement.

(5) The local educational agency shall take whatever action is necessary to ensure that the parent(s) understand and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for a parent(s) with deafness, or whose native language is other than English.

(6) The exception to the IEP team determination regarding placement is with disciplinary actions involving interim alternative education settings for 45-

day removals under 8VAC20-81-160 D 6 a. (34 CFR 300.530(f)(2) and (g))

B. Independent educational evaluation.

1. General. (34 CFR 300.502(a))

a. The parent(s) of a child with a disability shall have the right to obtain an independent educational evaluation of the child.

b. The local educational agency shall provide to the parent(s) of a child with a disability, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained and the applicable criteria for independent educational evaluations.

2. Parental right to evaluation at public expense. (34 CFR 300.502(b) and (e))

a. The parent(s) has the right to an independent educational evaluation at public expense if the parent(s) disagrees with an evaluation component obtained by the local educational agency.

b. If the parent(s) requests an independent educational evaluation at public expense, the local educational agency shall, without unnecessary delay, either:

(1) Initiate a due process hearing to show that its evaluation is appropriate; or

(2) Ensure that an independent educational evaluation is provided at public expense, unless the local educational agency demonstrates in a due process hearing that the evaluation obtained by the parent(s) does not meet the local educational agency's criteria.

c. If the local educational agency initiates a due process hearing and the final decision is that the local educational agency's evaluation is appropriate, the parent(s) still has the right to an independent educational evaluation, but not at public expense.

d. If the parent(s) requests an independent educational evaluation, the local educational agency may ask the reasons for the parent's objection to the public evaluation. However, the explanation by the parent(s) may not be required and the local educational agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

e. A parent is entitled to only one independent educational evaluation at public expense each time the public educational agency conducts an evaluation component with which the parent disagrees.

f. If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the local educational agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. Except for the criteria, a local educational agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

3. Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the local educational agency an evaluation obtained at private expense, the results of the evaluation: (34 CFR 300.502(c))

a. Shall be considered by the local educational agency, if it meets local educational agency criteria, in any decision regarding the provision of a free appropriate public education to the child; and

b. May be presented by any party as evidence at a hearing under 8VAC20-81-210.

4. Requests for evaluations by special education hearing officers. If a special education hearing officer requests an independent educational evaluation for an evaluation component, as part of a hearing on a due process complaint, the cost of the evaluation shall be at public expense. (34 CFR 300.502(d))

C. Prior written notice by the local educational agency; content of notice.

1. Prior written notice shall be given to the parent(s) of a child with a disability within a reasonable time before the local educational agency: (34 CFR 300.503(a))

a. Proposes to initiate or change the identification, evaluation, or educational placement (including graduation with a standard or advanced studies diploma) of the child, or the provision of a free appropriate public education for the child; or

b. Refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education for the child.

2. The notice shall include: (34 CFR 300.503(b))

a. A description of the action proposed or refused by the local educational agency;

b. An explanation of why the local educational agency proposes or refuses to take the action;

c. A description of any other options the IEP team considered and the reasons for the rejection of those options;

d. A description of each evaluation procedure, assessment, record, or report the local educational agency used as a basis for the proposed or refused action;

e. A description of any other factors that are relevant to the local educational agency's proposal or refusal;

f. A statement that the parent(s) of a child with a disability have protection under the procedural safeguards of this chapter and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

g. Sources for the parent(s) to contact in order to obtain assistance in understanding the provisions of this section.

3. a. The notice shall be: (i) written in language understandable to the general public; and (ii) provided in the native language of the parent(s) or other mode of communication used by the parent(s), unless it is clearly not feasible to do so. (34 CFR 300.503(c))

b. If the native language or other mode of communication of the parent(s) is not a written language, the local educational agency shall take steps to ensure that:

(1) The notice is translated orally or by other means to the parent(s) in their native language or other mode of communication;

(2) The parent(s) understand the content of the notice; and

(3) There is written evidence that the requirements of subdivisions (1) and (2) of this subdivision have been met.

D. Procedural safeguards notice. (34 CFR 300.504)

1. A copy of the procedural safeguards available to the parent(s) of a child with a disability shall be given to the parent(s) by the local educational agency only one time a school year, except that a copy shall be given to the parent(s) upon:

a. Initial referral for or parent request for evaluation;

b. If the parent requests an additional copy;

c. Receipt of the first state complaint during a school year;

d. Receipt of the first request for a due process hearing during a school year; and

e. On the date on which the decision is made to make a disciplinary removal that constitutes a change in placement because of a violation of a code of student conduct.

2. The local educational agency may place a current copy of the procedural safeguards notice on its Internet website if a website exists, but the local educational agency does not meet its obligation under subdivision 1 of this subsection by directing the parent to the website. The local educational agency shall offer the parent(s) a printed copy of the procedural safeguards notice in accordance with subdivision 1 of this subsection.

3. The procedural safeguards notice shall include a full explanation of all of the procedural safeguards available relating to:

a. Independent educational evaluation;

b. Prior written notice;

c. Parental consent;

d. Access to educational records;

e. Opportunity to present and resolve complaints through the due process procedures;

f. The availability of mediation;

g. The child's placement during pendency of due process proceedings;

h. Procedures for students who are subject to placement in an interim alternative educational setting;

i. Requirements for unilateral placement by parents of children in private schools at public expense;

j. Due process hearings, including requirements for disclosure of evaluation results and recommendations;

k. Civil actions, including the time period in which to file those actions;

l. Attorneys' fees; and

m. The opportunity to present and resolve complaints through the state complaint procedures, including:

(1) The time period in which to file a complaint;

(2) The opportunity for the local educational agency to resolve the complaint; and

(3) The difference between the due process and the state complaint procedures, including the applicable jurisdiction, potential issues, and timelines for each process.

4. The notice required under this subsection shall meet the prior notice requirements regarding understandable language in subdivision C 3 of this section.

E. Parental consent.

1. Required parental consent. Informed parental consent is required before:

a. Conducting an initial evaluation or reevaluation, including a functional behavioral assessment if such

assessment is not a review of existing data conducted at an IEP meeting; (34 CFR 300.300(a)(1)(i))

b. An initial eligibility determination or any change in categorical identification;

c. Initial provision of special education and related services to a child with a disability; (34 CFR 300.300(b)(1))

d. Any revision to the child's IEP services;

e. Any partial or complete termination of special education and related services, except for graduation with a standard or advance studies diploma;

f. The provision of a free appropriate public education to children with disabilities who transfer between public agencies in Virginia or transfer to Virginia from another state in accordance with 8VAC20-81-120;

g. Accessing a child's public benefits or insurance or private insurance proceeds in accordance with subsection F of this section; and (34 CFR 300.154)

h. Inviting to an IEP meeting a representative of any participating agency that is likely to be responsible for providing or paying for secondary transition services. (34 CFR 300.321(b)(3))

2. Parental consent not required. Parental consent is not required before:

a. Review of existing data as part of an evaluation or a reevaluation, including a functional behavioral assessment; (34 CFR 300.300(d)(1))

b. Administration of a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of the parent(s) of all children; (34 CFR 300.300(d)(1))

c. The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation; (34 CFR 300.302)

d. Administration of a test or other evaluation that is used to measure progress on the child's IEP goals and is included in the child's IEP;

e. A teacher's or related service provider's observations or ongoing classroom evaluations;

f. Conducting an initial evaluation of a child who is a ward of the state and who is not residing with his parent(s) if: (34 CFR 300.300(a)(2))

(1) Despite reasonable efforts, the local educational agency cannot discover the whereabouts of the parent(s);

(2) The parent's rights have been terminated; or

(3) The rights of the parent(s) to make educational decisions have been subrogated by a judge and an individual appointed by the judge to represent the child has consented to the initial evaluation.

3. Revoking consent.

a. If at any time subsequent to the initial provision of special education and related services the parent revokes consent in writing for the continued provision of special education and related services: (34 CFR 300.300(b)(4))

(1) The local educational agency may not continue to provide special education and related services to the child, but must provide prior written notice in accordance with 8VAC20-81-170 C before ceasing the provision of special education and related services;

(2) The local educational agency may not use mediation or due process hearing procedures to obtain parental consent, or a ruling that the services may be provided to the child;

(3) The local educational agency's failure to provide the special education and related services to the child will not be considered a violation of the requirement to provide FAPE; and

(4) The local educational agency is not required to convene an IEP meeting or to develop an IEP for the child for the further provision of special education and related services.

b. If a parent revokes consent, that revocation is not retroactive in accordance with the definition of "consent" at 8VAC20-81-10.

4. Refusing consent.

a. If the parent(s) refuses consent for initial evaluation or a reevaluation, the local educational agency may, but is not required to, use mediation or due process hearing procedures to pursue the evaluation. The local educational agency does not violate its obligations under this chapter if it declines to pursue the evaluation. (34 CFR 300.300(a)(3) and (c)(1))

b. If the parent(s) refuses to consent to the initial provision of special education and related services: (34 CFR ~~300.300(b)(3) and (4))~~ 300.300(b)(3))

(1) The local educational agency may not use mediation or due process hearing procedures to obtain parental consent, or a ruling that the services may be provided to the child;

(2) The local educational agency's failure to provide the special education and related services to the child for which consent is requested is not considered a violation of the requirement to provide FAPE; and

(3) The local educational agency is not required to convene an IEP meeting or to develop an IEP for the child for the special education and related services for

which the local educational agency requests consent. However, the local educational agency may convene an IEP meeting and develop an IEP to inform the parent about the services that may be provided with parental consent.

c. If the parent(s) of a parentally placed private school child refuses consent for an initial evaluation or a reevaluation, the local educational agency: (34 CFR 300.300(d)(4))

(1) May not use mediation or due process hearing procedures to obtain parental consent, or a ruling that the evaluation of the child may be completed; and

(2) Is not required to consider the child as eligible for equitable provision of services in accordance with 8VAC20-81-150.

d. A local educational agency may not use a parent's refusal to consent to one service or activity to deny the parent(s) or child any other service, benefit, or activity of the local educational agency, except as provided by this chapter. (34 CFR 300.300(d)(3))

5. Withholding consent.

a. If the parent(s) fails to respond to a request to consent for an initial evaluation, the local educational agency may, but is not required to, use mediation or due process hearing procedures to pursue the evaluation. The local educational agency does not violate its obligations under this chapter if it declines to pursue the evaluation. (34 CFR 300.300(a)(3) and (c)(1))

b. Informed parental consent need not be obtained for reevaluation if the local educational agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent(s) has failed to respond. (34 CFR 300.300(c)(2))

c. If the parent(s) fails to respond to a request to provide consent for the initial provision of special education and related services, the local educational agency follows the provisions of subdivision 4 b of this subsection. (34 CFR 300.300(b)(3) and (4))

6. Consent for initial evaluation may not be construed as consent for initial provision of special education and related services. (34 CFR 300.300(a)(1)(ii))

7. The local educational agency shall make reasonable efforts to obtain informed parental consent for an initial evaluation and the initial provision of special education and related services. (34 CFR 300.300(a)(1)(iii) and (b)(2))

8. To meet the reasonable measures requirement of this section, the local educational agency shall have a record of its attempts to secure the consent, such as: (34 CFR 300.322(d) and 34 CFR 300.300(a), (b), (c) and (d)(5))

a. Detailed records of telephone calls made or attempted and the results of those calls;

b. Copies of correspondence (written, electronic, or facsimile) sent to the parent(s) and any responses received; and

c. Detailed records of visits made to the parent's home or place of employment and the results of those visits.

F. Parental rights regarding use of public or private insurance. Each local educational agency using Medicaid or other public benefits or insurance programs to pay for services required under this chapter, as permitted under the public insurance program, and each local educational agency using private insurance to pay for services required under this chapter, shall provide notice to the parent(s) and obtain informed parental consent in accordance with 8VAC20-81-300. (34 CFR 300.154)

G. Confidentiality of information.

1. Access rights. (34 CFR 300.613)

a. The local educational agency shall permit the parent(s) to inspect and review any education records relating to their children that are collected, maintained, or used by the local educational agency under this chapter. The local educational agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing in accordance with 8VAC20-81-160 and 8VAC20-81-210, or resolution session in accordance with 8VAC20-81-210, and in no case more than 45 calendar days after the request has been made.

b. The right to inspect and review education records under this section includes:

(1) The right to a response from the local educational agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the local educational agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

c. A local educational agency may presume that a parent has authority to inspect and review records relating to the parent's children unless the local educational agency has been provided a copy of a judicial order or decree, or other legally binding documentation, that the parent does not have the authority under applicable Virginia law governing such matters as guardianship, separation, and divorce.

2. Record of access. Each local educational agency shall keep a record of parties, except parents and authorized employees of the local educational agency, obtaining access to education records collected, maintained, or used under Part B of the Act, including the name of the party, the date of access, and the purpose for which the party is authorized to use the records. (34 CFR 300.614)

3. Record on more than one child. If any education record includes information on more than one child, the parent(s) of those children have the right to inspect and review only the information relating to their child or to be informed of the specific information requested. (34 CFR 300.615)

4. List of types and locations of information. Each local educational agency shall provide a parent(s) on request a list of the types and locations of education records collected, maintained, or used by the local educational agency. (34 CFR 300.616)

5. Fees. (34 CFR 300.617)

a. Each local educational agency may charge a fee for copies of records that are made for a parent(s) under this chapter if the fee does not effectively prevent the parent(s) from exercising their right to inspect and review those records.

b. A local educational agency may not charge a fee to search for or to retrieve information under this section.

c. A local educational agency may not charge a fee for copying a child's IEP that is required to be provided to the parent(s) in accordance with 8VAC20-81-110 E 7.

6. Amendment of records at parent's request. (34 CFR 300.618)

a. A parent(s) who believes that information in the education records collected, maintained, or used under this chapter is inaccurate or misleading or violates the privacy or other rights of the child may request the local educational agency that maintains the information to amend the information.

b. The local educational agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

c. If the local educational agency decides to refuse to amend the information in accordance with the request, it shall inform the parent(s) of the refusal and advise the parent(s) of the right to a hearing under subdivision 7 of this subsection.

7. Opportunity for a hearing. The local educational agency shall provide on request an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. (34 CFR 300.619)

8. Results of hearing. (34 CFR 300.620)

a. If, as a result of the hearing, the local educational agency decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

b. If, as a result of the hearing, the local educational agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the child's education records a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

c. Any explanation placed in the records of the child under this section shall:

(1) Be maintained by the local educational agency as part of the records of the child as long as the record or contested portion is maintained by the local educational agency; and

(2) If the records of the child or the contested portion is disclosed by the local educational agency to any party, the explanation shall also be disclosed to the party.

9. Hearing procedures. A hearing held under subdivision 7 of this subsection shall be conducted in accordance with the procedures under 34 CFR 99.22 of the Family Educational Rights and Privacy Act. (20 USC § 1232g; 34 CFR 300.621)

a. The local educational agency may:

(1) Develop local procedures for such a hearing process; or

(2) Obtain a hearing officer from the Supreme Court of Virginia's special education hearing officer list in accordance with the provisions of 8VAC20-81-210 H.

10. Consent. (34 CFR 300.32; 34 CFR 300.622)

a. Parental consent shall be obtained before personally identifiable information is disclosed to anyone other than officials of the local educational agency unless the information is contained in the education records, and the disclosure is authorized under the Family Education Rights and Privacy Act. (20 USC § 1232g).

b. Parental consent is not required before personally identifiable information is disclosed to officials of the local educational agencies collecting, maintaining, or using personally identifiable information under this chapter, except:

(1) Parental consent, or the consent of a child who has reached the age of majority, shall be obtained before personally identifiable information is released to officials

of any agency or institution providing or paying for transition services.

(2) If a child is enrolled, or is going to enroll in a private school that is not located in the local educational agency where the parent(s) resides, parental consent shall be obtained before any personally identifiable information about the child is released between officials in the local educational agency where the private school is located, and officials in the local educational agency where the parent(s) resides.

11. Safeguards. (34 CFR 300.623)

a. Each local educational agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

b. Each local educational agency shall ensure that electronic communications via emails or facsimiles regarding any matter associated with the child, including matters related to IEP meetings, disciplinary actions, or service delivery, be part of the child's educational record.

c. One official at each local educational agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

d. All persons collecting, maintaining, or using personally identifiable information shall receive training or instruction on Virginia's policies and procedures for ensuring confidentiality of the information.

e. Each local educational agency shall maintain for public inspection a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

12. Destruction of information. (34 CFR 300.624)

a. The local educational agency shall inform parents when personally identifiable information collected, maintained, or used under this chapter is no longer needed to provide educational services to the child.

b. This information shall be destroyed at the request of the parents. However, a permanent record of a student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed shall be maintained without time limitation.

c. The local educational agency shall comply with the Records Retention and Disposition Schedule of the Library of Virginia.

H. Electronic mail. If the local educational agency makes the option available, parent(s) of a child with a disability may elect to receive prior written notice, the procedural safeguards notice, and the notice of a request for due process, by electronic mail. (34 CFR 300.505)

I. Electronic signature. If an electronically filed document contains an electronic signature, the electronic signature has the legal effect and enforceability of an original signature. An electronic signature is an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. (Chapter 42.1 (§ 59.1-479 et seq.) of Title 59.1 of the Code of Virginia)

J. Audio and video recording.

1. The local educational agency shall permit the use of audio recording devices at meetings convened to determine a child's eligibility under 8VAC20-81-80; to develop, review, or revise the child's IEP under 8VAC20-81-110 F; and to review discipline matters under 8VAC20-81-160 D. The parent(s) shall inform the local educational agency before the meeting in writing, unless the parents cannot write in English, that they will be audio recording the meeting. If the parent(s) does not inform the local educational agency, the parent(s) shall provide the local educational agency with a copy of the audio recording. The parent(s) shall provide their own audio equipment and materials for audio recording. If the local educational agency audio records meetings or receives a copy of an audio recording from the parent(s), the audio recording becomes a part of the child's educational record.

2. The local educational agency may have policies that prohibit, limit, or otherwise regulate the use of:

a. Video recording devices at meetings convened pursuant to this chapter; or

b. Audio or video recording devices at meetings other than those meetings identified in subdivision 1 of this subsection.

3. These policies shall:

a. Stipulate that the recordings become part of the child's educational record;

b. Ensure that the policy is uniformly applied; and

c. If the policy prohibits the use of the devices, the policy shall provide for exceptions if they are necessary to ensure that the parent(s) understands the IEP, the special education process, or to implement other parental rights guaranteed under this chapter.

8VAC20-81-210. Due process hearing.

A. The Virginia Department of Education provides for an impartial special education due process hearing system to resolve disputes between parents and local educational agencies with respect to any matter relating to the: (§ 22.1-214 of the Code of Virginia; 34 CFR 300.121 and 34 CFR 300.507 through 34 CFR 300.518)

1. Identification of a child with a disability, including initial eligibility, any change in categorical identification, and any partial or complete termination of special education and related services;

2. Evaluation of a child with a disability (including disagreements regarding payment for an independent educational evaluation);

3. Educational placement and services of the child; and

4. Provision of a free appropriate public education to the child.

B. The Virginia Department of Education uses the impartial hearing officer system that is administered by the Supreme Court of Virginia.

C. The Virginia Department of Education uses the list of hearing officers maintained by the Office of the Executive Secretary of the Supreme Court of Virginia and its Rules of Administration for the names of individuals to serve as special education hearing officers. In accordance with the Rules of Administration, the Virginia Department of Education provides the Office of the Executive Secretary annually the names of those special education hearing officers who are recertified to serve in this capacity.

D. The Virginia Department of Education establishes procedures for:

1. Providing special education hearing officers specialized training on the federal and state special education law and regulations, as well as associated laws and regulations impacting children with disabilities, knowledge of disabilities and special education programs, case law, management of hearings, and decision writing.

2. Establishing the number of special education hearing officers who shall be certified to hear special education due process cases.

a. The Virginia Department of Education shall review annually its current list of special education hearing officers and determine the recertification status of each hearing officer.

b. Notwithstanding anything to the contrary in this subdivision, individuals on the special education hearing officers list on July 7, 2009, shall be subject to the Virginia Department of Education's review of recertification status based on past and current performance.

c. The ineligibility of a special education hearing officer continuing to serve in this capacity shall be based on the factors listed in subdivision 3 c of this subsection.

3. Evaluation, continued eligibility, and disqualification requirements of special education hearing officers:

a. The Virginia Department of Education shall establish procedures for evaluating special education hearing officers.

b. The first review of the recertification status of each special education hearing officer will be conducted within a reasonable time following July 7, 2009.

c. In considering whether a special education hearing officer will be certified or recertified, the Virginia Department of Education shall determine the number of hearing officers needed to hear special education due process cases, and consider matters related to the special education hearing officer's adherence to the factors in subdivision H 5 of this section, as well as factors involving the special education hearing officer's:

(1) Issuing an untimely decision, or failing to render decision within regulatory time frames;

(2) Unprofessional demeanor;

(3) Inability to conduct an orderly hearing;

(4) Inability to conduct a hearing in conformity with the federal and state laws and regulations regarding special education;

(5) Improper ex parte contacts;

(6) Violations of due process requirements;

(7) Mental or physical incapacity;

(8) Unjustified refusal to accept assignments;

(9) Failure to complete training requirements as outlined by the Virginia Department of Education;

(10) Professional disciplinary action; or

(11) Issuing a decision that contains:

(a) Inaccurate appeal rights of the parents; or

(b) No controlling case or statutory authority to support the findings.

d. When a special education hearing officer has been denied certification or recertification based on the factors in subdivision 3 c of this section, the Virginia Department of Education shall notify the special education hearing officer and the Office of the Executive Secretary of the Supreme Court of Virginia that the hearing officer is no longer certified to serve as a special education hearing officer.

Upon notification of denial of certification or recertification, the hearing officer may, within 10 calendar days of the postmark of the letter of notification, request of the Superintendent of Public Instruction, or his designee, reconsideration of the decision. Such request shall be in writing and shall contain any additional information desired for consideration. The

Superintendent of Public Instruction, or his designee, shall render a decision within 10 calendar days of receipt of the request for reconsideration. The Virginia Department of Education shall notify the hearing officer and the Office of the Executive Secretary of the Supreme Court of Virginia of its decision.

4. Reviewing and analyzing the decisions of special education hearing officers, and the requirement for special education hearing officers to reissue decisions, relative to correct use of citations, readability, and other errors such as incorrect names or conflicting data, but not errors of law that are reserved for appellate review.

E. Filing the request for a due process hearing. If any of the following provisions are challenged by one of the parties in a due process hearing, the special education hearing officer determines the outcome of the case going forward.

1. The request for due process shall allege a violation that happened not more than two years before the parent(s) or the local educational agency knew or should have known about the alleged action that forms the basis of the request for due process. This timeline does not apply if the request for a due process hearing could not be filed because: (34 CFR 300.507(a) and 34 CFR 300.511(e) and (f))

a. The local educational agency specifically misrepresented that it had resolved the issues identified in the request; or

b. The local educational agency withheld information that it was required to provide under the IDEA.

2. A local educational agency may initiate a due process hearing to resolve a disagreement when the parent(s) withholds or refuses consent for an evaluation or an action that requires parental consent to provide services to a student who has been identified as a student with a disability or who is suspected of having a disability. However, a local educational agency may not initiate a due process hearing to resolve parental withholding or refusing consent for the initial provision of special education to the child. (34 CFR 300.300(a)(3)(i) and 34 CFR 300.300(b)(3))

3. In circumstances involving disciplinary actions, the parent(s) of a student with a disability may request an expedited due process hearing if the parent(s) disagrees with: (34 CFR 300.532)

a. The manifestation determination regarding whether the child's behavior was a manifestation of the child's disability; or

b. Any decision regarding placement under the disciplinary procedures.

4. In circumstances involving disciplinary actions, the local educational agency may request an expedited hearing if the school division believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others. (34 CFR 300.532)

F. Procedure for requesting a due process hearing. (34 CFR 300.504(a)(2), 34 CFR 300.507, 34 CFR 300.508 and 34 CFR 300.511)

1. A request for a hearing shall be made in writing to the Virginia Department of Education. A copy of that request shall be delivered contemporaneously by the requesting party to the other party.

a. If the local educational agency initiates the due process hearing, the local educational agency shall advise the parent(s) and the Virginia Department of Education in writing of this action.

b. If the request is received solely by the Virginia Department of Education, the Virginia Department of Education shall immediately notify the local educational agency by telephone or by facsimile and forward a copy of the request to the local educational agency as soon as reasonably possible, including those cases where mediation is requested.

c. The request for a hearing shall be kept confidential by the local educational agency and the Virginia Department of Education.

2. A party may not have a due process hearing until that party or the attorney representing the party files a notice that includes:

a. The name of the child;

b. The address of the residence of the child (or available contact information in the case of a homeless child);

c. The name of the school the child is attending;

d. A description of the nature of the child's problem relating to the proposed or refused initiation or change, including facts relating to the problem; and

e. A proposed resolution of the problem to the extent known and available to the parent(s) at the time of the notice.

3. The due process notice shall be deemed sufficient unless the party receiving the notice notifies the special education hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements listed in subdivision 2 of this subsection.

4. The party receiving the notice may challenge the sufficiency of the due process notice by providing a notification of the challenge to the special education hearing officer within 15 calendar days of receipt the due process request. A copy of the challenge shall be sent to the other party and the Virginia Department of Education.

5. Within five calendar days of receipt of the notification challenging the sufficiency of the due process notice, the special education hearing officer shall determine on the face of the notice whether the notification meets the requirements in subdivision 2 of this subsection.

6. The special education hearing officer has the discretionary authority to permit either party to raise issues at the hearing that were not raised in the notice by the party requesting the due process hearing in light of particular facts and circumstances of the case.

7. The local educational agency shall upon receipt of a request for a due process hearing, inform the parent(s) of the availability of mediation described in 8VAC20-81-190 and of any free or low-cost legal and other relevant services available in the area. The local educational agency also shall provide the parent(s) with a copy of the procedural safeguards notice upon receipt of the parent's(s') first request for a due process hearing in a school year.

G. Amendment of due process notice. (34 CFR 300.508(d)(3))

1. A party may amend its due process notice only if:

a. The other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or

b. The special education hearing officer grants permission, except that the special education hearing officer may only grant such permission at any time not later than five calendar days before a due process hearing occurs.

2. The applicable timeline for a due process hearing under this part shall begin again at the time the party files an amended notice, including the timeline for resolution sessions.

H. Assignment of the special education hearing officer. (34 CFR 300.511)

1. Within five business days of receipt of the request for a nonexpedited hearing and three business days of receipt of the request for an expedited hearing:

a. The local educational agency shall contact the Supreme Court of Virginia for the appointment of the special education hearing officer.

b. The local educational agency contacts the special education hearing officer to confirm availability, and upon acceptance, notifies the special education hearing officer in writing, with a copy to the parent(s) and the Virginia Department of Education of the appointment.

2. Upon request, the Virginia Department of Education shall share information on the qualifications of the special education hearing officer with the parent(s) and the local educational agency.

3. Either party has five business days after notice of the appointment is received or the basis for the objection becomes known to the party to object to the appointment by presenting a request for consideration of the objection to the special education hearing officer.

a. If the special education hearing officer's ruling on the objection does not resolve the objection, then within five business days of receipt of the ruling the party may proceed to file an affidavit with the Executive Secretary of the Supreme Court of Virginia. The failure to file a timely objection serves as a waiver of objections that were known or should have been known to the party.

b. The filing of a request for removal or disqualification shall not stay the proceedings or filing requirements in any way except that the hearing may not be conducted until the Supreme Court of Virginia issues a decision on the request in accordance with its procedures.

c. If a special education hearing officer recuses himself or is otherwise disqualified, the Supreme Court of Virginia shall ensure that another special education hearing officer is promptly appointed.

4. A hearing shall not be conducted by a person who:

a. Has a personal or professional interest that would conflict with that person's objectivity in the hearing;

b. Is an employee of the Virginia Department of Education or the local educational agency that is involved in the education and care of the child. A person who otherwise qualifies to conduct a hearing is not an employee of the agency solely because he is paid by the agency to serve as a special education hearing officer; or

c. Represents schools or parents in any matter involving special education or disability rights, or is an employee of any parent rights agency or organization, or disability rights agency or organization.

5. A special education hearing officer shall:

a. Possess knowledge of, and the ability to understand, the provisions of the Act, federal and state regulations pertaining to the Act, and legal interpretations of the Act by federal and state courts;

b. Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

c. Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

I. Duration of the special education hearing officer's authority.

1. The special education hearing officer's authority begins with acceptance of the case assignment.

2. The special education hearing officer has authority over a due process proceeding until:

a. Issuance of the special education hearing officer's decision; or

b. The Supreme Court of Virginia revokes such authority by removing or disqualifying the special education hearing officer.

J. Child's status during administrative or judicial proceedings. (34 CFR 300.518; 34 CFR 300.533)

1. Except as provided in 8VAC20-81-160, during the pendency of any administrative or judicial proceeding, the child shall remain in the current educational placement unless the parent(s) of the child and local educational agency agree otherwise;

2. If the proceeding involves an application for initial admission to public school, the child, with the consent of the parent(s), shall be placed in the public school until the completion of all the proceedings;

3. If the decision of a special education hearing officer agrees with the child's parent(s) that a change of placement is appropriate, that placement shall be treated as an agreement between the local educational agency and the parent(s) for the purposes of subdivision 1 of this section;

4. The child's placement during administrative or judicial proceedings regarding a disciplinary action by the local educational agency shall be in accordance with 8VAC20-81-160;

5. The child's placement during administrative or judicial proceedings regarding a placement for noneducational reasons by a Comprehensive Services Act team shall be in accordance with 8VAC20-81-150; or

6. If the proceeding involves an application for initial services under Part B of the Act from Part C and the child is no longer eligible for Part C services because the child has turned three, the school division is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services, the school division shall provide those special education and related services that are not in dispute between the agency and the school division.

K. Rights of parties in the hearing. (§ 22.1-214 C of the Code of Virginia; 34 CFR 300.512)

1. Any party to a hearing has the right to:

a. Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

b. Present evidence and confront, cross-examine, and request that the special education hearing officer compel the attendance of witnesses;

c. Move that the special education hearing officer prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

d. Obtain a written or, at the option of the parent(s), electronic, verbatim record of the hearing; and

e. Obtain written or, at the option of the parent(s), electronic findings of fact and decisions.

2. Additional disclosure of information shall be given as follows:

a. At least five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing; and

b. A special education hearing officer may bar any party that fails to comply with subdivision 2 a of this subsection from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

3. Parental rights at hearings.

a. A parent(s) involved in a hearing shall be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

b. The record of the hearing and the findings of fact and decisions shall be provided at no cost to the parent(s), even though the applicable appeal period has expired.

L. Responsibilities of the Virginia Department of Education. The Virginia Department of Education shall: (34 CFR 300.513(d), 34 CFR 300.509 and 34 CFR 300.511)

1. Maintain and monitor the due process hearing system and establish procedures for its operation;

2. Ensure that the local educational agency discharges its responsibilities in carrying out the requirements of state and federal statutes and regulations;

3. Develop and disseminate a model form to be used by the parent(s) to give notice in accordance with the contents of the notice listed in subdivision F 2 of this section;

4. Maintain and ensure that each local educational agency maintains a list of persons who serve as special education hearing officers. This list shall include a statement of the qualifications of each special education hearing officer;

5. Provide findings and decisions of all due process hearings to the state special education advisory committee and to the public after deleting any personally identifiable information;

6. Review and approve implementation plans filed by local educational agencies pursuant to hearing officer decisions in hearings that have been fully adjudicated; and

7. Ensure that noncompliance findings identified through due process or court action are corrected as soon as possible, but in no case later than one year from identification.

M. Responsibilities of the parent. In a due process hearing, the parent(s) shall: (34 CFR 300.512)

1. Decide whether the hearing will be open to the public;

2. Make timely and necessary responses to the special education hearing officer personally or through counsel or other authorized representatives;

3. Assist in clarifying the issues for the hearing and participate in the pre-hearing conference scheduled by the special education hearing officer;

4. Provide information to the special education hearing officer to assist in the special education hearing officer's administration of a fair and impartial hearing;

5. Provide documents and exhibits necessary for the hearing within required timelines; and

6. Comply with timelines, orders, and requests of the special education hearing officer.

N. Responsibilities of the local educational agency. The local educational agency shall: (34 CFR 300.504, 34 CFR 300.506, 34 CFR 300.507 and 34 CFR 300.511)

1. Maintain a list of the persons serving as special education hearing officers. This list shall include a statement of the qualifications of each special education hearing officer;

2. Upon request, provide the parent(s) a form for use to provide notice that they are requesting a due process hearing;

3. Provide the parent(s) a copy of their procedural safeguards upon receipt of the parent's(s') first request for a due process hearing in a school year;

4. Inform the parent(s) at the time the request is made of the availability of mediation;

5. Inform the parent(s) of any free or low-cost legal and other relevant services if the parent(s) requests it, or anytime the parent(s) or the local educational agency initiates a hearing;

6. Assist the special education hearing officer, upon request, in securing the location, transcription, and recording equipment for the hearing;

7. Make timely and necessary responses to the special education hearing officer;

8. Assist in clarifying the issues for the hearing and participate in the pre-hearing conference scheduled by the special education hearing officer;

9. Upon request, provide information to the special education hearing officer to assist in the special education hearing officer's administration of a fair and impartial hearing;

10. Provide documents and exhibits necessary for the hearing within required timelines;

11. Comply with timelines, orders, and requests of the special education hearing officer;

12. Maintain a file, which is a part of the child's scholastic record, containing communications, exhibits, decisions, and mediation communications, except as prohibited by laws or regulations;

13. Forward all necessary communications to the Virginia Department of Education and parties as required;

14. Notify the Virginia Department of Education when a special education hearing officer's decision has been appealed to court by either the parent(s) or the local educational agency;

15. Forward the record of the due process proceeding to the appropriate court for any case that is appealed;

16. Develop and submit to the Virginia Department of Education an implementation plan, with copy to the parent(s), within 45 calendar days of the hearing officer's decision in hearings that have been fully adjudicated.

a. If the decision is appealed or the school division is considering an appeal and the decision is not an agreement by the hearing officer with the parent(s) that a change in placement is appropriate, then the decision and submission of implementation plan is held in abeyance pursuant to the appeal proceedings.

b. In cases where the decision is an agreement by the hearing officer with the parent(s) that a change in placement is appropriate, the hearing officer's decision must be implemented while the case is appealed and an implementation plan must be submitted by the local educational agency.

c. The implementation plan:

(1) Must be based upon the decision of the hearing officer;

(2) Shall include the revised IEP if the decision affects the child's educational program; and

(3) Shall contain the name and position of a case manager in the local educational agency charged with implementing the decision; and

17. Provide the Virginia Department of Education, upon request, with information and documentation that noncompliance findings identified through due process or court action are corrected as soon as possible but in no case later than one year from issuance of the special education hearing officer's decision.

O. Responsibilities of the special education hearing officer. The special education hearing officer shall: (34 CFR 300.511 through 34 CFR 300.513; and 34 CFR 300.532)

1. Within five business days of agreeing to serve as the special education hearing officer, secure a date, time, and location for the hearing that are convenient to both parties, and notify both parties to the hearing and the Virginia Department of Education, in writing, of the date, time, and location of the hearing.

2. Ascertain whether the parties will have attorneys or others assisting them at the hearing. The special education hearing officer shall send copies of correspondence to the parties or their attorneys.

3. Conduct a prehearing conference via a telephone conference call or in person unless the special education hearing officer deems such conference unnecessary. The prehearing conference may be used to clarify or narrow issues and determine the scope of the hearing. If a prehearing conference is not held, the special education hearing officer shall document in the written prehearing report to the Virginia Department of Education the reason for not holding the conference.

4. Upon request by one of the parties to schedule a prehearing conference, determine the scope of the conference and conduct the conference via telephone call or in person. If the special education hearing officer deems such conference unnecessary, the special education hearing officer shall document in writing to the parties, with copy to the Virginia Department of Education, the reason(s) for not holding the conference.

5. At the prehearing stage:

a. Discuss with the parties the possibility of pursuing mediation and review the options that may be available to settle the case;

b. Determine when an IDEA due process notice also indicates a Section 504 dispute, whether to hear both disputes in order to promote efficiency in the hearing process and avoid confusion about the status of the Section 504 dispute; and

c. Document in writing to the parties, with copy to the Virginia Department of Education, prehearing determinations including a description of the right to appeal the case directly to either a state or federal court.

6. Monitor the mediation process, if the parties agree to mediate, to ensure that mediation is not used to deny or delay the right to a due process hearing, that parental rights are protected, and that the hearing is concluded within regulatory timelines.

7. Ascertain from the parent(s) whether the hearing will be open to the public.

8. Ensure that the parties have the right to a written or, at the option of the parent(s), an electronic verbatim record of the proceedings and that the record is forwarded to the local educational agency for the file after making a decision.

9. Receive a list of witnesses and documentary evidence for the hearing (including all evaluations and related recommendations that each party intends to use at the hearing) no later than five business days prior to the hearing.

10. Ensure that the local educational agency has appointed a surrogate parent in accordance with 8VAC20-81-220 when the parent(s) or guardian is not available or cannot be located.

11. Ensure that an atmosphere conducive to fairness is maintained at all times in the hearing.

12. Not require the parties or their representatives to submit briefs as a condition of rendering a decision. The special education hearing officer may permit parties to submit briefs, upon the parties' request.

13. Base findings of fact and decisions solely upon the preponderance of the evidence presented at the hearing and applicable state and federal law and regulations.

14. Report findings of fact and decisions in writing to the parties and their attorneys and the Virginia Department of Education. If the hearing is an expedited hearing, the special education hearing officer may issue an oral decision at the conclusion of the hearing, followed by a written decision within 10 school days of the hearing being held.

15. Include in the written findings:

a. Findings of fact relevant to the issues that are determinative of the case;

b. Legal principles upon which the decision is based, including references to controlling case law, statutes, and regulations;

c. An explanation of the basis for the decision for each issue that is determinative of the case; and

d. If the special education hearing officer made findings that required relief to be granted, then an explanation of the relief granted may be included in the decision.

16. Subject to the procedural determinations described in subdivision 17 of this subsection, the decision made by a special education hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

17. In matters alleging a procedural violation, a special education hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies:

a. Impeded the child's right to a free appropriate public education;

b. Significantly impeded the parent's(s') opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or

c. Caused a deprivation of educational benefits. Nothing in this subdivision shall be construed to preclude a special education hearing officer from ordering a local educational agency to comply with procedural requirements under 34 CFR 300.500 through 34 CFR 300.536.

18. Maintain a well-documented record and return the official record to the local educational agency upon conclusion of the case.

19. Determine in a hearing regarding a manifestation determination whether the local educational agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements in 8VAC20-81-160.

P. Authority of the special education hearing officer. The special education hearing officer has the authority to: (§ 22.1-214 B of the Code of Virginia; 34 CFR 300.515, 34 CFR 300.512 and 34 CFR 300.532)

1. Exclude any documentary evidence that was not provided and any testimony of witnesses who were not identified at least five business days prior to the hearing;

2. Bar any party from introducing evaluations or recommendations at the hearing that have not been disclosed to all other parties at least five business days prior to the hearing without the consent of the other party;

3. Issue subpoenas requiring testimony or the productions of books, papers, and physical or other evidence:

a. The special education hearing officer shall rule on any party's motion to quash or modify a subpoena. The special education hearing officer shall issue the ruling in writing to all parties with copy to the Virginia Department of Education.

b. The special education hearing officer or a party may request an order of enforcement for a subpoena in the circuit court of the jurisdiction in which the hearing is to be held.

c. Any person so subpoenaed may petition the circuit court for a decision regarding the validity of such subpoena if the special education hearing officer does not quash or modify the subpoena after objection;

4. Administer an oath to witnesses testifying at a hearing and require all witnesses to testify under oath or affirmation when testifying at a hearing;

5. Stop hostile or irrelevant pursuits in questioning and require that the parties and their attorneys, advocates, or advisors comply with the special education hearing officer's rules and with relevant laws and regulations;

6. Excuse witnesses after they testify to limit the number of witnesses present at the same time or sequester witnesses during the hearing;

7. Refer the matter in dispute to a conference between the parties when informal resolution and discussion appear to be desirable and constructive. This action shall not be used to deprive the parties of their rights and shall be exercised only when the special education hearing officer determines that the best interests of the child will be served;

8. Require an independent educational evaluation of the child. This evaluation shall be at public expense and shall be conducted in accordance with 8VAC20-81-170;

9. a. At the request of either party for a nonexpedited hearing, grant specific extensions of time beyond the periods set out in this chapter, if in the best interest of the child. This action shall in no way be used to deprive the parties of their rights and shall be exercised only when the requesting party has provided sufficient information that the best interests of the child will be served by the grant of an extension. The special education hearing officer may grant such requests for cause, but not for personal attorney convenience. Changes in hearing dates or timeline extensions shall be noted in writing and sent to all parties and to the Virginia Department of Education.

b. In instances where neither party requests an extension of time beyond the period set forth in this chapter, and mitigating circumstances warrant an extension, the special education hearing officer shall review the specific

circumstances and obtain the approval of the Virginia Department of Education to the extension;

10. Take action to move the case to conclusion, including dismissing the pending proceeding if either party refuses to comply in good faith with the special education hearing officer's orders;

11. Set guidelines regarding media coverage if the hearing is open to the public;

12. Enter a disposition as to each determinative issue presented for decision and identify and determine the prevailing party on each issue that is decided; and

13. Hold an expedited hearing when a parent of a child with a disability disagrees with any decision regarding a change in placement for a child who violates a code of student conduct, or a manifestation determination, or a local educational agency believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others.

a. The hearing shall occur within 20 school days of the date the due process notice is received. The special education hearing officer shall make a determination within 10 school days after the hearing.

b. Unless the parents and local educational agency agree in writing to waive the resolution meeting or agree to use the mediation process:

(1) A resolution meeting shall occur within seven days of receiving notice of the due process notice; and

(2) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process notice.

c. Once a determination is made, the special education hearing officer may:

(1) Return the child with a disability to the placement from which the child was removed if the special education hearing officer determines that the removal was a violation of special education disciplinary procedures or that the child's behavior was a manifestation of the child's disability; or

(2) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the special education hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

Q. Timelines for nonexpedited due process hearings. (34 CFR 300.510 and 34 CFR 300.515)

1. Resolution meeting.

a. Within 15 days of receiving notice of the parent's(s') due process notice, and prior to the initiation of the due process hearing, the school division shall convene a meeting with the parent and the relevant member(s) of the IEP Team who have specific knowledge of the facts identified in the due process notice that:

(1) Includes a representative of the local educational agency who has decision making authority on behalf of the local educational agency; and

(2) May not include an attorney of the local educational agency unless the parent is accompanied by an attorney.

b. The purpose of the meeting is for the parent of the child to discuss the due process issues, and the facts that form the basis of the due process request, so that the local educational agency has the opportunity to resolve the dispute that is the basis for the due process request.

c. The meeting described in subdivisions 1 a and 1 b of this subsection need not be held if:

(1) The parent and the local educational agency agree in writing to waive the meeting; or

(2) The parent and the local educational agency agree to use the mediation process described in this chapter.

d. The parent and the local educational agency determine the relevant members of the IEP Team to attend the meeting.

e. The parties may enter into a confidentiality agreement as part of their resolution agreement. There is nothing in this chapter, however, that requires the participants in a resolution meeting to keep the discussion confidential or make a confidentiality agreement a condition of a parents' participation in the resolution meeting.

2. Resolution period.

a. If the local educational agency has not resolved the due process issues to the satisfaction of the parent within 30 calendar days of the receipt of the due process notice, the due process hearing may occur.

b. Except as provided in subdivision 3 of this subsection, the timeline for issuing a final decision begins at the expiration of this 30-calendar-day period.

c. Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding subdivisions 2 a and 2 b of this subsection, the failure of the parent filing a due process notice to participate in the resolution meeting delays the timelines for the resolution process and the due process hearing until the meeting is held.

d. If the local educational agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented in

accordance with the provision in 8VAC20-81-110 E 4), the local educational agency may at the conclusion of the 30-calendar-day period, request that a special education hearing officer dismiss the parent's due process request.

e. If the local educational agency fails to hold the resolution meeting specified in subdivision 1 a of this subsection within 15 calendar days of receiving notice of a parent's request for due process or fails to participate in the resolution meeting, the parent may seek the intervention of a special education hearing officer to begin the due process hearing timeline.

3. Adjustments to 30-calendar-day resolution period. The 45-calendar-day timeline for the due process starts the day after one of the following events:

a. Both parties agree in writing to waive the resolution meeting;

b. After either the mediation or resolution meeting starts but before the end of the 30-calendar-day period, the parties agree in writing that no agreement is possible; or

c. If both parties agree in writing to continue the mediation at the end of the 30-calendar-day resolution period, but later, the parent or local educational agency withdraws from the mediation process.

4. Written settlement agreement. If a resolution to the dispute is reached at the meeting described in subdivisions 1 a and 1 b of this subsection, the parties shall execute a legally binding agreement that is:

a. Signed by both the parent and a representative of the local educational agency who has the authority to bind the local educational agency; and

b. Enforceable in any Virginia court of competent jurisdiction or in a district court of the United States.

5. Agreement review period. If the parties execute an agreement pursuant to subdivision 4 of this subsection, a party may void the agreement within three business days of the agreement's execution.

6. The special education hearing officer shall ensure that, not later than 45 calendar days after the expiration of the 30-calendar-day period under subdivision 2 or the adjusted time periods described in subdivision 3 of this subsection:

a. A final decision is reached in the hearing; and

b. A copy of the decision is mailed to each of the parties.

7. The special education hearing officer shall document in writing, within five business days, changes in hearing dates or extensions and send documentation to all parties and the Virginia Department of Education.

8. Each hearing involving oral arguments shall be conducted at a time and place that is reasonably convenient to the parent(s) and child involved.

9. The local educational agency is not required to schedule a resolution session if the local educational agency requests the due process hearing. The 45-day timeline for the special education hearing officer to issue the decision after the local educational agency's request for a due process hearing is received by the parent(s) and the Virginia Department of Education. However, if the parties elect to use mediation, the 30-day resolution process is still applicable.

R. Timelines for expedited due process hearings. (34 CFR 300.532(c))

1. The expedited due process hearing shall occur within 20 school days of the date the due process request is received. The special education hearing officer shall make a determination within 10 school days after the hearing.

2. Unless the parents and local educational agency agree in writing to waive the resolution meeting or agree to use the mediation process described in 8VAC20-81-190:

a. A resolution meeting shall occur within seven days of receiving notice of the due process complaint.

b. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

c. The resolution period is part of, and not separate from, the expedited due process hearing timeline.

3. Document in writing within five business days any changes in hearing dates and send documentation to all parties and the Virginia Department of Education.

S. Costs of due process hearing and attorneys' fees. (34 CFR 300.517)

1. The costs of an independent educational evaluation ordered by the special education hearing officer, special education hearing officer, court reporters, and transcripts are shared equally by the local educational agency and the Virginia Department of Education.

2. The local educational agency is responsible for its own attorneys' fees.

3. The parent(s) are responsible for their attorneys' fees. If the parent(s) is the prevailing party, the parent(s) has the right to petition either a state circuit court or a federal district court for an award of reasonable attorneys' fees as part of the costs.

4. A state circuit court or a federal district court may award reasonable attorneys' fees as part of the costs to the

parent(s) of a child with a disability who is the prevailing party.

5. The court may award reasonable attorneys' fees only if the award is consistent with the limitations, exclusions, exceptions, and reductions in accordance with the Act and its implementing regulations and 8VAC20-81-310.

T. Right of appeal. (34 CFR ~~300.516)~~ 300.516; § 22.1-214 D of the Code of Virginia)

1. A decision by the special education hearing officer in any hearing, including an expedited hearing, is final and binding unless the decision is appealed by a party in a state circuit court within 180 days of the issuance of the decision, or in a federal district court within 90 days of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Act without regard to the amount in controversy.

2. On appeal, the court receives the record of the administrative proceedings, hears additional evidence at the request of a party, bases its decision on a preponderance of evidence, and grants the relief that the court determines to be appropriate.

3. If the special education hearing officer's decision is appealed in court, implementation of the special education hearing officer's order is held in abeyance except in those cases where the special education hearing officer has agreed with the child's parent(s) that a change in placement is appropriate in accordance with subsection J of this section. In those cases, the special education hearing officer's order shall be implemented while the case is being appealed.

4. If the special education hearing officer's decision is not implemented, a complaint may be filed with the Virginia Department of Education for an investigation through the provisions of 8VAC20-81-200.

U. Nothing in this chapter prohibits or limits rights under other federal laws or regulations. (34 CFR 300.516)

8VAC20-81-220. Surrogate parent procedures.

A. Role of surrogate parent. The surrogate parent appointed in accordance with this section represents the child in all matters relating to the identification, evaluation, or educational placement of the child; or the provision of a free appropriate public education to the child. (34 CFR 300.519(g))

B. Appointment of surrogate parents.

1. Children, aged two to 21, inclusive, who are suspected of having or determined to have disabilities do not require a surrogate parent if ~~: a. The~~ the parent(s) or guardians are allowing relatives or private individuals to act as a parent ~~;~~.

~~b. The child is in the custody of the local department of social services or a licensed child placing agency, and termination of parental rights has been granted by a juvenile and domestic relations district court of competent jurisdiction in accordance with § 16.1-283, 16.1-277.01, or 16.1-277.02 of the Code of Virginia. The foster parent for that child may serve as the parent of the child for the purposes of any special education proceedings; or~~

~~c. The child is in the custody of a local department of social services or a licensed child placing agency, and a permanent foster care placement order has been entered by a juvenile and domestic relations district court of competent jurisdiction in accordance with § 63.2-908 of the Code of Virginia. The permanent foster parent named in the order for that child may serve as the parent of the child for the purposes of any special education proceedings.~~

2. Unless ~~one of~~ the ~~exceptions~~ exception outlined in subdivision 1 of this subsection applies, the local educational agency shall appoint a surrogate parent for a child, aged two to 21, inclusive, who is suspected of having or determined to have a disability when: (34 CFR 300.519(a))

a. No parent, as defined in 8VAC20-81-10, can be identified;

b. The local educational agency, after reasonable efforts, cannot discover the whereabouts of a parent;

c. The child is a ward of the state and either subdivision 1 a or 1 b of this subsection is also met; or

d. The child is an unaccompanied homeless youth as defined in § 725(6) of the McKinney-Vento Homeless Assistance Act (42 USC § 11434a(6)) and § 22.1-3 of the Code of Virginia and either subdivision 1 a or 1 b of this subsection is met.

3. The local educational agency shall appoint a surrogate parent as the educational representative for a child who reaches the age of majority if the local educational agency has received written notification that the child is not competent to provide informed consent in accordance with 8VAC20-81-180 C 3 or C 4 and no family member is available to serve as the child's educational representative.

4. If the child is a ward of the state, the judge overseeing the child's case may appoint a surrogate parent as the educational representative of the child. The appointed surrogate shall meet the requirements of subdivision E 1 c of this section. (34 CFR 300.519(c))

C. Procedures for surrogate parents.

1. The local educational agency shall establish procedures in accordance with the requirements of this chapter, for determining whether a child needs a surrogate parent. (34 CFR 300.519(b))

2. The local educational agency shall establish procedures for assigning a surrogate parent to an eligible child. The surrogate parent shall be appointed by the local educational agency superintendent or designee within 30 calendar days of the determination that a surrogate parent is necessary. (34 CFR 300.519(b) and (h))

a. The appointment having been effected, the local educational agency shall notify in writing:

(1) The child with a disability, aged two to 21, inclusive, as appropriate to the disability;

(2) The surrogate parent-appointee; and

(3) The person charged with responsibility for the child.

b. The surrogate parent serves for the duration of the school year for which the surrogate parent is appointed unless a shorter time period is appropriate given the content of the child's IEP.

c. If the child requires the services of a surrogate parent during the summer months, the local educational agency shall extend the appointment as needed, consistent with timelines required by law.

d. At the conclusion of each school year, the appointment of surrogate parents shall be renewed or not renewed following a review by the local educational agency.

3. Each local educational agency shall establish procedures that include conditions and methods for changing or terminating the assignment of a surrogate parent before that surrogate parent's appointment has expired. Established procedures shall provide the right to request a hearing to challenge the qualifications or termination if the latter occurs prior to the end of the term of appointment. The assignment of a surrogate parent may be terminated only when one or more of the circumstances occur as follows:

a. The child reaches the age of majority and rights are transferred to the child or to an educational representative who has been appointed for the child in accordance with the procedures in 8VAC20-81-180;

b. The child is found no longer eligible for special education services and the surrogate parent has consented to the termination of services;

c. Legal guardianship for the child is transferred to a person who is able to carry out the role of the parent;

d. The parent(s), whose whereabouts were previously unknown, are now known and available; or

e. The appointed surrogate parent is no longer eligible according to subsection E of this section.

D. Identification and recruitment of surrogate parents.

1. The local educational agency shall develop and maintain a list of individuals within its jurisdiction who are qualified to serve as surrogate parents. It may be necessary for the local educational agency to go beyond jurisdictional limits in generating a list of potentially qualified surrogate parents.

2. Individuals who are not on the local educational agency list may be eligible to serve as surrogate parents, subject to the local educational agency's discretion. In such situations, the needs of the individual child and the availability of qualified persons who are familiar with the child and who would otherwise qualify shall be considerations in the local educational agency's determination of surrogate eligibility. Other factors that warrant the local educational agency's attention include:

a. Consideration of the appointment of a relative to serve as surrogate parent; and

b. ~~Consideration of the appointment of a foster parent who has the knowledge and skills to represent the child adequately; and c.~~ The appropriateness of the child's participation in the selection of the surrogate parent.

E. Qualifications of surrogate parents. (34 CFR 300.519(d), (e), and (f))

1. The local educational agency shall ensure that a person appointed as a surrogate:

a. Has no personal or professional interest that conflicts with the interest of the child;

b. Has knowledge and skills that ensure adequate representation of the child;

c. Is not an employee of the Virginia Department of Education, the local educational agency, or any other agency that is involved in the education or care of the child; and

d. Is of the age of majority.

2. A person who otherwise qualifies to be a surrogate parent is not an employee of the agency solely because the person is paid by the agency to serve as a surrogate parent.

3. If the child is an unaccompanied homeless youth, appropriate staff of an emergency shelter, transition shelter, independent living program, or street outreach program may be appointed as a temporary surrogate even though the staff member is an employee of an agency that is involved in the education or care of the child. The temporary surrogate shall otherwise meet the qualifications of a surrogate, and may serve only until a surrogate parent

meeting all of the qualifications outlined in this section can be assigned.

F. Rights of surrogate parents. The surrogate parent, when representing the child's educational interest, has the same rights as those accorded to parents under this chapter. (34 CFR 300.519(g)).

Part IV
Funding

8VAC20-81-240. Eligibility for funding.

A. Each local school division and state-operated program shall maintain current policies and procedures and supporting documentation to demonstrate compliance with the Act and the Virginia Board of Education regulations governing the provision of special education and related services, licensure and accreditation. Changes to the local policies and procedures shall be made as determined by local need, as a result of changes in state or federal laws or regulations, as a result of required corrective action, or as a result of decisions reached in administrative proceedings, judicial determinations, or other findings of noncompliance. Revisions to policies and procedures must be approved by local school boards for local school divisions, or the Board of Visitors for the Virginia School for the Deaf and the Blind at Staunton. State-operated programs shall submit revisions to policies and procedures to the state special education advisory committee for review. (34 CFR 300.201; 34 CFR 300.220)

B. All disbursement is subject to the availability of funds. In the event of insufficient state funds, disbursement may be prorated pursuant to provisions of the Virginia Appropriation Act.

8VAC20-81-270. Funds to assist with the education of children with disabilities residing in state-operated programs.

A. State mental health facilities. State funds for education for children in state mental health facilities are appropriated to the Virginia Department of Education. Local funds for such education shall be an amount equal to the required local per pupil expenditure for the period during which a local school division has a child in residence at a state mental health facility. Such amount shall be transferred by the Virginia Department of Education from the local school division's basic aid funds to the mental health facilities. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

B. State training centers for people with intellectual disabilities. State funds for special education and related services for children with disabilities in state training centers for people with intellectual disabilities are appropriated to the Department of Behavioral Health and Developmental Services. Local funds for such education shall be an amount equal to the required local per pupil expenditure for the period during which a local school division has a child in residence at a state mental retardation facility. Such amount shall be transferred by the Virginia Department of Education from the local school division's basic aid funds to the centers. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

C. State specialized children's hospitals. State funds for special education and related services are appropriated to the Virginia Department of Education. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

D. Woodrow Wilson Rehabilitation Center. State funds for education for children are appropriated to the Virginia Department of Education. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

E. Regional and local juvenile detention homes. State funds for education services are appropriated to the Virginia Department of Education. (Virginia Appropriation Act; 34 CFR 300.705)

F. State-operated diagnostic clinics. State funds for the employment of educational consultants assigned to child development and other specialty clinics operated by the state Department of Health are appropriated to the Virginia Department of Education. (Virginia Appropriation Act; 34 CFR 300.705)

G. Virginia Department of Correctional Education. State funds for the education of children, including children with disabilities, are appropriated to the Virginia Department of Correctional Education for the education of all children residing in state adult or juvenile correctional facilities and juveniles committed to the Department of Juvenile Justice and placed in a private facility under contract with the Department of Juvenile Justice. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

H. The Virginia School for the Deaf and the Blind at Staunton. State funds are appropriated directly to the school to operate day and residential special education programs for children placed by local school divisions. Local funds for the education of children at the Virginia school shall be the amount equal to the local per pupil expenditure for the period in which the child is a resident of the school. Such amount shall be transferred by the Virginia Department of Education from the local school division's basic aid funds to the Virginia ~~schools~~ school. (Virginia Appropriation Act; 34 CFR 300.705)

~~I. Regional and local jails. State funds for education services are appropriated to the Virginia Department of Education. (Virginia Appropriation Act; 34 CFR 300.705)~~

8VAC20-81-340. Special education caseload staffing requirements.

Figure 1: Local school division caseload maximums as funded by the Virginia Appropriation Act.

Disability Category	Level II		Level I
	With Paraprofessional 100% of the time	Without Paraprofessional 100% of the Time	
Autism	8	6	24
Deaf-blindness	8	6	
Developmental Delay: age 5-6	10	8	
Developmental Delay: age 2-5	8 Center-based 10 Combined	12 Home-based and/or Itinerant	
Emotional Disability	10	8	24
Hearing Impairment/ Deaf	10	8	24
~~Learning~~ Intellectual Disability	10	8	24
~~Intellectual~~ Learning Disability	10	8	24
Multiple Disabilities	8	6	
Orthopedic Impairment	10	8	24
Other Health Impairment	10	8	24
Speech or Language Impairment	NA	NA	68 (Itinerant)
Traumatic Brain Injury	May be placed in any program, according to the IEP.		
Combined group of students needing Level I services with students needing Level II services	20 Points (see Figure 2)		

Figure 2: Values for students receiving Level I services when combined with students receiving Level II services.

Disability Category	Level II Values		Level I
	With Paraprofessional 100% of the time	Without Paraprofessional 100% of the time	Values
Autism	2.5	3.3	1
Deaf-blindness	2.5	3.3	1
Developmental Delay: age 5-6	2.0	2.5	1
Emotional Disability	2.0	2.5	1
Hearing Impairment/Deaf	2.0	2.5	1
~~Learning~~ Intellectual Disability	2.0	2.5	1
~~Intellectual~~ Learning Disability	2.0	2.5	1
Multiple Disabilities	2.5	3.3	1
Orthopedic Impairment	2.0	2.5	1
Other Health Impairment	2.0	2.5	1
Traumatic Brain Injury	2.0	2.5	1

VA.R. Doc. No. R10-2239; Filed December 1, 2009, 1:04 p.m.

TITLE 9. ENVIRONMENT

STATE AIR POLLUTION CONTROL BOARD

Proposed Regulation

Titles of Regulations: **9VAC5-20. General Provisions (amending 9VAC5-20-21).**

9VAC5-40. Existing Stationary Sources (amending 9VAC5-40-6970, 9VAC5-40-7050; adding 9VAC5-40-6975).

9VAC5-45. Consumer and Commercial Products (adding 9VAC5-45-10 through 9VAC5-45-850).

Statutory Authority: § 10.1-1308 of the Code of Virginia.

Public Hearing Information:

February 3, 2010 - 10 a.m. - Department of Environmental Quality, 629 East Main Street, 2nd Floor Conference Room, Richmond, VA

Public Comment Deadline: February 19, 2010.

Agency Contact: Gary Graham, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4103, FAX (804) 698-4510, or email gegraham@deq.virginia.gov.

Basis: Section 10.1-1308 of the Virginia Air Pollution Control Law (Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 of the Code of Virginia) authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling, and prohibiting air pollution in order to protect public health and welfare. Written assurance from the Office of the Attorney General that the State Air Pollution Control Board possesses the statutory authority to promulgate the proposed regulation amendments is available upon request.

Federal Requirements

Identification of Specific Applicable Federal Requirements:

Ozone is formed by complex series of reactions between nitrogen oxides (NO_x) and volatile organic compounds (VOCs) under the influence of solar ultraviolet radiation (sunlight). Ozone shows a very strong diurnal (daily) and seasonal (April to October) cyclical character. Ozone injures vegetation, has adverse effects on materials (rubber and fabrics), and is a pulmonary irritant that affects respiratory mucous membranes, lung tissues, and respiratory functions.

The original ozone air quality standard that was the focus of air quality planning requirements after the promulgation of the 1990 Amendments to the Clean Air Act (CAA) was a 1-hour standard. Since then, EPA has promulgated a new 8-hour ozone air quality standard, and associated designation of nonattainment areas, which necessitates the initiation of new plans and regulatory actions.

40 CFR Part 81 specifies the designations of areas made under § 107(d) of the CAA and the associated nonattainment classification (if any) under § 181 of the CAA or 40 CFR 51.903(a), as applicable. On April 30, 2004 (69 FR 23858), EPA published its final decision as to the 8-hour nonattainment areas and associated classifications. The new designations were effective June 15, 2004. The Commonwealth of Virginia designations are in 40 CFR 81.347.

40 CFR Part 51, Subpart X, contains the provisions for the implementation of the 8-hour ozone National Ambient Air Quality Standards (NAAQS), along with the associated planning requirements. On April 30, 2004 (69 FR 23951), EPA published phase 1 of its final rule adding Subpart X to 40 CFR Part 51. Specifically, 40 CFR 51.903(a) sets forth the classification criteria and nonattainment dates for 8-hour ozone nonattainment areas once they are designated as such under 40 CFR Part 81. The remainder of the planning requirements (phase 2) were published on November 29, 2005 (70 FR 71612).

The state regulations established VOC and NO_x emissions control areas to provide the legal mechanism to define the geographic areas in which Virginia implements control measures to attain and maintain the air quality standards for ozone. The emissions control areas may or may not coincide with the nonattainment areas, depending on the necessity of the planning requirements.

General Federal Requirements:

Sections 109 (a) and (b) of the Clean Air Act (CAA) require EPA to prescribe primary and secondary air quality standards to protect public health and welfare, respectively, for each air pollutant for which air quality criteria were issued before the enactment of the 1970 Clean Air Act. These standards are known as the National Ambient Air Quality Standards (NAAQS). Section 109 (c) requires the U.S. Environmental Protection Agency (EPA) to prescribe such standards simultaneously with the issuance of new air quality criteria for any additional air pollutant. The primary and secondary air quality criteria are authorized for promulgation under § 108.

Once the NAAQS are promulgated pursuant to § 109, § 107(d) sets out a process for designating those areas that are in compliance with the standards (attainment or unclassifiable) and those areas that are not (nonattainment). Governors provide the initial recommendations but EPA makes the final decision. Section 107(d) also sets forth the process for redesignations once the nonattainment areas are in compliance with the applicable NAAQS.

Section 110(a) of the CAA mandates that each state adopt and submit to EPA a plan that provides for the implementation, maintenance, and enforcement of each primary and secondary air quality standard within each air quality control region in the state. The state implementation plan shall be adopted only after reasonable public notice is given and public hearings are held. The plan shall include provisions to accomplish, among other tasks, the following:

(1) establish enforceable emission limitations and other control measures as necessary to comply with the provisions of the CAA, including economic incentives such as fees, marketable permits, and auctions of emissions rights;

(2) establish schedules for compliance;

(3) prohibit emissions that would contribute to nonattainment of the standards or interference with maintenance of the standards by any state; and

(4) require sources of air pollution to install, maintain, and replace monitoring equipment as necessary and to report periodically on emissions-related data.

40 CFR Part 50 specifies the NAAQS: sulfur dioxide, particulate matter, carbon monoxide, ozone (its precursors are nitrogen oxides and volatile organic compounds), nitrogen dioxide, and lead.

40 CFR Part 51 sets out requirements for the preparation, adoption, and submittal of state implementation plans. These requirements mandate that any such plan shall include several provisions, including those summarized below.

Subpart G (Control Strategy) specifies the description of control measures and schedules for implementation, the description of emissions reductions estimates sufficient to attain and maintain the standards, time periods for demonstrations of the control strategy's adequacy, an emissions inventory, an air quality data summary, data availability, special requirements for lead emissions, stack height provisions, and intermittent control systems.

Subpart K (Source Surveillance) specifies procedures for emissions reports and recordkeeping; procedures for testing, inspection, enforcement, and compliance; transportation control measures; and procedures for continuous emissions monitoring.

Subpart L (Legal Authority) specifies the requirements for legal authority to implement plans.

Section 51.230 under Subpart L specifies that each state implementation plan must show that the state has the legal authority to carry out the plan, including the authority to perform the following actions:

(1) adopt emission standards and limitations and any other measures necessary for the attainment and maintenance of the national ambient air quality standards;

(2) enforce applicable laws, regulations, and standards, and seek injunctive relief;

(3) abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons;

(4) prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location that will prevent the attainment or maintenance of a national standard;

(5) obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require recordkeeping and to make inspections and conduct tests of air pollution sources;

(6) require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the state on the nature and amounts of emissions from such stationary sources; and

(7) make emissions data available to the public as reported and as correlated with any applicable emission standards or limitations.

Section 51.231 under Subpart L requires the identification of legal authority as follows:

(1) the provisions of law or regulation that the state determines provide the authorities required under this section must be specifically identified, and copies of such laws or regulations must be submitted with the plan; and

(2) the plan must show that the legal authorities specified in this subpart are available to the state at the time of submission of the plan.

Subpart N (Compliance Schedules) specifies legally enforceable compliance schedules, final compliance schedule dates, and conditions for extensions beyond one year.

Part D describes how nonattainment areas are established, classified, and required to meet attainment. Subpart 1 provides the overall framework of what nonattainment plans are to contain, while Subpart 2 provides more detail on what is required of areas designated nonattainment for ozone.

Section 171 defines "reasonable further progress," "nonattainment area," "lowest achievable emission rate," and "modification."

Section 172(a) authorizes EPA to classify nonattainment areas for the purpose of assigning attainment dates. Section 172(b) authorizes EPA to establish schedules for the submission of plans designed to achieve attainment by the specified dates. Section 172(c) specifies the provisions to be included in each attainment plan, as follows:

(1) the implementation of all reasonably available control measures as expeditiously as practicable and shall provide for the attainment of the national ambient air quality standards;

(2) the requirement of reasonable further progress;

(3) a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutants in the nonattainment area;

(4) an identification and quantification of allowable emissions from the construction and modification of new and modified major stationary sources in the nonattainment area;

(5) the requirement for permits for the construction and operations of new and modified major stationary sources in the nonattainment area;

(6) the inclusion of enforceable emission limitations and such other control measures (including economic incentives such as fees, marketable permits, and auctions of emission rights) as well as schedules for compliance;

(7) if applicable, the proposal of equivalent modeling, emission inventory, or planning procedures; and

(8) the inclusion of specific contingency measures to be undertaken if the nonattainment area fails to make reasonable further progress or to attain the national ambient air quality standards by the attainment date.

Section 172(d) requires that attainment plans be revised if EPA finds inadequacies. Section 172(e) authorizes the issuance of requirements for nonattainment areas in the event of a relaxation of any national ambient air quality standard. Such requirements shall provide for controls that are not less stringent than the controls applicable to these same areas before such relaxation.

Section 107(d)(3)(D) provides that a state may petition EPA to redesignate a nonattainment area as attainment and EPA may approve the redesignation subject to certain criteria being met. Section 107(d)(3)(E) stipulates one of these criteria, that EPA must fully approve a maintenance plan that meets the requirements of § 175A.

According to § 175A(a), the maintenance plan must be part of a SIP submission, and must provide for maintenance of the NAAQS for at least 10 years after the redesignation. The plan must contain any additional measures, as needed, to ensure maintenance. Section 175A(b) further requires that eight years after redesignation, a maintenance plan for the next 10 years must then be submitted. As stated in § 175A(c), nonattainment requirements continue to apply until the SIP submittal is approved. Finally, § 175A(d) requires that the maintenance plan contain contingency provisions that will be implemented should the area fail to maintain the NAAQS as provided for in the original plan.

Under Part D, Subpart 2, § 181 sets forth the classifications and nonattainment dates for 1-hour ozone nonattainment areas once they are designated as such under § 107(d).

Section 184 establishes an Ozone Transport Region comprised of the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia. The Ozone Transport Commission is to assess the degree of interstate transport of the pollutant or precursors to the pollutant throughout the transport region, assess strategies for mitigating the interstate pollution, and recommend control measures to ensure that the plans for the relevant states meet the requirements of the Act.

40 CFR Part 81 specifies the designations of areas made under § 107(d) of the CAA and the associated nonattainment classification (if any) under § 181 of the CAA or 40 CFR 51.903(a), as applicable.

40 CFR Part 51, Subpart X, contains the provisions for the implementation of the 8-hour ozone NAAQS, along with the associated planning requirements. Specifically, 40 CFR 51.903(a) sets forth the classification criteria and nonattainment dates for 8-hour ozone nonattainment areas once they are designated as such under 40 CFR Part 81.

State Requirements

These specific amendments are not required by state mandate. Rather, Virginia's Air Pollution Control Law gives the State Air Pollution Control Board the discretionary authority to promulgate regulations "abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth" (§ 10.1-1308 A). The law defines such air pollution as "the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people or life or property" (§ 10.1-1300).

The Air Pollution Control Law (§ 10.1-1308 B) specifically requires that any regulation that prohibits the selling of a consumer product not restrict the continued sale of the product by retailers of any existing inventories in stock at the time the regulation is promulgated.

Purpose: The purpose of these regulations is to require owners to limit emissions of air pollution from portable fuel containers, certain consumer products, architectural and industrial maintenance coatings, adhesives and sealants, mobile equipment repair and refinishing operations, and paving operations to the level necessary for (i) the protection of public health and welfare, and (ii) the attainment and maintenance of the air quality standards. The proposed amendments are being made to adopt new standards for the control of VOC emissions from adhesive and sealants in the Northern Virginia, Fredericksburg, and Richmond VOC Emissions Control Areas and to adopt new and revised standards for the control of VOC emissions from portable fuel containers and certain consumer products within the Northern Virginia, Fredericksburg, and Richmond VOC Emissions Control Areas. The proposed amendments are also being made to extend VOC emissions controls for architectural and industrial maintenance coatings and mobile equipment repair and refinishing operations into the Richmond VOC Emissions Control Area. This action is being taken to allow Virginia to meet its obligation to implement control measures in areas designated as nonattainment under the 8-hour ozone standard and to implement contingency measures within former nonattainment areas that have been redesignated as ozone maintenance areas.

Substance: The proposed regulatory action adds a new chapter (9VAC5-45) specifically for regulations pertaining to

consumer and commercial products and is applicable to specific product types and the owners that are involved in the manufacture, distribution, retail sales and in some cases, the marketing and use of those products in certain VOC Emissions Control Areas. This proposed regulatory action also amends an article in Chapter 40 that pertains to shops that apply some types of consumer and commercial products in VOC Emissions Control Areas.

In Part I of the new Chapter 45, special provisions specify the general testing, monitoring, compliance, notification, recordkeeping, and reporting requirements that are applicable to all articles in the new chapter and specify certain other sections of the regulations that are not generally applicable. Exceptions to the special provisions are addressed in each individual article of the new chapter.

In Part II of the new Chapter 45:

1. The proposed regulatory action establishes standards for Portable Fuel Containers for products manufactured before and after May 1, 2010, as new Articles 1 and 2 in Chapter 45, respectively, and applies to all of the products subject to the current provisions of Chapter 40, Article 42, Portable Fuel Container Spillage. Article 1 clarifies some Article 42 exemptions and definitions, adds another exemption category, removes obsolete standards and their associated administrative requirements, and provides criteria for sell-through of products. Because Article 1 applies to all products manufactured before May 1, 2010, and is designed to replace Chapter 40, Article 42, the compliance schedule proposed for Article 1 is the same as that in Chapter 40, Article 42. Article 2 applies to all portable fuel container products manufactured on or after May 1, 2010, and requires board precertification of new portable fuel container products as compliant with new labeling requirements and with new and more stringent design and performance standards. Article 2 also includes applicability to a new category of owner, and adds (i) new and revised exemptions, (ii) new certification procedures, (iii) new testing standards, and (iv) alternative compliance provisions for innovative products over those provisions now applicable under Chapter 40, Article 42. The new Article 2 specifies a compliance deadline no later than May 1, 2010. The new Article 1 will apply only in the Northern Virginia and Fredericksburg VOC Emissions Control Areas. The new Article 2 will apply in the Northern Virginia, Fredericksburg, and Richmond VOC Emissions Control Areas. Chapter 40, Article 42 will be repealed at an appropriate time after the standards in the new Article 1 are effective.

2. The proposed regulatory action establishes standards for Consumer Products manufactured before and after May 1, 2010, as a new Articles 3 and 4 in Chapter 45, respectively, and applies to all of the products subject to the current provisions of Chapter 40, Article 50, Consumer Products. Article 3 pertains to consumer products manufactured before May 1, 2010, clarifies some definitions and standards, makes the Alternative Control Plan procedures more flexible, revises labeling, reporting and other administrative requirements, and clarifies sell-through criteria. Article 3 applies to all products manufactured before May 1, 2010, and is designed to replace Chapter 40, Article 50, therefore the compliance schedule proposed for Article 3 is the same as Chapter 40, Article 50. Article 4 applies to all consumer products manufactured after May 1, 2010, and includes all of the changes made in Article 3, adds more definitions and standards for some new product categories, and establishes new labeling and other administrative requirements. Article 4 specifies a compliance deadline no later than May 1, 2010. The new Article 3 will apply only in the Northern Virginia and Fredericksburg VOC Emissions Control Areas. The new Article 4 will apply in the Northern Virginia, Fredericksburg, and Richmond VOC Emissions Control Areas. Chapter 40, Article 50 will be repealed at an appropriate time after the standards in the new Articles 3 and 4 are effective.

3. The proposed regulatory action establishes standards for Architectural and Industrial Maintenance Coatings and incorporates all of the provisions of Chapter 40, Article 49, Emission Standards for Architectural and Industrial Maintenance Coatings into a new Article 5 in Chapter 45, except that the new Article 5 removes some obsolete reporting requirements and changes the remaining one to a recordkeeping requirement. The standards and other provisions of the new Article 5 are not substantively changed from what is in Chapter 40, Article 49, therefore no new compliance dates are proposed for the Northern Virginia and Fredericksburg VOC Emissions Control Areas. The standards and other provisions are being extended into the Richmond VOC Emissions Control Area with a proposed compliance deadline of May 1, 2010. Chapter 40, Article 49 will be repealed at an appropriate time after the new Article 5 standards are effective.

4. The proposed regulatory action will add a new regulation, Article 6 in the new Chapter 45, which establishes new emission standards for adhesives and sealants. The provisions of this article apply to owners who sell, supply, offer for sale, or manufacture for sale commercial adhesives, sealants, adhesive primers or sealant primers that contain volatile organic compounds within the Northern Virginia, Fredericksburg, and Richmond VOC Emissions Control Areas. The provisions will also apply to owners that use, apply for compensation, or solicit the use or application of such products in those areas. Exempted from the regulation is any such product manufactured in the Northern Virginia, Fredericksburg, or Richmond VOC Emissions Control Areas for shipment and use outside of these areas. The provisions of this regulation

will not apply to a manufacturer or distributor who sells, supplies, or offers for sale such products that do not comply with the VOC standards as long as the manufacturer or distributor can demonstrate both that the product is intended for shipment and use outside of those areas and that the manufacturer or distributor has taken reasonable prudent precautions to assure that the product is not distributed in those areas. A number of product-specific exemptions are also allowed. VOC content limits are specified for different product categories. Control technology guidelines are offered as an alternate means of achieving compliance with the standards. Test methods, registration requirements, and recordkeeping procedures are provided. This article specifies a compliance deadline of May 1, 2010.

5. The proposed regulatory action establishes standards for asphalt paving operations and incorporates all of the provisions of Chapter 40, Article 39, Emission Standards for Asphalt Paving Operations, as a new Article 7 in Chapter 45. Applicability provisions in Article 7 apply to owners instead of sources and a new definition of paving operations is added that clarifies the types of operations to which the provisions of the regulation apply. Since the standards and other provisions in this article are not substantively changed, no new compliance date is proposed. Chapter 40, Article 39 will be repealed at an appropriate time after the new Article 7 standards are effective.

The text of these new articles includes the textual changes to the regulations that are included in the recently adopted, but not yet effective, revision D06 (also titled as Consumer and Commercial Products). This regulatory action preserves changes made by revision D06 in the event that revision D06 is delayed or withdrawn in its entirety. This regulatory action also incorporates the following substantive changes to revision D06:

1. This proposed regulatory action expands the applicability of the new Article 2 concerning portable fuel containers, the new Article 4 concerning consumer products, the new Article 5 concerning architectural and maintenance coatings, and the new Article 6 concerning adhesives and sealants into the Richmond VOC Emissions Control Area. It does not affect the applicability of Article 7 concerning asphalt paving operations, which already applies in all VOC emissions control areas;

2. This regulatory action extends compliance dates originally proposed in revision D06 as January 1, 2009, to a more reasonable date in the future (May 1, 2010); and

3. This proposed regulatory action extends the standards and other provisions for 9VAC5-40, Article 48, concerning mobile equipment repair and refinishing operations that are currently applicable only in the Northern Virginia and Fredericksburg VOC Emissions Control Areas into the Richmond VOC Emissions Control Area. A compliance deadline of May 1, 2010, is specified for applicability of the standards and other provisions within the Richmond VOC Emissions Control Area.

If revision D06 becomes effective, then this revision will be redacted to remove the changes incorporated into regulation by revision D06, and the compliance dates associated with applying regulatory standards in Chapter 45 and in Chapter 40, Article 48 in the Richmond VOC Emissions Control Area may be revised to be more consistent with the effective regulation.

Issues: Public: The primary advantage to the public is that the adoption of these regulations will significantly decrease emissions of VOCs in the Northern Virginia, Fredericksburg, and Richmond areas, thus benefiting public health and welfare. The primary disadvantage to the public is the inconvenience of having certain familiar noncompliant products become unavailable within the applicable areas, and having to pay a slightly increased cost for the replacement compliant products.

Regulated Community: The primary advantage to the regulated community is that the new regulations are clearer and have fewer reporting requirements than some of the regulations they replace. The primary disadvantages are that there may be more costs associated with distributing compliant products within the Richmond VOC Emissions Control Area, there may be fewer days that certain products may be applied, and there may be a need for worker training for some users to learn how to apply some of the compliant products correctly.

Department: The primary advantages to the department are that the adoption of these regulations will allow Virginia (1) to attain and maintain air quality standards and improve public health of Virginians, and (2) to uphold its promise to its jurisdictional neighbors (Maryland and Washington, D.C.) to all take similar regulatory action in order to minimize regulatory differences across the affected borders. There is no disadvantage to the department.

When revision D06 becomes effective, then the advantages and disadvantages of this regulatory action will be restricted to the Richmond VOC Emissions Control Area.

Most of the proposed regulation amendments are not more restrictive than the applicable federal requirements. However, there is no federal requirement for applying standards for adhesives and sealants in the Richmond VOC Emissions Control Area, so applying such standards there exceeds the federal requirements. Standards for adhesives and sealants are proposed for the Richmond VOC Emissions Control Area in response to violations of the 0.08 ppm NAAQS ozone standard in the Richmond area in 2007 and 2008, and are proposed in anticipation of federal

implementation of the more restrictive 0.075 ppm NAAQS ozone standard.

Localities particularly affected by the proposed regulations are the counties of Arlington, Fairfax, Loudoun, Prince William, Stafford, Spotsylvania, Charles City, Chesterfield, Hanover, Henrico, and Prince George; and the cities of Alexandria, Fairfax, Falls Church, Manassas, Manassas Park, Fredericksburg, Colonial Heights, Hopewell, Petersburg, and Richmond.

Revision D06 affected all of the localities listed above except for those in the Richmond VOC Emissions Control Area. Since revision D06 has been adopted and is expected to become effective, the localities particularly affected by this regulatory action would then be restricted to just those areas that are located in the Richmond VOC Emissions Control Area; specifically, the counties of Charles City, Chesterfield, Hanover, Henrico, and Prince George; and the cities of Colonial Heights, Hopewell, Petersburg, and Richmond.

The Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. In order to comply with Environmental Protection Agency (EPA) and statutory mandates, the Virginia Air Pollution Control Board (board) proposes several regulatory changes that affect the Northern Virginia, Fredericksburg, and Richmond volatile organic compound (VOC) Emissions Control Areas including: 1) amending the portable fuel container spillage and consumer products provisions to conform to the strategies recommended by the federal Ozone Transport Commission (OTC), 2) prohibiting owners from manufacturing, distributing, selling, and using noncompliant consumer and commercial adhesive and sealant products and architectural and industrial maintenance coating products, 3) prohibiting the mixing, storage, and application of noncompliant emulsified asphalt coating products, with an exception for coating residential driveways, and 4) adding the Richmond VOC Emissions Control Area to the list of areas that that have restrictions on emissions from mobile equipment repair and refinishing operations.[1]

Result of Analysis. The benefits likely exceed the costs for one or more proposed changes. There is insufficient data to accurately compare the magnitude of the benefits versus the costs for other changes.

Estimated Economic Impact. In 2004, the Environmental Protection Agency (EPA) promulgated the Phase 1 Ozone Implementation Regulation to provide a process for classifying volatile organic compound (VOC) Emissions Control Areas, based on the severity of their ozone problems, and establishing deadlines for state and local governments to reduce ozone levels. The phase 1 regulation established a process for transitioning from implementation of the 1-hour ozone air quality standard to the more protective 8-hour ozone air quality standard.

The Phase 2 Ozone Implementation Regulation was promulgated by the EPA in 2005 to provide the remaining elements of the process to implement the 8-hour ozone air quality standard. The phase 2 EPA regulation outlines emissions control and planning requirements for states to address as they develop their state implementation plans (SIPs) demonstrating how they will reduce ozone pollution to meet the 8-hour ozone standard. Additionally, the regulation requires states to demonstrate that non-attainment areas will attain the 8-hour ozone standard as expeditiously as practicable.

The federal Ozone Transport Commission (OTC) has identified what are considered the least cost methods of ozone control that will enable states to attain the 8-hour ozone standard within Ozone Transport Regions (OTR). The board proposed consumer and commercial product requirements for these regulations are consistent with these least cost methods recommended by the OTC in order for the Commonwealth to meet the EPA mandated 8-hour ozone standard.

As mentioned above, the board proposed requirements include: 1) amending the portable fuel container spillage and consumer products provisions to conform to the strategies recommended by the OTC, 2) prohibiting owners from manufacturing, distributing, selling, and using noncompliant consumer and commercial adhesive and sealant products and architectural and industrial maintenance coating products, 3) prohibiting the mixing, storage, and application of noncompliant emulsified asphalt coating products, with an exception for coating residential driveways and 4) adding the Richmond VOC Emissions Control Area to the list of areas that have restrictions on emissions from mobile equipment repair and refinishing operations.

The following costs are projected for regulated entities in the Northern Virginia, Fredericksburg, and Richmond VOC Emissions Control Areas for implementation and compliance and include projected reporting, recordkeeping and other administrative costs: 1) Portable Fuel Containers: insignificant cost to Virginia small businesses or individuals, 2) Consumer Products: up to, but likely somewhat less than $9,200,000 cost per year for manufacturers, distributors and retailers of consumer products in the region combined, $2,700,000 of which would be in the Richmond area, 3) Architectural and Industrial Coatings: up to $5,800,000 annually in the Richmond VOC area, 4) Adhesives and Sealants: up to.$1,640,000 per year cost shared between manufacturers, distributors, and contractors ($1,150,000 in Northern Virginia and Fredericksburg, $490,000 in Richmond), and 5) Asphalt Paving: no significant net cost or savings.

The adoption of this regulation will decrease emissions of VOC in the Northern Virginia, Fredericksburg, and

Richmond areas by an estimated total of 16.0 tons per day or more.[2] This significant emissions reduction will benefit public health and welfare by reducing ozone. Ozone injures vegetation, has adverse effects on materials (rubber and fabrics), and is a pulmonary irritant that affects respiratory mucous membranes, lung tissues, and respiratory functions. Reducing ozone will thus likely result in healthier citizens and reduce property damage. It will also allow Virginia to avoid federal sanctions that would be imposed for violating the SIP provisions of the Clean Air Act and to uphold its promise to its jurisdictional neighbors (Maryland and Washington, D.C.) to take this action.

Businesses and Entities Affected. The proposed amendments potentially affect: a) 476 manufacturers, distributors and retailers and 295 contractors of consumer products, b) four manufacturers and 165 contractors of architectural and industrial coatings, c) 3844 manufacturers and contractors of apply adhesives and sealants, d) 83 asphalt paving contractors, e) 331 mobile equipment repair and refinishing shops, and f) their customers.[3] Most of the firms qualify as small businesses.

Localities Particularly Affected. The proposed regulatory amendments particularly affect the counties of Arlington, Fairfax, Loudoun, Prince William, Stafford, Spotsylvania, Charles City, Chesterfield, Hanover, Henrico and Prince George; and the cities of Alexandria, Fairfax, Falls Church, Manassas, Manassas Park, Fredericksburg, Colonial Heights, Hopewell, Petersburg, and Richmond.

Projected Impact on Employment. The increased costs for manufacturers, distributors and retailers of consumer products, manufacturers of adhesives and sealants and contractors who use adhesives and sealants, architectural and industrial coatings manufacturers, and mobile equipment repair and refinishing shops will likely reduce profitability. This will consequently likely have a moderate negative impact on employment.

Effects on the Use and Value of Private Property. Manufacturing that produces VOC will be altered in ways that will reduce VOC emission. This will increase costs and consequently moderately reduce the value of some firms.

Small Businesses: Costs and Other Effects. The proposed amendments will increase costs for some small businesses such as manufacturers, distributors and retailers of consumer products and manufacturers of adhesives and sealants and contractors who use adhesives and sealants.

Small Businesses: Alternative Method that Minimizes Adverse Impact. Though the board's proposals add costs for some small businesses, there is not a clear alternative that reduces the adverse impact and still enables the Commonwealth to meet EPA requirements.

Real Estate Development Costs. The proposed amendments may moderately, but probably not significantly, add to real estate development costs via increased costs associated with adhesives, sealants, and consumer products.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 36 (06). Section 2.2-4007.04 requires that such economic impact analyses 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, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

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[1] The Northern Virginia and Fredericksburg VOC Emissions Control Areas already have restrictions on emissions from mobile equipment repair and refinishing operations.

[2] Data source: Department of Environmental Quality

[3] Data source: via Department of Environmental Quality, the Virginia Employment Commission database on January 27, 2009.

Agency's Response to the Department of Planning and Budget's Economic Impact Analysis: The department has reviewed the economic impact analysis prepared by the Department of Planning and Budget and has no comment.

Summary:

A new chapter (9VAC5-45) is established for the control of volatile organic compound (VOC) emissions from various consumer and commercial products. The new chapter consists of two parts. The first part of the new chapter contains general requirements pertaining to all of the types of consumer and commercial products regulated. The second part is composed of articles that contain VOC content and emission standards for individual types of consumer products and contain the control technology, testing, monitoring, administrative, recordkeeping and reporting requirements necessary to determine compliance with each of the applicable standards.

The new chapter includes two articles that control VOC emissions from portable fuel containers and spouts in the Northern Virginia, Fredericksburg, and Richmond VOC Emissions Control Areas. These articles implement design, performance, and labeling standards for portable fuel container products before and after May 1, 2010, and prohibit owners from manufacturing, distributing, and selling noncompliant products.

The new chapter includes two articles that control VOC emissions from certain types of consumer products in the Northern Virginia, Fredericksburg, and Richmond VOC Emissions Control Areas. These articles implement VOC content standards for some individual product categories before and after May 1, 2010, and prohibit owners from manufacturing, distributing, advertising, or selling noncompliant products.

The new chapter includes an article for the control of VOC emissions from architectural and industrial maintenance coatings in the Northern Virginia, Fredericksburg, and Richmond VOC Emissions Control Areas. This article implements VOC content standards for all such coating products and prohibits owners from manufacturing, distributing, selling, and using noncompliant products.

The new chapter includes an article that controls VOC emissions from adhesives, adhesive primers, sealants, and sealant primers in the Northern Virginia, Richmond, and Fredericksburg VOC Emissions Control Areas. This article implements VOC content limits for those products and prohibits owners from manufacturing, distributing, selling, or applying noncompliant products.

The new chapter also includes an article that controls VOC emissions from asphalt paving operations in all VOC Emissions Control Areas, which prescribes the use of emulsified asphalt coatings, except for the purpose of coating residential driveways, and prohibits the mixing, storage and application of noncompliant products.

Chapter 40, Article 48 currently controls VOC emissions from mobile equipment repair and refinishing operations in the Northern Virginia and Fredericksburg VOC Emissions Control Areas. This article is being amended to implement these controls in the Richmond VOC Emissions Control Area also.

This regulatory action incorporates all of the changes proposed by revision D06 (Consumer and Commercial Products). In addition, this action (i) expands applicability of four of the seven new articles proposed in revision D06 into the Richmond VOC Emissions Control Area, (ii) revises the compliance dates, and (iii) amends Chapter 40, Article 48 concerning mobile equipment repair and refinishing, to expand the applicability of that article into the Richmond VOC Emissions Control Area. When revision D06 becomes effective, the changes made in revision D06 will be removed from this proposal.

9VAC5-20-21. Documents incorporated by reference.

A. The Administrative Process Act and Virginia Register Act provide that state regulations may incorporate documents by reference. Throughout these regulations, documents of the types specified below have been incorporated by reference.

1. United States Code.

2. Code of Virginia.

3. Code of Federal Regulations.

4. Federal Register.

5. Technical and scientific reference documents.

Additional information on key federal regulations and nonstatutory documents incorporated by reference and their availability may be found in subsection E of this section.

B. Any reference in these regulations to any provision of the Code of Federal Regulations (CFR) shall be considered as the adoption by reference of that provision. The specific version of the provision adopted by reference shall be that contained in the CFR (2008) in effect July 1, 2008. In making reference to the Code of Federal Regulations, 40 CFR Part 35 means Part 35 of Title 40 of the Code of Federal Regulations; 40 CFR 35.20 means § 35.20 in Part 35 of Title 40 of the Code of Federal Regulations.

C. Failure to include in this section any document referenced in the regulations shall not invalidate the applicability of the referenced document.

D. Copies of materials incorporated by reference in this section may be examined by the public at the central office of the Department of Environmental Quality, Eighth Floor, 629 East Main Street, Richmond, Virginia, between 8:30 a.m. and 4:30 p.m. of each business day.

E. Information on federal regulations and nonstatutory documents incorporated by reference and their availability may be found below in this subsection.

1. Code of Federal Regulations.

a. The provisions specified below from the Code of Federal Regulations (CFR) are incorporated herein by reference.

(1) 40 CFR Part 50-National Primary and Secondary Ambient Air Quality Standards.

(a) Appendix A -- Reference Method for the Determination of Sulfur Dioxide in the Atmosphere (Pararosaniline Method).

(b) Appendix B -- Reference Method for the Determination of Suspended Particulate Matter in the Atmosphere (High-Volume Method).

(c) Appendix C -- Measurement Principle and Calibration Procedure for the Continuous Measurement of Carbon Monoxide in the Atmosphere (Non-Dispersive Infrared Photometry).

(d) Appendix D -- Measurement Principle and Calibration Procedure for the Measurement of Ozone in the Atmosphere.

(e) Appendix E -- Reserved.

(f) Appendix F -- Measurement ~~Principle~~ Principle and Calibration Procedure for the Measurement of Nitrogen Dioxide in the Atmosphere (Gas Phase Chemiluminescence).

(g) Appendix G -- Reference Method for the Determination of Lead in Suspended Particulate Matter Collected from Ambient Air.

(h) Appendix H -- Interpretation of the National Ambient Air Quality Standards for Ozone.

(i) Appendix I -- Interpretation of the 8-Hour Primary and Secondary National Ambient Air Quality Standards for Ozone.

(j) Appendix J -- Reference Method for the Determination of Particulate Matter as PM_{10} in the Atmosphere.

(k) Appendix K -- Interpretation of the National Ambient Air Quality Standards for Particulate Matter.

(l) Appendix L - Reference Method for the Determination of Fine Particulate Matter as $PM_{2.5}$ in the Atmosphere.

(m) Appendix M - Reserved.

(n) Appendix N - Interpretation of the National Ambient Air Quality Standards for $PM_{2.5}$.

(o) Appendix O - Reference Method for the Determination of Coarse Particulate Matter as PM in the Atmosphere.

(p) Appendix P - Interpretation of the Primary and Secondary National Ambient Air Quality Standards for Ozone.

(q) Appendix Q - Reference Method for the Determination of Lead in Suspended Particulate Matter as PM_{10} Collected from Ambient Air.

(r) Appendix R - Interpretation of the National Ambient Air Quality Standards for Lead.

(2) 40 CFR Part 51 -- Requirements for Preparation, Adoption, and Submittal of Implementation Plans.

(a) Appendix M -- Recommended Test Methods for State Implementation Plans.

~~(a)~~ (b) Appendix S -- Emission Offset Interpretive Ruling.

~~(b)~~ (c) Appendix W -- Guideline on Air Quality Models (Revised).

~~(c)~~ (d) Appendix Y - Guidelines for BART Determinations Under the Regional Haze Rule.

(3) 40 CFR Part 58 -- Ambient Air Quality Surveillance.

Appendix A - Quality Assurance Requirements for SLAMS, SPMs and PSD Air Monitoring.

(4) 40 CFR Part 60 -- Standards of Performance for New Stationary Sources.

The specific provisions of 40 CFR Part 60 incorporated by reference are found in Article 5 (9VAC5-50-400 et seq.) of Part II of 9VAC5-50 (New and Modified Sources).

(5) 40 CFR Part 61 -- National Emission Standards for Hazardous Air Pollutants.

The specific provisions of 40 CFR Part 61 incorporated by reference are found in Article 1 (9VAC5-60-60 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

(6) 40 CFR Part 63 -- National Emission Standards for Hazardous Air Pollutants for Source Categories.

The specific provisions of 40 CFR Part 63 incorporated by reference are found in Article 2 (9VAC5-60-90 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

(7) 40 CFR Part 59, Subpart D-National Volatile Organic Compound Emission Standards for Architectural Coatings, Appendix A -- "Determination of Volatile Matter Content of Methacrylate Multicomponent Coatings Used as Traffic Marking Coatings."

(8) 40 CFR Part 64, Compliance Assurance Monitoring.

(9) 40 CFR Part 72, Permits Regulation.

(10) 40 CFR Part 73, Sulfur Dioxide Allowance System.

(11) 40 CFR Part 74, Sulfur Dioxide Opt-Ins.

(12) 40 CFR Part 75, Continuous Emission Monitoring.

(13) 40 CFR Part 76, Acid Rain Nitrogen Oxides Emission Reduction Program.

(14) 40 CFR Part 77, Excess Emissions.

(15) 40 CFR Part 78, Appeal Procedures for Acid Rain Program.

(16) 40 CFR Part 59, Subpart C, National Volatile Organic Compound Emission Standards for Consumer Products.

(17) 40 CFR Part 152, Subpart I, Classification of Pesticides.

(18) 49 CFR Part 172, Hazardous Materials Table. Special Provisions, Hazardous Materials Communications, Emergency Response Information, and Training Requirements, Subpart E, Labeling.

(19) 29 CFR Part 1926, Subpart F, Fire Protection and Prevention.

b. Copies may be obtained from: Superintendent of Documents, P.O. Box 371954, Pittsburgh, Pennsylvania 15250-7954; phone (202) 783-3238.

2. U.S. Environmental Protection Agency.

a. The following documents from the U.S. Environmental Protection Agency are incorporated herein by reference:

(1) Reich Test, Atmospheric Emissions from Sulfuric Acid Manufacturing Processes, Public Health Service Publication No. PB82250721, 1980.

(2) Compilation of Air Pollutant Emission Factors (AP-42). Volume I: Stationary and Area Sources, stock number 055-000-00500-1, 1995; Supplement A, stock number 055-000-00551-6, 1996; Supplement B, stock number 055-000-00565, 1997; Supplement C, stock number 055-000-00587-7, 1997; Supplement D, 1998; Supplement E, 1999.

(3) "Guidelines for Determining Capture Efficiency" (GD-35), Emissions Monitoring and Analysis Division, Office of Air Quality Planning and Standards, January 9, 1995.

b. Copies of the document identified in subdivision E 2 a (1) of this subdivision, and Volume I and Supplements A through C of the document identified in subdivision E 2 a (2) of this subdivision, may be obtained from: U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161; phone 1-800-553-6847. Copies of Supplements D and E of the document identified in subdivision E 2 a (2) of this subdivision may be obtained online from EPA's Technology Transfer Network at http://www.epa.gov/ttn/index.html. Copies of the document identified in subdivision E 2 a (3) of this subdivision are only available online from EPA's Technology Transfer Network at http://www.epa.gov/ttn/emc/guidlnd.html.

3. U.S. government.

a. The following document from the U.S. government is incorporated herein by reference: Standard Industrial Classification Manual, 1987 (U.S. Government Printing Office stock number 041-001-00-314-2).

b. Copies may be obtained from: Superintendent of Documents, P.O. Box 371954, Pittsburgh, Pennsylvania 15250-7954; phone (202) 512-1800.

4. American Society for Testing and Materials (ASTM).

a. The documents specified below from the American Society for Testing and Materials are incorporated herein by reference.

(1) D323-99a, "Standard Test Method for Vapor Pressure of Petroleum Products (Reid Method)."

(2) D97-96a, "Standard Test Method for Pour Point of Petroleum Products."

(3) D129-00, "Standard Test Method for Sulfur in Petroleum Products (General Bomb Method)."

(4) D388-99, "Standard Classification of Coals by Rank."

(5) D396-98, "Standard Specification for Fuel Oils."

(6) D975-98b, "Standard Specification for Diesel Fuel Oils."

(7) D1072-90(1999), "Standard Test Method for Total Sulfur in Fuel Gases."

(8) D1265-97, "Standard Practice for Sampling Liquefied Petroleum (LP) Gases (Manual Method)."

(9) D2622-98, "Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-Ray Fluorescence Spectrometry."

(10) D4057-95(2000), "Standard Practice for Manual Sampling of Petroleum and Petroleum Products."

(11) D4294-98, "Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy-Dispersive X-Ray Fluorescence Spectroscopy."

(12) D523-89, "Standard Test Method for Specular Gloss" (1999).

(13) D1613-02, "Standard Test Method for Acidity in Volatile Solvents and Chemical Intermediates Used in Paint, Varnish, Lacquer and Related Products" (2002).

(14) D1640-95, "Standard Test Methods for Drying, Curing, or Film Formation of Organic Coatings at Room Temperature" (1999).

(15) E119-00a, "Standard Test Methods for Fire Tests of Building Construction Materials" (2000).

(16) E84-01, "Standard Test Method for Surface Burning Characteristics of Building Construction Materials" (2001).

(17) D4214-98, "Standard Test Methods for Evaluating the Degree of Chalking of Exterior Paint Films" (1998).

(18) ~~D86-01~~ D86-04b, "Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure" ~~(2001)~~ (2004).

(19) D4359-90, "Standard Test Method for Determining Whether a Material is a Liquid or a Solid" (reapproved 2000).

(20) E260-96, "Standard Practice for Packed Column Gas Chromatography" (reapproved 2001).

(21) D3912-95, "Standard Test Method for Chemical Resistance of Coatings Used in Light-Water Nuclear Power Plants" (reapproved 2001).

(22) D4082-02, "Standard Test Method for Effects of Gamma Radiation on Coatings for Use in Light-Water Nuclear Power Plants."

(23) F852-99, "Standard Specification for Portable Gasoline Containers for Consumer Use" (reapproved 2006).

(24) F976-02, "Standard Specification for Portable Kerosine and Diesel Containers for Consumer Use."

(25) D4457-02, "Standard Test Method for Determination of Dichloromethane and 1,1,1-Trichloroethane in Paints and Coatings by Direct Injection into a Gas Chromatograph" (reapproved 2008).

(26) D3792-05, "Standard Test Method for Water Content of Coatings by Direct Injection Into a Gas Chromatograph."

(27) D2879-97, "Standard Test Method for Vapor Pressure-Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteniscope" (reapproved 2007).

b. Copies may be obtained from: American Society for Testing Materials, 100 Barr Harbor Drive, West Conshohocken, Pennsylvania 19428-2959; phone (610) 832-9585.

5. American Petroleum Institute (API).

a. The following document from the American Petroleum Institute is incorporated herein by reference: Evaporative Loss from Floating Roof Tanks, API MPMS Chapter 19, April 1, 1997.

b. Copies may be obtained from: American Petroleum Institute, 1220 L Street, Northwest, Washington, D.C. 20005; phone (202) 682-8000.

6. American Conference of Governmental Industrial Hygienists (ACGIH).

a. The following document from the ACGIH is incorporated herein by reference: 1991-1992 Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices (ACGIH Handbook).

b. Copies may be obtained from: ACGIH, 1330 Kemper Meadow Drive, Suite 600, Cincinnati, Ohio 45240; phone (513) 742-2020.

7. National Fire Prevention Association (NFPA).

a. The documents specified below from the National Fire Prevention Association are incorporated herein by reference.

(1) NFPA 385, Standard for Tank Vehicles for Flammable and Combustible Liquids, 2000 Edition.

(2) NFPA 30, Flammable and Combustible Liquids Code, 2000 Edition.

(3) NFPA 30A, Code for Motor Fuel Dispensing Facilities and Repair Garages, 2000 Edition.

b. Copies may be obtained from the National Fire Prevention Association, One Batterymarch Park, P.O. Box 9101, Quincy, Massachusetts 02269-9101; phone (617) 770-3000.

8. American Society of Mechanical Engineers (ASME).

a. The documents specified below from the American Society of Mechanical Engineers are incorporated herein by reference.

(1) ASME Power Test Codes: Test Code for Steam Generating Units, Power Test Code 4.1-1964 (R1991).

(2) ASME Interim Supplement 19.5 on Instruments and Apparatus: Application, Part II of Fluid Meters, 6th edition (1971).

(3) Standard for the Qualification and Certification of Resource Recovery Facility Operators, ASME QRO-1-1994.

b. Copies may be obtained from the American Society of Mechanical Engineers, Three Park Avenue, New York, New York 10016; phone (800) 843-2763.

9. American Hospital Association (AHA).

a. The following document from the American Hospital Association is incorporated herein by reference: An Ounce of Prevention: Waste Reduction Strategies for Health Care Facilities, AHA Catalog no. W5-057007, 1993.

b. Copies may be obtained from: American Hospital Association, One North Franklin, Chicago, IL 60606; phone (800) 242-2626.

10. Bay Area Air Quality Management District (BAAQMD).

a. The following documents from the Bay Area Air Quality Management District are incorporated herein by reference:

(1) Method 41, "Determination of Volatile Organic Compounds in Solvent-Based Coatings and Related Materials Containing Parachlorobenzotrifluoride" (December 20, 1995).

(2) Method 43, "Determination of Volatile Methylsiloxanes in Solvent-Based Coatings, Inks, and Related Materials" (November 6, 1996).

b. Copies may be obtained from: Bay Area Air Quality Management District, 939 Ellis Street, San Francisco, CA 94109, phone (415) 771-6000.

11. South Coast Air Quality Management District (SCAQMD).

a. The following documents from the South Coast Air Quality Management District are incorporated herein by reference:

(1) Method 303-91, "Determination of Exempt Compounds," in Manual SSMLLABM, "Laboratory Methods of Analysis for Enforcement Samples" (1996).

(2) Method 318-95, "Determination of Weight Percent Elemental Metal in Coatings by X-Ray Diffraction," in Manual SSMLLABM, "Laboratory Methods of Analysis for Enforcement Samples" (1996).

(3) Rule 1174 Ignition Method Compliance Certification Protocol (February 28, 1991).

(4) Method 304-91, "Determination of Volatile Organic Compounds (VOC) in Various Materials," in Manual SSMLLABM, "Laboratory Methods of Analysis for Enforcement Samples" (1996).

(5) Method 316A-92, "Determination of Volatile Organic Compounds (VOC) in Materials Used for Pipes and Fittings" in Manual SSMLLABM, "Laboratory Methods of Analysis for Enforcement Samples" (1996).

(6) "General Test Method for Determining Solvent Losses from Spray Gun Cleaning Systems," October 3, 1989.

b. Copies may be obtained from: South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, CA 91765, phone (909) 396-2000.

12. California Air Resources Board (CARB).

a. The following documents from the California Air Resources Board are incorporated herein by reference:

(1) Test Method 510, "Automatic Shut-Off Test Procedure for Spill-Proof Systems and Spill-Proof Spouts" (July 6, 2000).

(2) Test Method 511, "Automatic Closure Test Procedure for Spill-Proof Systems and Spill-Proof Spouts" (July 6, 2000).

(3) ~~Test Method 512, "Determination of Fuel Flow Rate for Spill-Proof Systems and Spill-Proof Spouts" (July 6, 2000).~~ Method 100, "Procedures for Continuous Gaseous Emission Stack Sampling" (July 28, 1997).

(4) Test Method 513, "Determination of Permeation Rate for Spill-Proof Systems" (July 6, 2000).

(5) ~~Test~~ Method 310 ~~(including Appendices A and B)~~, "Determination of Volatile Organic Compounds (VOC) in Consumer Products and Reactive Organic Compounds in Aerosol Coating Products (Including Appendices A and B)" ~~(July 18, 2001)~~ (May 5, 2005).

(6) California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 8.5, Article 1, § 94503.5 (2003).

(7) California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 8.5, Article 2, §§ 94509 and 94511 (2003).

(8) California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 8.5, Article 4, §§ 94540-94555 (2003).

(9) "Certification Procedure 501 for Portable Fuel Containers and Spill-Proof Spouts, CP-501" (July 26, 2006).

(10) "Test Procedure for Determining Integrity of Spill-Proof Spouts and Spill-Proof Systems, TP-501" (July 26, 2006).

(11) "Test Procedure for Determining Diurnal Emissions from Portable Fuel Containers, TP-502" (July 26, 2006).

b. Copies may be obtained from: California Air Resources Board, P.O. Box 2815, Sacramento, CA 95812, phone (906) 322-3260 or (906) 322-2990.

13. American Architectural Manufacturers Association.

a. The following documents from the American Architectural Manufacturers Association are incorporated herein by reference:

(1) Voluntary Specification 2604-02, "Performance Requirements and Test Procedures for High Performance Organic Coatings on Aluminum Extrusions and Panels" (2002).

(2) Voluntary Specification 2605-02, "Performance Requirements and Test Procedures for Superior Performing Organic Coatings on Aluminum Extrusions and Panels" (2002).

b. Copies may be obtained from: American Architectural Manufacturers Association, 1827 Walden Office Square,

Suite 550, Schaumburg, IL 60173, phone (847) 303-5664.

14. American Furniture Manufacturers Association.

a. The following document from the American Furniture Manufacturers Association is incorporated herein by reference: Joint Industry Fabrics Standards Committee, Woven and Knit Residential Upholstery Fabric Standards and Guidelines (January 2001).

b. Copies may be obtained from: American Furniture Manufacturers Association, P.O. Box HP-7, High Point, NC 27261; phone (336) 884-5000.

Article 48
Emission Standards for Mobile Equipment Repair and Refinishing Operations (Rule 4-48)

9VAC5-40-6970. Applicability and designation of affected facility.

A. Except as provided in ~~subsection C of this section~~ 9VAC5-40-6975, the affected facility to which the provisions of this article apply is each mobile equipment repair and refinishing operation. Certain provisions also apply to each person providing or selling affected coatings.

B. The provisions of this article apply only to sources and persons in the Northern Virginia, ~~and~~ Fredericksburg, and Richmond Volatile Organic Compound Emissions Control Areas designated in 9VAC5-20-206.

~~C. The provisions of this article do not apply under any of the following circumstances:~~

~~1. The mobile equipment repair and refinishing operation is subject to Article 28 (9VAC5-40-3860 et seq.) of 9VAC5 Chapter 40 (Emission Standards for Automobile and Light Duty Truck Coating Application Systems).~~

~~2. The mobile equipment repair and refinishing operation is subject to Article 34 (9VAC5-40-4760 et seq.) of 9VAC5 Chapter 40 (Emission Standards for Miscellaneous Metal Parts and Products Coating Application Systems).~~

~~3. The person applying the coatings does not receive compensation for the application of the coatings.~~

~~4. The mobile equipment repair and refinishing operations uses coatings required to meet military specifications (MILSPEC) where no other existing coating can be used that meets the provisions of this article.~~

9VAC5-40-6975. Exemptions.

The provisions of this article do not apply under any of the following circumstances:

1. The mobile equipment repair and refinishing operation is subject to Article 28 (9VAC5-40-3860 et seq.) of 9VAC5-40 (Emission Standards for Automobile and Light Duty Truck Coating Application Systems).

2. The mobile equipment repair and refinishing operation is subject to Article 34 (9VAC5-40-4760 et seq.) of 9VAC5-40 (Emission Standards for Miscellaneous Metal Parts and Products Coating Application Systems).

3. The person applying the coatings does not receive compensation for the application of the coatings.

4. The mobile equipment repair and refinishing operation uses coatings required to meet military specifications (MILSPEC) where no other existing coating can be used that meets the provisions of this article.

9VAC5-40-7050. Compliance ~~schedule~~ schedules.

Affected persons and facilities shall comply with the provisions of this article as expeditiously as possible but in no case later than:

1. January 1, 2005, in the Northern Virginia VOC Emissions Control Area; ~~or~~

2. January 1, 2008, in the Fredericksburg VOC Emissions Control Area~~.~~; or

3. May 1, 2010, in the Richmond VOC Emissions Control Area.

CHAPTER 45
CONSUMER AND COMMERCIAL PRODUCTS

Part I
Special Provisions

9VAC5-45-10. Applicability.

A. The provisions of this chapter, unless specified otherwise, shall apply to:

1. Any product for which an emission standard or other requirement is prescribed under this chapter; and

2. Any owner or other person that engages in or permits an operation that is subject to the provisions of this chapter. Such operations may include, but are not limited to, the manufacture, packaging, distribution, marketing, application, sale or use, or contracting for the application, sale, or use, of the products specified in subdivision 1 of this subsection.

B. The provisions set forth in subdivisions 1 through 6 of this subsection, unless specified otherwise, shall not apply to any product or operation for which emission standards are prescribed under this chapter.

1. The provisions of 9VAC5-20-160 (Registration).

2. The provisions of 9VAC5-20-180 (Facility and control equipment maintenance or malfunction).

3. The provisions of Article 1 (9VAC5-40-60 et seq.) of Part II of 9VAC5-40 (Existing Stationary Sources) and Article 1 (9VAC5-50-60 et seq.) of Part II of 9VAC5-50 (New and Modified Stationary Sources).

4. The provisions of Article 2 (9VAC5-40-130 et seq.) of Part II of 9VAC5-40 (Existing Stationary Sources) and Article 2 (9VAC5-50-130 et seq.) of Part II of 9VAC5-50 (New and Modified Stationary Sources).

5. The provisions of Article 4 (9VAC5-60-200 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources) and Article 5 (9VAC5-60-300 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

6. The provisions of Article 6 (9VAC5-80-1100 et seq.), Article 7 (9VAC5-80-1400 et seq.), Article 8 (9VAC5-80-1605 et seq.), and Article 9 (9VAC5-80-2000 et seq.) of Part II of 9VAC5-80 (Permits for Stationary Sources).

C. Nothing in this chapter shall be interpreted to exempt a stationary source from any provision of 9VAC5-40 (Existing Stationary Sources), 9VAC5-50 (New and Modified Stationary Sources), 9VAC5-60 (Hazardous Air Pollutant Sources) or 9VAC5-80 (Permits for Stationary Sources) that may apply.

D. Any owner or other person subject to the provisions of this chapter may provide any report, notification, or other document by electronic media if acceptable to both the owner and board. This subsection shall not apply to documents requiring signatures or certification under 9VAC5-20-230.

9VAC5-45-20. Compliance.

A. Unless otherwise specified in this chapter, no owner or other person shall engage in or permit any applicable operation (such as the manufacture, packaging, distribution, marketing, application, sale or use, or contracting for the application, sale or use, of any product) in violation of a standard prescribed under this chapter after the effective date of such standard.

1. Compliance with standards in this chapter, other than opacity standards, shall be determined by emission tests established by 9VAC5-45-30, unless specified otherwise in the applicable standard.

2. Compliance with federal requirements in this chapter may be determined by alternative or equivalent methods only if approved by the administrator. For purposes of this subsection, federal requirements consist of the following:

a. New source performance standards established pursuant to § 111 of the federal Clean Air Act.

b. All terms and conditions in a federal operating permit, including any provisions that limit a source's potential to emit, unless expressly designated as not federally enforceable.

c. Limitations and conditions that are part of an implementation plan.

d. Limitations and conditions that are part of a § 111(d) or § 111(d)/129 plan.

e. Limitations and conditions that are part of a federal construction permit issued under 40 CFR 52.21 or any construction permit issued under regulations approved by EPA in accordance with 40 CFR Part 51.

f. Limitations and conditions that are part of an operating permit issued pursuant to a program approved by EPA into an implementation plan as meeting EPA's minimum criteria for federal enforceability, including adequate notice and opportunity for EPA and public comment prior to issuance of the final permit and practicable enforceability.

3. Compliance with opacity standards in this chapter shall be determined by conducting observations in accordance with Reference Method 9 or any alternative method. For purposes of determining initial compliance, the minimum total time of observations shall be three hours (30 six-minute averages) for the emission test or other set of observations (meaning those fugitive-type emission sources subject only to an opacity standard). Opacity readings of portions of plumes that contain condensed, uncombined water vapor shall not be used for purposes of determining compliance with opacity standards.

4. The opacity standards prescribed under this chapter shall apply at all times except during periods of startup, shutdown, malfunction, and as otherwise provided in the applicable standard. This exception shall not apply to the following federal requirements:

a. Limitations and conditions that are part of an implementation plan.

b. Limitations and conditions that are part of a federal construction permit issued under 40 CFR 52.21 or any construction permit issued under regulations approved by EPA in accordance with 40 CFR Part 51.

c. Limitations and conditions that are part of an operating permit issued pursuant to a program approved by EPA into an implementation plan as meeting EPA's minimum criteria for federal enforceability, including adequate notice and opportunity for EPA and public comment prior to issuance of the final permit and practicable enforceability.

B. No owner or other person subject to the provisions of this chapter shall fail to conduct emission tests as required under this chapter.

C. No owner or other person subject to the provisions of this chapter shall fail to install, calibrate, maintain, and operate equipment for continuously monitoring and recording emissions or process parameters or both as required under this chapter.

D. No owner or other person subject to the provisions of this chapter shall fail to provide notifications and reports, revise

reports, maintain records, or report emission test or monitoring results as required under this chapter.

E. At all times, including periods of startup, shutdown, soot blowing and malfunction, owners shall, to the extent practicable, maintain and operate any equipment associated with an operation subject to the provisions of this chapter including associated air pollution control equipment in a manner consistent with air pollution control practices for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the board, which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the operation.

F. At all times the disposal of volatile organic compounds shall be accomplished by taking measures, to the extent practicable, consistent with air pollution control practices for minimizing emissions. Volatile organic compounds shall not be intentionally spilled, discarded in sewers that are not connected to a treatment plant, or stored in open containers or handled in any other manner that would result in evaporation beyond that consistent with air pollution control practices for minimizing emissions.

G. For the purpose of submitting compliance certifications or establishing whether or not an owner or other person has violated or is in violation of any standard in this chapter, nothing in this chapter shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate emission or compliance test or procedure had been performed.

9VAC5-45-30. Emission testing.

A. Emission tests for operations and products subject to standards prescribed under this chapter shall be conducted and reported, and data shall be reduced as set forth in this chapter and in the appropriate reference methods unless the board (i) specifies or approves, in specific cases, the use of a reference method with minor changes in methodology; (ii) approves the use of an equivalent method; (iii) approves the use of an alternative method the results of which the board has determined to be adequate for indicating whether such operation or product is in compliance; (iv) waives the requirement for emission tests because the owner or other person has demonstrated by other means to the board's satisfaction that such operation or product is in compliance with the standard; or (v) approves shorter sampling times and smaller sample volumes when necessitated by process variables or other factors. In cases where no appropriate reference method exists for an operation or product subject to an emission standard for volatile organic compounds, the applicable test method in 9VAC5-20-121 may be considered appropriate.

B. Emission testing for operations and products subject to standards prescribed under this chapter shall be subject to testing guidelines approved by the board. Procedures may be adjusted or changed by the board to suit specific sampling conditions or needs based upon good practice, judgment, and experience. When such tests are adjusted, consideration shall be given to the effect of such change on established emission standards. Tests shall be performed under the direction of persons whose qualifications are acceptable to the board.

C. Emission tests for operations and products subject to standards prescribed under this chapter shall be conducted under conditions that the board shall specify to the owner, based on representative performance of such operation or product. The owner shall make available to the board such records as may be necessary to determine the conditions of the emission tests. Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of an emission test unless otherwise specified in the applicable standard.

D. An owner may request that the board determine the opacity of emissions from operations or control devices that are subject to the provisions of this chapter during the emission tests required by this section.

E. Except as otherwise specified in the applicable test method or procedure, each emission test for an operation or product subject to standards prescribed under this chapter shall consist of three separate runs using the applicable test method. Each run shall be conducted for the time and under the conditions acceptable to the board. For the purpose of determining compliance with an applicable standard, the arithmetic mean of the results of the three runs shall apply. In the event that a sample is accidentally lost, or if conditions occur in which one of the three runs must be discontinued because of forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances beyond the owner's control, compliance may, upon the approval of the board, be determined using the arithmetic mean of the results of the two other runs.

F. The board may test emissions of volatile organic compounds from any operation or product subject to standards prescribed under this chapter. Upon request of the board the owner shall provide, or cause to be provided, emission testing facilities as follows:

1. Sampling ports adequate for test methods applicable to such source. This includes (i) constructing the air pollution control system such that volumetric flow rates and pollutant emission rates can be accurately determined by applicable test methods and procedures and (ii) providing a stack or duct with acceptable flow characteristics during emission tests, as demonstrated by applicable test methods and procedures.

2. Safe sampling platforms.

3. Safe access to sampling platforms.

4. Utilities for sampling and testing equipment.

5. Test enclosures for determining capture efficiency.

G. The board may, at its discretion, accept other demonstrations of compliance in lieu of emission testing, such as the results of manufacturer emission testing of a product batch or manufacturer product batch formulation records.

H. Upon request of the board, any owner or other person causing or permitting any operation subject to the provisions of this chapter shall conduct emission tests in accordance with procedures approved by the board.

9VAC5-45-40. Monitoring.

A. Unless otherwise approved by the board, owners or other persons subject the provisions of an standard under this chapter shall install, calibrate, maintain, and operate systems for continuously monitoring and recording emissions of specified pollutants as specified in the applicable article of this chapter. However, nothing in this chapter shall exempt any owner from complying with subsection F of this section.

B. All continuous monitoring systems and monitoring devices shall be installed and operational prior to conducting emission tests required under 9VAC5-45-30. Verification of operational status shall, as a minimum, include completion of the manufacturer's written requirements or recommendations for installation, operation, and calibration of the device and completion of any conditioning period specified by the appropriate specification in Appendix B of 40 CFR Part 60.

C. During any emissions tests required under 9VAC5-45-30 or within 30 days thereafter and at such other times as may be requested by the board, the owner or other person subject to the requirements of subsection A of this section shall conduct continuous monitoring system performance evaluations and furnish the board within 60 days of them two or, upon request, more copies of a written report of the results of such tests. These continuous monitoring system performance evaluations shall be conducted in accordance with the requirements and procedures specified in the applicable emission standard, the requirements contained in applicable procedures in 9VAC5-20-121, and the requirements and procedures equivalent to those contained in the appropriate specification of Appendix B of 40 CFR Part 60.

D. Unless otherwise approved by the board, all continuous monitoring systems required by subsection A of this section shall be installed, calibrated, maintained, and operated in accordance with (i) applicable requirements in this section, (ii) requirements in the applicable emission standard, and (iii) requirements equivalent to those in 40 CFR 60.13.

E. After receipt and consideration of written application, the board may approve alternatives to any monitoring procedures or requirements of this chapter including, but not limited to, the following:

1. Alternative monitoring requirements when installation of a continuous monitoring system or monitoring device specified by this chapter would not provide accurate measurements due to liquid water or other interferences caused by substances within the effluent gases.

2. Alternative monitoring requirements when the source is infrequently operated.

3. Alternative monitoring requirements to accommodate continuous monitoring systems that require additional measurements to correct for stack moisture conditions.

4. Alternative locations for installing continuous monitoring systems or monitoring devices when the owner can demonstrate the installation at alternate locations will enable accurate and representative measurements.

5. Alternative methods of converting pollutant concentration measurements to units of the standards.

6. Alternative procedures for computing emission averages that do not require integration of data (e.g., some facilities may demonstrate that the variability of their emissions is sufficiently small to allow accurate reduction of data based upon computing averages from equally spaced data points over the averaging period).

7. Alternative monitoring requirements when the effluent from a single source or the combined effluent from two or more sources are released to the atmosphere through more than one point.

8. Alternative procedures for performing calibration checks.

9. Alternative monitoring requirements when the requirements of this section would impose an extreme economic burden on the owner.

10. Alternative monitoring requirements when the continuous monitoring systems cannot be installed due to physical limitations at the source.

F. Upon request of the board, the owner or other person subject to the provisions of this chapter shall install, calibrate, maintain, and operate equipment for continuously monitoring and recording emissions or process parameters or both in accordance with methods and procedures acceptable to the board.

9VAC5-45-50. Notification, records and reporting.

A. Any owner or other person subject to the continuous monitoring provisions of 9VAC5-45-40 C shall provide written notifications to the board of the following:

1. The date upon which demonstration of the continuous monitoring system performance begins in accordance with 9VAC5-45-40 C. Notification shall be postmarked not less than 30 days prior to such date.

2. The date of any emission test the owner wishes the board to consider in determining compliance with a standard. Notification shall be postmarked not less than 30 days prior to such date.

3. The anticipated date for conducting the opacity observations required by 9VAC5-45-20 A 3. The notification shall also include, if appropriate, a request for the board to provide a visible emissions reader during an emission test. The notification shall be postmarked not less than 30 days prior to such date.

B. Any owner or other person subject to the continuous monitoring provisions of 9VAC5-45-40 A shall maintain records of the occurrence and duration of any startup, shutdown, or malfunction of the operation subject to the provisions of an article under this chapter; any malfunction of the air pollution control equipment; or any periods during which a continuous monitoring system or monitoring device is inoperative.

C. Each owner or other person required to install a continuous monitoring system (CMS) or monitoring device shall submit a written report of excess emissions (as defined in the applicable emission standard) and either a monitoring systems performance report or a summary report form, or both, to the board semiannually, except when (i) more frequent reporting is specifically required by an applicable emission standard or the CMS data are to be used directly for compliance determination, in which case quarterly reports shall be submitted; or (ii) the board, on a case-by-case basis, determines that more frequent reporting is necessary to accurately assess the compliance status of the source. The summary report and form shall meet the requirements of 40 CFR 60.7(d). The frequency of reporting requirements may be reduced as provided in 40 CFR 60.7(e). All reports shall be postmarked by the 30th day following the end of each calendar half (or quarter, as appropriate). Written reports of excess emissions shall include the following information:

1. The magnitude of excess emissions computed in accordance with 9VAC5-40-41 B 6, any conversion factors used, and the date and time of commencement and completion of each period of excess emissions.

2. The process operating time during the reporting period.

3. Specific identification of each period of excess emissions that occurs during startups, shutdowns, and malfunctions of the source.

4. The nature and cause of any malfunction (if known), the corrective action taken or preventative measures adopted.

5. The date and time identifying each period during which the continuous monitoring system was inoperative except for zero and span checks and the nature of the system repairs or adjustments.

6. When no excess emissions have occurred or the continuous monitoring systems have not been inoperative, repaired, or adjusted, such information shall be stated in the report.

D. Any owner or other person subject to the continuous monitoring provisions of 9VAC5-45-40 or monitoring requirements of an article under this chapter shall maintain a file of all measurements, including continuous monitoring system, monitoring device, and emission testing measurements; all continuous monitoring system performance evaluations; all continuous monitoring system or monitoring device calibration checks; adjustments and maintenance performed on these systems or devices; and all other information required by this chapter recorded in a permanent form suitable for inspection. The file shall be retained for at least two years (unless a longer period is specified in the applicable standard) following the date of such measurements, maintenance, reports, and records.

E. Any data or information required by the Regulations for the Control and Abatement of Air Pollution, any permit or order of the board, or which the owner wishes the board to consider, to determine compliance with an emission standard shall be recorded or maintained in a time frame consistent with the averaging period of the standard.

F. Any owner or other person that is subject to the provisions of this chapter shall keep records as may be necessary to determine its emissions. Any owner or other person claiming that an operation or product is exempt from the provisions of the Regulations for the Control and Abatement of Air Pollution shall keep records as may be necessary to demonstrate to the satisfaction of the board its continued exempt status.

G. Unless otherwise specified by the provisions of an article under this chapter, all records required to determine compliance with the provisions of an article under this chapter shall be maintained by the owner or other person subject to such provision for two years from the date such record is created and shall be made available to the board upon request.

H. Upon request of the board, the owner or other person subject to the provisions of this chapter shall provide notifications and report, revise reports, maintain records, or report emission test or monitoring results in a manner and form and using procedures acceptable to board.

I. Information submitted to the board to meet the requirements of this chapter shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the

criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

Part II
Emission Standards

Article 1
Emission Standards for Portable Fuel Containers and Spouts Manufactured before May 1, 2010

9VAC5-45-60. Applicability.

A. Except as provided in 9VAC5-45-70, the provisions of this article apply to any portable fuel container or spout manufactured before May 1, 2010. The provisions of Article 2 (9VAC5-45-160 et seq.) of this part apply to portable fuel containers and spouts manufactured on or after May 1, 2010.

B. Except as provided in 9VAC5-45-70, the provisions of this article apply to any owner or other person who sells, supplies, offers for sale, or manufactures for sale portable fuel containers or spouts.

C. The provisions of this article apply only to owners and other persons in the Northern Virginia and Fredericksburg Volatile Organic Compound Emissions Control Areas designated in 9VAC5-20-206.

9VAC5-45-70. Exemptions.

A. The provisions of this article do not apply to any portable fuel container or spout manufactured for shipment, sale, and use outside of the applicable volatile organic compound emissions control areas designated in 9VAC5-45-60.

B. The provisions of this article do not apply to a manufacturer or distributor who sells, supplies, or offers for sale a portable fuel container or spout that does not comply with the emission standards specified in 9VAC5-45-90, as long as the manufacturer or distributor can demonstrate that: (i) the portable fuel container or spout is intended for shipment and use outside of the applicable volatile organic compound emissions control areas designated in 9VAC5-45-60 C; and (ii) the manufacturer or distributor has taken reasonable prudent precautions to assure that the portable fuel container or spout is not distributed within the applicable volatile organic compound emissions control areas designated in 9VAC5-45-60 C. This subsection does not apply to portable fuel containers or spouts that are sold, supplied, or offered for sale to retail outlets.

C. The provisions of this article do not apply to safety cans meeting the requirements of 29 CFR Part 1926 Subpart F.

D. The provisions of this article do not apply to portable fuel containers with a nominal capacity less than or equal to one quart.

E. The provisions of this article do not apply to rapid refueling devices with nominal capacities greater than or equal to four gallons, provided (i) such devices are designed for use in officially sanctioned off-highway motor sports such as car racing or motorcycle competitions, and (ii) such devices either create a leak-proof seal against a stock target fuel tank, or are designed to operate in conjunction with a receiver permanently installed on the target fuel tank.

F. The provisions of this article do not apply to portable fuel tanks manufactured specifically to deliver fuel through a hose attached between the portable fuel tank and the outboard engine for the purpose of operating the outboard engine.

G. The provisions of this article do not apply to closed-system portable fuel containers that are used exclusively for fueling remote control model airplanes.

H. For purposes of this article, the terms "supply" or "supplied" do not include internal transactions within a business or governmental entity. These terms only apply to transactions between manufacturers/commercial distributors that sell, or otherwise provide, products to businesses/governmental entities/individuals.

9VAC5-45-80. Definitions.

A. For the purpose of applying this article in the context of the Regulations for the Control and Abatement of Air Pollution and related uses, the words or terms shall have the meanings given them in subsection C of this section.

B. As used in this article, all terms not defined herein shall have the meanings given them in 9VAC5-10 (General Definitions) unless otherwise required by context.

C. Terms defined.

"ASTM" means the American Society for Testing and Materials.

"CARB" means California Air Resources Board.

"Consumer" means any person who purchases or otherwise acquires a new portable fuel container or spout for personal, family, household, or institutional use. Persons acquiring a portable fuel container or spout for resale are not "consumers" for that product.

"Distributor" means any person to whom a portable fuel container or spout is sold or supplied for the purpose of resale or distribution in commerce. This term does not include manufacturers, retailers, and consumers.

"Fuel" means all motor fuels subject to any provision of Chapter 12 (§ 59.1-149 et seq.) of Title 59.1 of the Code of Virginia, excluding liquefied petroleum gas, compressed natural gas, and hydrogen. This term includes, but is not limited to, gasoline, diesel fuel, and gasoline-alcohol blends.

"Manufacturer" means any person who imports, manufactures, assembles, produces, packages, repackages, or re-labels a portable fuel container or spout.

"Nominal capacity" means the volume indicated by the manufacturer that represents the maximum recommended filling level.

"Outboard engine" means a spark-ignition marine engine that, when properly mounted on a marine watercraft in the position to operate, houses the engine and drive unit external to the hull of the marine watercraft.

"Permeation" means the process by which individual fuel molecules may penetrate the walls and various assembly components of a portable fuel container directly to the outside ambient air.

"Portable fuel container" means any container or vessel with a nominal capacity of 10 gallons or less intended for reuse that is designed, used, sold, advertised for sale, or offered for sale for receiving, transporting, storing, and dispensing fuel. Portable fuel containers do not include containers or vessels permanently embossed or permanently labeled as described in 49 CFR 172.407 (a) with language indicating that the containers or vessels are solely intended for use with nonfuel products.

"Retail outlet" means any establishment at which portable fuel containers or spouts are sold, supplied, or offered for sale.

"Retailer" means any person who owns, leases, operates, controls, or supervises a retail outlet.

"Spill-proof spout" means any spout that complies with the standards specified in 9VAC5-45-90 B and the administrative requirements in 9VAC5-45-100.

"Spill-proof system" means any configuration of portable fuel container and firmly attached spout that complies with the standards in 9VAC5-45-90 A and the administrative requirements in 9VAC5-45-100.

"Spout" means any device that can be firmly attached to a portable fuel container and through which the contents of the container may be poured. A spout does not include a device that can be used to lengthen the spout to accommodate necessary applications.

"Target fuel tank" means any receptacle that receives fuel from a portable fuel container.

9VAC5-45-90. Standard for volatile organic compounds.

A. No owner or other person shall sell, supply, offer for sale, or manufacture for sale any portable fuel container after the compliance dates specified in 9VAC5-45-120 A unless that portable fuel container meets all of the following standards for spill-proof systems:

1. Has an automatic shut-off that stops the fuel flow before the target fuel tank overflows.

2. Automatically closes and seals when removed from the target fuel tank and remains completely closed when not dispensing fuel.

3. Has only one opening for both filling and pouring.

4. Does not exceed a permeation rate of 0.4 grams per gallon per day.

5. Is warranted by the manufacturer for a period of not less than one year against defects in materials and workmanship.

B. No owner or other person shall sell, supply, offer for sale, or manufacture for sale any spout after the compliance dates specified in 9VAC5-45-120 unless that spout meets all of the following standards for spill-proof spouts:

1. Has an automatic shut-off that stops the fuel flow before the target fuel tank overflows.

2. Automatically closes and seals when removed from the target fuel tank and remains completely closed when not dispensing fuel.

3. Is warranted by the manufacturer for a period of not less than one year against defects in materials and workmanship.

C. The test procedures for determining compliance with the standards in this section are set forth in 9VAC5-45-130. The manufacturer of portable fuel containers or spouts shall perform the tests for determining compliance as set forth in 9VAC5-45-130 to show that its product meets the standards of this section prior to allowing the product to be offered for sale. The manufacturer shall maintain records of these compliance tests for as long as the product is available for sale and shall make those test results available within 60 days of request.

D. Compliance with the standards in this section does not exempt spill-proof systems or spill-proof spouts from compliance with other applicable federal and state statutes and regulations such as state fire codes, safety codes, and other safety regulations, nor will the board test for or determine compliance with such other statutes or regulations.

E. The following provisions apply to sell through of portable fuel containers and spouts manufactured before May 1, 2010:

1. Notwithstanding the provisions of subsections A and B of this section, a portable fuel container or spout manufactured before the applicable compliance date specified in 9VAC5-45-120 A, may be sold, supplied, or offered for sale after the applicable compliance date, if the date of manufacture or a date code representing the date of manufacture is clearly displayed on the portable fuel container or spout.

2. Notwithstanding the provisions of subsections A and B of this section, a portable fuel container or spout manufactured after the applicable compliance date specified in 9VAC5-45-120 A and before May 1, 2010 may be sold, supplied, or offered for sale after May 1, 2010, if it complies with all of the provisions of Article 2 (9VAC5-45-160 et seq.) of this part.

3. Except as provided in subdivisions 1 and 2 of this subsection, displaying the date of manufacture, or a code indicating the date of manufacture, on the product container or package does not exempt the owner or product from the provisions of this article.

9VAC5-45-100. Administrative requirements.

A. Each manufacturer of a portable fuel container subject to and complying with 9VAC5-45-90 A shall clearly display on each spill-proof system:

1. The phrase "Spill-Proof System";

2. A date of manufacture or representative date code; and

3. A representative code identifying the portable fuel container as subject to and complying with 9VAC5-45-90 A.

B. Each manufacturer of a spout subject to and complying with 9VAC5-45-90 B shall clearly display on the accompanying package, or for spill-proof spouts sold without packaging, on either the spill-proof spout or a label affixed thereto:

1. The phrase "Spill-Proof Spout";

2. A date of manufacture or representative date code; and

3. A representative code identifying the spout as subject to and complying with 9VAC5-45-90 B.

C. Each manufacturer subject to subsection A or B shall file an explanation of both the date code and representative code with the board no later than the later of three months after the effective date of this article or within three months of production, and within three months after any change in coding.

D. Each manufacturer of a spout subject to subsection B of this section shall clearly display the make, model number, and size of those portable fuel containers the spout is designed to accommodate and for which the manufacturer can demonstrate the container's compliance with 9VAC5-45-90 on the accompanying package, or for spill-proof spouts sold without packaging, on either the spill-proof spout or a label affixed thereto.

E. Manufacturers of portable fuel containers not subject to or not in compliance with 9VAC5-45-90 may not display the phrase "Spill-Proof System" or "Spill-Proof Spout" on the portable fuel container or spout or on any sticker or label affixed thereto or on any accompanying package.

F. Each manufacturer of a portable fuel container or spout subject to and complying with 9VAC5-45-90 that due to its design or other features cannot be used to refuel on-road motor vehicles shall clearly display the phrase "Not Intended For Refueling On-Road Motor Vehicles" in type of 34 point or greater on each of the following:

1. For a portable fuel container sold as a spill-proof system, on the system or on a label affixed thereto, and on the accompanying package, if any; and

2. For a spill-proof spout sold separately from a spill-proof system, on either the spill-proof spout, or a label affixed thereto, and on the accompanying package, if any.

9VAC5-45-110. Compliance.

The provisions of subsections B, D, F, and G of 9VAC5-45-20 (Compliance) apply. The other provisions of 9VAC5-45-20 do not apply.

9VAC5-45-120. Compliance schedules.

A. Affected persons shall comply with the provisions of this article as expeditiously as possible but in no case later than:

1. January 1, 2005, in the Northern Virginia VOC Emissions Control Area; or

2. January 1, 2008, in the Fredericksburg VOC Emissions Control Area.

B. Any owner or other person who cannot comply with the provisions of this article by the date specified in subsection A of this section, due to extraordinary reasons beyond that person's reasonable control, may apply in writing to the board for a waiver. The waiver application shall set forth:

1. The specific grounds upon which the waiver is sought, including the facts that support the extraordinary reasons that compliance is beyond the applicant's reasonable control;

2. The proposed date by which compliance with the provisions of this article will be achieved; and

3. A compliance report detailing the methods by which compliance will be achieved.

C. No waiver may be granted unless all of the following findings are made:

1. That, due to reasons beyond the reasonable control of the applicant, required compliance with this article would result in extraordinary economic hardship;

2. That the public interest in mitigating the extraordinary hardship to the applicant by issuing the waiver outweighs the public interest in avoiding any increased emissions of air contaminants that would result from issuing the waiver; and

3. That the compliance report proposed by the applicant can reasonably be implemented and shall achieve compliance as expeditiously as possible.

D. Any approval of a waiver shall specify a final compliance date by which compliance with the requirements of this article shall be achieved. Any approval of a waiver shall contain a condition that specifies the increments of progress necessary to assure timely compliance and such other conditions that the board finds necessary to carry out the purposes of this article.

E. A waiver shall cease to be effective upon the failure of the party to whom the waiver was granted to comply with any term or condition of the waiver.

F. Upon the application of any person, the board may review, and for good cause, modify or revoke a waiver from requirements of this article.

9VAC5-45-130. Test methods and procedures.

A. The provisions of subsection G of 9VAC5-45-30 (Emission testing) apply. The other provisions of 9VAC5-45-30 do not apply.

B. Testing to determine compliance with 9VAC5-45-90 B of this article shall be performed by using the following test procedures (see 9VAC5-20-21):

1. CARB "Automatic Shut-Off Test Procedure for Spill-Proof Systems and Spill-Proof Spouts."

2. CARB "Automatic Closure Test Procedure for Spill-Proof Systems and Spill-Proof Spouts."

C. Testing to determine compliance with 9VAC5-45-90 A of this article shall be performed by using all test procedures in subsection B of this section and the following test procedure: CARB Determination of Permeation Rate for Spill-Proof Systems (see 9VAC5-20-21). Alternative methods that are shown to be accurate, precise, and appropriate may be used upon written approval of the board.

9VAC5-45-140. Monitoring.

The provisions of 9VAC5-45-40 (Monitoring) do not apply.

9VAC5-45-150. Notification, records and reporting.

The provisions of subsections E, F, and G of 9VAC5-45-50 (Notification, records and reporting) apply. The other provisions of 9VAC5-45-50 do not apply.

Article 2
Emission Standards for Portable Fuel Containers and Spouts Manufactured On or After May 1, 2010

9VAC5-45-160. Applicability.

A. Except as provided in 9VAC5-45-170, the provisions of this article apply to any portable fuel container or spout manufactured on or after May 1, 2010. The provisions of Article 1 (9VAC5-45-60 et seq.) of this part apply to portable fuel containers and spouts manufactured before May 1, 2010.

B. Except as provided in 9VAC5-45-170, the provisions of this article apply to any owner or other person who sells, supplies, offers for sale, advertises for sale, or manufactures for sale portable fuel containers or spouts.

C. The provisions of this article apply only to owners and other persons in the Northern Virginia, Fredericksburg, and Richmond Volatile Organic Compound Emissions Control Areas designated in 9VAC5-20-206.

9VAC5-45-170. Exemptions.

A. The provisions of this article do not apply to any portable fuel container or spout manufactured for shipment, sale, and use outside of the applicable volatile organic compound emissions control areas designated in 9VAC5-45-160 C.

B. The provisions of this article do not apply to a manufacturer or distributor who sells, supplies, or offers for sale a portable fuel container or spout that does not comply with the emission standards specified in 9VAC5-45-190, as long as the manufacturer or distributor can demonstrate that: (i) the portable fuel container or spout is intended for shipment and use outside of the applicable volatile organic compound emissions control areas designated in 9VAC5-45-160 C; and (ii) the manufacturer or distributor has taken reasonable prudent precautions to assure that the portable fuel container or spout is not distributed within the applicable volatile organic compound emissions control areas designated in 9VAC5-45-160 C. This subsection does not apply to portable fuel containers or spouts that are sold, supplied, or offered for sale to retail outlets.

C. The provisions of this article do not apply to safety cans meeting the requirements of 29 CFR Part 1926 Subpart F.

D. The provisions of this article do not apply to portable fuel containers with a nominal capacity less than or equal to one quart.

E. The provisions of this article do not apply to rapid refueling devices with nominal capacities greater than or equal to four gallons provided (i) such devices are designed for use in officially sanctioned off-highway motor sports such as car racing or motorcycle competitions, and (ii) such devices either create a leak-proof seal against a stock target fuel tank, or are designed to operate in conjunction with a receiver permanently installed on the target fuel tank.

F. The provisions of this article do not apply to portable fuel tanks manufactured specifically to deliver fuel through a hose attached between the portable fuel tank and the outboard engine for the purpose of operating the outboard engine.

G. The provisions of this article do not apply to closed-system portable fuel containers that are used exclusively for fueling remote control model airplanes.

H. For purposes of this article, the terms "supply" or "supplied" do not include internal transactions within a business or governmental entity. These terms only apply to transactions between manufacturers/commercial distributors that sell, or otherwise provide, products to businesses/governmental entities/individuals.

9VAC5-45-180. Definitions.

A. For the purpose of applying this article in the context of the Regulations for the Control and Abatement of Air Pollution and related uses, the words or terms shall have the meanings given them in subsection C of this section.

B. As used in this article, all terms not defined herein shall have the meanings given them in 9VAC5-10 (General Definitions) unless otherwise required by context.

C. Terms defined.

"ASTM" means the American Society for Testing and Materials.

"CARB" means California Air Resources Board.

"CARB certification executive order" means a CARB decision, signed by the CARB Executive Officer and specifying that one or more portable fuel containers or spouts has been certified by CARB to meet the requirements of CARB "Certification Procedure 501 for Portable Fuel Containers and Spill-Proof Spouts, CP-501" (see 9VAC5-20-21)

"Consumer" means any person who purchases or otherwise acquires a new portable fuel container or spout for personal, family, household, or institutional use. Persons acquiring a portable fuel container or spout for resale are not "consumers" for that product.

"Distributor" means any person to whom a portable fuel container or spout is sold or supplied for the purpose of resale or distribution in commerce. This term does not include manufacturers, retailers, and consumers.

"Fuel" means all motor fuels subject to any provision of Chapter 12 (§ 59.1-149 et seq.) of Title 59.1 of the Code of Virginia, excluding liquefied petroleum gas, compressed natural gas, and hydrogen. This term includes, but is not limited to, gasoline, diesel fuel, and gasoline-alcohol blends.

"Kerosene" or "kerosine" means any light petroleum distillate that is commonly or commercially known, sold, or represented as kerosene, that is used in space heating, cook stoves, and water heaters, and that is suitable for use as a light source when burned in wick-fed lamps.

"Manufacturer" means any person who imports, manufactures, assembles, produces, packages, repackages, or re-labels a portable fuel container or spout.

"Nominal capacity" means the volume indicated by the manufacturer that represents the maximum recommended filling level.

"Outboard engine" means a spark-ignition marine engine that, when properly mounted on a marine watercraft in the position to operate, houses the engine and drive unit external to the hull of the marine watercraft.

"Permeation" means the process by which individual fuel molecules may penetrate the walls and various assembly components of a portable fuel container directly to the outside ambient air.

"Portable fuel container" means any container or vessel with a nominal capacity of 10 gallons or less intended for reuse that is designed, used, sold, advertised for sale, or offered for sale for receiving, transporting, storing, and dispensing fuel or kerosene. Portable fuel containers do not include containers or vessels permanently embossed or permanently labeled as described in 49 CFR 172.407 (a) with language indicating that the containers or vessels are solely intended for use with nonfuel or nonkerosene products.

"Product category" means the applicable category that best describes the product with respect to its nominal capacity, material construction, fuel flow rate, and permeation rate, as applicable, as determined by the board.

"Retail outlet" means any establishment at which portable fuel containers or spouts are sold, supplied, or offered for sale.

"Retailer" means any person who owns, leases, operates, controls, or supervises a retail outlet.

"Spill-proof spout" means any spout that is certified by the board to be in compliance with the standards specified in 9VAC5-45-190 B and complies with the administrative requirements in 9VAC5-45-220.

"Spill-proof system" means any configuration of portable fuel container and firmly attached spout that is certified by the board to be in compliance with the standards in 9VAC5-45-190 B and complies with the administrative requirements in 9VAC5-45-220.

"Spout" means any device that can be firmly attached to a portable fuel container and through which the contents of the container may be poured. A spout does not include a device that can be used to lengthen the spout to accommodate necessary applications.

"Target fuel tank" means any receptacle that receives fuel from a portable fuel container.

9VAC5-45-190. Standard for volatile organic compounds.

A. The following provisions apply to portable fuel containers and spouts manufactured on or after May 1, 2010:

1. No owner or other person shall sell, supply, offer for sale or advertise for sale any portable fuel container or spout manufactured on or after May 1, 2010, unless that portable container or spout is certified by the board to be a spill-proof system or spill-proof spout that is in compliance with the standards in subsection B of this section, in accordance with the certification procedures specified in 9VAC5-45-200.

2. No owner or other person shall manufacture for sale any portable fuel container or spout on or after May 1, 2010, unless that portable container or spout is certified by the board to be a spill-proof system or spill-proof spout that is in compliance with the standards in subsection B of this section in accordance with the certification procedures specified in 9VAC5-45-200.

B. The following standards apply to each portable fuel container or spout manufactured on or after May 1, 2010, that is subject to the provisions of this article:

1. Portable fuel containers shall be color coded and marked as follows:

a. Portable fuel containers shall be color coded for specific fuels:

(1) Gasoline - red;

(2) Diesel - yellow; and

(3) Kerosene - blue.

b. Each portable fuel container shall have identification markings on the container and on the spill-proof spout.

(1) Red containers shall be permanently identified with the embossed language or permanent durable label "GASOLINE" in minimum 34-point Arial font or a font of equivalent proportions.

(2) Yellow containers shall be permanently identified with the embossed language, or permanent durable label "DIESEL" in minimum 34-point Arial font or a font of equivalent proportions.

(3) Blue containers shall be permanently identified with the embossed language, or permanent durable label "KEROSENE" in minimum 34-point Arial font or a font of equivalent proportions.

2. Portable fuel containers shall comply with emissions standards as follows:

a. Portable fuel containers that are equipped with an intended spill-proof spout shall emit no more than 0.3 grams per gallon per day.

b. Compliance with emission standards in this subdivision shall be determined using the test procedure specified in 9VAC5-45-250 B 2.

c. Portable fuel containers that share similar designs, that are constructed of identical materials, and that are manufactured using identical processes, but vary only in size or color may be considered for certification as a product family.

3. Portable fuel containers and spouts shall comply with the specifications for durability in subsection 7.4 of the test procedure specified in 9VAC5-45-250 B 2.

4. There shall be no fluid leakage from any point in the spill-proof system or spill-proof spout as specified in the test procedures specified in 9VAC5-45-250 B 1 and 2.

5. The spill-proof system or spill-proof spout shall automatically close when the spill-proof spout is removed from the target tank, seal, and remain completely closed when not dispensing fuel, as specified in the test procedure specified in 9VAC5-45-250 B 1. Also, no liquid, beyond wetted surfaces, shall be retained in the spill-proof spout after fueling that may evaporate into the atmosphere.

6. An applicant seeking certification of a portable fuel container or spout from the board pursuant to this article shall also:

a. Warrant that its spill-proof system or spill-proof spout is free from defects in materials and workmanship that cause such systems or spill-proof spouts to fail to conform with each of the certification and compliance standards specified in CARB "Certification Procedure 501 for Portable Fuel Containers and Spill-Proof Spouts, CP-501," for a period of one year from the date of sale; and

b. Supply a copy of the warranty language specified in subdivision a of this subdivision that is supplied to the buyer in the packaging for each spill-proof system or spill-proof spout at the time of sale identifying the following minimum requirements:

(1) A statement of the terms and length of the warranty period;

(2) An unconditional statement that the spill-proof system or spill-proof spout is certified to the requirements in subdivision a of this subdivision (which may be referred to as being certified to California requirements); and

(3) A listing of the specific certification requirements or limitations to which it was certified.

7. An applicant shall supply a copy of the operating instructions intended for each spill-proof system or spill-proof spout, and fueling application, as supplied to the buyer in the packaging for each spill-proof system or spill-proof spout at the time of sale. These instructions shall include, at a minimum, the following specifications:

a. A listing of any specific equipment types, such as passenger cars and trucks, lawn and garden equipment, off-road motorcycles and snowmobiles, industrial equipment, and marine vessels that the spill-proof system or spill-proof spout, is not intended to refuel; and

b. Other instructions, such as the recommended fueling angle(s) or special instructions such as venting prior to use.

8. Spill-proof systems, spill-proof spouts and all components incorporated therein, such as gaskets, seals, or O-rings must demonstrate compliance with the requirements specified in 9VAC5-45-250 B 3 and 4. Applicants may request limited certification for use with only specified fuel blends. Such fuel-specific certifications shall clearly specify the limits and restrictions of the certification.

9. A portable fuel container may incorporate a secondary opening or vent hole (i.e., an opening other than the opening needed for the spout) provided the secondary opening or vent hole is not easily tampered by a consumer, and it does not emit hydrocarbon vapors in excess of the amounts specified in this section during fueling, storage, transportation, or handling events.

C. The test procedures for determining compliance with the standards in this section are set forth in 9VAC5-45-250. The manufacturer of portable fuel containers or spouts shall perform the tests for determining compliance as set forth in 9VAC5-45-250 to show that its product meets the standards of this section prior to allowing the product to be offered for sale. The manufacturer shall maintain records of these compliance tests for as long as the product is available for sale and shall make those test results available within 60 days of request.

D. Compliance with the standards in this section does not exempt spill-proof systems or spill-proof spouts from compliance with other applicable federal and state statutes and regulations such as state fire codes, safety codes, and other safety regulations, nor will the board test for or determine compliance with such other statutes or regulations.

9VAC5-45-200. Certification procedures.

A. Provisions follow concerning the requirements and process for board certification of a portable fuel container or spout manufactured on or after May 1, 2010, as a spill-proof system or spill-proof spout.

B. To be considered by the board for certification, an application for certification shall be submitted in writing to the board by the manufacturer of the portable fuel container or spout.

1. Except as provided in subdivision D 2 of this section, the application shall contain the following information:

a. An identification of the names, addresses, and phone numbers of the company, owner or other persons that are submitting the application, and the names and phone numbers of contact persons that are knowledgeable concerning the application.

b. Model numbers and sizes of spill-proof systems or spill-proof spouts for which certification is requested.

c. Test data that demonstrates that the spill-proof systems or spill-proof spouts comply with each of the certification requirements identified in 9VAC5-45-190 B.

d. Engineering drawings of the spill-proof system or spill-proof spout detailing dimensions specific to each component. If an application is submitted for a spill-proof system (i.e., container and spout), separate dimensioned drawings for the portable fuel container and for the spill-proof spout are required. If more than one type or size of portable fuel container or more than one type of spill-proof spout is included in the application, separate dimensioned drawings are required for each component.

e. Test data from each of the test procedures specified in 9VAC5-45-250 B 1 and 2 demonstrating that the spill-proof system, spill-proof spout, or component meets the applicable criteria.

f. Any other test data that supports the requirements in subdivision e of this subsection and that would assist in the determination of certification.

g. The language, symbols, or patterns that will actually be permanently embossed on the spill-proof system or spill-proof spout. This shall include examples of date code wheels as well as all other permanent markings and their locations on the container and/or spill-proof spout. Once the board certifies a spill-proof system or spill-proof spout, these permanent markings cannot be altered or modified in any way without first obtaining the board's approval.

h. The language or labels that may be affixed to the spill-proof system or spill-proof spout at the time of sale.

i. The manufacturer's recommended instructions, instruction decals, or any other type of placard attached to the spill-proof system or spill-proof spout at the time of sale. Include examples of actual decals or placards if available. Proposed placards or decals are sufficient if actual samples are not available. Once the board certifies a spill-proof system or spill-proof spout, these decals or placards cannot be altered or modified in any way without first obtaining the board's approval.

j. The manufacturer warranty(s) as defined in 9VAC5-45-190 B 6.

k. A description of the materials used in the construction of the spill-proof system or spill-proof spout. Material compositions of gaskets, O-rings, and seals must be described.

l. If the applicant is not the manufacturer of all system components incorporated in a spill-proof system or spill-proof spout, the applicant must include evidence that the component manufacturers have been notified of the applicant's intended use of the manufacturers' components in the spill-proof system or spill-proof spout for which the application is being made.

(1) If the applicant is requesting inclusion of one or more components not manufactured by it on the applicable spill-proof system or spill-proof spout, the applicant shall notify the component manufacturers and obtain the information required of the application as specified in this subsection.

(2) If the component design and material specifications requested for inclusion in the certification have not been previously incorporated in a spill-proof system or spill-proof spout that has been issued a CARB certification Executive Order or has been certified by the board pursuant to these procedures, each of the components shall be subject to each of the application and test requirements specified in this article.

m. A sample of the spill-proof system or spill-proof spout is not required as part of the initial application for certification. The board may later require that a sample be provided if it is deemed necessary to make the proper certification determination.

n. The document certification statement required by 9VAC5-20-230, signed by a responsible official as defined in that section.

o. The information required by subdivision B 1 a of this section is public information that may not be claimed as confidential. Other information submitted to the board to meet the requirements of this article shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

2. In accordance with the time periods specified in subsection C of this section, the board will certify a portable fuel container or spout. The board will specify such terms and conditions as are necessary to ensure that the emissions from the portable fuel containers or spouts do not exceed the VOC standards specified in 9VAC5-45-190. The certification shall also include operational terms, conditions, and data to be reported to the board to ensure that all requirements of this article are met.

C. Provisions follow concerning the portable fuel container or spout certification time frames.

1. The board will take appropriate action on an application within the following time periods:

a. Within 30 working days of receipt of an application, the board will inform the applicant in writing that either:

(1) The application is complete and accepted for filing, or

(2) The application is deficient, and identify the specific information required to make the application complete.

b. Within 30 working days of receipt of additional information provided in response to a determination that an application is deficient, the board will inform the applicant in writing that either:

(1) The additional information is sufficient to make the application complete, and the application is accepted for filing, or

(2) The application is deficient, and identify the specific information required to make the application complete.

c. If the board finds that an application meets the requirements of subsection B of this section, then it shall certify that the requirements have been met in accordance with the requirements of this article. The board will normally act to approve or disapprove a complete application within 90 working days after the application is deemed complete.

2. The board may extend the time period in subdivision 1 c of this subsection if additional information is needed.

D. In accordance with the following procedures, the board will take into consideration whether the portable fuel container or spout has been certified by CARB.

1. In lieu of granting certification based upon review of an application as required under subsection B of this section, certification may be granted by the board as follows:

a. Certification may be granted solely on the basis of the effective CARB certification executive order, or

b. Certification may be granted on the basis of the effective CARB certification executive order, modified as necessary by the board to meet the requirements of this article.

2. An abbreviated application may be submitted by a manufacturer requesting certification by the board under subdivision 1 of this subsection. The abbreviated application shall include, as a minimum:

a. A request by the manufacturer that certification be granted by the board based upon an effective CARB certification executive order.

b. A copy of the effective CARB certification executive order, including all conditions established by CARB applicable to the CARB certification executive order.

c. A certification that the manufacturer will (i) comply with the applicable CARB certification executive order within the volatile organic compound emissions control areas specified in 9VAC5-45-160 C and (ii) comply with any additional terms and conditions that the board may specify in granting certification under this subsection.

d. Manufacturer and product information as specified in subdivisions B 1 a and b of this section.

e. The document certification statement required by 9VAC5-20-230 certifying the information in the application and signed by a responsible official.

4. The board's certification shall contain such terms and conditions as necessary to adapt terms and conditions in the CARB certification executive order to satisfy the provisions of this article.

5. Any board certification granted under this subsection is contingent upon the effective CARB certification executive order provided with the application. Board certification granted on the basis of this subsection automatically expires on the date that the CARB certification executive order upon which it was based is no longer effective.

9VAC5-45-210. Innovative products.

Manufacturers of portable fuel containers or spouts may seek an innovative products exemption in accordance with the following criteria:

1. The board will exempt a portable fuel container or spout from one or more of the requirements specified in 9VAC5-45-190 if a manufacturer demonstrates by clear and convincing evidence that, due to some characteristic of the product formulation, design, delivery systems, or other factors, the use of the product will result in cumulative VOC emissions below the highest emitting representative spill-proof system or representative spill-proof spout in its product category as determined from applicable testing.

2. A manufacturer (applicant) shall apply in writing to the board for an innovative product exemption. The application shall include the supporting documentation that quantifies the emissions from the innovative product, including the actual physical test methods used to generate the data. In addition, the applicant must provide the information necessary to enable the board to establish enforceable conditions for granting the exemption. The application shall also include the certification statement required by 9VAC5-20-230 signed by a responsible official. Information submitted by a manufacturer pursuant to this section shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

3. Within 30 days of receipt of the exemption application, the board will determine whether an application is complete.

4. Within 90 days after an application has been deemed complete, the board will determine whether, under what conditions, and to what extent an exemption from the requirements of 9VAC5-45-190 will be permitted. The board may extend this time period if additional time is needed to reach a decision. An applicant may submit additional supporting documentation before a decision has been reached. The board will notify the applicant of the decision in writing and specify such terms and conditions as are necessary to insure that emissions from the product will meet the emissions reductions specified in subdivision 1 of this section, and that such emissions reductions can be enforced.

5. In granting an innovative product exemption for a portable fuel container or spout, the board will specify the test methods for determining conformance to the conditions established pursuant to subdivision 4 of this section. The test methods may include criteria for reproducibility, accuracy, and sampling and laboratory procedures.

6. For any portable fuel container or spout for which an innovative product exemption has been granted pursuant to this section, the manufacturer shall notify the board in writing at least 30 days before the manufacturer changes a product's design, delivery system, or other factors that may effect the VOC emissions during recommended usage. The manufacturer shall also notify the board within 30 days after the manufacturer learns of any information that would alter the emissions estimates submitted to the board in support of the exemption application.

7. If the standards specified in 9VAC5-45-190 are amended for a product category, all innovative product exemptions granted for products in the product category, except as provided in subdivision 8 of this subsection, have no force and effect as of the effective date of the amended standards.

8. If the board believes that a portable fuel container or spout for which an exemption has been granted no longer meets the criteria for an innovative product specified in subdivision 1 of this section, the board may modify or

revoke the exemption as necessary to assure that the product will meet these criteria.

9VAC5-45-220. Administrative requirements.

A. Each manufacturer of a portable fuel container subject to and complying with 9VAC5-45-190 shall clearly display on each spill-proof system:

1. The phrase "Spill-Proof System";

2. A date of manufacture or representative date code; and

3. A representative code identifying either:

a. The portable fuel container as subject to and complying with 9VAC5-45-190; or

b. The effective CARB certification executive order issued for the portable fuel container.

B. Each manufacturer of a spout subject to and complying with 9VAC5-45-190 shall clearly display on the accompanying package, or for spill-proof spouts sold without packaging, on either the spill-proof spout or a label affixed thereto:

1. The phrase "Spill-Proof Spout";

2. A date of manufacture or representative date code; and

3. A representative code identifying either:

a. The spout as subject to and complying with 9VAC5-45-190; or

b. The effective CARB certification executive order issued for the spout.

C. Each manufacturer subject to subsection A or B shall file an explanation of both the date code and representative code with the board no later than the later of three months after the effective date of this article or within three months of production, and within three months after any change in coding.

D. Each manufacturer of a spout subject to subsection B of this section shall clearly display the make, model number, and size of those portable fuel containers the spout is designed to accommodate and for which the manufacturer can demonstrate the container's compliance with 9VAC5-45-190 on the accompanying package, or for spill-proof spouts sold without packaging, on either the spill-proof spout or a label affixed thereto.

E. Manufacturers of portable fuel containers not subject to or not in compliance with 9VAC5-45-190 may not display the phrase "Spill-Proof System" or "Spill-Proof Spout" on the portable fuel container or spout or on any sticker or label affixed thereto or on any accompanying package.

F. Each manufacturer of a portable fuel container or spout subject to and complying with 9VAC5-45-190 that due to its design or other features cannot be used to refuel on-road motor vehicles shall clearly display the phrase "Not Intended For Refueling On-Road Motor Vehicles" in type of 34 point or greater on each of the following:

1. For a portable fuel container sold as a spill-proof system, on the system or on a label affixed thereto, and on the accompanying package, if any; and

2. For a spill-proof spout sold separately from a spill-proof system, on either the spill-proof spout, or a label affixed thereto, and on the accompanying package, if any.

9VAC5-45-230. Compliance.

The provisions of subsections B, D, F, and G of 9VAC5-45-20 (Compliance) apply. The other provisions of 9VAC5-45-20 do not apply.

9VAC5-45-240. Compliance schedules.

A. Affected persons shall comply with the provisions of this article as expeditiously as possible but in no case later than May 1, 2010.

B. Any owner or other person who cannot comply with the provisions of this article by the date specified in subsection A of this section, due to extraordinary reasons beyond that person's reasonable control, may apply in writing to the board for a waiver. The waiver application shall set forth:

1. The specific grounds upon which the waiver is sought, including the facts that support the extraordinary reasons that compliance is beyond the applicant's reasonable control;

2. The proposed date by which compliance with the provisions of this article will be achieved; and

3. A compliance report detailing the methods by which compliance will be achieved.

C. No waiver may be granted unless all of the following findings are made:

1. That, due to reasons beyond the reasonable control of the applicant, required compliance with this article would result in extraordinary economic hardship;

2. That the public interest in mitigating the extraordinary hardship to the applicant by issuing the waiver outweighs the public interest in avoiding any increased emissions of air contaminants that would result from issuing the waiver; and

3. That the compliance report proposed by the applicant can reasonably be implemented and shall achieve compliance as expeditiously as possible.

D. Any approval of a waiver shall specify a final compliance date by which compliance with the requirements of this article shall be achieved. Any approval of a waiver shall contain a condition that specifies the increments of progress necessary to assure timely compliance and such other

conditions that the board finds necessary to carry out the purposes of this article.

E. A waiver shall cease to be effective upon the failure of the party to whom the waiver was granted to comply with any term or condition of the waiver.

F. Upon the application of any person, the board may review, and for good cause, modify or revoke a waiver from requirements of this article.

9VAC5-45-250. Test methods and procedures.

A. The provisions of subsection G of 9VAC5-45-30 (Emission testing) apply. The other provisions of 9VAC5-45-30 do not apply.

B. Testing to determine compliance with 9VAC5-45-190 B of this article shall be performed by using the following test procedures specified in CARB "Certification Procedure 501 for Portable Fuel Containers and Spill-Proof Spouts, CP-501" (see 9VAC5-20-21):

1. CARB "Test Procedure for Determining Integrity of Spill-Proof Spouts and Spill-Proof Systems, TP-501" (see 9VAC5-20-21).

2. CARB "Test Procedure for Determining Diurnal Emissions from Portable Fuel Containers, TP-502" (see 9VAC5-20-21).

3. ASTM "Standard Specification for Portable Kerosine and Diesel Containers for Consumer Use" (see 9VAC5-20-21).

4. ASTM "Standard Specification for Portable Gasoline Containers for Consumer Use" (see 9VAC5-20-21).

C. Alternative methods that are shown to be accurate, precise, and appropriate may be used upon written approval of the board.

9VAC5-45-260. Monitoring.

The provisions of 9VAC5-45-40 (Monitoring) do not apply.

9VAC5-45-270. Notification, records and reporting.

The provisions of subsections E, F, and G of 9VAC5-45-50 (Notification, records and reporting) apply. The other provisions of 9VAC5-45-50 do not apply.

Article 3
Emission Standards for Consumer Products Manufactured before May 1, 2010

9VAC5-45-280. Applicability.

A. Except as provided in 9VAC5-45-290, the provisions of this article apply to any consumer product manufactured before May 1, 2010, that contains volatile organic compounds (VOCs). The provisions of Article 4 (9VAC5-45-400 et seq.) of this part apply to consumer products manufactured on or after May 1, 2010.

B. Except as provided in 9VAC5-45-290, the provisions of this article apply to any owner or other person who sells, supplies, offers for sale or manufactures for sale any consumer product.

C. The provisions of this article apply to owners and other persons in the Northern Virginia and Fredericksburg Volatile Organic Compound Emissions Control Areas designated in 9VAC5-20-206.

D. For purposes of this article, the terms "supply" or "supplied" do not include internal transactions within a business or governmental entity. These terms only apply to transactions between manufacturers/commercial distributors that sell, or otherwise provide, products to businesses/governmental entities/individuals.

9VAC5-45-290. Exemptions.

A. This article shall not apply to any consumer product manufactured in the applicable volatile organic compound emissions control areas designated in 9VAC5-45-280 C for shipment and use outside of those areas.

B. The provisions of this article shall not apply to a manufacturer or distributor who sells, supplies, or offers for sale a consumer product that does not comply with the VOC standards specified in 9VAC5-45-310 A, as long as the manufacturer or distributor can demonstrate both that the consumer product is intended for shipment and use outside of the applicable volatile organic compound emissions control areas designated in 9VAC5-45-280 C, and that the manufacturer or distributor has taken reasonable prudent precautions to assure that the consumer product is not distributed to those applicable volatile organic compound emissions control areas. This subsection does not apply to consumer products that are sold, supplied, or offered for sale by any person to retail outlets in those applicable volatile organic compound emissions control areas.

C. The medium volatility organic compound (MVOC) content standards specified in 9VAC5-45-310 A for antiperspirants or deodorants shall not apply to ethanol.

D. The VOC limits specified in 9VAC5-45-310 A shall not apply to fragrances up to a combined level of 2.0% by weight contained in any consumer product and shall not apply to colorants up to a combined level of 2.0% by weight contained in any antiperspirant or deodorant.

E. The requirements of 9VAC5-45-310 A for antiperspirants or deodorants shall not apply to those volatile organic compounds that contain more than 10 carbon atoms per molecule and for which the vapor pressure is unknown, or that have a vapor pressure of 2 mm Hg or less at 20°C.

F. The VOC limits specified in 9VAC5-45-310 A shall not apply to any LVP-VOC.

G. The VOC limits specified in 9VAC5-45-310 A shall not apply to air fresheners that are composed entirely of fragrance, less compounds not defined as VOCs or LVP-VOC exempted under subsection F of this section.

H. The VOC limits specified in 9VAC5-45-310 A shall not apply to air fresheners and insecticides containing at least 98% paradichlorobenzene.

I. The VOC limits specified in 9VAC5-45-310 A shall not apply to adhesives sold in containers of one fluid ounce or less.

J. The VOC limits specified in 9VAC5-45-310 A shall not apply to bait station insecticides. For the purpose of this section, bait station insecticides are containers enclosing an insecticidal bait that is not more than 0.5 ounce by weight, where the bait is designed to be ingested by insects and is composed of solid material feeding stimulants with less than 5.0% active ingredients.

K. A person who cannot comply with the requirements set forth in 9VAC5-45-310, because of extraordinary reasons beyond the person's reasonable control may apply in writing to the board for a waiver.

1. The application shall set forth:

a. The specific grounds upon which the waiver is sought, including the facts that support the extraordinary reasons that compliance is beyond the applicant's reasonable control;

b. The proposed dates by which compliance with the provisions of 9VAC5-45-310 will be achieved; and

c. A compliance report reasonably detailing the methods by which compliance will be achieved.

2. Upon receipt of an application containing the information required in subdivision 1 of this subsection, the board will hold a public hearing to determine whether, under what conditions, and to what extent, a waiver from the requirements in 9VAC5-45-310 is necessary and will be permitted. A hearing shall be initiated no later than 75 days after receipt of a waiver application. Notice of the time and place of the hearing shall be sent to the applicant by certified mail not less than 30 days prior to the hearing. Notice of the hearing shall also be submitted for publication in the Virginia Register of Regulations. At least 30 days prior to the hearing, the waiver application shall be made available to the public for inspection. Information submitted to the board by a waiver applicant shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia. The board may consider both public and confidential information in reaching a decision on a waiver application. Interested members of the public shall be allowed a reasonable opportunity to testify at the hearing and their testimony shall be considered.

3. No waiver shall be granted unless all of the following findings are made:

a. That, because of reasons beyond the reasonable control of the applicant, requiring compliance with 9VAC5-45-310 would result in extraordinary economic hardship;

b. That the public interest in mitigating the extraordinary hardship to the applicant by issuing the waiver outweighs the public interest in avoiding any increased emissions of air pollutants that would result from issuing the waiver; and

c. That the compliance report proposed by the applicant can reasonably be implemented and will achieve compliance as expeditiously as possible.

4. Any waiver may be issued as an order of the board. The waiver order shall specify a final compliance date by which the requirements of 9VAC5-45-310 will be achieved. Any waiver order shall contain a condition that specifies increments of progress necessary to assure timely compliance and such other conditions that the board, in consideration of the testimony received at the hearing, finds necessary to carry out the purposes of the Virginia Air Pollution Control Law and the regulations of the board.

5. A waiver shall cease to be effective upon failure of the party to whom the waiver was granted to comply with any term or condition of the waiver order.

6. Upon the application of anyone, the board may review and for good cause modify or revoke a waiver from requirements of 9VAC5-45-310.

L. The requirements of 9VAC5-45-340 A shall not apply to consumer products registered under FIFRA.

9VAC5-45-300. Definitions.

A. For the purpose of applying this article in the context of the Regulations for the Control and Abatement of Air Pollution and related uses, the words or terms shall have the meanings given them in subsection C of this section.

B. As used in this article, all terms not defined herein shall have the meanings given them in 9VAC5-10 (General Definitions), unless otherwise required by context.

C. Terms defined.

"ACP" or "alternative control plan" means any emissions averaging program approved by the board pursuant to the provisions of this article.

"ACP agreement" means the document signed by the board that includes the conditions and requirements of the board and

that allows manufacturers to sell ACP products pursuant to the requirements of this article.

"ACP emissions" means the sum of the VOC emissions from every ACP product subject to an ACP agreement approving an ACP, during the compliance period specified in the ACP agreement, expressed to the nearest pound of VOC and calculated according to the following equation:

$$ACP\ Emissions = (Emissions)_1 + (Emissions)_2 + \ldots + (Emissions)_N$$

$$Emissions = \frac{(VOC\ Content) \times (Enforceable\ Sales)}{100}$$

where:

1, 2, ...N = each product in an ACP up to the maximum N.

Enforceable sales = (see definition in this section).

VOC content = one of the following:

1. For all products except for charcoal lighter material products:

$$VOC\ Content = \frac{((B - C) \times 100)}{A}$$

where:

A = total net weight of unit (excluding container and packaging).

B = total weight of all VOCs per unit.

C = total weight of all exempted VOCs per unit, as specified in 9VAC5-45-290.

2. For charcoal lighter material products only:

$$VOC\ Content = \frac{(Certified\ \ Emissions \times 100)}{Certified\ \ Use\ Rate}$$

where:

Certified emissions = (see definition in this section).

Certified use rate = (see definition in this section).

"ACP limit" means the maximum allowable ACP emissions during the compliance period specified in an ACP agreement approving an ACP, expressed to the nearest pound of VOC and calculated according to the following equation:

$$ACP\ Limit = (Limit)_1 + (Limit)_2 + \ldots + (Limit)_N$$

where:

$$Limit = \frac{(ACP\ Standard) \times (Enforceable\ Sales)}{100}$$

where:

Enforceable sales = (see definition in this section).

ACP standard = (see definition in this section).

1, 2, ...N = each product in an ACP up to the maximum N.

"ACP product" means any consumer product subject to the VOC standards specified in 9VAC5-45-310 A, except those products that have been exempted as innovative products under 9VAC5-45-330.

"ACP reformulation" or "ACP reformulated" means the process of reducing the VOC content of an ACP product within the period that an ACP is in effect to a level that is less than the current VOC content of the product.

"ACP standard" means either the ACP product's pre-ACP VOC content or the applicable VOC standard specified in 9VAC5-45-310 A, whichever is the lesser of the two.

"ACP VOC standard" means the maximum allowable VOC content for an ACP product, determined as follows:

1. The applicable VOC standard specified in 9VAC5-45-310 A for all ACP products except for charcoal lighter material;

2. For charcoal lighter material products only, the VOC standard for the purposes of this article shall be calculated according to the following equation:

$$VOC\ Standard = \frac{(0.020\ \ pound\ VOC\ \ per\ start \times 100)}{Certified\ \ Use\ Rate}$$

where:

0.020 = the certification emissions level for the product, as specified in 9VAC5-45-310 F.

Certified use rate = (see definition in this section).

"Adhesive" means any product that is used to bond one surface to another by attachment. Adhesive does not include products used on humans and animals, adhesive tape, contact paper, wallpaper, shelf liners, or any other product with an adhesive incorporated onto or in an inert substrate. For contact adhesive only, adhesive also does not include units of product, less packaging, that consist of more than one gallon. In addition, for construction, panel, and floor covering adhesive and general purpose adhesive only, adhesive does not include units of product, less packaging, that weigh more than one pound and consist of more than 16 fluid ounces. The package size limitations do not apply to aerosol adhesives.

"Adhesive remover" means a product designed to remove adhesive from either a specific substrate or a variety of substrates. Adhesive remover does not include products that remove adhesives intended exclusively for use on humans or animals. For the purpose of this definition, adhesive shall mean a substance used to bond one or more materials. Adhesives include, but are not limited to, caulks, sealants,

glues, or similar substances used for the purpose of forming a bond.

"Aerosol adhesive" means an aerosol product in which the spray mechanism is permanently housed in a nonrefillable can designed for hand-held application without the need for ancillary hoses or spray equipment. Aerosol adhesives include special purpose spray adhesives, mist spray adhesives, and web spray adhesives.

"Aerosol cooking spray" means any aerosol product designed either to reduce sticking on cooking and baking surfaces or to be applied on food, or both.

"Aerosol product" means a pressurized spray system that dispenses product ingredients by means of a propellant contained in a product or a product's carrier, or by means of a mechanically induced force. Aerosol product does not include pump sprays.

"Agricultural use" means the use of any pesticide or method or device for the control of pests in connection with the commercial production, storage, or processing of any animal or plant crop. Agricultural use does not include the sale or use of pesticides in properly labeled packages or containers that are intended for home use, use in structural pest control, industrial use, or institutional use. For the purposes of this definition only:

1. "Home use" means use in a household or its immediate environment.

2. "Industrial use" means use for or in a manufacturing, mining, or chemical process or use in the operation of factories, processing plants, and similar sites.

3. "Institutional use" means use within the perimeter of, or on property necessary for the operation of, buildings such as hospitals, schools, libraries, auditoriums, and office complexes.

4. "Structural pest control" means a use requiring a license under the applicable state pesticide licensing requirement.

"Air freshener" means any consumer product including, but not limited to, sprays, wicks, powders, and crystals, designed for the purpose of masking odors or freshening, cleaning, scenting, or deodorizing the air. Air fresheners do not include products that are used on the human body, products that function primarily as cleaning products (as indicated on a product label), disinfectant products claiming to deodorize by killing germs on surfaces, or institutional or industrial disinfectants when offered for sale solely through institutional and industrial channels of distribution. Air fresheners do include spray disinfectants and other products that are expressly represented for use as air fresheners, except institutional and industrial disinfectants when offered for sale through institutional and industrial channels of distribution. To determine whether a product is an air freshener, all verbal and visual representations regarding product use on the label or packaging and in the product's literature and advertising may be considered. The presence of, and representations about, a product's fragrance and ability to deodorize (resulting from surface application) shall not constitute a claim of air freshening.

"All other carbon-containing compounds" means all other compounds that contain at least one carbon atom and are not an "exempt compound" or an "LVP-VOC."

"All other forms" means all consumer product forms for which no form-specific VOC standard is specified. Unless specified otherwise by the applicable VOC standard, all other forms include, but are not limited to, solids, liquids, wicks, powders, crystals, and cloth or paper wipes (towelettes).

"Alternative control plan" or "ACP" means any emissions averaging program approved by the board pursuant to the provisions of this article.

"Antimicrobial hand or body cleaner or soap" means a cleaner or soap that is designed to reduce the level of microorganisms on the skin through germicidal activity. Antimicrobial hand or body cleaner or soap includes, but is not limited to, antimicrobial hand or body washes or cleaners, food handler hand washes, healthcare personnel hand washes, pre-operative skin preparations, and surgical scrubs. Antimicrobial hand or body cleaner or soap does not include prescription drug products, antiperspirants, astringent or toner, deodorant, facial cleaner or soap, general-use hand or body cleaner or soap, hand dishwashing detergent (including antimicrobial), heavy-duty hand cleaner or soap, medicated astringent or medicated toner, and rubbing alcohol.

"Antiperspirant" means any product including, but not limited to, aerosols, roll-ons, sticks, pumps, pads, creams, and squeeze-bottles, that is intended by the manufacturer to be used to reduce perspiration in the human axilla by at least 20% in at least 50% of a target population.

"Architectural coating" means a coating applied to stationary structures and their appurtenances, to mobile homes, to pavements, or to curbs.

"ASTM" means the American Society for Testing and Materials.

"Astringent or toner" means any product not regulated as a drug by the United States Food and Drug Administration that is applied to the skin for the purpose of cleaning or tightening pores. This category also includes clarifiers and substrate-impregnated products. This category does not include any hand, face, or body cleaner or soap product, medicated astringent or medicated toner, cold cream, lotion, or antiperspirant.

"Automotive brake cleaner" means a cleaning product designed to remove oil, grease, brake fluid, brake pad material, or dirt from motor vehicle brake mechanisms.

"Automotive hard paste wax" means an automotive wax or polish that is:

1. Designed to protect and improve the appearance of automotive paint surfaces;

2. A solid at room temperature; and

3. Contains no water.

"Automotive instant detailer" means a product designed for use in a pump spray that is applied to the painted surface of automobiles and wiped off prior to the product being allowed to dry.

"Automotive rubbing or polishing compound" means a product designed primarily to remove oxidation, old paint, scratches or swirl marks, and other defects from the painted surfaces of motor vehicles without leaving a protective barrier.

"Automotive wax, polish, sealant, or glaze" means a product designed to seal out moisture, increase gloss, or otherwise enhance a motor vehicle's painted surfaces. Automotive wax, polish, sealant, or glaze includes, but is not limited to, products designed for use in auto body repair shops and drive-through car washes, as well as products designed for the general public. Automotive wax, polish, sealant, or glaze does not include automotive rubbing or polishing compounds, automotive wash and wax products, surfactant-containing car wash products, and products designed for use on unpainted surfaces such as bare metal, chrome, glass, or plastic.

"Automotive windshield washer fluid" means any liquid designed for use in a motor vehicle windshield washer system either as an antifreeze or for the purpose of cleaning, washing, or wetting the windshield. Automotive windshield washer fluid also includes liquids that are (i) packaged as a pre-wetted, single-use manual wipe and (ii) designed exclusively for cleaning, washing, or wetting automotive glass surfaces for the purpose of restoring or maintaining visibility for the driver. Glass cleaners that are intended for use on other glass surfaces are not included in this definition. Automotive windshield washer fluid does not include fluids placed by the manufacturer in a new vehicle.

"Bathroom and tile cleaner" means a product designed to clean tile or surfaces in bathrooms. Bathroom and tile cleaners do not include products designed primarily to clean toilet bowls or toilet tanks.

"Bug and tar remover" means a product labeled to remove either or both of the following from painted motor vehicle surfaces without causing damage to the finish: (i) biological residues, such as insect carcasses and tree sap, and (ii) road grime, such as road tar, roadway paint markings, and asphalt.

"CARB" means the California Air Resources Board.

"Carburetor or fuel-injection air intake cleaner" means a product designed to remove fuel deposits, dirt, or other contaminants from a carburetor, choke, throttle body of a fuel-injection system, or associated linkages. Carburetor or fuel-injection air intake cleaner does not include products designed exclusively to be introduced directly into the fuel lines or fuel storage tank prior to introduction into the carburetor or fuel injectors.

"Carpet and upholstery cleaner" means a cleaning product designed for the purpose of eliminating dirt and stains on rugs, carpeting, and the interior of motor vehicles or on household furniture or objects upholstered or covered with fabrics such as wool, cotton, nylon, or other synthetic fabrics. Carpet and upholstery cleaners include, but are not limited to, products that make fabric protectant claims. Carpet and upholstery cleaners do not include general purpose cleaners, spot removers, vinyl or leather cleaners, dry cleaning fluids, or products designed exclusively for use at industrial facilities engaged in furniture or carpet manufacturing.

"Certified emissions" means the emissions level for products approved under 9VAC5-45-310 F, as determined pursuant to South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21), expressed to the nearest 0.001 pound VOC per start.

"Certified use rate" means the usage level for products approved under 9VAC5-45-310 F, as determined pursuant to South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21), expressed to the nearest 0.001 pound certified product used per start.

"Charcoal lighter material" means any combustible material designed to be applied on, incorporated in, added to, or used with charcoal to enhance ignition. Charcoal lighter material does not include any of the following:

1. Electrical starters and probes;

2. Metallic cylinders using paper tinder;

3. Natural gas;

4. Propane; or

5. Fat wood.

"Colorant" means any pigment or coloring material used in a consumer product for an aesthetic effect or to dramatize an ingredient.

"Compliance period" means the period of time, not to exceed one year, for which the ACP limit and ACP emissions are calculated and for which compliance with the ACP limit is determined, as specified in the ACP agreement approving an ACP.

"Construction, panel, and floor covering adhesive" means any one-component adhesive that is designed exclusively for the installation, remodeling, maintenance, or repair of:

1. Structural and building components that include, but are not limited to, beams, trusses, studs, paneling (drywall or drywall laminates, fiberglass reinforced plastic (FRP), plywood, particle board, insulation board, predecorated hardboard or tileboard, etc.), ceiling and acoustical tile, molding, fixtures, countertops or countertop laminates, cove or wall bases, and flooring or subflooring; or

2. Floor or wall coverings that include, but are not limited to, wood or simulated wood covering, carpet, carpet pad or cushion, vinyl-backed carpet, flexible flooring material, nonresilient flooring material, mirror tiles and other types of tiles, and artificial grass.

Construction, panel, and floor covering adhesive does not include floor seam sealer.

"Consumer" means a person who purchases or acquires a consumer product for personal, family, household, or institutional use. Persons acquiring a consumer product for resale are not consumers for that product.

"Consumer product" means a chemically formulated product used by household and institutional consumers including, but not limited to, detergents; cleaning compounds; polishes; floor finishes; cosmetics; personal care products; home, lawn, and garden products; disinfectants; sanitizers; aerosol paints; and automotive specialty products, but does not include other paint products, furniture coatings, or architectural coatings. As used in this article, consumer products shall also refer to aerosol adhesives, including aerosol adhesives used for consumer, industrial, or commercial uses.

"Contact adhesive" means an adhesive that:

1. Is designed for application to both surfaces to be bonded together;

2. Is allowed to dry before the two surfaces are placed in contact with each other;

3. Forms an immediate bond that is impossible, or difficult, to reposition after both adhesive-coated surfaces are placed in contact with each other; and

4. Does not need sustained pressure or clamping of surfaces after the adhesive-coated surfaces have been brought together using sufficient momentary pressure to establish full contact between both surfaces.

Contact adhesive does not include rubber cements that are primarily intended for use on paper substrates. Contact adhesive also does not include vulcanizing fluids that are designed and labeled for tire repair only.

"Contact person" means a representative that has been designated by the responsible ACP party for the purpose of reporting or maintaining information specified in the ACP agreement approving an ACP.

"Container or packaging" means the part or parts of the consumer or institutional product that serve only to contain, enclose, incorporate, deliver, dispense, wrap, or store the chemically formulated substance or mixture of substances that is solely responsible for accomplishing the purposes for which the product was designed or intended. Containers or packaging include any article onto or into which the principal display panel and other accompanying literature or graphics are incorporated, etched, printed, or attached.

"Crawling bug insecticide" means an insecticide product that is designed for use against ants, cockroaches, or other household crawling arthropods, including, but not limited to, mites, silverfish, or spiders. Crawling bug insecticide does not include products designed to be used exclusively on humans or animals or a house dust mite product. For the purposes of this definition only:

1. "House dust mite product" means a product whose label, packaging, or accompanying literature states that the product is suitable for use against house dust mites, but does not indicate that the product is suitable for use against ants, cockroaches, or other household crawling arthropods.

2. "House dust mite" means mites that feed primarily on skin cells shed in the home by humans and pets and that belong to the phylum Arthropoda, the subphylum Chelicerata, the class Arachnida, the subclass Acari, the order Astigmata, and the family Pyroglyphidae.

"Date-code" means the day, month, and year on which the consumer product was manufactured, filled, or packaged, or a code indicating such a date.

"Deodorant" means any product that is intended by the manufacturer to be used to minimize odor in the human axilla by retarding the growth of bacteria that cause the decomposition of perspiration. Deodorant includes, but is not limited to, aerosols, roll-ons, sticks, pumps, pads, creams, and squeeze-bottles.

"Device" means an instrument or contrivance (other than a firearm) that is designed for trapping, destroying, repelling, or mitigating a pest or other form of plant or animal life (other than human and other than bacterium, virus, or another microorganism on or in living humans or other living animals); but not including equipment used for the application of pesticides when sold separately therefrom.

"Disinfectant" means a product intended to destroy or irreversibly inactivate infectious or other undesirable bacteria, pathogenic fungi, or viruses on surfaces or inanimate objects and whose label is registered under the FIFRA. Disinfectant does not include any of the following:

1. Products designed solely for use on humans or animals;

2. Products designed for agricultural use;

3. Products designed solely for use in swimming pools, therapeutic tubs, or hot tubs; or

4. Products that, as indicated on the principal display panel or label, are designed primarily for use as bathroom and tile cleaners, glass cleaners, general purpose cleaners, toilet bowl cleaners, or metal polishes.

"Distributor" means a person to whom a consumer product is sold or supplied for the purposes of resale or distribution in commerce, except that manufacturers, retailers, and consumers are not distributors.

"Double phase aerosol air freshener" means an aerosol air freshener with the liquid contents in two or more distinct phases that require the product container to be shaken before use to mix the phases, producing an emulsion.

"Dry cleaning fluid" means a nonaqueous liquid product designed and labeled exclusively for use on:

1. Fabrics that are labeled "for dry clean only," such as clothing or drapery; or

2. S-coded fabrics.

Dry cleaning fluid includes, but is not limited to, those products used by commercial dry cleaners and commercial businesses that clean fabrics such as draperies at the customer's residence or work place. Dry cleaning fluid does not include spot remover or carpet and upholstery cleaner. For the purposes of this definition, "S-coded fabric" means an upholstery fabric designed to be cleaned only with water-free spot cleaning products as specified by the American Furniture Manufacturers Association Joint Industry Fabrics Standards Committee, Woven and Knit Residential Upholstery Fabric Standards and Guidelines (see 9VAC5-20-21).

"Dusting aid" means a product designed to assist in removing dust and other soils from floors and other surfaces without leaving a wax or silicone-based coating. Dusting aid does not include pressurized gas dusters.

"Electronic cleaner" means a product labeled for the removal of dirt, grease, or grime from electrical equipment such as electric motors, circuit boards, electricity panels, and generators.

"Enforceable sales" means the total amount of an ACP product sold for use in the applicable volatile organic compound emissions control areas designated in 9VAC5-45-280 C during the applicable compliance period specified in the ACP agreement approving an ACP, as determined through enforceable sales records (expressed to the nearest pound, excluding product container and packaging).

"Enforceable sales record" means a written, point-of-sale record or another board-approved system of documentation from which the mass, in pounds (less product container and packaging), of an ACP product sold to the end user in the applicable volatile organic compound emissions control areas designated in 9VAC5-45-280 C during the applicable compliance period can be accurately documented. For the purposes of this article, enforceable sales records include, but are not limited to, the following types of records:

1. Accurate records of direct retail or other outlet sales to the end user during the applicable compliance period;

2. Accurate compilations, made by independent market surveying services, of direct retail or other outlet sales to the end users for the applicable compliance period, provided that a detailed method that can be used to verify data composing such summaries is submitted by the responsible ACP party and approved by the board; and

3. Other accurate product sales records acceptable to the board.

"Engine degreaser" means a cleaning product designed to remove grease, grime, oil, and other contaminants from the external surfaces of engines and other mechanical parts.

"Exempt compound" means acetone, ethane, methyl acetate, parachlorobenzotrifluoride (1-chloro-4-trifluoromethyl benzene), or perchloroethylene (tetrachloroethylene).

"Fabric protectant" means a product designed to be applied to fabric substrates to protect the surface from soiling from dirt and other impurities or to reduce absorption of liquid into the fabric's fibers. Fabric protectant does not include waterproofers, products designed for use solely on leather, or products designed for use solely on fabrics that are labeled "for dry clean only" and sold in containers of 10 fluid ounces or less.

"Facial cleaner or soap" means a cleaner or soap designed primarily to clean the face. Facial cleaner or soap includes, but is not limited to, facial cleansing creams, gels, liquids, lotions, and substrate-impregnated forms. Facial cleaner or soap does not include prescription drug products, antimicrobial hand or body cleaner or soap, astringent or toner, general-use hand or body cleaner or soap, medicated astringent or medicated toner, or rubbing alcohol.

"Fat wood" means pieces of wood kindling with high naturally-occurring levels of sap or resin that enhance ignition of the kindling. Fat wood does not include kindling with substances added to enhance flammability, such as wax-covered or wax-impregnated wood-based products.

"FIFRA" means the Federal Insecticide, Fungicide, and Rodenticide Act (7 USC § 136-136y).

"Flea and tick insecticide" means an insecticide product that is designed for use against fleas, ticks, their larvae, or their eggs. Flea and tick insecticide does not include products that are designed to be used exclusively on humans or animals and their bedding.

"Flexible flooring material" means asphalt, cork, linoleum, no-wax, rubber, seamless vinyl, and vinyl composite flooring.

"Floor polish or wax" means a wax, polish, or other product designed to polish, protect, or enhance floor surfaces by leaving a protective coating that is designed to be periodically replenished. Floor polish or wax does not include spray buff products, products designed solely for the purpose of cleaning floors, floor finish strippers, products designed for unfinished wood floors, and coatings subject to architectural coatings regulations.

"Floor seam sealer" means a product designed and labeled exclusively for bonding, fusing, or sealing (coating) seams between adjoining rolls of installed flexible sheet flooring.

"Floor wax stripper" means a product designed to remove natural or synthetic floor polishes or waxes through breakdown of the polish or wax polymers or by dissolving or emulsifying the polish or wax. Floor wax stripper does not include aerosol floor wax strippers or products designed to remove floor wax solely through abrasion.

"Flying bug insecticide" means an insecticide product that is designed for use against flying insects or other flying arthropods, including but not limited to flies, mosquitoes, moths, or gnats. Flying bug insecticide does not include wasp and hornet insecticide, products that are designed to be used exclusively on humans or animals, or a moth-proofing product. For the purposes of this definition only, "moth-proofing product" means a product whose label, packaging, or accompanying literature indicates that the product is designed to protect fabrics from damage by moths, but does not indicate that the product is suitable for use against flying insects or other flying arthropods.

"Fragrance" means a substance or complex mixture of aroma chemicals, natural essential oils, and other functional components, the sole purpose of which is to impart an odor or scent, or to counteract a malodor.

"Furniture coating" means a paint designed for application to room furnishings including, but not limited to, cabinets (kitchen, bath and vanity), tables, chairs, beds, and sofas.

"Furniture maintenance product" means a wax, polish, conditioner, or other product designed for the purpose of polishing, protecting, or enhancing finished wood surfaces other than floors. Furniture maintenance products do not include dusting aids, products designed solely for the purpose of cleaning, and products designed to leave a permanent finish such as stains, sanding sealers, and lacquers.

"Gel" means a colloid in which the disperse phase has combined with the continuous phase to produce a semisolid material, such as jelly.

"General purpose adhesive" means a nonaerosol adhesive designed for use on a variety of substrates. General purpose adhesive does not include:

1. Contact adhesives;

2. Construction, panel, and floor covering adhesives;

3. Adhesives designed exclusively for application on one specific category of substrates (i.e., substrates that are composed of similar materials, such as different types of metals, paper products, ceramics, plastics, rubbers, or vinyls); or

4. Adhesives designed exclusively for use on one specific category of articles (i.e., articles that may be composed of different materials but perform a specific function, such as gaskets, automotive trim, weather-stripping, or carpets).

"General purpose cleaner" means a product designed for general all-purpose cleaning, in contrast to cleaning products designed to clean specific substrates in certain situations. General purpose cleaner includes products designed for general floor cleaning, kitchen or countertop cleaning, and cleaners designed to be used on a variety of hard surfaces and does not include general purpose degreasers and electronic cleaners.

"General purpose degreaser" means a product labeled to remove or dissolve grease, grime, oil, and other oil-based contaminants from a variety of substrates, including automotive or miscellaneous metallic parts. General purpose degreaser does not include engine degreaser, general purpose cleaner, adhesive remover, electronic cleaner, metal polish or cleanser, products used exclusively in solvent cleaning tanks or related equipment, or products that are (i) sold exclusively to establishments that manufacture or construct goods or commodities; and (ii) labeled "not for retail sale." Solvent cleaning tanks or related equipment includes, but is not limited to, cold cleaners, vapor degreasers, conveyorized degreasers, film cleaning machines, or products designed to clean miscellaneous metallic parts by immersion in a container.

"General-use hand or body cleaner or soap" means a cleaner or soap designed to be used routinely on the skin to clean or remove typical or common dirt and soils. General-use hand or body cleaner or soap includes, but is not limited to, hand or body washes, dual-purpose shampoo-body cleaners, shower or bath gels, and moisturizing cleaners or soaps. General-use hand or body cleaner or soap does not include prescription drug products, antimicrobial hand or body cleaner or soap, astringent or toner, facial cleaner or soap, hand dishwashing detergent (including antimicrobial), heavy-duty hand cleaner or soap, medicated astringent or medicated toner, or rubbing alcohol.

"Glass cleaner" means a cleaning product designed primarily for cleaning surfaces made of glass. Glass cleaner does not include products designed solely for the purpose of cleaning optical materials used in eyeglasses, photographic equipment, scientific equipment, and photocopying machines.

"Gross sales" means the estimated total sales of an ACP product in the applicable volatile organic compound

emissions control areas designated in 9VAC5-45-280 C during a specific compliance period (expressed to the nearest pound), based on either of the following methods, whichever the responsible ACP party demonstrates to the satisfaction of the board will provide an accurate sales estimate:

1. Apportionment of national or regional sales of the ACP product to sales, determined by multiplying the average national or regional sales of the product by the fraction of the national or regional population, respectively, that is represented by the current population of the applicable volatile organic compound emissions control areas designated in 9VAC5-45-280 C; or

2. Another documented method that provides an accurate estimate of the total current sales of the ACP product.

"Hair mousse" means a hairstyling foam designed to facilitate styling of a coiffure and provide limited holding power.

"Hair shine" means a product designed for the primary purpose of creating a shine when applied to the hair. Hair shine includes, but is not limited to, dual-use products designed primarily to impart a sheen to the hair. Hair shine does not include hair spray, hair mousse, hair styling gel or spray gel, or products whose primary purpose is to condition or hold the hair.

"Hair spray" means a consumer product designed primarily for the purpose of dispensing droplets of a resin on and into a hair coiffure that will impart sufficient rigidity to the coiffure to establish or retain the style for a period of time.

"Hair styling gel" means a high viscosity, often gelatinous, product that contains a resin and is designed for the application to hair to aid in styling and sculpting of the hair coiffure.

"Heavy-duty hand cleaner or soap" means a product designed to clean or remove difficult dirt and soils such as oil, grease, grime, tar, shellac, putty, printer's ink, paint, graphite, cement, carbon, asphalt, or adhesives from the hand with or without the use of water. Heavy-duty hand cleaner or soap does not include prescription drug products, antimicrobial hand or body cleaner or soap, astringent or toner, facial cleaner or soap, general-use hand or body cleaner or soap, medicated astringent or medicated toner, or rubbing alcohol.

"Herbicide" means a pesticide product designed to kill or retard a plant's growth, but excludes products that are (i) for agricultural use, or (ii) restricted materials that require a permit for use and possession.

"High volatility organic compound" or "HVOC" means a volatile organic compound that exerts a vapor pressure greater than 80 millimeters of mercury (mm Hg) when measured at 20°C.

"Household product" means a consumer product that is primarily designed to be used inside or outside of living quarters or residences that are occupied or intended for occupation by people, including the immediate surroundings.

"Insecticide" means a pesticide product that is designed for use against insects or other arthropods, but excluding products that are:

1. For agricultural use;

2. For a use that requires a structural pest control license under applicable state laws or regulations; or

3. Materials classified for restricted use pursuant to 40 CFR 152.75 and require a pesticide business license from the Virginia Pesticide Control Board pursuant to 2VAC20-40-20 for use and possession.

"Insecticide fogger" means an insecticide product designed to release all or most of its content as a fog or mist into indoor areas during a single application.

"Institutional product" or "industrial and institutional (I&I) product" means a consumer product that is designed for use in the maintenance or operation of an establishment that:

1. Manufactures, transports, or sells goods or commodities, or provides services for profit; or

2. Is engaged in the nonprofit promotion of a particular public, educational, or charitable cause.

Establishments include, but are not limited to, government agencies, factories, schools, hospitals, sanitariums, prisons, restaurants, hotels, stores, automobile service and parts centers, health clubs, theaters, or transportation companies. Institutional product does not include household products and products that are incorporated into or used exclusively in the manufacture or construction of the goods or commodities at the site of the establishment.

"Label" means written, printed, or graphic matter affixed to, applied to, attached to, blown into, formed, molded into, embossed on, or appearing upon a consumer product or consumer product package, for purposes of branding, identifying, or giving information with respect to the product or to the contents of the package.

"Laundry prewash" means a product that is designed for application to a fabric prior to laundering and that supplements and contributes to the effectiveness of laundry detergents or provides specialized performance.

"Laundry starch product" means a product that is designed for application to a fabric, either during or after laundering, to impart and prolong a crisp, fresh look and may also act to help ease ironing of the fabric. Laundry starch product includes, but is not limited to, fabric finish, sizing, and starch.

"Lawn and garden insecticide" means an insecticide product labeled primarily to be used in household lawn and garden

areas to protect plants from insects or other arthropods. Notwithstanding the requirements of 9VAC5-45-340 C, aerosol lawn and garden insecticides may claim to kill insects or other arthropods.

"Liquid" means a substance or mixture of substances that is capable of a visually detectable flow as determined under ASTM "Standard Test Method for Determining Whether a Material is a Liquid or a Solid" (see 9VAC5-20-21). Liquid does not include powders or other materials that are composed entirely of solid particles.

"Lubricant" means a product designed to reduce friction, heat, noise, or wear between moving parts, or to loosen rusted or immovable parts or mechanisms. Lubricant does not include automotive power steering fluids; products for use inside power generating motors, engines, and turbines, and their associated power-transfer gearboxes; two-cycle oils or other products designed to be added to fuels; products for use on the human body or animals; or products that are:

1. Sold exclusively to establishments that manufacture or construct goods or commodities; and

2. Labeled "not for retail sale."

"LVP content" means the total weight, in pounds, of LVP-VOC in an ACP product multiplied by 100 and divided by the product's total net weight (in pounds, excluding container and packaging), expressed to the nearest 0.1.

"LVP-VOC" means a chemical compound or mixture that contains at least one carbon atom and meets one of the following:

1. Has a vapor pressure less than 0.1 mm Hg at 20°C, as determined by CARB Method 310 (see 9VAC5-20-21);

2. Is a chemical compound with more than 12 carbon atoms, or a chemical mixture composed solely of compounds with more than 12 carbon atoms, and the vapor pressure is unknown;

3. Is a chemical compound with a boiling point greater than 216°C , as determined by CARB Method 310 (see 9VAC5-20-21); or

4. Is the weight percent of a chemical mixture that boils above 216°C, as determined by CARB Method 310 (see 9VAC5-20-21).

For the purposes of the definition of LVP-VOC, "chemical compound" means a molecule of definite chemical formula and isomeric structure, and "chemical mixture" means a substrate composed of two or more chemical compounds.

"Manufacturer" means a person who imports, manufactures, assembles, produces, packages, repackages, or relabels a consumer product.

"Medicated astringent or medicated toner" means a product regulated as a drug by the United States Food and Drug Administration that is applied to the skin for the purpose of cleaning or tightening pores. Medicated astringent or medicated toner includes, but is not limited to, clarifiers and substrate-impregnated products. Medicated astringent or medicated toner does not include hand, face, or body cleaner or soap products, astringent or toner, cold cream, lotion, antiperspirants, or products that must be purchased with a doctor's prescription.

"Medium volatility organic compound" or "MVOC" means a volatile organic compound that exerts a vapor pressure greater than 2 mm Hg and less than or equal to 80 mm Hg when measured at 20°C.

"Metal polish or cleanser" means a product designed primarily to improve the appearance of finished metal, metallic, or metallized surfaces by physical or chemical action. To "improve the appearance" means to remove or reduce stains, impurities, or oxidation from surfaces or to make surfaces smooth and shiny. Metal polish or cleanser includes, but is not limited to, metal polishes used on brass, silver, chrome, copper, stainless steel, and other ornamental metals. Metal polish or cleanser does not include automotive wax, polish, sealant, or glaze, wheel cleaner, paint remover or stripper, products designed and labeled exclusively for automotive and marine detailing, or products designed for use in degreasing tanks.

"Missing data days" means the number of days in a compliance period for which the responsible ACP party has failed to provide the required enforceable sales or VOC content data to the board, as specified in the ACP agreement.

"Mist spray adhesive" means an aerosol that is not a special purpose spray adhesive and that delivers a particle or mist spray, resulting in the formation of fine, discrete particles that yield a generally uniform and smooth application of adhesive to the substrate.

"Multipurpose dry lubricant" means a lubricant that is:

1. Designed and labeled to provide lubricity by depositing a thin film of graphite, molybdenum disulfide ("moly"), or polytetrafluoroethylene or closely related fluoropolymer ("teflon") on surfaces; and

2. Designed for general purpose lubrication, or for use in a wide variety of applications.

"Multipurpose lubricant" means a lubricant designed for general purpose lubrication, or for use in a wide variety of applications. Multipurpose lubricant does not include multipurpose dry lubricants, penetrants, or silicone-based multipurpose lubricants.

"Multipurpose solvent" means an organic liquid designed to be used for a variety of purposes, including cleaning or degreasing of a variety of substrates, or thinning, dispersing, or dissolving other organic materials. Multipurpose solvent includes solvents used in institutional facilities, except for

laboratory reagents used in analytical, educational, research, scientific, or other laboratories. Multipurpose solvent does not include solvents used in cold cleaners, vapor degreasers, conveyorized degreasers or film cleaning machines, or solvents that are incorporated into, or used exclusively in the manufacture or construction of, the goods or commodities at the site of the establishment.

"Nail polish" means a clear or colored coating designed for application to the fingernails or toenails and including but not limited to lacquers, enamels, acrylics, base coats, and top coats.

"Nail polish remover" means a product designed to remove nail polish and coatings from fingernails or toenails.

"Nonaerosol product" means a consumer product that is not dispensed by a pressurized spray system.

"Noncarbon containing compound" means a compound that does not contain carbon atoms.

"Nonresilient flooring" means flooring of a mineral content that is not flexible. Nonresilient flooring includes but is not limited to terrazzo, marble, slate, granite, brick, stone, ceramic tile, and concrete.

"Nonselective terrestrial herbicide" means a terrestrial herbicide product that is toxic to plants without regard to species.

"One-product business" means a responsible ACP party that sells, supplies, offers for sale, or manufactures for use in the applicable volatile organic compound emissions control areas designated in 9VAC5-45-280 C:

1. Only one distinct ACP product, sold under one product brand name, which is subject to the requirements of 9VAC5-45-310; or

2. Only one distinct ACP product line subject to the requirements of 9VAC5-45-310, in which all the ACP products belong to the same product category and the VOC contents in the products are within 98.0% and 102.0% of the arithmetic mean of the VOC contents over the entire product line.

"Oven cleaner" means a cleaning product designed to clean and to remove dried food deposits from oven walls.

"Paint" means a pigmented liquid, liquefiable, or mastic composition designed for application to a substrate in a thin layer that is converted to an opaque solid film after application and is used for protection, decoration or identification, or to serve some functional purpose such as the filling or concealing of surface irregularities or the modification of light and heat radiation characteristics.

"Paint remover or stripper" means a product designed to strip or remove paints or other related coatings, by chemical action, from a substrate without markedly affecting the substrate. Paint remover or stripper does not include multipurpose solvents, paint brush cleaners, products designed and labeled exclusively to remove graffiti, and hand cleaner products that claim to remove paints and other related coatings from skin.

"Penetrant" means a lubricant designed and labeled primarily to loosen metal parts that have bonded together due to rusting, oxidation, or other causes. Penetrant does not include multipurpose lubricants that claim to have penetrating qualities but are not labeled primarily to loosen bonded parts.

"Pesticide" means and includes a substance or mixture of substances labeled, designed, or intended for use in preventing, destroying, repelling, or mitigating a pest, or a substance or mixture of substances labeled, designed, or intended for use as a defoliant, desiccant, or plant regulator, provided that the term "pesticide" will not include a substance, mixture of substances, or device that the U.S. Environmental Protection Agency does not consider to be a pesticide.

"Pre-ACP VOC content" means the lowest VOC content of an ACP product between January 1, 1990, and the date on which the application for a proposed ACP is submitted to the board, based on the data obtained from accurate records available to the board that yields the lowest VOC content for the product.

"Pressurized gas duster" means a pressurized product labeled to remove dust from a surface solely by means of mass air or gas flow, including surfaces such as photographs, photographic film negatives, computer keyboards, and other types of surfaces that cannot be cleaned with solvents. Pressurized gas duster does not include dusting aids.

"Principal display panel" means that part of a label that is so designed as to most likely be displayed, presented, shown, or examined under normal and customary conditions of display or purchase. Whenever a principal display panel appears more than once, all requirements pertaining to the principal display panel shall pertain to all such principal display panels.

"Product brand name" means the name of the product exactly as it appears on the principal display panel of the product.

"Product category" means the applicable category that best describes the product as listed in this section and in Table 45-3A in 9VAC5-45-310 A.

"Product form," for the purpose of complying with 9VAC5-45-390 (notification, records and reporting) only, means the applicable form that most accurately describes the product's dispensing form as follows:

A = Aerosol Product.

S = Solid.

P = Pump Spray.

L = Liquid.

SS = Semisolid.

O = Other.

"Product line" means a group of products of identical form and function belonging to the same product category.

"Propellant" means a liquefied or compressed gas that is used in whole or in part, such as a cosolvent, to expel a liquid or other material from the same self-pressurized container or from a separate container.

"Pump spray" means a packaging system in which the product ingredients within the container are not under pressure and in which the product is expelled only while a pumping action is applied to a button, trigger, or other actuator.

"Reconcile or reconciliation" means to provide sufficient VOC emission reductions to completely offset shortfalls generated under the ACP during an applicable compliance period.

"Reconciliation of shortfalls plan" means the plan to be implemented by the responsible ACP party when shortfalls have occurred, as approved by the board pursuant to 9VAC5-45-320 B 1 g (10).

"Responsible ACP party" means the company, firm, or establishment that is listed on the ACP product's label. If the label lists two or more companies, firms, or establishments, the responsible ACP party is the party that the ACP product was "manufactured for" or "distributed by," as noted on the label.

"Responsible party" means the company, firm, or establishment that is listed on the product's label. If the label lists two companies, firms, or establishments, the responsible party is the party that the product was "manufactured for" or "distributed by," as noted on the label.

"Restricted materials" means pesticides established as restricted materials under Chapter 39 (§ 3.2-3900 et seq.) of Title 3.2 of the Code of Virginia.

"Retail outlet" means an establishment at which consumer products are sold, supplied, or offered for sale directly to consumers.

"Retailer" means a person who sells, supplies, or offers consumer products for sale directly to consumers.

"Roll-on product" means an antiperspirant or deodorant that dispenses active ingredients by rolling a wetted ball or wetted cylinder on the affected area.

"Rubber and vinyl protectant" means a product designed to protect, preserve, or renew vinyl, rubber, and plastic on vehicles, tires, luggage, furniture, and household products such as vinyl covers, clothing, and accessories. Rubber and vinyl protectant does not include products primarily designed to clean the wheel rim, such as aluminum or magnesium wheel cleaners, and tire cleaners that do not leave an appearance-enhancing or protective substance on the tire.

"Rubbing alcohol" means a product containing isopropyl alcohol (also called isopropanol) or denatured ethanol and labeled for topical use, usually to decrease germs in minor cuts and scrapes, to relieve minor muscle aches, as a rubefacient, and for massage.

"Sealant and caulking compound" means a product with adhesive properties that is designed to fill, seal, waterproof, or weatherproof gaps or joints between two surfaces. Sealant and caulking compound does not include roof cements and roof sealants; insulating foams; removable caulking compounds; clear or paintable or water resistant caulking compounds; floor seam sealers; products designed exclusively for automotive uses; or sealers that are applied as continuous coatings. Sealant and caulking compound also does not include units of product, less packaging, which weigh more than one pound and consist of more than 16 fluid ounces. For the purposes of this definition only, "removable caulking compounds" means a compound that temporarily seals windows or doors for three- to six-month time intervals; and "clear or paintable or water resistant caulking compounds" means a compound that contains no appreciable level of opaque fillers or pigments, transmits most or all visible light through the caulk when cured, is paintable, and is immediately resistant to precipitation upon application.

"Semisolid" means a product that, at room temperature, will not pour, but will spread or deform easily, including, but not limited to gels, pastes, and greases.

"Shaving cream" means an aerosol product that dispenses a foam lather intended to be used with a blade or cartridge razor or other wet-shaving system, in the removal of facial or other bodily hair.

"Shortfall" means the ACP emissions minus the ACP limit when the ACP emissions were greater than the ACP limit during a specified compliance period, expressed to the nearest pound of VOC. Shortfall does not include emissions occurring prior to the date that the ACP agreement approving an ACP is signed by the board.

"Silicone-based multipurpose lubricant" means a lubricant that is:

1. Designed and labeled to provide lubricity primarily through the use of silicone compounds including, but not limited to, polydimethylsiloxane; and

2. Designed and labeled for general purpose lubrication, or for use in a wide variety of applications.

Silicone-based multipurpose lubricant does not include products designed and labeled exclusively to release manufactured products from molds.

"Single phase aerosol air freshener" means an aerosol air freshener with the liquid contents in a single homogeneous phase and that does not require that the product container be shaken before use.

"Small business" means any stationary source that is owned or operated by a person that employs 100 or fewer individuals; is a small business concern as defined in the federal Small Business Act; is not a major stationary source; does not emit 50 tons or more per year of any regulated pollutant; and emits less than 75 tons per year of all regulated pollutants.

"Solid" means a substance or mixture of substances that, either whole or subdivided (such as the particles composing a powder), is not capable of visually detectable flow as determined under ASTM "Standard Test Method for Determining Whether a Material is a Liquid or a Solid" (see 9VAC5-20-21).

"Special purpose spray adhesive" means an aerosol adhesive that meets any of the following definitions:

1. "Mounting adhesive" means an aerosol adhesive designed to permanently mount photographs, artwork, or other drawn or printed media to a backing (paper, board, cloth, etc.) without causing discoloration to the artwork.

2. "Flexible vinyl adhesive" means an aerosol adhesive designed to bond flexible vinyl to substrates. "Flexible vinyl" means a nonrigid polyvinyl chloride plastic with at least 5.0%, by weight, of plasticizer content. A plasticizer is a material, such as a high boiling point organic solvent, that is incorporated into a plastic to increase its flexibility, workability, or distensibility, and may be determined using ASTM "Standard Practice for Packed Column Gas Chromatography" (see 9VAC5-20-21) or from product formulation data.

3. "Polystyrene foam adhesive" means an aerosol adhesive designed to bond polystyrene foam to substrates.

4. "Automobile headliner adhesive" means an aerosol adhesive designed to bond together layers in motor vehicle headliners.

5. "Polyolefin adhesive" means an aerosol adhesive designed to bond polyolefins to substrates.

6. "Laminate repair or edgebanding adhesive" means an aerosol adhesive designed for:

a. The touch-up or repair of items laminated with high pressure laminates (e.g., lifted edges, delaminates, etc.); or

b. The touch-up, repair, or attachment of edgebonding materials, including but not limited to, other laminates, synthetic marble, veneers, wood molding, and decorative metals.

For the purposes of this definition, "high pressure laminate" means sheet materials that consist of paper, fabric, or other core material that have been laminated at temperatures exceeding 265°F and at pressures between 1,000 and 1,400 psi.

7. "Automotive engine compartment adhesive" means an aerosol adhesive designed for use in motor vehicle under-the-hood applications that require oil and plasticizer resistance, as well as high shear strength, at temperatures of 200-275°F.

"Spot remover" means a product labeled to clean localized areas or remove localized spots or stains on cloth or fabric, such as drapes, carpets, upholstery, and clothing, that does not require subsequent laundering to achieve stain removal. Spot remover does not include dry cleaning fluid, laundry prewash, or multipurpose solvent.

"Spray buff product" means a product designed to restore a worn floor finish in conjunction with a floor buffing machine and special pad.

"Stick product" means an antiperspirant or a deodorant that contains active ingredients in a solid matrix form, and that dispenses the active ingredients by frictional action on the affected area.

"Structural waterproof adhesive" means an adhesive whose bond lines are resistant to conditions of continuous immersion in fresh or salt water and that conforms with the definition in the federal consumer products regulation, 40 CFR 59 Subpart C.

"Surplus reduction" means the ACP limit minus the ACP emissions when the ACP limit was greater than the ACP emissions during a given compliance period, expressed to the nearest pound of VOC. Except as provided in 9VAC5-45-320 F 3, surplus reduction does not include emissions occurring prior to the date that the ACP agreement approving an ACP is signed by the board.

"Surplus trading" means the buying, selling, or transfer of surplus reductions between responsible ACP parties.

"Terrestrial" means to live on or grow from land.

"Tire sealant and inflator" means a pressurized product that is designed to temporarily inflate and seal a leaking tire.

"Total maximum historical emissions" or "TMHE" means the total VOC emissions from all ACP products for which the responsible ACP party has failed to submit the required VOC content or enforceable sales records. The TMHE shall be calculated for each ACP product during each portion of a compliance period for which the responsible ACP party has failed to provide the required VOC content or enforceable sales records. The TMHE shall be expressed to the nearest pound and calculated according to the following calculation:

$$TMHE = (MHE)_1 + (MHE)_2 + \ldots + (MHE)_N$$

$$MHE = \left(\frac{\text{Highest VOC Content} \times \text{Highest Sales}}{100 \times 365}\right) \times \text{Missing Data Days}$$

where:

Highest VOC content = the maximum VOC content that the ACP product has contained in the previous five years, if the responsible ACP party has failed to meet the requirements for reporting VOC content data (for any portion of the compliance period), as specified in the ACP agreement approving the ACP, or the current actual VOC content, if the responsible ACP party has provided all required VOC Content data (for the entire compliance period), as specified in the ACP agreement.

Highest sales = the maximum one-year gross sales of the ACP product in the previous five years, if the responsible ACP party has failed to meet the requirements for reporting enforceable sales records (for any portion of the compliance period), as specified in the ACP agreement approving the ACP, or the current actual one-year enforceable sales for the product, if the responsible ACP party has provided all required enforceable sales records (for the entire compliance period), as specified in the ACP agreement approving the ACP.

Missing Data Days = (see definition in this section).

1, 2, ..., N = each product in an ACP, up to the maximum N, for which the responsible ACP party has failed to submit the required enforceable sales or VOC content data as specified in the ACP agreement.

"Type A propellant" means a compressed gas such as CO_2, N_2, N_2O, or compressed air that is used as a propellant and is either incorporated with the product or contained in a separate chamber within the product's packaging.

"Type B propellant" means a halocarbon that is used as a propellant including chlorofluorocarbons (CFCs), hydrochlorofluorocarbons (HCFCs), and hydrofluorocarbons (HFCs).

"Type C propellant" means a propellant that is not a Type A or Type B propellant, including propane, isobutane, n-butane, and dimethyl ether (also known as dimethyl oxide).

"Undercoating" means an aerosol product designed to impart a protective, nonpaint layer to the undercarriage, trunk interior, or firewall of motor vehicles to prevent the formation of rust or to deaden sound. Undercoating includes, but is not limited to, rubberized, mastic, or asphaltic products.

"Usage directions" means the text or graphics on the product's principal display panel, label, or accompanying literature that describes to the end user how and in what quantity the product is to be used.

"VOC content" means, except for charcoal lighter products, the total weight of VOC in a product expressed as a percentage of the product weight (exclusive of the container or packaging), as determined pursuant to 9VAC5-45-370 B and C.

For charcoal lighter material products only,

$$VOC\ Content = \frac{(Certified\ Emissions \times 100)}{Certified\ Use\ Rate}$$

where:

Certified emissions = (see definition in this section).

Certified use rate = (see definition in this section).

"Volatile organic compound" or "VOC" means volatile organic compound as defined in 9VAC5-10-20.

"Wasp and hornet insecticide" means an insecticide product that is designed for use against wasps, hornets, yellow jackets or bees by allowing the user to spray from a distance a directed stream or burst at the intended insects or their hiding place.

"Waterproofer" means a product designed and labeled exclusively to repel water from fabric or leather substrates. Waterproofer does not include fabric protectants.

"Wax" means a material or synthetic thermoplastic substance generally of high molecular weight hydrocarbons or high molecular weight esters of fatty acids or alcohols, except glycerol and high polymers (plastics). Wax includes, but is not limited to, substances derived from the secretions of plants and animals such as carnauba wax and beeswax, substances of a mineral origin such as ozocerite and paraffin, and synthetic polymers such as polyethylene.

"Web spray adhesive" means an aerosol adhesive that is not a mist spray or special purpose spray adhesive.

"Wood floor wax" means wax-based products for use solely on wood floors.

"Working day" means a day between Monday through Friday, inclusive, except for federal holidays.

9VAC5-45-310. Standard for volatile organic compounds.

A. Except as provided in 9VAC5-45-290, 9VAC5-45-320, and 9VAC5-45-330, no owner or other person shall (i) sell, supply, or offer for sale a consumer product manufactured on or after the applicable compliance date specified in 9VAC5-45-360 or (ii) manufacture for sale a consumer product on or after the applicable compliance date specified in 9VAC5-45-360, that contains volatile organic compounds in excess of the limits specified in Table 45-3A.

TABLE 45-3A

Product Category	Percent VOC by Weight
Adhesives	
Aerosol adhesives	
Mist spray adhesive:	65%
Web spray adhesive:	55%
Special purpose spray adhesives	
Automotive engine compartment adhesive:	70%
Automotive headliner adhesive:	65%
Flexible vinyl adhesive:	70%
Laminate repair or edgebanding adhesive:	60%
Mounting adhesive:	70%
Polystyrene foam adhesive:	65%
Polyolefin adhesive:	60%
Contact adhesive:	80%
Construction, panel, and floor covering adhesive:	15%
General purpose adhesive:	10%
Structural waterproof adhesive:	15%
Air fresheners	
Single-phase aerosol:	30%
Double-phase aerosol:	25%
Liquid/Pump spray:	18%
Solid/Gel:	3%
Antiperspirants	
Aerosol:	40% HVOC, 10% MVOC
Nonaerosol:	0% HVOC, 0% MVOC
Automotive brake cleaner:	45%
Automotive rubbing or polishing compound:	17%
Automotive wax, polish, sealant, or glaze	
Hard paste wax:	45%
Instant detailer:	3%
All other forms:	15%
Automotive windshield washer fluid:	35%
Bathroom and tile cleaners	
Aerosol:	7%
All other forms:	5%
Bug and tar remover:	40%
Carburetor or fuel-injection air intake cleaner:	45%
Carpet and upholstery cleaners	
Aerosol:	7%
Nonaerosol (dilutable):	0.1%
Nonaerosol (ready-to-use):	3.0%
Charcoal lighter material:	See subsection F of this section.
Cooking spray, aerosol:	18%
Deodorants	
Aerosol:	0% HVOC, 10% MVOC
Nonaerosol:	0% HVOC, 0% MVOC
Dusting aids	
Aerosol:	25%
All other forms:	7%
Engine degreasers	
Aerosol:	35%
Nonaerosol:	5%
Fabric protectant:	60%
Floor polishes/Waxes	
Products for flexible flooring materials:	7%
Products for nonresilient flooring:	10%
Wood floor wax:	90%

Floor wax stripper, nonaerosol:	See subsection H of this section.
Furniture maintenance products	
Aerosol:	17%
All other forms except solid or paste:	7%
General purpose cleaners	
Aerosol:	10%
Nonaerosol:	4%
General purpose degreasers	
Aerosol:	50%
Nonaerosol:	4%
Glass cleaners	
Aerosol:	12%
Nonaerosol:	4%
Hair mousse:	6%
Hair shine:	55%
Hair spray:	55%
Hair styling gel:	6%
Heavy-duty hand cleaner or soap:	8%
Insecticides	
Crawling bug (aerosol):	15%
Crawling bug (all other forms):	20%
Flea and tick:	25%
Flying bug (aerosol):	25%
Flying bug (all other forms):	35%
Fogger:	45%
Lawn and garden (all other forms):	20%
Lawn and garden (nonaerosol):	3%
Wasp and hornet:	40%
Laundry prewash	
Aerosol/Solid:	22%
All other forms:	5%
Laundry starch product:	5%
Metal polish or cleanser:	30%
Multi-purpose lubricant (excluding solid or semi-solid products):	50%
Nail polish remover:	75%
Nonselective terrestrial herbicide, nonaerosol:	3%
Oven cleaners	
Aerosol/Pump spray:	8%
Liquid:	5%
Paint remover or stripper:	50%
Penetrant:	50%
Rubber and vinyl protectants	
Nonaerosol:	3%
Aerosol:	10%
Sealant and caulking compound:	4%
Shaving cream:	5%
Silicone-based multipurpose lubricant (excluding solid or semi-solid products):	60%
Spot removers	
Aerosol:	25%
Nonaerosol:	8%
Tire sealant and inflator:	20%
Undercoating, aerosol:	40%

B. No owner or other person shall sell, supply, offer for sale, or manufacture for sale an antiperspirant or a deodorant that contains a compound that has been defined as a toxic pollutant in 9VAC5-60-210 C.

C. Provisions follow concerning products that are diluted prior to use.

1. For consumer products for which the label, packaging, or accompanying literature specifically states that the product should be diluted with water or non-VOC solvent prior to use, the limits specified in Table 45-3A shall apply to the product only after the minimum recommended dilution has taken place. For purposes of this subsection, "minimum recommended dilution" shall not include recommendations for incidental use of a concentrated product to deal with limited special applications such as hard-to-remove soils or stains.

2. For consumer products for which the label, packaging, or accompanying literature states that the product should

be diluted with a VOC solvent prior to use, the limits specified in Table 45-3A shall apply to the product only after the maximum recommended dilution has taken place.

D. The following provisions apply to sell through of consumer products manufactured before May 1, 2010:

1. Notwithstanding the provisions of subsections A and G, H or I of this section, a consumer product manufactured before the applicable compliance date specified in 9VAC5-45-360, may be sold, supplied, or offered for sale after the applicable compliance date if the date of manufacture or a date code representing the date of manufacture is clearly displayed on the product container or package.

2. Notwithstanding the provisions of subsections A and G, H or I of this section, a consumer product manufactured after the applicable compliance date specified in 9VAC5-45-360 and before May 1, 2010 may be sold, supplied, or offered for sale after May 1, 2010, if it complies with all of the provisions of Article 4 (9VAC5-45-400 et seq.) of this part.

3. Except as provided in subdivisions 1 and 2 of this subsection, displaying the date of manufacture, or a code indicating the date of manufacture, on the product container or package does not exempt the owner or product from the provisions of this article.

E. For those consumer products that are registered under FIFRA, the effective date of the VOC standards shall be one year after the applicable compliance date specified in 9VAC5-45-360.

F. The following requirements shall apply to all charcoal lighter material products:

1. Effective as of the applicable compliance date specified in 9VAC5-45-360, no owner or other person shall (i) sell, supply, or offer for sale a charcoal lighter material product manufactured on or after the applicable compliance date or (ii) manufacture for sale a charcoal lighter material product unless at the time of the transaction:

a. The manufacturer can demonstrate to the board's satisfaction that they have been issued a currently effective certification by CARB under the Consumer Products provisions under Subchapter 8.5, Article 2, § 94509(h), of Title 17 of the California Code of Regulations (see 9VAC5-20-21). This certification remains in effect for as long as the CARB certification remains in effect. A manufacturer claiming such a certification on this basis must submit to the board a copy of the certification decision (i.e., the executive order), including all conditions established by CARB applicable to the certification.

b. The manufacturer or distributor of the charcoal lighter material has been issued a currently effective certification pursuant to subdivision 2 of this subsection.

c. The charcoal lighter material meets the formulation criteria and other conditions specified in the applicable ACP agreement issued pursuant to subdivision 2 of this subsection.

d. The product usage directions for the charcoal lighter material are the same as those provided to the board pursuant to subdivision 2 c of this subsection.

2. Provisions follow concerning certification requirements.

a. No charcoal lighter material formulation shall be certified under this subdivision unless the applicant for certification demonstrates to the board's satisfaction that the VOC emissions from the ignition of charcoal with the charcoal lighter material are less than or equal to 0.020 pound of VOC per start, using the procedures specified in the South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21). The provisions relating to LVP-VOC in 9VAC5-45-290 F and 9VAC5-45-300 C shall not apply to a charcoal lighter material subject to the requirements of 9VAC5-45-310 A and this subsection.

b. The board may approve alternative test procedures that are shown to provide equivalent results to those obtained using the South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21).

c. A manufacturer or distributor of charcoal lighter material may apply to the board for certification of a charcoal lighter material formulation in accordance with this subdivision. The application shall be in writing and shall include, at a minimum, the following:

(1) The results of testing conducted pursuant to the procedures specified in South Coast Air Quality Management District Rule 1174 Testing Protocol (see 9VAC5-20-21); and

(2) The exact text or graphics that will appear on the charcoal lighter material's principal display panel, label, or accompanying literature. The provided material shall clearly show the usage directions for the product. These directions shall accurately reflect the quantity of charcoal lighter material per pound of charcoal that was used in the South Coast Air Quality Management District Rule 1174 Testing Protocol (see 9VAC5-20-21) for that product, unless:

(a) The charcoal lighter material is intended to be used in fixed amounts independent of the amount of charcoal used, such as certain paraffin cubes, or

(b) The charcoal lighter material is already incorporated into the charcoal, such as certain "bag light," "instant light" or "match light" products.

(3) For a charcoal lighter material that meets the criteria specified in subdivision 2 c (2) (a) of this subsection, the usage instructions provided to the board will accurately reflect the quantity of charcoal lighter material used in the South Coast Air Quality Management District Rule 1174 Testing Protocol (see 9VAC5-20-21) for that product.

(4) Physical property data, formulation data, or other information required by the board for use in determining when a product modification has occurred and for use in determining compliance with the conditions specified on the ACP agreement issued pursuant to subdivision 2 e of this subsection.

d. Within 30 days of receipt of an application, the board will advise the applicant in writing either that it is complete or that specified additional information is required to make it complete. Within 30 days of receipt of additional information, the board will advise the applicant in writing either that the application is complete, or that specified additional information or testing is still required before it can be deemed complete.

e. If the board finds that an application meets the requirements of subdivision 2 of this subsection, then an ACP agreement shall be issued certifying the charcoal lighter material formulation and specifying such conditions as are necessary to insure that the requirements of this subsection are met. The board will act on a complete application within 90 days after the application is deemed complete.

3. For charcoal lighter material for which certification has been granted pursuant to subdivision 2 of this subsection, the applicant for certification shall notify the board in writing within 30 days of: (i) a change in the usage directions, or (ii) a change in product formulation, test results, or other information submitted pursuant to subdivision 2 of this subsection that may result in VOC emissions greater than 0.020 pound of VOC per start.

4. If the board determines that a certified charcoal lighter material formulation results in VOC emissions from the ignition of charcoal that are greater than 0.020 pound of VOC per start, as determined by the South Coast Air Quality Management District Rule 1174 Testing Protocol (see 9VAC5-20-21) and the statistical analysis procedures contained therein, the board will revoke or modify the certification as is necessary to assure that the charcoal lighter material will result in VOC emissions of less than or equal to 0.020 pound of VOC per start.

G. Requirements for aerosol adhesives.

1. The standards for aerosol adhesives apply to all uses of aerosol adhesives, including consumer, industrial, and commercial uses. Except as otherwise provided in 9VAC5-45-290 and 9VAC5-45-330, no owner or other person shall sell, supply, offer for sale, use, or manufacture for sale an aerosol adhesive that, at the time of sale, use, or manufacture, contains VOCs in excess of the specified standard.

2. a. In order to qualify as a "special purpose spray adhesive," the product must meet one or more of the definitions for special purpose spray adhesive specified in 9VAC5-45-300 C, but if the product label indicates that the product is suitable for use on a substrate or application not listed in 9VAC5-45-300 C, then the product shall be classified as either a "web spray adhesive" or a "mist spray adhesive."

b. If a product meets more than one of the definitions specified in 9VAC5-45-300 C for "special purpose spray adhesive," and is not classified as a "web spray adhesive" or "mist spray adhesive" under subdivision 2 a of this subsection, then the VOC limit for the product shall be the lowest applicable VOC limit specified in 9VAC5-45-310 A.

3. Effective as of the applicable compliance dates specified in 9VAC5-45-360, no person shall (i) sell, supply, or offer for sale an aerosol adhesive manufactured on or after the applicable compliance date or (ii) manufacture for sale an aerosol adhesive that contains any of the following compounds: methylene chloride, perchloroethylene, or trichloroethylene.

4. All aerosol adhesives must comply with the labeling requirements specified in 9VAC5-45-340 D.

H. Effective as of the applicable compliance date specified in 9VAC5-45-360, no owner or other person shall sell, supply, offer for sale, or manufacture for use a floor wax stripper unless the following requirements are met:

1. The label of each nonaerosol floor wax stripper must specify a dilution ratio for light or medium build-up of polish that results in an as-used VOC concentration of 3.0% by weight or less.

2. If a nonaerosol floor wax stripper is also intended to be used for removal of heavy build-up of polish, the label of that floor wax stripper must specify a dilution ratio for heavy build-up of polish that results in an as-used VOC concentration of 12% by weight or less.

3. The terms "light build-up," "medium build-up" or "heavy build-up" are not specifically required as long as comparable terminology is used.

I. For a consumer product for which standards are specified under subsection A of this section, no owner or other person shall sell, supply, offer for sale, or manufacture for sale a consumer product that contains any of the following ozone-depleting compounds:

CFC-11 (trichlorofluoromethane), CFC-12 (dichlorodifluoromethane);

CFC-113 (1,1,1-trichloro-2,2,2-trifluoroethane);

CFC-114 (1-chloro-1,1-difluoro-2-chloro-2,2-difluoroethane);

CFC-115 (chloropentafluoroethane), halon 1211 (bromochlorodifluoromethane);

halon 1301 (bromotrifluoromethane), halon 2402 (dibromotetrafluoroethane);

HCFC-22 (chlorodifluoromethane), HCFC-123 (2,2-dichloro-1,1,1-trifluoroethane);

HCFC-124 (2-chloro-1,1,1,2-tetrafluoroethane);

HCFC-141b (1,1-dichloro-1-fluoroethane), HCFC-142b (1-chloro-1,1-difluoroethane);

1,1,1-trichloroethane; or

carbon tetrachloride.

J. The requirements of subsection I of this section shall not apply to an existing product formulation that complies with Table 45-3A or an existing product formulation that is reformulated to meet Table 45-3A, provided the ozone-depleting compound content of the reformulated product does not increase.

K. The requirements of subsection I of this section shall not apply to ozone-depleting compounds that may be present as impurities in a consumer product in an amount equal to or less than 0.01% by weight of the product.

9VAC5-45-320. Alternative control plan (ACP) for consumer products.

A. 1. Manufacturers of consumer products may seek an ACP agreement in accordance with subsections B through L of this section.

2. Only responsible ACP parties for consumer products may enter into an ACP agreement under the provisions of this section.

B. Provisions follow concerning the requirements and process for approval of an ACP.

1. To be considered by the board for approval, an application for a proposed ACP shall be submitted in writing to the board by the responsible ACP party and shall contain all of the following:

a. An identification of the contact persons, phone numbers, names, and addresses of the responsible ACP party that is submitting the ACP application and will be implementing the ACP requirements specified in the ACP agreement.

b. A statement of whether the responsible ACP party is a small business or a one-product business.

c. A listing of the exact product brand name, form, available variations (flavors, scents, colors, sizes, etc.), and applicable product category for each distinct ACP product that is proposed for inclusion in the ACP.

d. For each proposed ACP product identified in subdivision 1 c of this subsection, a demonstration to the satisfaction of the board that the enforceable sales records to be used by the responsible ACP party for tracking product sales meet the minimum criteria specified in subdivision 1 d (5) of this subsection. To provide this demonstration, the responsible ACP party shall either demonstrate to the satisfaction of the board that other records provided to the board in writing by the responsible ACP party meet the minimum criteria of subdivision 1 d (5) of this subsection for tracking product sales of each ACP product, or do all of the following:

(1) Provide the contact persons, phone numbers, names, street and mail addresses of all persons and businesses who will provide information that will be used to determine the enforceable sales;

(2) Determine the enforceable sales of each product using enforceable sales records;

(3) Demonstrate, to the satisfaction of the board, the validity of the enforceable sales based on enforceable sales records provided by the contact persons or the responsible ACP party;

(4) Calculate the percentage of the gross sales that is composed of enforceable sales; and

(5) Determine which ACP products have enforceable sales that are 75% or more of the gross sales. Only ACP products meeting this criteria shall be allowed to be sold under an ACP.

e. For each of the ACP products identified in subdivision 1 d (5) of this subsection, the inclusion of the following:

(1) Legible copies of the existing labels for each product;

(2) The VOC content and LVP content for each product. The VOC content and LVP content shall be reported for two different periods as follows:

(a) The VOC and LVP contents of the product at the time the application for an ACP is submitted, and

(b) The VOC and LVP contents of the product that were used at any time within the four years prior to the date of submittal of the application for an ACP if either the VOC or LVP contents have varied by more than plus or minus 10% of the VOC or LVP contents reported in subdivision 1 e (2) (a) of this subsection.

f. A written commitment obligating the responsible ACP party to date-code every unit of each ACP product approved for inclusion in the ACP. The commitment shall require the responsible ACP party to display the date-code on each ACP product container or package no later than five working days after the date an ACP agreement approving an ACP is signed by the board.

g. An operational plan covering all the products identified under subdivision 1 d (5) of this subsection for each compliance period that the ACP will be in effect. The operational plan shall contain all of the following:

(1) An identification of the compliance periods and dates for the responsible ACP party to report the information required by the board in the ACP agreement approving an ACP. The length of the compliance period shall be chosen by the responsible ACP party (not to exceed 365 days). The responsible ACP party shall also choose the dates for reporting information such that all required VOC content and enforceable sales data for all ACP products shall be reported to the board at the same time and at the same frequency.

(2) An identification of specific enforceable sales records to be provided to the board for enforcing the provisions of this article and the ACP agreement approving an ACP. The enforceable sales records shall be provided to the board no later than the compliance period dates specified in subdivision 1 g (1) of this subsection.

(3) For a small business or a one-product business that will be relying to some extent on surplus trading to meet its ACP limits, a written commitment from the responsible ACP party that they will transfer the surplus reductions to the small business or one-product business upon approval of the ACP.

(4) For each ACP product, all VOC content levels that will be applicable for the ACP product during each compliance period. The plan shall also identify the specific method by which the VOC content will be determined and the statistical accuracy and precision (repeatability and reproducibility) will be calculated for each specified method.

(5) The projected enforceable sales for each ACP product at each different VOC content for every compliance period that the ACP will be in effect.

(6) A detailed demonstration showing the combination of specific ACP reformulations or surplus trading (if applicable) that is sufficient to ensure that the ACP emissions will not exceed the ACP limit for each compliance period that the ACP will be in effect, the approximate date within each compliance period that such reformulations or surplus trading are expected to occur, and the extent to which the VOC contents of the ACP products will be reduced (i.e., by ACP reformulation). This demonstration shall use the equations specified in 9VAC5-45-300 C for projecting the ACP emissions and ACP limits during each compliance period. This demonstration shall also include all VOC content levels and projected enforceable sales for all ACP products to be sold during each compliance period.

(7) A certification that all reductions in the VOC content of a product will be real, actual reductions that do not result from changing product names, mischaracterizing ACP product reformulations that have occurred in the past, or other attempts to circumvent the provisions of this article.

(8) Written explanations of the date-codes that will be displayed on each ACP product's container or packaging.

(9) A statement of the approximate dates by which the responsible ACP party plans to meet the applicable ACP VOC standards for each product in the ACP.

(10) An operational plan ("reconciliation of shortfalls plan") that commits the responsible ACP party to completely reconcile shortfalls, even, to the extent permitted by law, if the responsible ACP party files for bankruptcy protection. The plan for reconciliation of shortfalls shall contain all of the following:

(a) A clear and convincing demonstration of how shortfalls of up to 5.0%, 10%, 15%, 25%, 50%, 75% and 100% of the applicable ACP limit will be completely reconciled within 90 working days from the date the shortfall is determined;

(b) A listing of the specific records and other information that will be necessary to verify that the shortfalls were reconciled as specified in this subsection; and

(c) A commitment to provide a record or information requested by the board to verify that the shortfalls have been completely reconciled.

h. A declaration, signed by a legal representative for the responsible ACP party, that states that all information and operational plans submitted with the ACP application are true and correct.

2. a. In accordance with the time periods specified in subsection C of this section, the board will issue an ACP agreement approving an ACP that meets the requirements of this article. The board will specify such terms and conditions as are necessary to ensure that the emissions from the ACP products do not exceed the emissions that would have occurred if the ACP products subject to the ACP had met the VOC standards specified in 9VAC5-45-310 A. The ACP shall also include:

(1) Only those ACP products for which the enforceable sales are at least 75% of the gross sales as determined in subdivision 1 d (5) of this subsection;

(2) A reconciliation of shortfalls plan meeting the requirements of this article; and

(3) Operational terms, conditions, and data to be reported to the board to ensure that all requirements of this article are met.

b. The board will not approve an ACP submitted by a responsible ACP party if the board determines, upon review of the responsible ACP party's compliance history with past or current ACPs or the requirements for consumer products in this article, that the responsible ACP party has a recurring pattern of violations and has consistently refused to take the necessary steps to correct those violations.

C. Provisions follow concerning ACP approval time frames.

1. The board will take appropriate action on an ACP within the following time periods:

a. Within 30 working days of receipt of an ACP application, the board will inform the applicant in writing that either:

(1) The application is complete and accepted for filing, or

(2) The application is deficient, and identify the specific information required to make the application complete.

b. Within 30 working days of receipt of additional information provided in response to a determination that an ACP application is deficient, the board will inform the applicant in writing that either:

(1) The additional information is sufficient to make the application complete, and the application is accepted for filing, or

(2) The application is deficient, and identify the specific information required to make the application complete.

c. If the board finds that an application meets the requirements of subsection B of this section, then it shall issue an ACP agreement in accordance with the requirements of this article. The board will normally act to approve or disapprove a complete application within 90 working days after the application is deemed complete.

2. The board may extend the time period in subdivision 1 c of this subsection if additional information is needed.

D. Provisions follow concerning recordkeeping and availability of requested information.

1. All information specified in the ACP Agreement approving an ACP shall be maintained by the responsible ACP party for a minimum of three years after such records are generated. Such records shall be clearly legible and maintained in good condition during this period.

2. The records specified in subdivision 1 of this subsection shall be made available to the board or its authorized representative:

a. Immediately upon request, during an on-site visit to a responsible ACP party,

b. Within five working days after receipt of a written request from the board, or

c. Within a time period mutually agreed upon by both the board and the responsible ACP party.

E. Provisions follow concerning violations.

1. Failure to meet a requirement of this article or a condition of an applicable ACP agreement shall constitute a single, separate violation of this article for each day until such requirement or condition is satisfied, except as otherwise provided in subdivisions 2 through 8 of this subsection.

2. False reporting of information in an ACP application or in any supporting documentation or amendments thereto shall constitute a single, separate violation of the requirements of this article for each day that the approved ACP is in effect.

3. An exceedance during the applicable compliance period of the VOC content specified for an ACP product in the ACP agreement approving an ACP shall constitute a single, separate violation of the requirements of this article for each ACP product that exceeds the specified VOC content that is sold, supplied, offered for sale, or manufactured for use.

4. Any of the following actions shall each constitute a single, separate violation of the requirements of this article for each day after the applicable deadline until the requirement is satisfied:

a. Failure to report data or failure to report data accurately in writing to the board regarding the VOC content, LVP content, enforceable sales, or other information required by the deadline specified in the applicable ACP agreement;

b. False reporting of information submitted to the board for determining compliance with the ACP requirements;

c. Failure to completely implement the reconciliation of shortfalls plan that is set forth in the ACP agreement within 30 working days from the date of written notification of a shortfall by the board; or

d. Failure to completely reconcile the shortfall as specified in the ACP agreement within 90 working days from the date of written notification of a shortfall by the board.

5. False reporting or failure to report any of the information specified in subdivision F 2 i of this section or the sale or transfer of invalid surplus reductions shall constitute a single, separate violation of the requirements of this article for each day during the time period for which the surplus reductions are claimed to be valid.

6. Except as provided in subdivision 7 of this subsection, an exceedance of the ACP limit for a compliance period that the ACP is in effect shall constitute a single, separate violation of the requirements of this article for each day of the applicable compliance period. The board will determine whether an exceedance of the ACP limit has occurred as follows:

a. If the responsible ACP party has provided all required information for the applicable compliance period specified in the ACP agreement approving an ACP, then the board will determine whether an exceedance has occurred using the enforceable sales records and VOC content for each ACP product as reported by the responsible ACP party for the applicable compliance period.

b. If the responsible ACP party has failed to provide all the required information specified in the ACP agreement for an applicable compliance period, the board will determine whether an exceedance of the ACP limit has occurred as follows.

(1) For the missing data days, the board will calculate the total maximum historical emissions as specified in 9VAC5-45-300 C.

(2) For the remaining portion of the compliance period that are not missing data days, the board will calculate the emissions for each ACP product using the enforceable sales records and VOC content that were reported for that portion of the applicable compliance period.

(3) The ACP emissions for the entire compliance period shall be the sum of the total maximum historical emissions, determined pursuant to subdivision 6 b (1) of this subsection, and the emissions determined pursuant to subdivision 6 b (2) of this subsection.

(4) The board will calculate the ACP limit for the entire compliance period using the ACP Standards applicable to each ACP product and the enforceable sales records specified in subdivision 6 b (2) of this subsection. The enforceable sales for each ACP product during missing data days, as specified in subdivision 6 b (1) of this subsection, shall be zero.

(5) An exceedance of the ACP limit has occurred when the ACP emissions, determined pursuant to subdivision 6 b (3) of this subsection, exceeds the ACP limit, determined pursuant to subdivision 6 b (4) of this subsection.

7. If a violation specified in subdivision 6 of this subsection occurs, the responsible ACP party may, pursuant to this subdivision, establish the number of violations as calculated according to the following equation:

$$NEV = \frac{(ACP\ emissions - ACP\ limit)}{40\ pounds}$$

where:

NEV = number of ACP limit violations.

ACP emissions = the ACP emissions for the compliance period.

ACP limit = the ACP limit for the compliance period.

40 pounds = number of pounds of emissions equivalent to one violation.

The responsible ACP party may determine the number of ACP limit violations pursuant to this subdivision only if it has provided all required information for the applicable compliance period, as specified in the ACP agreement approving the ACP. By choosing this option, the responsible ACP party waives all legal objections to the calculation of the ACP limit violations pursuant to this subdivision.

8. A cause of action against a responsible ACP party under this section shall be deemed to accrue on the date when the records establishing a violation are received by the board.

9. The responsible ACP party is fully liable for compliance with the requirements of this article, even if the responsible ACP party contracts with or otherwise relies on another person to carry out some or all of the requirements of this article.

F. Provisions follow concerning surplus reductions and surplus trading.

1. The board will issue surplus reduction certificates that establish and quantify, to the nearest pound of VOC reduced, the surplus reductions achieved by a responsible ACP party operating under an ACP. The surplus reductions can be bought from, sold to, or transferred to a responsible ACP party operating under an ACP, as provided in subdivision 2 of this subsection. All surplus reductions shall be calculated by the board at the end of each compliance period within the time specified in the approved ACP. Surplus reduction certificates shall not constitute instruments, securities, or another form of property.

2. The issuance, use, and trading of all surplus reductions shall be subject to the following provisions:

a. For the purposes of this article, VOC reductions from sources of VOCs other than consumer products subject to the VOC standards specified in 9VAC5-45-310 A may not be used to generate surplus reductions.

b. Surplus reductions are valid only when generated by a responsible ACP party and only while that responsible ACP party is operating under an approved ACP.

c. Surplus reductions are valid only after the board has issued an ACP agreement pursuant to subdivision 1 of this subsection.

d. Surplus reductions issued by the board may be used by the responsible ACP party who generated the surplus until the reductions expire, are traded, or until the ACP is canceled pursuant to subdivision J 2 of this section.

e. Surplus reductions cannot be applied retroactively to a compliance period prior to the compliance period in which the reductions were generated.

f. Except as provided in subdivision 2 g (2) of this subsection, only small or one-product businesses selling products under an approved ACP may purchase surplus reductions. An increase in the size of a small business or one-product business shall have no effect on surplus reductions purchased by that business prior to the date of the increase.

g. While valid, surplus reductions can be used only for the following purposes:

(1) To adjust the ACP emissions of either the responsible ACP party who generated the reductions or the responsible ACP party to which the reductions were traded, provided the surplus reductions are not to be used by a responsible ACP party to further lower its ACP emissions when its ACP emissions are equal to or less than the ACP limit during the applicable compliance period; or

(2) To be traded for the purpose of reconciling another responsible ACP party's shortfalls, provided such reconciliation is part of the reconciliation of shortfalls plan approved by the board pursuant to subdivision B 1 g (10) of this section.

h. A valid surplus reduction shall be in effect starting five days after the date of issuance by the board for a continuous period equal to the number of days in the compliance period during which the surplus reduction was generated. The surplus reduction shall then expire at the end of its effective period.

i. At least five working days prior to the effective date of transfer of surplus reductions, both the responsible ACP party that is selling surplus reductions and the responsible ACP party that is buying the surplus reductions shall, either together or separately, notify the board in writing of the transfer. The notification shall include all of the following:

(1) The date the transfer is to become effective.

(2) The date the surplus reductions being traded are due to expire.

(3) The amount (in pounds of VOCs) of surplus reductions that is being transferred.

(4) The total purchase price paid by the buyer for the surplus reductions.

(5) The contact persons, names of the companies, street and mail addresses, and phone numbers of the responsible ACP parties involved in the trading of the surplus reductions.

(6) A copy of the board-issued surplus reductions certificate, signed by both the seller and buyer of the certificate, showing transfer of all or a specified portion of the surplus reductions. The copy shall show the amount of any remaining nontraded surplus reductions, if applicable, and shall show their expiration date. The copy shall indicate that both the buyer and seller of the surplus reductions fully understand the conditions and limitations placed upon the transfer of the surplus reductions and accept full responsibility for the appropriate use of such surplus reductions as provided in this section.

j. Surplus reduction credits shall only be traded between ACP products.

3. Provisions follow concerning limited-use surplus reduction credits for early reformulations of ACP products.

a. For the purposes of this subdivision, "early reformulation" means an ACP product that is reformulated to result in a reduction in the product's VOC content, and that is sold, supplied, or offered for sale for the first time during the one-year (365 day) period immediately prior to the date on which the application for a proposed ACP is submitted to the board. Early reformulation does not include reformulated ACP products that are sold, supplied, or offered for sale more than one year prior to the date on which the ACP application is submitted to the board.

b. If requested in the application for a proposed ACP, the board will, upon approval of the ACP, issue surplus reduction credits for early reformulation of ACP products, provided that all of the following documentation has been provided by the responsible ACP party to the satisfaction of the board:

(1) Accurate documentation showing that the early reformulation reduced the VOC content of the ACP product to a level that is below the pre-ACP VOC content of the product or below the applicable VOC

standard specified in 9VAC 5-45-310 A, whichever is the lesser of the two;

(2) Accurate documentation demonstrating that the early reformulated ACP product was sold in retail outlets within the time period specified in subdivision 3 a of this subsection;

(3) Accurate sales records for the early reformulated ACP product that meet the definition of enforceable sales records and that demonstrate that the enforceable sales for the ACP product are at least 75% of the gross sales for the product, as specified in subdivision B 1 d of this section; and

(4) Accurate documentation for the early reformulated ACP product that meets the requirements specified in subdivisions B 1 c and d and B 1 g (7) and (8) of this section and that identifies the specific test methods for verifying the claimed early reformulation and the statistical accuracy and precision of the test methods as specified in subdivision B 1 g (4) of this section.

c. Surplus reduction credits issued pursuant to this subsection shall be calculated separately for each early reformulated ACP product by the board according to the following equation:

$$SR = Enforceable\ Sales\ x\ \frac{((VOC\ Content)_{initial} - (VOC\ Content)_{final})}{100}$$

where:

SR = surplus reductions for the ACP product, expressed to the nearest pound.

Enforceable sales = the enforceable sales for the early reformulated ACP product, expressed to the nearest pound of ACP product.

VOC $content_{initial}$ = the pre-ACP VOC content of the ACP product, or the applicable VOC standard specified in 9VAC5-45-310 A, whichever is the lesser of the two, expressed to the nearest 0.1 pounds of VOC per 100 pounds of ACP product.

VOC $content_{final}$ = the VOC content of the early reformulated ACP product after the early reformulation is achieved, expressed to the nearest 0.1 pounds of VOC per 100 pounds of ACP product.

d. The use of limited use surplus reduction credits issued pursuant to this subdivision shall be subject to all of the following provisions:

(1) Limited use surplus reduction credits shall be used solely to reconcile the responsible ACP party's shortfalls, if any, generated during the first compliance period occurring immediately after the issuance of the ACP agreement approving an ACP, and may not be used for another purpose;

(2) Limited use surplus reduction credits may not be transferred to, or used by, another responsible ACP party; and

(3) Except as provided in this subdivision, limited use surplus reduction credits shall be subject to all requirements applicable to surplus reductions and surplus trading as specified in subdivisions 1 and 2 of this subsection.

G. Provisions follow concerning the reconciliation of shortfalls.

1. At the end of each compliance period, the responsible ACP party shall make an initial calculation of shortfalls occurring in that compliance period as specified in the ACP agreement approving the ACP. Upon receipt of this information, the board will determine the amount of a shortfall that has occurred during the compliance period and shall notify the responsible ACP party of this determination.

2. The responsible ACP party shall implement the reconciliation of shortfalls plan as specified in the ACP agreement approving the ACP within 30 working days from the date of written notification of a shortfall by the board.

3. All shortfalls shall be completely reconciled within 90 working days from the date of written notification of a shortfall by the board by implementing the reconciliation of shortfalls plan specified in the ACP agreement approving the ACP.

4. All requirements specified in the ACP agreement approving an ACP, including all applicable ACP limits, shall remain in effect while shortfalls are in the process of being reconciled.

H. Provisions follow concerning the notification of modifications to an ACP by the responsible ACP party.

1. Board pre-approval is not required for modifications that are a change to an ACP product's: (i) product name, (ii) product formulation, (iii) product form, (iv) product function, (v) applicable product category, (vi) VOC content, (vii) LVP content, (viii) date-codes, or (ix) recommended product usage directions. The responsible ACP party shall notify the board of such changes, in writing, no later than 15 working days from the date such a change occurs. For each modification, the notification shall fully explain the following:

a. The nature of the modification;

b. The extent to which the ACP product formulation, VOC content, LVP content, or recommended usage directions will be changed;

c. The extent to which the ACP emissions and ACP limit specified in the ACP agreement will be changed for the applicable compliance period; and

d. The effective date and corresponding date-codes for the modification.

2. The responsible ACP party may propose modifications to the enforceable sales records or the reconciliation of shortfalls plan specified in the ACP agreement approving the ACP, however, such modifications require board pre-approval. Any such proposed modifications shall be fully described in writing and forwarded to the board. The responsible ACP party shall clearly demonstrate that the proposed modifications will meet the requirements of this article. The board will act on the proposed modifications using the procedure set forth in subsection C of this section. The responsible ACP party shall meet all applicable requirements of the existing ACP until such time as a proposed modification is approved in writing by the board.

3. Except as otherwise provided in subdivisions 1 and 2 of this subsection, the responsible ACP party shall notify the board, in writing, of information known by the responsible ACP party that may alter the information submitted pursuant to the requirements of subsection B of this section. The responsible ACP party shall provide such notification to the board no later than 15 working days from the date such information is known to the responsible ACP party.

I. Provisions follow concerning the modification of an ACP by the board.

1. If the board determines that: (i) the enforceable sales for an ACP product are no longer at least 75% of the gross sales for that product, (ii) the information submitted pursuant to the approval process set forth in subsection C of this section is no longer valid, or (iii) the ACP emissions are exceeding the ACP limit specified in the ACP agreement approving an ACP, then the board will modify the ACP as necessary to ensure that the ACP meets all requirements of this article and that the ACP emissions will not exceed the ACP limit.

2. If any applicable VOC standards specified in 9VAC5-45-310 A are modified by the board in a future rulemaking, the board will modify the ACP limit specified in the ACP agreement approving an ACP to reflect the modified ACP VOC standards as of their effective dates.

J. Provisions follow concerning the cancellation of an ACP.

1. An ACP shall remain in effect until:

a. The ACP reaches the expiration date specified in the ACP agreement;

b. The ACP is modified by the responsible ACP party and approved by the board as provided in subsection H of this section;

c. The ACP is modified by the board as provided in subsection I of this section;

d. The ACP includes a product for which the VOC standard specified in 9VAC5-45-310 A is modified by the board in a future rulemaking, and the responsible ACP party informs the board in writing that the ACP will terminate on the effective date of the modified standard; or

e. The ACP is cancelled pursuant to subdivision 2 of this subsection.

2. The board will cancel an ACP if any of the following circumstances occur:

a. The responsible ACP party demonstrates to the satisfaction of the board that the continuation of the ACP will result in an extraordinary economic hardship.

b. The responsible ACP party violates the requirements of the approved ACP, and the violation results in a shortfall that is 20% or more of the applicable ACP limit (i.e., the ACP emissions exceed the ACP limit by 20% or more).

c. The responsible ACP party fails to meet the requirements of subsection G of this section within the time periods specified in that subsection.

d. The responsible ACP party has demonstrated a recurring pattern of violations and has consistently failed to take the necessary steps to correct those violations.

3. Cancellations of ACPs are considered case decisions and will be processed using the procedures prescribed in 9VAC5-170-40 A 2 and applicable provisions of Article 3 (§ 2.2-4018 et seq.) of the Administrative Process Act.

4. The responsible ACP party for an ACP that is canceled pursuant to this section and who does not have a valid ACP to immediately replace the canceled ACP shall meet all of the following requirements:

a. All remaining shortfalls in effect at the time of ACP cancellation shall be reconciled in accordance with the requirements of subsection G of this section, and

b. All ACP products subject to the ACP shall be in compliance with the applicable VOC standards in 9VAC5-45-310 A immediately upon the effective date of ACP cancellation.

5. Violations incurred pursuant to subsection E of this section shall not be cancelled or affected by the subsequent cancellation or modification of an ACP pursuant to subsection H, I, or J of this section.

K. The information required by subdivisions B 1 a and b and F 2 i of this section is public information that may not be claimed as confidential. Other information submitted to the board to meet the requirements of this section shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

L. A responsible ACP party may transfer an ACP to another responsible ACP party, provided that all of the following conditions are met:

1. The board will be notified, in writing, by both responsible ACP parties participating in the transfer of the ACP and its associated ACP agreement. The written notifications shall be postmarked at least five working days prior to the effective date of the transfer and shall be signed and submitted separately by both responsible parties. The written notifications shall clearly identify the contact persons, business names, mail and street addresses, and phone numbers of the responsible parties involved in the transfer.

2. The responsible ACP party to which the ACP is being transferred shall provide a written declaration stating that the transferee shall fully comply with all requirements of the ACP agreement approving the ACP and this article.

M. In approving agreements under subsections B through L of this section, the board will take into consideration whether the applicant has been granted an ACP by CARB. A manufacturer of consumer products that has been granted an ACP agreement by the CARB under the provisions in Subchapter 8.5, Article 4, Sections 94540-94555, of Title 17 of the California Code of Regulations (see 9VAC5-20-21) may be exempt from Table 45-3A for the period of time that the CARB ACP agreement remains in effect provided that all ACP products used for emission credits within the CARB ACP agreement are contained in Table 45-3A. A manufacturer claiming such an ACP agreement on this basis must submit to the board a copy of the CARB ACP decision (i.e., the executive order), including all conditions established by CARB applicable to the exemption and certification that the manufacturer will comply with the CARB ACP decision for those ACP products in the areas specified in 9VAC5-45-280 C.

9VAC5-45-330. Innovative products.

A. Manufacturers of consumer products may seek an innovative products exemption in accordance with the following criteria:

1. The board will exempt a consumer product from the VOC limits specified in 9VAC5-45-310 A if a manufacturer demonstrates by clear and convincing evidence that, due to some characteristic of the product formulation, design, delivery systems or other factors, the use of the product will result in less VOC emissions as compared to:

a. The VOC emissions from a representative consumer product that complies with the VOC limits specified in 9VAC5-45-310 A, or

b. The calculated VOC emissions from a noncomplying representative product, if the product had been reformulated to comply with the VOC limits specified in 9VAC5-45-310 A. VOC emissions shall be calculated using the following equation:

$$E_R = \frac{E_{NC} \times VOC_{STD}}{VOC_{NC}}$$

where:

E_R = The VOC emissions from the noncomplying representative product, had it been reformulated.

E_{NC} = The VOC emissions from the noncomplying representative product in its current formulation.

VOC_{STD} = the VOC limit specified in Table 45-3A.

VOC_{NC} = the VOC content of the noncomplying product in its current formulation.

If a manufacturer demonstrates that this equation yields inaccurate results due to some characteristic of the product formulation or other factors, an alternative method that accurately calculates emissions may be used upon approval of the board.

2. For the purposes of this subsection, "representative consumer product" means a consumer product that meets all of the following criteria:

a. The representative product shall be subject to the same VOC limit in 9VAC5-45-310 A as the innovative product;

b. The representative product shall be of the same product form as the innovative product unless the innovative product uses a new form that does not exist in the product category at the time the application is made; and

c. The representative product shall have at least a similar efficacy as other consumer products in the same product category based on tests generally accepted for that product category by the consumer products industry.

3. A manufacturer shall apply in writing to the board for an exemption claimed under subdivision A 1 of this section. The application shall include the supporting documentation that demonstrates the emissions from the innovative product, including the actual physical test methods used to

generate the data and, if necessary, the consumer testing undertaken to document product usage. In addition, the applicant must provide the information necessary to enable the board to establish enforceable conditions for granting the exemption, including the VOC content for the innovative product and test methods for determining the VOC content. Information submitted to the board pursuant to this section shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

4. Within 30 days of receipt of the exemption application, the board will determine whether an application is complete.

5. Within 90 days after an application has been deemed complete, the board will determine whether, under what conditions, and to what extent an exemption from the requirements of 9VAC5-45-310 A will be permitted. The board may extend this time period if additional time is needed to reach a decision, and additional supporting documentation may be submitted by the applicant before a decision has been reached. The board will notify the applicant of the decision in writing and specify such terms and conditions as are necessary to insure that emissions from the product will meet the emissions reductions specified in subdivision 1 of this subsection, and that such emissions reductions can be enforced.

6. In granting an exemption for a product, the board will establish enforceable conditions. These conditions shall include the VOC content of the innovative product, dispensing rates, application rates, and other parameters determined by the board to be necessary. The board will also specify the test methods for determining conformance to the conditions established. The test methods shall include criteria for reproducibility, accuracy, sampling, and laboratory procedures.

7. For a product for which an exemption has been granted pursuant to this section, the manufacturer shall notify the board in writing within 30 days of a change in the product formulation or recommended product usage directions and shall also notify the board within 30 days if the manufacturer learns of information that would alter the emissions estimates submitted to the board in support of the exemption application.

8. If the VOC limits specified in 9VAC5-45-310 A are lowered for a product category through a subsequent rulemaking, all innovative product exemptions granted for products in the product category, except as provided in this subdivision, shall have no force and effect as of the effective date of the modified VOC standard. This subdivision shall not apply to those innovative products that have VOC emissions less than the applicable lowered VOC limit and for which a written notification of the product's emissions status versus the lowered VOC limit has been submitted to and approved by the board at least 60 days before the effective date of such limits.

9. If the board believes that a consumer product for which an exemption has been granted no longer meets the criteria for an innovative product specified in subdivision 1 of this subsection, the board may modify or revoke the exemption as necessary to assure that the product will meet these criteria.

B. In granting an exemption under this section, the board will take into consideration whether the applicant has been granted an innovative product exemption by CARB. A manufacturer of consumer products that has been granted an innovative product exemption by the CARB under the innovative products provisions in Subchapter 8.5, Article 2, Section 94511, or Subchapter 8.5, Article 1, Section 94503.5 of Title 17 of the California Code of Regulations (see 9VAC5-20-21), may be exempt from Table 45-3A for the period of time that the CARB innovative products exemption remains in effect provided that all consumer products within the CARB innovative products exemption are contained in Table 45-3A. A manufacturer claiming such an exemption on this basis must submit to the board a copy of the innovative product exemption decision (i.e., the executive order), including all conditions established by CARB applicable to the exemption and certification that the manufacturer will comply with the CARB innovative product exemption decision for those products in the areas specified in 9VAC5-45-280 C.

9VAC5-45-340. Administrative requirements.

A. Provisions follow concerning product dating.

1. Each manufacturer of a consumer product subject to 9VAC5-45-310 shall clearly display on each consumer product container or package, the day, month, and year on which the product was manufactured or a code indicating such date.

2. A manufacturer who uses the following code to indicate the date of manufacture shall not be subject to the requirements of subdivision B 1 of this section, if the code is represented separately from other codes on the product container so that it is easily recognizable:

YY DDD = year year day day day

where:

YY = two digits representing the year in which the product was manufactured, and

DDD = three digits representing the day of the year on which the product was manufactured, with 001

representing the first day of the year, 002 representing the second day of the year, and so forth (i.e., the Julian date).

3. The date or date code shall be located on the container or inside the cover or cap so that it is readily observable or obtainable (by simply removing the cap or cover) without irreversibly disassembling a part of the container or packaging. For the purposes of this subdivision, information may be displayed on the bottom of a container as long as it is clearly legible without removing any product packaging.

4. This date or date code shall be displayed on each consumer product container or package no later than the effective date of the applicable standard specified in 9VAC5-45-310 A.

5. The requirements of this section shall not apply to products containing no VOCs or containing VOCs at 0.10% by weight or less.

B. Additional provisions follow concerning product dating.

1. If a manufacturer uses a code indicating the date of manufacture for a consumer product subject to 9VAC5-45-310, an explanation of the date portion of the code must be filed with the board upon request by the board.

2. If a manufacturer changes any code indicating the date of manufacture for any consumer product subject to 9VAC5-45-310 and the board has requested an explanation of any previous product dating code for that consumer product, then an explanation of the modified code shall be submitted to the board before any products displaying the modified code are sold, supplied, or offered for sale within the areas designated in 9VAC5-45-280 C.

3. No person shall erase, alter, deface, or otherwise remove or make illegible any date or code indicating the date of manufacture from any regulated product container without the express authorization of the manufacturer.

4. Date code explanations for codes indicating the date of manufacture are public information and may not be claimed as confidential.

C. Notwithstanding the definition of "product category" in 9VAC5-45-300 C, if anywhere on the principal display panel of a consumer product, a representation is made that the product may be used as or is suitable for use as a consumer product for which a lower VOC limit is specified in 9VAC5-45-310 A, then the lowest VOC limit shall apply. This requirement does not apply to general purpose cleaners, antiperspirant or deodorant products, and insecticide foggers.

D. Provisions follow concerning additional labeling requirements for aerosol adhesives.

1. In addition to the requirements specified in subsections A and C of this section and in 9VAC5-45-390, both the manufacturer and responsible party for each aerosol adhesive product subject to this article shall ensure that all products clearly display the following information on each product container that is manufactured on or after July 1, 2005.

a. The aerosol adhesive category as specified in 9VAC5-45-310 A or an abbreviation of the category shall be displayed;

b. (1) The applicable VOC standard for the product that is specified in 9VAC5-45-310 A, expressed as a percentage by weight, shall be displayed unless the product is included in an alternative control plan approved by the board, as provided in 9VAC5-45-320, and the product exceeds the applicable VOC standard;

(2) If the product is included in an alternative control plan approved by the board, and the product exceeds the applicable VOC standard specified in 9VAC5-45-310 A, the product shall be labeled with the term "ACP" or "ACP product";

c. If the product is classified as a special purpose spray adhesive, the applicable substrate or application or an abbreviation of the substrate or application that qualifies the product as special purpose shall be displayed;

d. If the manufacturer or responsible party uses an abbreviation as allowed by this subsection, an explanation of the abbreviation must be filed with the board before the abbreviation is used.

2. The information required in subdivision 1 of this subsection shall be displayed on the product container such that it is readily observable without removing or disassembling a portion of the product container or packaging. For the purposes of this subsection, information may be displayed on the bottom of a container as long as it is clearly legible without removing product packaging.

3. No person shall remove, alter, conceal, or deface the information required in subdivision 1 of this subsection prior to final sale of the product.

9VAC5-45-350. Compliance.

The provisions of 9VAC5-45-20 (Compliance) apply.

9VAC5-45-360. Compliance schedules.

Affected owners or other persons shall comply with the provisions of this article as expeditiously as possible but in no case later than:

1. January 1, 2005, in the Northern Virginia VOC Emissions Control Area; or

2. January 1, 2008, in the Fredericksburg VOC Emissions Control Area.

9VAC5-45-370. Test methods and procedures.

A. The provisions of 9VAC5-45-30 (Emission testing) apply.

B. 1. Testing to determine compliance with the requirements of this article shall be performed using CARB Method 310 (see 9VAC5-20-21). Alternative methods that can accurately determine the concentration of VOCs in a subject product or its emissions may be used consistent with the approval requirements of 9VAC5-45-30 A.

2. In sections 3.5, 3.6, and 3.7 of CARB Method 310 (see 9VAC5-20-21), a process is specified for the "Initial Determination of VOC Content" and the "Final Determination of VOC Content." Information submitted to the board to meet the requirements of this section shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

C. For VOC content determinations using product formulation and records, testing to determine compliance with the requirements of this article may also be demonstrated through calculation of the VOC content from records of the amounts of constituents used to make the product pursuant to the following criteria:

1. Compliance determinations based on these records may not be used unless the manufacturer of a consumer product keeps accurate records for each day of production of the amount and chemical composition of the individual product constituents. These records must be kept for at least three years.

2. For the purposes of this subsection, the VOC content shall be calculated according to the following equation:

$$VOC\ Content = \frac{((B - C) \times 100)}{A}$$

where:

A = total net weight of unit (excluding container and packaging).

B = total weight of all VOCs per unit.

C = total weight of all exempted VOCs per unit, as specified in 9VAC5-45-290.

3. If product records appear to demonstrate compliance with the VOC limits, but these records are contradicted by product testing performed using CARB Method 310 (see 9VAC5-20-21), the results of CARB Method 310 shall take precedence over the product records and may be used to establish a violation of the requirements of this article.

D. Testing to determine whether a product is a liquid or solid shall be performed using ASTM "Standard Test Method for Determining Whether a Material is a Liquid or a Solid" (see 9VAC5-20-21).

E. Testing to determine compliance with the certification requirements for charcoal lighter material shall be performed using the procedures specified in the South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21).

F. Testing to determine distillation points of petroleum distillate-based charcoal lighter materials shall be performed using ASTM "Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure" (see 9VAC5-20-21).

G. No person shall create, alter, falsify, or otherwise modify records in such a way that the records do not accurately reflect the constituents used to manufacture a product, the chemical composition of the individual product, and other tests, processes, or records used in connection with product manufacture.

9VAC5-45-380. Monitoring.

The provisions of 9VAC5-45-40 (Monitoring) apply.

9VAC5-45-390. Notification, records and reporting.

A. The provisions of 9VAC5-45-50 (Notification, records and reporting) apply.

B. Upon 90 days written notice, the board may require a responsible party to report information for a consumer product the board may specify, including, but not limited to, all or part of the following information:

1. The company name of the responsible party and the party's address, telephone number, and designated contact person.

2. A showing satisfactory to the board under 9VAC5-170-60 B and C that supports any claim of confidentiality made pursuant to 9VAC5-170-60, §§ 10.1-1314 and 10.1-1314.1 of the Virginia Air Pollution Control Law, and other applicable state confidentiality requirements.

3. The product brand name for each consumer product subject to registration and, upon request by the board, the product label.

4. The product category to which the consumer product belongs.

5. The applicable product forms listed separately.

6. An identification of each product brand name and form as a "Household Product," "I&I Product," or both.

7. Separate sales in pounds per year, to the nearest pound, and the method used to calculate sales for each product form.

8. For registrations submitted by two companies, an identification of the company that is submitting relevant data separate from that submitted by the responsible party. All registration information from both companies shall be submitted by the date specified in this subsection.

9. For each product brand name and form, the net percent by weight of the total product, less container and packaging, composed of the following, rounded to the nearest one-tenth of a percent (0.1%):

a. Total exempt compounds;

b. Total LVP-VOCs that are not fragrances;

c. Total all other carbon-containing compounds that are not fragrances;

d. Total all noncarbon-containing compounds;

e. Total fragrance;

f. For products containing greater than 2.0% by weight fragrance:

(1) The percent of fragrances that are LVP-VOCs; and

(2) The percent of fragrances that are all other carbon-containing compounds; and

g. Total paradichlorobenzene.

10. For each product brand name and form, the identity, including the specific chemical name and associated Chemical Abstract Services (CAS) number, of the following:

a. Each exempt compound; and

b. Each LVP-VOC that is not a fragrance.

11. If applicable, the weight percent composed of propellant for each product.

12. If applicable, an identification of the type of propellant.

C. In addition to the requirements of subdivision B 10 of this section, the responsible party shall report to the board the net percentage by weight of each ozone-depleting compound that is:

1. Listed in 9VAC5-45-310 I; and

2. Contained in a product subject to registration under subsection B of this section in an amount greater than 1.0% by weight.

D. Information submitted by responsible parties pursuant to this section shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

E. Provisions follow concerning special recordkeeping and reporting requirements for consumer products that contain perchloroethylene or methylene chloride.

1. The requirements of this subsection shall apply to all responsible parties for consumer products that are subject to 9VAC5-45-310 A and contain perchloroethylene or methylene chloride. For the purposes of this subsection, a product contains perchloroethylene or methylene chloride if the product contains 1.0% or more by weight (exclusive of the container or packaging) of either perchloroethylene or methylene chloride.

2. For each consumer product that contains perchloroethylene or methylene chloride, the responsible party shall keep records of the following information for products sold during each calendar year, beginning with the year of the applicable compliance date specified in 9VAC5-45-360, and ending with the year 2010:

a. The product brand name and a copy of the product label with legible usage instructions;

b. The product category to which the consumer product belongs;

c. The applicable product form, listed separately;

d. For each product form listed in subdivision 2 c of this subsection, the total sales during the calendar year to the nearest pound (exclusive of the container or packaging), and the method used for calculating sales;

e. The weight percentage, to the nearest 0.10% of perchloroethylene and methylene chloride in the consumer product;

3. Upon 90 days written notice, the board may require a responsible party to report the information specified in subdivision 2 of this subsection.

4. Records required by subdivision 2 of this subsection shall be maintained by the responsible party for five calendar years from the date such records were created.

5. Alternative control plan notifications, records, and reporting shall be made as required by 9VAC5-45-320 and as required in the ACP agreement.

6. Innovative product notifications, records, and reporting shall be made as required by 9VAC5-45-330 and as required in the innovative products exemption notification letter.

Article 4
Emission Standards for Consumer Products Manufactured on or after May 1, 2010

9VAC5-45-400. Applicability.

A. Except as provided in 9VAC5-45-410, the provisions of this article apply to any consumer product manufactured on or

after May 1, 2010, that contains volatile organic compounds (VOCs). The provisions of Article 3 (9VAC5-45-280 et seq.) of this part apply to consumer products manufactured before May 1, 2010.

B. Except as provided in section 9VAC5-45-410, the provisions of this article apply to any owner or other person who sells, supplies, offers for sale or manufactures for sale any consumer product.

C. The provisions of this article apply to owners and other persons in the Northern Virginia, Fredericksburg, and Richmond Volatile Organic Compound Emissions Control Areas designated in 9VAC5-20-206.

D. For purposes of this article, the terms "supply" or "supplied" do not include internal transactions within a business or governmental entity. These terms only apply to transactions between manufacturers/commercial distributors that sell or otherwise provide products to businesses/governmental entities/individuals.

9VAC5-45-410. Exemptions.

A. This article shall not apply to any consumer product manufactured in the applicable volatile organic compound emissions control areas designated in 9VAC5-45-400 C for shipment and use outside of those areas.

B. The provisions of this article shall not apply to a manufacturer or distributor who sells, supplies, or offers for sale a consumer product that does not comply with the VOC standards specified in 9VAC5-45-430 A, as long as the manufacturer or distributor can demonstrate both that the consumer product is intended for shipment and use outside of the applicable volatile organic compound emissions control areas designated in 9VAC5-45-400 C, and that the manufacturer or distributor has taken reasonable prudent precautions to assure that the consumer product is not distributed to those applicable volatile organic compound emissions control areas. This subsection does not apply to consumer products that are sold, supplied, or offered for sale by any person to retail outlets in those applicable volatile organic compound emissions control areas.

C. The medium volatility organic compound (MVOC) content standards specified in 9VAC5-45-430 A for antiperspirants or deodorants shall not apply to ethanol.

D. The VOC limits specified in 9VAC5-45-430 A shall not apply to fragrances up to a combined level of 2.0% by weight contained in any consumer product and shall not apply to colorants up to a combined level of 2.0% by weight contained in any antiperspirant or deodorant.

E. The requirements of 9VAC5-45-430 A for antiperspirants or deodorants shall not apply to those volatile organic compounds that contain more than 10 carbon atoms per molecule and for which the vapor pressure is unknown, or that have a vapor pressure of 2 mm Hg or less at 20°C.

F. The VOC limits specified in 9VAC5-45-430 A shall not apply to any LVP-VOC.

G. The VOC limits specified in 9VAC5-45-430 A shall not apply to air fresheners that are composed entirely of fragrance, less compounds not defined as VOCs or LVP-VOC exempted under subsection F of this section.

H. The VOC limits specified in 9VAC5-45-430 A shall not apply to air fresheners and insecticides containing at least 98% paradichlorobenzene.

I. The VOC limits specified in 9VAC5-45-430 A shall not apply to adhesives sold in containers of one fluid ounce or less.

J. The VOC limits specified in 9VAC5-45-430 A shall not apply to bait station insecticides. For the purpose of this section, bait station insecticides are containers enclosing an insecticidal bait that is not more than 0.5 ounce by weight, where the bait is designed to be ingested by insects and is composed of solid material feeding stimulants with less than 5.0% active ingredients.

K. A person who cannot comply with the requirements set forth in 9VAC5-45-430, because of extraordinary reasons beyond the person's reasonable control may apply in writing to the board for a waiver.

1. The application shall set forth:

a. The specific grounds upon which the waiver is sought, including the facts that support the extraordinary reasons that compliance is beyond the applicant's reasonable control;

b. The proposed dates by which compliance with the provisions of 9VAC5-45-430 will be achieved; and

c. A compliance report reasonably detailing the methods by which compliance will be achieved.

2. Upon receipt of an application containing the information required in subdivision 1 of this subsection, the board will hold a public hearing to determine whether, under what conditions, and to what extent, a waiver from the requirements in 9VAC5-45-430 is necessary and will be permitted. A hearing shall be initiated no later than 75 days after receipt of a waiver application. Notice of the time and place of the hearing shall be sent to the applicant by certified mail not less than 30 days prior to the hearing. Notice of the hearing shall also be submitted for publication in the Virginia Register of Regulations. At least 30 days prior to the hearing, the waiver application shall be made available to the public for inspection. Information submitted to the board by a waiver applicant shall be available to the public, except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled

in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia. The board may consider both public and confidential information in reaching a decision on a waiver application. Interested members of the public shall be allowed a reasonable opportunity to testify at the hearing and their testimony shall be considered.

3. No waiver shall be granted unless all of the following findings are made:

a. That, because of reasons beyond the reasonable control of the applicant, requiring compliance with 9VAC5-45-430 would result in extraordinary economic hardship;

b. That the public interest in mitigating the extraordinary hardship to the applicant by issuing the waiver outweighs the public interest in avoiding any increased emissions of air pollutants that would result from issuing the waiver; and

c. That the compliance report proposed by the applicant can reasonably be implemented and will achieve compliance as expeditiously as possible.

4. Any waiver may be issued as an order of the board. The waiver order shall specify a final compliance date by which the requirements of 9VAC5-45-430 will be achieved. Any waiver order shall contain a condition that specifies increments of progress necessary to assure timely compliance and such other conditions that the board, in consideration of the testimony received at the hearing, finds necessary to carry out the purposes of the Virginia Air Pollution Control Law and the regulations of the board.

5. A waiver shall cease to be effective upon failure of the party to whom the waiver was granted to comply with any term or condition of the waiver order.

6. Upon the application of anyone, the board may review and for good cause modify or revoke a waiver from requirements of 9VAC5-45-430.

L. The requirements of 9VAC5-45-460 A shall not apply to consumer products registered under FIFRA.

9VAC5-45-420. Definitions.

A. For the purpose of applying this article in the context of the Regulations for the Control and Abatement of Air Pollution and related uses, the words or terms shall have the meanings given them in subsection C of this section.

B. As used in this article, all terms not defined herein shall have the meanings given them in 9VAC5-10 (General Definitions), unless otherwise required by context.

C. Terms defined.

"ACP" or "alternative control plan" means any emissions averaging program approved by the board pursuant to the provisions of this article.

"ACP agreement" means the document signed by the board that includes the conditions and requirements of the board and that allows manufacturers to sell ACP products pursuant to the requirements of this article.

"ACP emissions" means the sum of the VOC emissions from every ACP product subject to an ACP agreement approving an ACP, during the compliance period specified in the ACP agreement, expressed to the nearest pound of VOC and calculated according to the following equation:

$$ACP\ Emissions = (Emissions)_1 + (Emissions)_2 + \ldots + (Emissions)_N$$

$$Emissions = \frac{(VOC\ Content) \times (Enforceable\ Sales)}{100}$$

where:

1, 2,...N = each product in an ACP up to the maximum N.

Enforceable sales = (see definition in this section).

VOC content = one of the following:

1. For all products except for charcoal lighter material products:

$$VOC\ Content = \frac{((B - C) \times 100)}{A}$$

where:

A = total net weight of unit (excluding container and packaging).

B = total weight of all VOCs per unit.

C = total weight of all exempted VOCs per unit, as specified in 9VAC5-45-410.

2. For charcoal lighter material products only:

$$VOC\ Content = \frac{(Certified\ \ Emissions \times 100)}{Certified\ \ Use\ Rate}$$

where:

Certified emissions = (see definition in this section).

Certified use rate = (see definition in this section).

"ACP limit" means the maximum allowable ACP emissions during the compliance period specified in an ACP agreement approving an ACP, expressed to the nearest pound of VOC, and calculated according to the following equation:

$$ACP\ Limit = (Limit)_1 + (Limit)_2 + \ldots + (Limit)_N$$

where:

$$Limit = \frac{(ACP\ Standard) \times (Enforceable\ Sales)}{100}$$

where:

Enforceable sales = (see definition in this section).

ACP standard = (see definition in this section).

1, 2, ...N = each product in an ACP up to the maximum N.

"ACP product" means any consumer product subject to the VOC standards specified in 9VAC5-45-430 A, except those products that have been exempted as innovative products under 9VAC5-45-450.

"ACP reformulation" or "ACP reformulated" means the process of reducing the VOC content of an ACP product within the period that an ACP is in effect to a level that is less than the current VOC content of the product.

"ACP standard" means either the ACP product's pre-ACP VOC content or the applicable VOC standard specified in 9VAC5-45-430 A, whichever is the lesser of the two.

"ACP VOC standard" means the maximum allowable VOC content for an ACP product, determined as follows:

1. The applicable VOC standard specified in 9VAC5-45-430 A for all ACP products except for charcoal lighter material;

2. For charcoal lighter material products only, the VOC standard for the purposes of this article shall be calculated according to the following equation:

$$VOC\ Standard = \frac{(0.020\ pound\ VOC\ per\ start\ x\ 100)}{Certified\ Use\ Rate}$$

where:

0.020 = the certification emissions level for the product, as specified in9VAC5-45-430 E.

Certified use rate = (see definition in this section).

"Adhesive" means any product that is used to bond one surface to another by attachment. Adhesive does not include products used on humans and animals, adhesive tape, contact paper, wallpaper, shelf liners, or any other product with an adhesive incorporated onto or in an inert substrate. For contact adhesive only, adhesive also does not include units of product, less packaging, that consist of more than one gallon. In addition, for construction, panel, and floor covering adhesive and general purpose adhesive only, adhesive does not include units of product, less packaging, that weigh more than one pound and consist of more than 16 fluid ounces. The package size limitations do not apply to aerosol adhesives.

"Adhesive remover" means a product designed to remove adhesive from either a specific substrate or a variety of substrates. Adhesive remover does not include products that remove adhesives intended exclusively for use on humans or animals. For the purpose of this definition and the following adhesive remover subcategories in subdivisions 1 through 4 of this definition, adhesive shall mean a substance used to bond one or more materials. Adhesives include, but are not limited to, caulk, sealant, glue, or similar substances used for the purpose of forming a bond.

1. "Floor and wall covering adhesive remover" means a product designed or labeled to remove floor or wall coverings and associated adhesive from the underlying substrate.

2. "Gasket or thread locking adhesive remover" means a product designed or labeled to remove gaskets or thread locking adhesives. Products labeled for dual use as a paint stripper and as a gasket remover or thread locking adhesive remover are considered gasket or thread locking adhesive remover.

3. "General purpose adhesive remover" means a product designed or labeled to remove cyanoacrylate adhesives and nonreactive adhesives or residue from a variety of substrates. General purpose adhesive remover includes, but is not limited to, products that remove thermoplastic adhesives, pressure sensitive adhesives, dextrin-based or starch-based adhesives, casein glues, rubber-based or latex-based adhesives, as well as products that remove stickers, decals, stencils, or similar materials. General purpose adhesive remover does not include floor or wall covering adhesive remover.

4. "Specialty adhesive remover" means a product designed to remove reactive adhesives from a variety of substrates. Reactive adhesives include adhesives that require a hardener or catalyst in order for the bond to occur. Examples of reactive adhesives include, but are not limited to, epoxies, urethanes, and silicones. Specialty adhesive remover does not include gasket or thread locking adhesive remover.

"Aerosol adhesive" means an aerosol product in which the spray mechanism is permanently housed in a nonrefillable can designed for hand-held application without the need for ancillary hoses or spray equipment. Aerosol adhesives include special purpose spray adhesives, mist spray adhesives, and web spray adhesives.

"Aerosol cooking spray" means any aerosol product designed either to reduce sticking on cooking and baking surfaces or to be applied on food, or both.

"Aerosol product" means a pressurized spray system that dispenses product ingredients by means of a propellant contained in a product or a product's carrier, or by means of a mechanically induced force. Aerosol product does not include pump sprays.

"Agricultural use" means the use of any pesticide or method or device for the control of pests in connection with the commercial production, storage, or processing of any animal or plant crop. Agricultural use does not include the sale or use

of pesticides in properly labeled packages or containers that are intended for home use, use in structural pest control, industrial use, or institutional use. For the purposes of this definition only:

1. "Home use" means use in a household or its immediate environment.

2. "Industrial use" means use for or in a manufacturing, mining, or chemical process or use in the operation of factories, processing plants, and similar sites.

3. "Institutional use" means use within the perimeter of, or on property necessary for the operation of, buildings such as hospitals, schools, libraries, auditoriums, and office complexes.

4. "Structural pest control" means a use requiring a license under the applicable state pesticide licensing requirement.

"Air freshener" means any consumer product including, but not limited to, sprays, wicks, powders, and crystals, designed for the purpose of masking odors or freshening, cleaning, scenting, or deodorizing the air. Air fresheners do not include products that are used on the human body, products that function primarily as cleaning products (as indicated on a product label) or as toilet/urinal care products, disinfectant products claiming to deodorize by killing germs on surfaces, or institutional or industrial disinfectants when offered for sale solely through institutional and industrial channels of distribution. Air fresheners do include spray disinfectants and other products that are expressly represented for use as air fresheners, except institutional and industrial disinfectants when offered for sale through institutional and industrial channels of distribution. To determine whether a product is an air freshener, all verbal and visual representations regarding product use on the label or packaging and in the product's literature and advertising may be considered. The presence of, and representations about, a product's fragrance and ability to deodorize (resulting from surface application) shall not constitute a claim of air freshening.

"All other carbon-containing compounds" means all other compounds that contain at least one carbon atom and are not an "exempt compound" or an "LVP-VOC."

"All other forms" means all consumer product forms for which no form-specific VOC standard is specified. Unless specified otherwise by the applicable VOC standard, all other forms include, but are not limited to, solids, liquids, wicks, powders, crystals, and cloth or paper wipes (towelettes).

"Alternative control plan" or "ACP" means any emissions averaging program approved by the board pursuant to the provisions of this article.

"Antimicrobial hand or body cleaner or soap" means a cleaner or soap that is designed to reduce the level of microorganisms on the skin through germicidal activity. Antimicrobial hand or body cleaner or soap includes, but is not limited to, antimicrobial hand or body washes or cleaners, food handler hand washes, healthcare personnel hand washes, pre-operative skin preparations, and surgical scrubs. Antimicrobial hand or body cleaner or soap does not include prescription drug products, antiperspirants, astringent or toner, deodorant, facial cleaner or soap, general-use hand or body cleaner or soap, hand dishwashing detergent (including antimicrobial), heavy-duty hand cleaner or soap, medicated astringent or medicated toner, and rubbing alcohol.

"Antiperspirant" means any product including, but not limited to, aerosols, roll-ons, sticks, pumps, pads, creams, and squeeze-bottles, that is intended by the manufacturer to be used to reduce perspiration in the human axilla by at least 20% in at least 50% of a target population.

"Anti-static product" means a product that is labeled to eliminate, prevent, or inhibit the accumulation of static electricity. Anti-static products do not include electronic cleaners, floor polish or waxes, floor coatings, and products that meet the definition of aerosol coating products or architectural coatings.

"Architectural coating" means a coating applied to stationary structures and their appurtenances, to mobile homes, to pavements, or to curbs.

"ASTM" means the American Society for Testing and Materials.

"Astringent or toner" means any product not regulated as a drug by the United States Food and Drug Administration that is applied to the skin for the purpose of cleaning or tightening pores. This category also includes clarifiers and substrate-impregnated products. This category does not include any hand, face, or body cleaner or soap product, medicated astringent or medicated toner, cold cream, lotion, or antiperspirant.

"Automotive brake cleaner" means a cleaning product designed to remove oil, grease, brake fluid, brake pad material, or dirt from motor vehicle brake mechanisms.

"Automotive hard paste wax" means an automotive wax or polish that is:

1. Designed to protect and improve the appearance of automotive paint surfaces;

2. A solid at room temperature; and

3. Contains no water.

"Automotive instant detailer" means a product designed for use in a pump spray that is applied to the painted surface of automobiles and wiped off prior to the product being allowed to dry.

"Automotive rubbing or polishing compound" means a product designed primarily to remove oxidation, old paint, scratches or swirl marks, and other defects from the painted

surfaces of motor vehicles without leaving a protective barrier.

"Automotive wax, polish, sealant, or glaze" means a product designed to seal out moisture, increase gloss, or otherwise enhance a motor vehicle's painted surfaces. Automotive wax, polish, sealant, or glaze includes, but is not limited to, products designed for use in auto body repair shops and drive-through car washes, as well as products designed for the general public. Automotive wax, polish, sealant, or glaze does not include automotive rubbing or polishing compounds, automotive wash and wax products, surfactant-containing car wash products, and products designed for use on unpainted surfaces such as bare metal, chrome, glass, or plastic.

"Automotive windshield washer fluid" means any liquid designed for use in a motor vehicle windshield washer system either as an antifreeze or for the purpose of cleaning, washing, or wetting the windshield. Automotive windshield washer fluid also includes liquids that are (i) packaged as a pre-wetted, single-use manual wipe and (ii) designed exclusively for cleaning, washing, or wetting automotive glass surfaces for the purpose of restoring or maintaining visibility for the driver. Glass cleaners that are intended for use on other glass surfaces are not included in this definition. Automotive windshield washer fluid does not include fluids placed by the manufacturer in a new vehicle.

"Bathroom and tile cleaner" means a product designed to clean tile or surfaces in bathrooms. Bathroom and tile cleaners do not include products designed primarily to clean toilet bowls, toilet tanks, or urinals.

"Bug and tar remover" means a product labeled to remove either or both of the following from painted motor vehicle surfaces without causing damage to the finish: (i) biological residues, such as insect carcasses and tree sap, and (ii) road grime, such as road tar, roadway paint markings, and asphalt.

"CARB" means the California Air Resources Board.

"Carburetor or fuel-injection air intake cleaner" means a product designed to remove fuel deposits, dirt, or other contaminants from a carburetor, choke, throttle body of a fuel-injection system, or associated linkages. Carburetor or fuel-injection air intake cleaner does not include products designed exclusively to be introduced directly into the fuel lines or fuel storage tank prior to introduction into the carburetor or fuel injectors.

"Carpet and upholstery cleaner" means a cleaning product designed for the purpose of eliminating dirt and stains on rugs, carpeting, and the interior of motor vehicles or on household furniture or objects upholstered or covered with fabrics such as wool, cotton, nylon, or other synthetic fabrics. Carpet and upholstery cleaners include, but are not limited to, products that make fabric protectant claims. Carpet and upholstery cleaners do not include general purpose cleaners, spot removers, vinyl or leather cleaners, dry cleaning fluids, or products designed exclusively for use at industrial facilities engaged in furniture or carpet manufacturing.

"Certified emissions" means the emissions level for products approved under 9VAC5-45-430 E, as determined pursuant to South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21), expressed to the nearest 0.001 pound VOC per start.

"Certified use rate" means the usage level for products approved under 9VAC5-45-430 E, as determined pursuant to South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21), expressed to the nearest 0.001 pound certified product used per start.

"Charcoal lighter material" means any combustible material designed to be applied on, incorporated in, added to, or used with charcoal to enhance ignition. Charcoal lighter material does not include any of the following:

1. Electrical starters and probes;

2. Metallic cylinders using paper tinder;

3. Natural gas;

4. Propane; or

5. Fat wood.

"Colorant" means any pigment or coloring material used in a consumer product for an aesthetic effect or to dramatize an ingredient.

"Compliance period" means the period of time, not to exceed one year, for which the ACP limit and ACP emissions are calculated and for which compliance with the ACP limit is determined, as specified in the ACP agreement approving an ACP.

"Construction, panel, and floor covering adhesive" means any one-component adhesive that is designed exclusively for the installation, remodeling, maintenance, or repair of:

1. Structural and building components that include, but are not limited to, beams, trusses, studs, paneling (drywall or drywall laminates, fiberglass reinforced plastic (FRP), plywood, particle board, insulation board, predecorated hardboard or tileboard, etc.), ceiling and acoustical tile, molding, fixtures, countertops or countertop laminates, cove or wall bases, and flooring or subflooring; or

2. Floor or wall coverings that include, but are not limited to, wood or simulated wood covering, carpet, carpet pad or cushion, vinyl-backed carpet, flexible flooring material, nonresilient flooring material, mirror tiles and other types of tiles, and artificial grass.

Construction, panel, and floor covering adhesive does not include floor seam sealer.

"Consumer" means a person who purchases or acquires a consumer product for personal, family, household, or institutional use. Persons acquiring a consumer product for resale are not consumers for that product.

"Consumer product" means a chemically formulated product used by household and institutional consumers including, but not limited to, detergents; cleaning compounds; polishes; floor finishes; cosmetics; personal care products; home, lawn, and garden products; disinfectants; sanitizers; aerosol paints; and automotive specialty products, but does not include other paint products, furniture coatings, or architectural coatings. As used in this article, consumer products shall also refer to aerosol adhesives, including aerosol adhesives used for consumer, industrial, or commercial uses.

"Contact adhesive" means an adhesive that:

1. Is designed for application to both surfaces to be bonded together;

2. Is allowed to dry before the two surfaces are placed in contact with each other;

3. Forms an immediate bond that is impossible, or difficult, to reposition after both adhesive-coated surfaces are placed in contact with each other; and

4. Does not need sustained pressure or clamping of surfaces after the adhesive-coated surfaces have been brought together using sufficient momentary pressure to establish full contact between both surfaces.

Contact adhesive does not include rubber cements that are primarily intended for use on paper substrates. Contact adhesive also does not include vulcanizing fluids that are designed and labeled for tire repair only.

"Contact adhesive - general purpose" means any contact adhesive that is not a contact adhesive - special purpose.

"Contact adhesive - special purpose" means a contact adhesive that is used as follows:

1. To bond melamine-covered board, unprimed metal, unsupported vinyl, Teflon®, ultra-high molecular weight polyethylene, rubber, high pressure laminate or wood veneer 1/16 inch or less in thickness to any porous or nonporous surface, and is sold in units of product, less packaging, that contain more than eight fluid ounces; or

2. In automotive applications that are either:

a. Automotive under-the-hood applications requiring heat, oil, or gasoline resistance; or

b. Body-side molding, automotive weatherstrip, or decorative trim.

"Container or packaging" means the part or parts of the consumer or institutional product which serve only to contain, enclose, incorporate, deliver, dispense, wrap, or store the chemically formulated substance or mixture of substances that is solely responsible for accomplishing the purposes for which the product was designed or intended. Containers or packaging include any article onto or into which the principal display panel and other accompanying literature or graphics are incorporated, etched, printed, or attached.

"Contact person" means a representative that has been designated by the responsible ACP party for the purpose of reporting or maintaining information specified in the ACP agreement approving an ACP.

"Crawling bug insecticide" means an insecticide product that is designed for use against ants, cockroaches, or other household crawling arthropods, including, but not limited to, mites, silverfish or spiders. Crawling bug insecticide does not include products designed to be used exclusively on humans or animals or a house dust mite product. For the purposes of this definition only:

1. "House dust mite product" means a product whose label, packaging, or accompanying literature states that the product is suitable for use against house dust mites, but does not indicate that the product is suitable for use against ants, cockroaches, or other household crawling arthropods.

2. "House dust mite" means mites that feed primarily on skin cells shed in the home by humans and pets and that belong to the phylum Arthropoda, the subphylum Chelicerata, the class Arachnida, the subclass Acari, the order Astigmata, and the family Pyroglyphidae.

"Date-code" means the day, month, and year on which the consumer product was manufactured, filled, or packaged, or a code indicating such a date.

"Deodorant" means any product including, but not limited to, aerosols, roll-ons, sticks, pumps, pads, creams, and squeeze-bottles, that indicates or depicts on the container or packaging, or on any sticker or label affixed thereto, that the product can be used on or applied to the human axilla to provide a scent or minimize odor. A deodorant body spray product that indicates or depicts on the container or packaging, or on any sticker or label affixed thereto, that it can be used on or applied to the human axilla, is a deodorant.

"Deodorant body spray" means a personal fragrance product with 20% or less fragrance that is designed for application all over the human body to provide a scent. A deodorant body spray product that indicates or depicts on the container or packaging, or on any sticker or label affixed thereto, that it can be used on or applied to the human axilla, is a deodorant.

"Device" means an instrument or contrivance (other than a firearm) that is designed for trapping, destroying, repelling, or mitigating a pest or other form of plant or animal life (other than human and other than bacterium, virus, or another microorganism on or in living humans or other living

animals); but not including equipment used for the application of pesticides when sold separately therefrom.

"Disinfectant" means a product intended to destroy or irreversibly inactivate infectious or other undesirable bacteria, pathogenic fungi, or viruses on surfaces or inanimate objects and whose label is registered under the FIFRA. Disinfectant does not include any of the following:

1. Products designed solely for use on humans or animals;

2. Products designed for agricultural use;

3. Products designed solely for use in swimming pools, therapeutic tubs, or hot tubs; or

4. Products that, as indicated on the principal display panel or label, are designed primarily for use as bathroom and tile cleaners, glass cleaners, general purpose cleaners, toilet bowl cleaners, or metal polishes.

"Distributor" means a person to whom a consumer product is sold or supplied for the purposes of resale or distribution in commerce, except that manufacturers, retailers, and consumers are not distributors.

"Double phase aerosol air freshener" means an aerosol air freshener with the liquid contents in two or more distinct phases that require the product container to be shaken before use to mix the phases, producing an emulsion.

"Dry cleaning fluid" means a nonaqueous liquid product designed and labeled exclusively for use on:

1. Fabrics that are labeled "for dry clean only," such as clothing or drapery; or

2. S-coded fabrics.

Dry cleaning fluid includes, but is not limited to, those products used by commercial dry cleaners and commercial businesses that clean fabrics such as draperies at the customer's residence or work place. Dry cleaning fluid does not include spot remover or carpet and upholstery cleaner. For the purposes of this definition, "S-coded fabric" means an upholstery fabric designed to be cleaned only with water-free spot cleaning products as specified by the American Furniture Manufacturers Association Joint Industry Fabrics Standards Committee, Woven and Knit Residential Upholstery Fabric Standards and Guidelines (see 9VAC5-20-21).

"Dusting aid" means a product designed to assist in removing dust and other soils from floors and other surfaces without leaving a wax or silicone-based coating. Dusting aid does not include pressurized gas dusters.

"Electrical cleaner" means a product labeled to remove heavy soils such as grease, grime, or oil from electrical equipment, including, but not limited to, electric motors, armatures, relays, electric panels, or generators. Electrical cleaner does not include general purpose cleaners, general purpose degreasers, dusting aids, electronic cleaners, energized electrical cleaners, pressurized gas dusters, engine degreasers, anti-static products, or products designed to clean the casings or housings of electrical equipment.

"Electronic cleaner" means a product labeled for the removal of dirt, moisture, dust, flux or oxides from the internal components of electronic or precision equipment such as circuit boards, and the internal components of electronic devices, including but not limited to, radios, compact disc (CD) players, digital video disc (DVD) players, and computers. Electronic cleaner does not include general purpose cleaners, general purpose degreasers, dusting aids, pressurized gas dusters, engine degreasers, electrical cleaners, energized electrical cleaners, anti-static products, or products designed to clean the casings or housings of electronic equipment.

"Energized electrical cleaner" means a product that meets both of the following criteria:

1. The product is labeled to clean or degrease electrical equipment, where cleaning or degreasing is accomplished when electrical current exists, or when there is a residual electrical potential from a component, such as a capacitor;

2. The product label clearly displays the statements: "Energized equipment use only. Not to be used for motorized vehicle maintenance, or their parts."

Energized electrical cleaner does not include electronic cleaner.

"Enforceable sales" means the total amount of an ACP product sold for use in the applicable volatile organic compound emissions control areas designated in 9VAC5-45-400 C during the applicable compliance period specified in the ACP agreement approving an ACP, as determined through enforceable sales records (expressed to the nearest pound, excluding product container and packaging).

"Enforceable sales record" means a written, point-of-sale record or another board-approved system of documentation from which the mass, in pounds (less product container and packaging), of an ACP product sold to the end user in the applicable volatile organic compound emissions control areas designated in 9VAC5-45-400 C during the applicable compliance period can be accurately documented. For the purposes of this article, enforceable sales records include, but are not limited to, the following types of records:

1. Accurate records of direct retail or other outlet sales to the end user during the applicable compliance period;

2. Accurate compilations, made by independent market surveying services, of direct retail or other outlet sales to the end users for the applicable compliance period, provided that a detailed method that can be used to verify data composing such summaries is submitted by the responsible ACP party and approved by the board; and

3. Other accurate product sales records acceptable to the board.

"Engine degreaser" means a cleaning product designed to remove grease, grime, oil, and other contaminants from the external surfaces of engines and other mechanical parts.

"Exempt compound" means acetone, ethane, methyl acetate, parachlorobenzotrifluoride (1-chloro-4-trifluoromethyl benzene), or perchloroethylene (tetrachloroethylene).

"Existing product" means any formulation of the same product category and form sold, supplied, manufactured, or offered for sale prior to March 9, 2005, or any subsequently introduced identical formulation.

"Fabric protectant" means a product designed to be applied to fabric substrates to protect the surface from soiling from dirt and other impurities or to reduce absorption of liquid into the fabric's fibers. Fabric protectant does not include waterproofers, products designed for use solely on leather, or products designed for use solely on fabrics that are labeled "for dry clean only" and sold in containers of 10 fluid ounces or less.

"Fabric refresher" means a product labeled to neutralize or eliminate odors on nonlaundered fabric including, but not limited to, soft household surfaces, rugs, carpeting, draperies, bedding, automotive interiors, footwear, athletic equipment, clothing or on household furniture or objects upholstered or covered with fabrics such as, but not limited to, wool, cotton, or nylon. Fabric refresher does not include anti-static products, carpet and upholstery cleaners, soft household surface sanitizers, footwear or leather care products, spot removers, or disinfectants, or products labeled for application to both fabric and human skin. For the purposes of this definition only, soft household surface sanitizer means a product labeled to neutralize or eliminate odors on surfaces listed above whose label is registered as a sanitizer under FIFRA.

"Facial cleaner or soap" means a cleaner or soap designed primarily to clean the face. Facial cleaner or soap includes, but is not limited to, facial cleansing creams, semisolids, liquids, lotions, and substrate-impregnated forms. Facial cleaner or soap does not include prescription drug products, antimicrobial hand or body cleaner or soap, astringent or toner, general-use hand or body cleaner or soap, medicated astringent or medicated toner, or rubbing alcohol.

"Fat wood" means pieces of wood kindling with high naturally-occurring levels of sap or resin that enhance ignition of the kindling. Fat wood does not include kindling with substances added to enhance flammability, such as wax-covered or wax-impregnated wood-based products.

"FIFRA" means the Federal Insecticide, Fungicide, and Rodenticide Act (7 USC § 136-136y).

"Flea and tick insecticide" means an insecticide product that is designed for use against fleas, ticks, their larvae, or their eggs. Flea and tick insecticide does not include products that are designed to be used exclusively on humans or animals and their bedding.

"Flexible flooring material" means asphalt, cork, linoleum, no-wax, rubber, seamless vinyl, and vinyl composite flooring.

"Floor coating" means an opaque coating that is labeled and designed for application to flooring, including but not limited to, decks, porches, steps, and other horizontal surfaces which may be subject to foot traffic.

"Floor polish or wax" means a wax, polish, or other product designed to polish, protect, or enhance floor surfaces by leaving a protective coating that is designed to be periodically replenished. Floor polish or wax does not include spray buff products, products designed solely for the purpose of cleaning floors, floor finish strippers, products designed for unfinished wood floors, and coatings subject to architectural coatings regulations.

"Floor seam sealer" means a product designed and labeled exclusively for bonding, fusing, or sealing (coating) seams between adjoining rolls of installed flexible sheet flooring.

"Floor wax stripper" means a product designed to remove natural or synthetic floor polishes or waxes through breakdown of the polish or wax polymers or by dissolving or emulsifying the polish or wax. Floor wax stripper does not include aerosol floor wax strippers or products designed to remove floor wax solely through abrasion.

"Flying bug insecticide" means an insecticide product that is designed for use against flying insects or other flying arthropods, including but not limited to flies, mosquitoes, moths, or gnats. Flying bug insecticide does not include wasp and hornet insecticide, products that are designed to be used exclusively on humans or animals, or a moth-proofing product. For the purposes of this definition only, "moth-proofing product" means a product whose label, packaging, or accompanying literature indicates that the product is designed to protect fabrics from damage by moths, but does not indicate that the product is suitable for use against flying insects or other flying arthropods.

"Footwear or leather care product" means any product designed or labeled to be applied to footwear or to other leather articles or components, to maintain, enhance, clean, protect, or modify the appearance, durability, fit, or flexibility of the footwear, leather article or component. Footwear includes both leather and nonleather foot apparel. Footwear or leather care product does not include fabric protectants; general purpose adhesives; contact adhesives; vinyl/fabric/leather/polycarbonate coatings; rubber and vinyl protectants; fabric refreshers; products solely for deodorizing; or sealant products with adhesive properties used to create external protective layers greater than 2 millimeters thick.

"Fragrance" means a substance or complex mixture of aroma chemicals, natural essential oils, and other functional components with a combined vapor pressure not in excess of 2 mm of Hg at 20°C, the sole purpose of which is to impart an odor or scent, or to counteract a malodor.

"Furniture coating" means a paint designed for application to room furnishings including, but not limited to, cabinets (kitchen, bath and vanity), tables, chairs, beds, and sofas.

"Furniture maintenance product" means a wax, polish, conditioner, or other product designed for the purpose of polishing, protecting, or enhancing finished wood surfaces other than floors. Furniture maintenance products do not include dusting aids, wood cleaners and products designed solely for the purpose of cleaning, and products designed to leave a permanent finish such as stains, sanding sealers, and lacquers.

"Gel" means a colloid in which the disperse phase has combined with the continuous phase to produce a semisolid material, such as jelly.

"General purpose adhesive" means a nonaerosol adhesive designed for use on a variety of substrates. General purpose adhesive does not include:

1. Contact adhesives;

2. Construction, panel, and floor covering adhesives;

3. Adhesives designed exclusively for application on one specific category of substrates (i.e., substrates that are composed of similar materials, such as different types of metals, paper products, ceramics, plastics, rubbers, or vinyls); or

4. Adhesives designed exclusively for use on one specific category of articles (i.e., articles that may be composed of different materials but perform a specific function, such as gaskets, automotive trim, weather-stripping, or carpets).

"General purpose cleaner" means a product designed for general all-purpose cleaning, in contrast to cleaning products designed to clean specific substrates in certain situations. General purpose cleaner includes products designed for general floor cleaning, kitchen or countertop cleaning, and cleaners designed to be used on a variety of hard surfaces and does not include general purpose degreasers and electronic cleaners.

"General purpose degreaser" means a product labeled to remove or dissolve grease, grime, oil, and other oil-based contaminants from a variety of substrates, including automotive or miscellaneous metallic parts. General purpose degreaser does not include engine degreaser, general purpose cleaner, adhesive remover, electronic cleaner, electrical cleaner, energized electrical cleaner, metal polish or cleanser, products used exclusively in solvent cleaning tanks or related equipment, or products that are (i) sold exclusively to establishments that manufacture or construct goods or commodities; and (ii) labeled "not for retail sale." Solvent cleaning tanks or related equipment includes, but is not limited to, cold cleaners, vapor degreasers, conveyorized degreasers, film cleaning machines, or products designed to clean miscellaneous metallic parts by immersion in a container.

"General-use hand or body cleaner or soap" means a cleaner or soap designed to be used routinely on the skin to clean or remove typical or common dirt and soils. General-use hand or body cleaner or soap includes, but is not limited to, hand or body washes, dual-purpose shampoo-body cleaners, shower or bath gels, and moisturizing cleaners or soaps. General-use hand or body cleaner or soap does not include prescription drug products, antimicrobial hand or body cleaner or soap, astringent or toner, facial cleaner or soap, hand dishwashing detergent (including antimicrobial), heavy-duty hand cleaner or soap, medicated astringent or medicated toner, or rubbing alcohol.

"Glass cleaner" means a cleaning product designed primarily for cleaning surfaces made of glass. Glass cleaner does not include products designed solely for the purpose of cleaning optical materials used in eyeglasses, photographic equipment, scientific equipment, and photocopying machines.

"Graffiti remover" means a product labeled to remove spray paint, ink, marker, crayon, lipstick, nail polish, or shoe polish, from a variety of noncloth or nonfabric substrates. Graffiti remover does not include paint remover or stripper, nail polish remover, or spot remover. Products labeled for dual use as both a paint stripper and graffiti remover are considered graffiti removers.

"Gross sales" means the estimated total sales of an ACP product in the applicable volatile organic compound emissions control areas designated in 9VAC5-45-400 C during a specific compliance period (expressed to the nearest pound), based on either of the following methods, whichever the responsible ACP party demonstrates to the satisfaction of the board will provide an accurate sales estimate:

1. Apportionment of national or regional sales of the ACP product to sales, determined by multiplying the average national or regional sales of the product by the fraction of the national or regional population, respectively, that is represented by the current population of the applicable volatile organic compound emissions control areas designated in 9VAC5-45-400 C; or

2. Another documented method that provides an accurate estimate of the total current sales of the ACP product.

"Hair mousse" means a hairstyling foam designed to facilitate styling of a coiffure and provide limited holding power.

"Hair shine" means a product designed for the primary purpose of creating a shine when applied to the hair. Hair shine includes, but is not limited to, dual-use products designed primarily to impart a sheen to the hair. Hair shine does not include hair spray, hair mousse, hair styling product, hair styling gel, or products whose primary purpose is to condition or hold the hair.

"Hair spray" means a consumer product that is applied to styled hair, and is designed or labeled to provide sufficient rigidity to hold, retain and/or finish the style of the hair for a period of time. Hair spray includes aerosol hair sprays, pump hair sprays, spray waxes; color, glitter, or sparkle hairsprays that make finishing claims; and products that are both a styling and finishing product. Hair spray does not include spray products that are intended to aid in styling but does not provide finishing of a hairstyle. For the purposes of this article, "finish" or "finishing" means the maintaining or holding of previously styled hair for a period of time. For the purposes of this article, "styling" means the forming, sculpting, or manipulating the hair to temporarily alter the hair's shape.

"Hair styling product" means a consumer product that is designed or labeled for the application to wet, damp or dry hair to aid in defining, shaping, lifting, styling and or sculpting of the hair. Hair styling product includes, but is not limited to hair balm; clay; cream; creme; curl straightener; gel; liquid; lotion; paste; pomade; putty; root lifter; serum; spray gel; stick; temporary hair straightener; wax; spray products that aid in styling but do not provide finishing of a hairstyle; and leave-in volumizers, detanglers or conditioners that make styling claims. Hair styling product does not include hair mousse, hair shine, hair spray, or shampoos or conditioners that are rinsed from the hair prior to styling. For the purposes of this article, "finish" or "finishing" means the maintaining or holding of previously styled hair for a period of time. For the purposes of this article, "styling" means the forming, sculpting, or manipulating the hair to temporarily alter the hair's shape.

"Heavy-duty hand cleaner or soap" means a product designed to clean or remove difficult dirt and soils such as oil, grease, grime, tar, shellac, putty, printer's ink, paint, graphite, cement, carbon, asphalt, or adhesives from the hand with or without the use of water. Heavy-duty hand cleaner or soap does not include prescription drug products, antimicrobial hand or body cleaner or soap, astringent or toner, facial cleaner or soap, general-use hand or body cleaner or soap, medicated astringent or medicated toner, or rubbing alcohol.

"Herbicide" means a pesticide product designed to kill or retard a plant's growth, but excludes products that are (i) for agricultural use, or (ii) restricted materials that require a permit for use and possession.

"High volatility organic compound" or "HVOC" means a volatile organic compound that exerts a vapor pressure greater than 80 millimeters of mercury (mm Hg) when measured at 20°C.

"Household product" means a consumer product that is primarily designed to be used inside or outside of living quarters or residences that are occupied or intended for occupation by people, including the immediate surroundings.

"Insecticide" means a pesticide product that is designed for use against insects or other arthropods, but excluding products that are:

1. For agricultural use;

2. For a use that requires a structural pest control license under applicable state laws or regulations; or

3. Materials classified for restricted use pursuant to 40 CFR 152.75 and require a pesticide business license from the Virginia Pesticide Control Board pursuant to 2VAC20-40-20 for use and possession.

"Insecticide fogger" means an insecticide product designed to release all or most of its content as a fog or mist into indoor areas during a single application.

"Institutional product" or "industrial and institutional (I&I) product" means a consumer product that is designed for use in the maintenance or operation of an establishment that:

1. Manufactures, transports, or sells goods or commodities, or provides services for profit; or

2. Is engaged in the nonprofit promotion of a particular public, educational, or charitable cause.

Establishments include, but are not limited to, government agencies, factories, schools, hospitals, sanitariums, prisons, restaurants, hotels, stores, automobile service and parts centers, health clubs, theaters, or transportation companies. Institutional product does not include household products and products that are incorporated into or used exclusively in the manufacture or construction of the goods or commodities at the site of the establishment.

"Label" means written, printed, or graphic matter affixed to, applied to, attached to, blown into, formed, molded into, embossed on, or appearing upon a consumer product or consumer product package, for purposes of branding, identifying, or giving information with respect to the product or to the contents of the package.

"Laundry prewash" means a product that is designed for application to a fabric prior to laundering and that supplements and contributes to the effectiveness of laundry detergents or provides specialized performance.

"Laundry starch product" means a product that is designed for application to a fabric, either during or after laundering, to impart and prolong a crisp, fresh look and may also act to help ease ironing of the fabric. Laundry starch product includes, but is not limited to, fabric finish, sizing, and starch.

"Lawn and garden insecticide" means an insecticide product labeled primarily to be used in household lawn and garden areas to protect plants from insects or other arthropods. Notwithstanding the requirements of 9VAC5-45-460 C, aerosol lawn and garden insecticides may claim to kill insects or other arthropods.

"Liquid" means a substance or mixture of substances that is capable of a visually detectable flow as determined under ASTM "Standard Test Method for Determining Whether a Material is a Liquid or a Solid" (see 9VAC5-20-21). Liquid does not include powders or other materials that are composed entirely of solid particles.

"Lubricant" means a product designed to reduce friction, heat, noise, or wear between moving parts, or to loosen rusted or immovable parts or mechanisms. Lubricant does not include automotive power steering fluids; products for use inside power generating motors, engines, and turbines, and their associated power-transfer gearboxes; two-cycle oils or other products designed to be added to fuels; products for use on the human body or animals; or products that are:

1. Sold exclusively to establishments that manufacture or construct goods or commodities; and

2. Labeled "not for retail sale."

"LVP content" means the total weight, in pounds, of LVP-VOC in an ACP product multiplied by 100 and divided by the product's total net weight (in pounds, excluding container and packaging), expressed to the nearest 0.1.

"LVP-VOC" means a chemical compound or mixture that contains at least one carbon atom and meets one of the following:

1. Has a vapor pressure less than 0.1 mm Hg at 20°C, as determined by CARB Method 310 (see 9VAC5-20-21);

2. Is a chemical compound with more than 12 carbon atoms, or a chemical mixture composed solely of compounds with more than 12 carbon atoms as verified by formulation data, and the vapor pressure and boiling point are unknown;

3. Is a chemical compound with a boiling point greater than 216°C , as determined by CARB Method 310 (see 9VAC5-20-21); or

4. Is the weight percent of a chemical mixture that boils above 216°C, as determined by CARB Method 310 (see 9VAC5-20-21).

For the purposes of the definition of LVP-VOC, "chemical compound" means a molecule of definite chemical formula and isomeric structure, and "chemical mixture" means a substrate composed of two or more chemical compounds.

"Manufacturer" means a person who imports, manufactures, assembles, produces, packages, repackages, or relabels a consumer product.

"Medicated astringent or medicated toner" means a product regulated as a drug by the United States Food and Drug Administration that is applied to the skin for the purpose of cleaning or tightening pores. Medicated astringent or medicated toner includes, but is not limited to, clarifiers and substrate-impregnated products. Medicated astringent or medicated toner does not include hand, face, or body cleaner or soap products, astringent or toner, cold cream, lotion, antiperspirants, or products that must be purchased with a doctor's prescription.

"Medium volatility organic compound" or "MVOC" means a volatile organic compound that exerts a vapor pressure greater than 2 mm Hg and less than or equal to 80 mm Hg when measured at 20°C.

"Metal polish or cleanser" means a product designed primarily to improve the appearance of finished metal, metallic, or metallized surfaces by physical or chemical action. To "improve the appearance" means to remove or reduce stains, impurities, or oxidation from surfaces or to make surfaces smooth and shiny. Metal polish or cleanser includes, but is not limited to, metal polishes used on brass, silver, chrome, copper, stainless steel, and other ornamental metals. Metal polish or cleanser does not include automotive wax, polish, sealant, or glaze, wheel cleaner, paint remover or stripper, products designed and labeled exclusively for automotive and marine detailing, or products designed for use in degreasing tanks.

"Missing data days" means the number of days in a compliance period for which the responsible ACP party has failed to provide the required enforceable sales or VOC content data to the board, as specified in the ACP agreement.

"Mist spray adhesive" means an aerosol that is not a special purpose spray adhesive and that delivers a particle or mist spray, resulting in the formation of fine, discrete particles that yield a generally uniform and smooth application of adhesive to the substrate.

"Multipurpose dry lubricant" means a lubricant that is:

1. Designed and labeled to provide lubricity by depositing a thin film of graphite, molybdenum disulfide ("moly"), or polytetrafluoroethylene or closely related fluoropolymer ("teflon") on surfaces; and

2. Designed for general purpose lubrication, or for use in a wide variety of applications.

"Multipurpose lubricant" means a lubricant designed for general purpose lubrication, or for use in a wide variety of applications. Multipurpose lubricant does not include multipurpose dry lubricants, penetrants, or silicone-based multipurpose lubricants.

"Multipurpose solvent" means an organic liquid designed to be used for a variety of purposes, including cleaning or degreasing of a variety of substrates, or thinning, dispersing, or dissolving other organic materials. Multipurpose solvent includes solvents used in institutional facilities, except for laboratory reagents used in analytical, educational, research, scientific, or other laboratories. Multipurpose solvent does not include solvents used in cold cleaners, vapor degreasers, conveyorized degreasers or film cleaning machines, or solvents that are incorporated into, or used exclusively in the manufacture or construction of, the goods or commodities at the site of the establishment.

"Nail polish" means a clear or colored coating designed for application to the fingernails or toenails and including but not limited to lacquers, enamels, acrylics, base coats, and top coats.

"Nail polish remover" means a product designed to remove nail polish and coatings from fingernails or toenails.

"Nonaerosol product" means a consumer product that is not dispensed by a pressurized spray system.

"Noncarbon containing compound" means a compound that does not contain carbon atoms.

"Nonresilient flooring" means flooring of a mineral content that is not flexible. Nonresilient flooring includes but is not limited to terrazzo, marble, slate, granite, brick, stone, ceramic tile, and concrete.

"Nonselective terrestrial herbicide" means a terrestrial herbicide product that is toxic to plants without regard to species.

"One-product business" means a responsible ACP party that sells, supplies, offers for sale, or manufactures for use in the applicable volatile organic compound emissions control areas designated in 9VAC5-45-400:

1. Only one distinct ACP product, sold under one product brand name, which is subject to the requirements of 9VAC5-45-430; or

2. Only one distinct ACP product line subject to the requirements of 9VAC5-45-430, in which all the ACP products belong to the same product category and the VOC contents in the products are within 98.0% and 102.0% of the arithmetic mean of the VOC contents over the entire product line.

"Oven cleaner" means a cleaning product designed to clean and to remove dried food deposits from oven walls.

"Paint" means a pigmented liquid, liquefiable, or mastic composition designed for application to a substrate in a thin layer that is converted to an opaque solid film after application and is used for protection, decoration or identification, or to serve some functional purpose such as the filling or concealing of surface irregularities or the modification of light and heat radiation characteristics.

"Paint remover or stripper" means a product designed to strip or remove paints or other related coatings, by chemical action, from a substrate without markedly affecting the substrate. Paint remover or stripper does not include multipurpose solvents, paint brush cleaners, products designed and labeled exclusively as graffiti removers, and hand cleaner products that claim to remove paints and other related coatings from skin.

"Penetrant" means a lubricant designed and labeled primarily to loosen metal parts that have bonded together due to rusting, oxidation, or other causes. Penetrant does not include multipurpose lubricants that claim to have penetrating qualities but are not labeled primarily to loosen bonded parts.

"Personal fragrance product" means any product that is applied to the human body or clothing for the primary purpose of adding a scent or masking a malodor, including cologne, perfume, aftershave, and toilet water. Personal fragrance product does not include: (i) deodorant; (ii) medicated products designed primarily to alleviate fungal or bacterial growth on feet or other areas of the body; (iii) mouthwashes, breath fresheners and deodorizers; (iv) lotions, moisturizers, powders or other skin care products used primarily to alleviate skin conditions such as dryness and irritations; (v) products designed exclusively for use on human genitalia; (vi) soaps, shampoos, and products primarily used to clean the human body; and (vii) fragrance products designed to be used exclusively on nonhuman animals.

"Pesticide" means and includes a substance or mixture of substances labeled, designed, or intended for use in preventing, destroying, repelling, or mitigating a pest, or a substance or mixture of substances labeled, designed, or intended for use as a defoliant, desiccant, or plant regulator, provided that the term "pesticide" will not include a substance, mixture of substances, or device that the U.S. Environmental Protection Agency does not consider to be a pesticide.

"Pre-ACP VOC content" means the lowest VOC content of an ACP product between January 1, 1990, and the date on which the application for a proposed ACP is submitted to the board, based on the data obtained from accurate records available to the board that yields the lowest VOC content for the product.

"Pressurized gas duster" means a pressurized product labeled to remove dust from a surface solely by means of mass air or gas flow, including surfaces such as photographs, photographic film negatives, computer keyboards, and other types of surfaces that cannot be cleaned with solvents. Pressurized gas duster does not include dusting aids.

"Principal display panel" means that part of a label that is so designed as to most likely be displayed, presented, shown, or examined under normal and customary conditions of display or purchase. Whenever a principal display panel appears more than once, all requirements pertaining to the principal display panel shall pertain to all such principal display panels.

"Product brand name" means the name of the product exactly as it appears on the principal display panel of the product.

"Product category" means the applicable category that best describes the product as listed in this section and in Table 45-4A in 9VAC5-45-430 A.

"Product form," for the purpose of complying with 9VAC5-45-510 (notification, records and reporting) only, means the applicable form that most accurately describes the product's dispensing form as follows:

A = Aerosol Product.

S = Solid.

P = Pump Spray.

L = Liquid.

SS = Semisolid.

O = Other.

"Product line" means a group of products of identical form and function belonging to the same product category.

"Propellant" means a liquefied or compressed gas that is used in whole or in part, such as a cosolvent, to expel a liquid or other material from the same self-pressurized container or from a separate container.

"Pump spray" means a packaging system in which the product ingredients within the container are not under pressure and in which the product is expelled only while a pumping action is applied to a button, trigger, or other actuator.

"Reconcile or reconciliation" means to provide sufficient VOC emission reductions to completely offset shortfalls generated under the ACP during an applicable compliance period.

"Reconciliation of shortfalls plan" means the plan to be implemented by the responsible ACP party when shortfalls have occurred, as approved by the board pursuant to 9VAC5-45-440 B 1 g (10).

"Responsible ACP party" means the company, firm, or establishment that is listed on the ACP product's label. If the label lists two or more companies, firms, or establishments, the responsible ACP party is the party that the ACP product was "manufactured for" or "distributed by," as noted on the label.

"Responsible party" means the company, firm, or establishment that is listed on the product's label. If the label lists two companies, firms, or establishments, the responsible party is the party that the product was "manufactured for" or "distributed by," as noted on the label.

"Restricted materials" means pesticides established as restricted materials under Chapter 39 (§ 3.2-3900 et seq.) of Title 3.2 of the Code of Virginia.

"Retail outlet" means an establishment at which consumer products are sold, supplied, or offered for sale directly to consumers.

"Retailer" means a person who sells, supplies, or offers consumer products for sale directly to consumers.

"Roll-on product" means an antiperspirant or deodorant that dispenses active ingredients by rolling a wetted ball or wetted cylinder on the affected area.

"Rubber and vinyl protectant" means a product designed to protect, preserve, or renew vinyl, rubber, and plastic on vehicles, tires, luggage, furniture, and household products such as vinyl covers, clothing, and accessories. Rubber and vinyl protectant does not include products primarily designed to clean the wheel rim, such as aluminum or magnesium wheel cleaners, and tire cleaners that do not leave an appearance-enhancing or protective substance on the tire.

"Rubbing alcohol" means a product containing isopropyl alcohol (also called isopropanol) or denatured ethanol and labeled for topical use, usually to decrease germs in minor cuts and scrapes, to relieve minor muscle aches, as a rubefacient, and for massage.

"Sealant and caulking compound" means a product with adhesive properties that is designed to fill, seal, waterproof, or weatherproof gaps or joints between two surfaces. Sealant and caulking compound does not include roof cements and roof sealants; insulating foams; removable caulking compounds; clear or paintable or water resistant caulking compounds; floor seam sealers; products designed exclusively for automotive uses; or sealers that are applied as continuous coatings. Sealant and caulking compound also does not include units of product, less packaging, which weigh more than one pound and consist of more than 16 fluid ounces. For the purposes of this definition only, "removable caulking compounds" means a compound that temporarily seals windows or doors for three- to six-month time intervals; and "clear or paintable or water resistant caulking compounds" means a compound that contains no appreciable level of opaque fillers or pigments, transmits most or all visible light through the caulk when cured, is paintable, and is immediately resistant to precipitation upon application.

"Semisolid" means a product that, at room temperature, will not pour, but will spread or deform easily, including, but not limited to gels, pastes, and greases.

"Shaving cream" means an aerosol product that dispenses a foam lather intended to be used with a blade or cartridge razor or other wet-shaving system, in the removal of facial or other bodily hair. Shaving cream does not include shaving gel.

"Shaving gel" means an aerosol product that dispenses a post-foaming semisolid designed to be used with a blade, cartridge razor, or other shaving system in the removal of facial or other bodily hair. Shaving gel does not include shaving cream.

"Shortfall" means the ACP emissions minus the ACP limit when the ACP emissions were greater than the ACP limit during a specified compliance period, expressed to the nearest pound of VOC. Shortfall does not include emissions occurring prior to the date that the ACP agreement approving an ACP is signed by the board.

"Silicone-based multipurpose lubricant" means a lubricant that is:

1. Designed and labeled to provide lubricity primarily through the use of silicone compounds including, but not limited to, polydimethylsiloxane; and

2. Designed and labeled for general purpose lubrication, or for use in a wide variety of applications.

Silicone-based multipurpose lubricant does not include products designed and labeled exclusively to release manufactured products from molds.

"Single phase aerosol air freshener" means an aerosol air freshener with the liquid contents in a single homogeneous phase and that does not require that the product container be shaken before use.

"Small business" means any stationary source that is owned or operated by a person that employs 100 or fewer individuals; is a small business concern as defined in the federal Small Business Act; is not a major stationary source; does not emit 50 tons or more per year of any regulated pollutant; and emits less than 75 tons per year of all regulated pollutants.

"Solid" means a substance or mixture of substances that, either whole or subdivided (such as the particles composing a powder), is not capable of visually detectable flow as determined under ASTM "Standard Test Method for Determining Whether a Material is a Liquid or a Solid" (see 9VAC5-20-21).

"Special purpose spray adhesive" means an aerosol adhesive that meets any of the following definitions:

1. "Mounting adhesive" means an aerosol adhesive designed to permanently mount photographs, artwork, or other drawn or printed media to a backing (paper, board, cloth, etc.) without causing discoloration to the artwork.

2. "Flexible vinyl adhesive" means an aerosol adhesive designed to bond flexible vinyl to substrates. "Flexible vinyl" means a nonrigid polyvinyl chloride plastic with at least 5.0%, by weight, of plasticizer content. A plasticizer is a material, such as a high boiling point organic solvent, that is incorporated into a plastic to increase its flexibility, workability, or distensibility, and may be determined using ASTM "Standard Practice for Packed Column Gas Chromatography" (see 9VAC5-20-21) or from product formulation data.

3. "Polystyrene foam adhesive" means an aerosol adhesive designed to bond polystyrene foam to substrates.

4. "Automobile headliner adhesive" means an aerosol adhesive designed to bond together layers in motor vehicle headliners.

5. "Polyolefin adhesive" means an aerosol adhesive designed to bond polyolefins to substrates.

6. "Laminate repair or edgebanding adhesive" means an aerosol adhesive designed for:

a. The touch-up or repair of items laminated with high pressure laminates (e.g., lifted edges, delaminates, etc.); or

b. The touch-up, repair, or attachment of edgebonding materials, including but not limited to, other laminates, synthetic marble, veneers, wood molding, and decorative metals.

For the purposes of this definition, "high pressure laminate" means sheet materials that consist of paper, fabric, or other core material that have been laminated at temperatures exceeding 265°F and at pressures between 1,000 and 1,400 psi.

7. "Automotive engine compartment adhesive" means an aerosol adhesive designed for use in motor vehicle under-the-hood applications that require oil and plasticizer resistance, as well as high shear strength, at temperatures of 200-275°F.

"Spot remover" means a product labeled to clean localized areas or remove localized spots or stains on cloth or fabric, such as drapes, carpets, upholstery, and clothing, that does not require subsequent laundering to achieve stain removal. Spot remover does not include dry cleaning fluid, laundry prewash, or multipurpose solvent.

"Spray buff product" means a product designed to restore a worn floor finish in conjunction with a floor buffing machine and special pad.

"Stick product" means an antiperspirant or a deodorant that contains active ingredients in a solid matrix form, and that dispenses the active ingredients by frictional action on the affected area.

"Structural waterproof adhesive" means an adhesive whose bond lines are resistant to conditions of continuous immersion in fresh or salt water and that conforms with the definition in the federal consumer products regulation, 40 CFR 59 Subpart C.

"Surplus reduction" means the ACP limit minus the ACP emissions when the ACP limit was greater than the ACP emissions during a given compliance period, expressed to the nearest pound of VOC. Except as provided in 9VAC5-45-440 F 3, surplus reduction does not include emissions occurring prior to the date that the ACP agreement approving an ACP is signed by the board.

"Surplus trading" means the buying, selling, or transfer of surplus reductions between responsible ACP parties.

"Terrestrial" means to live on or grow from land.

"Tire sealant and inflator" means a pressurized product that is designed to temporarily inflate and seal a leaking tire.

"Toilet/urinal care product" means any product designed or labeled to clean or to deodorize toilet bowls, toilet tanks, or urinals. Toilet bowls, toilet tanks, or urinals includes, but is not limited to, toilets or urinals connected to permanent plumbing in buildings and other structures, portable toilets or urinals placed at temporary or remote locations, and toilet or urinals in vehicles such as buses, recreational motor homes, boats, ships, and aircraft. Toilet/urinal care product does not include bathroom and tile cleaner or general purpose cleaner.

"Total maximum historical emissions" or "TMHE" means the total VOC emissions from all ACP products for which the responsible ACP party has failed to submit the required VOC content or enforceable sales records. The TMHE shall be calculated for each ACP product during each portion of a compliance period for which the responsible ACP party has failed to provide the required VOC content or enforceable sales records. The TMHE shall be expressed to the nearest pound and calculated according to the following calculation:

$$TMHE = (MHE)_1 + (MHE)_2 + \ldots + (MHE)_N$$

$$MHE = \left(\frac{\text{Highest VOC Content x Highest Sales}}{100 \times 365}\right) \text{x Missing Data Days}$$

where:

Highest VOC content = the maximum VOC content that the ACP product has contained in the previous five years, if the responsible ACP party has failed to meet the requirements for reporting VOC content data (for any portion of the compliance period), as specified in the ACP agreement approving the ACP, or the current actual VOC content, if the responsible ACP party has provided all required VOC Content data (for the entire compliance period), as specified in the ACP agreement.

Highest sales = the maximum one-year gross sales of the ACP product in the previous five years, if the responsible ACP party has failed to meet the requirements for reporting enforceable sales records (for any portion of the compliance period), as specified in the ACP agreement approving the ACP, or the current actual one-year enforceable sales for the product, if the responsible ACP party has provided all required enforceable sales records (for the entire compliance period), as specified in the ACP agreement approving the ACP.

Missing Data Days = (see definition in this section).

1, 2, ..., N = each product in an ACP, up to the maximum N, for which the responsible ACP party has failed to submit the required enforceable sales or VOC content data as specified in the ACP agreement.

"Type A propellant" means a compressed gas such as CO_2, N_2, N_2O, or compressed air that is used as a propellant and is either incorporated with the product or contained in a separate chamber within the product's packaging.

"Type B propellant" means a halocarbon that is used as a propellant including chlorofluorocarbons (CFCs), hydrochlorofluorocarbons (HCFCs), and hydrofluorocarbons (HFCs).

"Type C propellant" means a propellant that is not a Type A or Type B propellant, including propane, isobutane, n-butane, and dimethyl ether (also known as dimethyl oxide).

"Undercoating" means an aerosol product designed to impart a protective, nonpaint layer to the undercarriage, trunk interior, or firewall of motor vehicles to prevent the formation of rust or to deaden sound. Undercoating includes, but is not limited to, rubberized, mastic, or asphaltic products.

"Usage directions" means the text or graphics on the product's principal display panel, label, or accompanying literature that describes to the end user how and in what quantity the product is to be used.

"Vinyl/fabric/leather/polycarbonate coating" means a coating designed and labeled exclusively to coat vinyl, fabric, leather, or polycarbonate substrates.

"VOC content" means, except for charcoal lighter products, the total weight of VOC in a product expressed as a percentage of the product weight (exclusive of the container or packaging), as determined pursuant to 9VAC5-45-490 B and C.

For charcoal lighter material products only,

$$VOC\ Content = \frac{(Certified\ Emissions \times 100)}{Certified\ Use\ Rate}$$

where:

Certified emissions = (see definition in this section).

Certified use rate = (see definition in this section).

"Volatile organic compound" or "VOC" means volatile organic compound as defined in 9VAC5-10-20.

"Wasp and hornet insecticide" means an insecticide product that is designed for use against wasps, hornets, yellow jackets or bees by allowing the user to spray from a distance a directed stream or burst at the intended insects or their hiding place.

"Waterproofer" means a product designed and labeled exclusively to repel water from fabric or leather substrates. Waterproofer does not include fabric protectants.

"Wax" means a material or synthetic thermoplastic substance generally of high molecular weight hydrocarbons or high molecular weight esters of fatty acids or alcohols, except glycerol and high polymers (plastics). Wax includes, but is not limited to, substances derived from the secretions of plants and animals such as carnauba wax and beeswax, substances of a mineral origin such as ozocerite and paraffin, and synthetic polymers such as polyethylene.

"Web spray adhesive" means an aerosol adhesive that is not a mist spray or special purpose spray adhesive.

"Wood cleaner" means a product labeled to clean wooden materials including but not limited to decking, fences, flooring, logs, cabinetry, and furniture. Wood cleaner does not include dusting aids, general purpose cleaners, furniture maintenance products, floor wax strippers, floor polish or waxes, or products designed and labeled exclusively to preserve or color wood.

"Wood floor wax" means wax-based products for use solely on wood floors.

"Working day" means a day between Monday through Friday, inclusive, except for federal holidays.

9VAC5-45-430. Standard for volatile organic compounds.

A. Except as provided in 9VAC5-45-410, 9VAC5-45-440, and 9VAC5-45-450, no owner or other person shall (i) sell, supply, or offer for sale a consumer product manufactured on or after May 1, 2010, or (ii) manufacture for sale a consumer product on or after May 1, 2010, that contains volatile organic compounds in excess of the limits specified in Table 45-4A.

TABLE 45-4A

Product Category:	Percent VOC by Weight
Adhesive Removers	
Floor or wall covering adhesive remover	5%
Gasket or thread locking adhesive remover	50%
General purpose adhesive remover	20%
Specialty adhesive remover	70%
Adhesives	
Aerosol adhesives	
Mist spray adhesive:	65%
Web spray adhesive:	55%
Special purpose spray adhesives	
Automotive engine compartment adhesive:	70%
Automotive headliner adhesive:	65%
Flexible vinyl adhesive:	70%
Laminate repair or edgebanding adhesive:	60%
Mounting adhesive:	70%
Polystyrene foam adhesive:	65%
Polyolefin adhesive:	60%
Contact adhesives	
General purpose contact adhesive:	55%
Special purpose contact adhesive:	80%
Construction, panel, and floor covering adhesive:	15%
General purpose adhesive:	10%
Structural waterproof adhesive:	15%
Air fresheners	
Single-phase aerosol:	30%
Double-phase aerosol:	25%
Liquid/Pump spray:	18%
Solid/Semisolid:	3%
Antiperspirants	
Aerosol:	40% HVOC, 10% MVOC
Nonaerosol:	0% HVOC, 0% MVOC
Anti-static product, nonaerosol:	11%

Automotive brake cleaner:	45%
Automotive rubbing or polishing compound:	17%
Automotive wax, polish, sealant, or glaze	
Hard paste wax:	45%
Instant detailer:	3%
All other forms:	15%
Automotive windshield washer fluid:	35%
Bathroom and tile cleaners	
Aerosol:	7%
All other forms:	5%
Bug and tar remover:	40%
Carburetor or fuel-injection air intake cleaner:	45%
Carpet and upholstery cleaners	
Aerosol:	7%
Nonaerosol (dilutable):	0.1%
Nonaerosol (ready-to-use):	3.0%
Charcoal lighter material:	See subsection E of this section.
Cooking spray, aerosol:	18%
Deodorants	
Aerosol:	0% HVOC, 10% MVOC
Nonaerosol:	0% HVOC, 0% MVOC
Dusting aids	
Aerosol:	25%
All other forms:	7%
Electrical cleaner	45%
Electronic cleaner	75%
Engine degreasers	
Aerosol:	35%
Nonaerosol:	5%
Fabric protectant:	60%

Fabric refreshers	
Aerosol:	15%
Nonaerosol:	6%
Floor polishes/Waxes	
Products for flexible flooring materials:	7%
Products for nonresilient flooring:	10%
Wood floor wax:	90%
Floor wax stripper, nonaerosol:	See subsection G of this section.
Footwear or leather care products	
Aerosol:	75%
Solid:	55%
All other forms:	15%
Furniture maintenance products	
Aerosol:	17%
All other forms except solid or paste:	7%
General purpose cleaners	
Aerosol:	10%
Nonaerosol:	4%
General purpose degreasers	
Aerosol:	50%
Nonaerosol:	4%
Glass cleaners	
Aerosol:	12%
Nonaerosol:	4%
Graffiti removers	
Aerosol:	50%
Nonaerosol:	30%
Hair mousse:	6%
Hair shine:	55%
Hair spray:	55%
Hair styling products	
Aerosol and pump spray:	6%

All other forms:	2%
Heavy-duty hand cleaner or soap:	8%
Insecticides	
Crawling bug (aerosol):	15%
Crawling bug (all other forms):	20%
Flea and tick:	25%
Flying bug (aerosol):	25%
Flying bug (all other forms):	35%
Fogger:	45%
Lawn and garden (all other forms):	20%
Lawn and garden (nonaerosol):	3%
Wasp and hornet:	40%
Laundry prewash	
Aerosol/Solid:	22%
All other forms:	5%
Laundry starch product:	5%
Metal polish or cleanser:	30%
Multi-purpose lubricant (excluding solid or semi-solid products):	50%
Nail polish remover:	75%
Non-selective terrestrial herbicide, nonaerosol:	3%
Oven cleaners	
Aerosol/Pump spray:	8%
Liquid:	5%
Paint remover or stripper:	50%
Penetrant:	50%
Rubber and vinyl protectants	
Nonaerosol:	3%
Aerosol:	10%
Sealant and caulking compound:	4%
Shaving cream:	5%
Shaving gel:	7%
Silicone-based multipurpose lubricant (excluding solid or semi-solid products):	60%
Spot removers	
Aerosol:	25%
Nonaerosol:	8%
Tire sealant and inflator:	20%
Toile/urinal care products	
Aerosol:	10%
Nonaerosol:	3%
Undercoating, aerosol:	40%
Wood cleaners	
Aerosol:	17%
Nonaerosol:	4%

B. No owner or other person shall sell, supply, offer for sale, or manufacture for sale an antiperspirant or a deodorant that contains a compound that has been defined as a toxic pollutant in 9VAC5-60-210 C.

C. Provisions follow concerning products that are diluted prior to use.

1. For consumer products for which the label, packaging, or accompanying literature specifically states that the product should be diluted with water or non-VOC solvent prior to use, the limits specified in Table 45-4A shall apply to the product only after the minimum recommended dilution has taken place. For purposes of this subsection, "minimum recommended dilution" shall not include recommendations for incidental use of a concentrated product to deal with limited special applications such as hard-to-remove soils or stains.

2. For consumer products for which the label, packaging, or accompanying literature states that the product should be diluted with a VOC solvent prior to use, the limits specified in Table 45-4A shall apply to the product only after the maximum recommended dilution has taken place.

D. For those consumer products that are registered under FIFRA, the effective date of the VOC standards in Table 45-4A shall be May 1, 2011. Prior to that date, the standards of Table 45-3A in 9VAC5-45-430 A shall apply unless the product is exempt under the provisions of 9VAC5-45-410.

E. The following requirements shall apply to all charcoal lighter material products:

1. Effective as of the applicable compliance date specified in 9VAC5-45-480, no owner or other person shall (i) sell, supply, or offer for sale a charcoal lighter material product manufactured on or after May 1, 2010, or (ii) manufacture for sale a charcoal lighter material product on or after May 1, 2010, unless at the time of the transaction:

a. The manufacturer can demonstrate to the board's satisfaction that they have been issued a currently effective certification by CARB under the Consumer Products provisions under Subchapter 8.5, Article 2, § 94509(h), of Title 17 of the California Code of Regulations (see 9VAC5-20-21). This certification remains in effect for as long as the CARB certification remains in effect. A manufacturer claiming such a certification on this basis must submit to the board a copy of the certification decision (i.e., the executive order), including all conditions established by CARB applicable to the certification.

b. The manufacturer or distributor of the charcoal lighter material has been issued a currently effective certification pursuant to subdivision 2 of this subsection.

c. The charcoal lighter material meets the formulation criteria and other conditions specified in the applicable ACP agreement issued pursuant to subdivision 2 of this subsection.

d. The product usage directions for the charcoal lighter material are the same as those provided to the board pursuant to subdivision 2 c of this subsection.

2. Provisions follow concerning certification requirements.

a. No charcoal lighter material formulation shall be certified under this subdivision unless the applicant for certification demonstrates to the board's satisfaction that the VOC emissions from the ignition of charcoal with the charcoal lighter material are less than or equal to 0.020 pound of VOC per start, using the procedures specified in the South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21). The provisions relating to LVP-VOC in 9VAC5-45-410 F and 9VAC5-45-420 C shall not apply to a charcoal lighter material subject to the requirements of 9VAC5-45-430 A and this subsection.

b. The board may approve alternative test procedures that are shown to provide equivalent results to those obtained using the South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21).

c. A manufacturer or distributor of charcoal lighter material may apply to the board for certification of a charcoal lighter material formulation in accordance with this subdivision. The application shall be in writing and shall include, at a minimum, the following:

(1) The results of testing conducted pursuant to the procedures specified in South Coast Air Quality Management District Rule 1174 Testing Protocol (see 9VAC5-20-21); and

(2) The exact text or graphics that will appear on the charcoal lighter material's principal display panel, label, or accompanying literature. The provided material shall clearly show the usage directions for the product. These directions shall accurately reflect the quantity of charcoal lighter material per pound of charcoal that was used in the South Coast Air Quality Management District Rule 1174 Testing Protocol (see 9VAC5-20-21) for that product, unless:

(a) The charcoal lighter material is intended to be used in fixed amounts independent of the amount of charcoal used, such as certain paraffin cubes, or

(b) The charcoal lighter material is already incorporated into the charcoal, such as certain "bag light," "instant light" or "match light" products.

(3) For a charcoal lighter material that meets the criteria specified in subdivision 2 c (2) (a) of this subsection, the usage instructions provided to the board will accurately reflect the quantity of charcoal lighter material used in the South Coast Air Quality Management District Rule 1174 Testing Protocol (see 9VAC5-20-21) for that product.

(4) Physical property data, formulation data, or other information required by the board for use in determining when a product modification has occurred and for use in determining compliance with the conditions specified on the ACP agreement issued pursuant to subdivision 2 e of this subsection.

d. Within 30 days of receipt of an application, the board will advise the applicant in writing either that it is complete or that specified additional information is required to make it complete. Within 30 days of receipt of additional information, the board will advise the applicant in writing either that the application is complete, or that specified additional information or testing is still required before it can be deemed complete.

e. If the board finds that an application meets the requirements of subdivision 2 of this subsection, then an ACP agreement shall be issued certifying the charcoal lighter material formulation and specifying such conditions as are necessary to insure that the requirements of this subsection are met. The board will act on a complete application within 90 days after the application is deemed complete.

3. For charcoal lighter material for which certification has been granted pursuant to subdivision 2 of this subsection, the applicant for certification shall notify the board in writing within 30 days of: (i) a change in the usage directions, or (ii) a change in product formulation, test results, or other information submitted pursuant to subdivision 2 of this subsection that may result in VOC emissions greater than 0.020 pound of VOC per start.

4. If the board determines that a certified charcoal lighter material formulation results in VOC emissions from the ignition of charcoal that are greater than 0.020 pound of VOC per start, as determined by the South Coast Air Quality Management District Rule 1174 Testing Protocol (see 9VAC5-20-21) and the statistical analysis procedures contained therein, the board will revoke or modify the certification as is necessary to assure that the charcoal lighter material will result in VOC emissions of less than or equal to 0.020 pound of VOC per start.

F. Requirements for aerosol adhesives.

1. The standards for aerosol adhesives apply to all uses of aerosol adhesives, including consumer, industrial, and commercial uses. Except as otherwise provided in 9VAC5-45-410 and 9VAC5-45-450, no owner or other person shall (i) sell, supply, offer for sale, or use an aerosol adhesive manufactured on or after May 1, 2010, or (ii) manufacture for sale an aerosol adhesive after May 1, 2010, that contains VOCs in excess of the specified standard.

2. a. In order to qualify as a "special purpose spray adhesive," the product must meet one or more of the definitions for special purpose spray adhesive specified in 9VAC5-45-420 C, but if the product label indicates that the product is suitable for use on a substrate or application not listed in 9VAC5-45-420 C, then the product shall be classified as either a "web spray adhesive" or a "mist spray adhesive."

b. If a product meets more than one of the definitions specified in 9VAC5-45-420 C for "special purpose spray adhesive," and is not classified as a "web spray adhesive" or "mist spray adhesive" under subdivision 2 a of this subsection, then the VOC limit for the product shall be the lowest applicable VOC limit specified in 9VAC5-45-430 A.

3. No person shall (i) sell, supply, or offer for sale an aerosol adhesive manufactured on or after May 1, 2010, or (ii) manufacture for sale on or after May 1, 2010, an aerosol adhesive, that contains any of the following compounds: methylene chloride, perchloroethylene, or trichloroethylene.

4. All aerosol adhesives must comply with the labeling requirements specified in 9VAC5-45-460 D.

G. Effective as of the applicable compliance date specified in 9VAC5-45-480, no owner or other person shall sell, supply, offer for sale, or manufacture for use a floor wax stripper unless the following requirements are met:

1. The label of each nonaerosol floor wax stripper must specify a dilution ratio for light or medium build-up of polish that results in an as-used VOC concentration of 3.0% by weight or less.

2. If a nonaerosol floor wax stripper is also intended to be used for removal of heavy build-up of polish, the label of that floor wax stripper must specify a dilution ratio for heavy build-up of polish that results in an as-used VOC concentration of 12% by weight or less.

3. The terms "light build-up," "medium build-up," or "heavy build-up" are not specifically required as long as comparable terminology is used.

H. For a consumer product for which standards are specified under subsection A of this section, no owner or other person shall sell, supply, offer for sale, or manufacture for sale a consumer product that contains any of the following ozone-depleting compounds:

CFC-11 (trichlorofluoromethane), CFC-12 (dichlorodifluoromethane);

CFC-113 (1,1,1-trichloro-2,2,2-trifluoroethane);

CFC-114 (1-chloro-1,1-difluoro-2-chloro-2,2-difluoroethane);

CFC-115 (chloropentafluoroethane), halon 1211 (bromochlorodifluoromethane);

halon 1301 (bromotrifluoromethane), halon 2402 (dibromotetrafluoroethane);

HCFC-22 (chlorodifluoromethane), HCFC-123 (2,2-dichloro-1,1,1-trifluoroethane);

HCFC-124 (2-chloro-1,1,1,2-tetrafluoroethane);

HCFC-141b (1,1-dichloro-1-fluoroethane), HCFC-142b (1-chloro-1,1-difluoroethane);

1,1,1-trichloroethane; or

carbon tetrachloride.

I. The requirements of subsection H of this section shall not apply to an existing product formulation that complies with Table 45-4A or an existing product formulation that is reformulated to meet Table 45-4A, provided the ozone-depleting compound content of the reformulated product does not increase.

J. The requirements of subsection H of this section shall not apply to ozone-depleting compounds that may be present as impurities in a consumer product in an amount equal to or less than 0.01% by weight of the product.

9VAC5-45-440. Alternative control plan (ACP) for consumer products.

A. 1. Manufacturers of consumer products may seek an ACP agreement in accordance with subsections B through L of this section.

2. Only responsible ACP parties for consumer products may enter into an ACP agreement under the provisions of this section.

B. Provisions follow concerning the requirements and process for approval of an ACP.

1. To be considered by the board for approval, an application for a proposed ACP shall be submitted in writing to the board by the responsible ACP party and shall contain all of the following:

a. An identification of the contact persons, phone numbers, names, and addresses of the responsible ACP party that is submitting the ACP application and will be implementing the ACP requirements specified in the ACP agreement.

b. A statement of whether the responsible ACP party is a small business or a one-product business.

c. A listing of the exact product brand name, form, available variations (flavors, scents, colors, sizes, etc.), and applicable product category for each distinct ACP product that is proposed for inclusion in the ACP.

d. For each proposed ACP product identified in subdivision 1 c of this subsection, a demonstration to the satisfaction of the board that the enforceable sales records to be used by the responsible ACP party for tracking product sales meet the minimum criteria specified in subdivision 1 d (5) of this subsection. To provide this demonstration, the responsible ACP party shall either demonstrate to the satisfaction of the board that other records provided to the board in writing by the responsible ACP party meet the minimum criteria of subdivision 1 d (5) of this subsection for tracking product sales of each ACP product, or do all of the following:

(1) Provide the contact persons, phone numbers, names, street and mail addresses of all persons and businesses who will provide information that will be used to determine the enforceable sales;

(2) Determine the enforceable sales of each product using enforceable sales records;

(3) Demonstrate, to the satisfaction of the board, the validity of the enforceable sales based on enforceable sales records provided by the contact persons or the responsible ACP party;

(4) Calculate the percentage of the gross sales that is composed of enforceable sales; and

(5) Determine which ACP products have enforceable sales that are 75% or more of the gross sales. Only ACP products meeting this criteria shall be allowed to be sold under an ACP.

e. For each of the ACP products identified in subdivision 1 d (5) of this subsection, the inclusion of the following:

(1) Legible copies of the existing labels for each product;

(2) The VOC content and LVP content for each product. The VOC content and LVP content shall be reported for two different periods as follows:

(a) The VOC and LVP contents of the product at the time the application for an ACP is submitted, and

(b) The VOC and LVP contents of the product that were used at any time within the four years prior to the date of submittal of the application for an ACP if either the VOC or LVP contents have varied by more than plus or minus 10% of the VOC or LVP contents reported in subdivision 1 e (2) (a) of this subsection.

f. A written commitment obligating the responsible ACP party to date-code every unit of each ACP product approved for inclusion in the ACP. The commitment shall require the responsible ACP party to display the date-code on each ACP product container or package no later than five working days after the date an ACP agreement approving an ACP is signed by the board.

g. An operational plan covering all the products identified under subdivision 1 d (5) of this subsection for each compliance period that the ACP will be in effect. The operational plan shall contain all of the following:

(1) An identification of the compliance periods and dates for the responsible ACP party to report the information required by the board in the ACP agreement approving an ACP. The length of the compliance period shall be chosen by the responsible ACP party (not to exceed 365 days). The responsible ACP party shall also choose the dates for reporting information such that all required VOC content and enforceable sales data for all ACP products shall be reported to the board at the same time and at the same frequency.

(2) An identification of specific enforceable sales records to be provided to the board for enforcing the provisions of this article and the ACP agreement approving an ACP. The enforceable sales records shall be provided to the board no later than the compliance period dates specified in subdivision 1 g (1) of this subsection.

(3) For a small business or a one-product business that will be relying to some extent on surplus trading to meet its ACP limits, a written commitment from the responsible ACP party that they will transfer the surplus reductions to the small business or one-product business upon approval of the ACP.

(4) For each ACP product, all VOC content levels that will be applicable for the ACP product during each compliance period. The plan shall also identify the specific method by which the VOC content will be determined and the statistical accuracy and precision (repeatability and reproducibility) will be calculated for each specified method.

(5) The projected enforceable sales for each ACP product at each different VOC content for every compliance period that the ACP will be in effect.

(6) A detailed demonstration showing the combination of specific ACP reformulations or surplus trading (if applicable) that is sufficient to ensure that the ACP emissions will not exceed the ACP limit for each compliance period that the ACP will be in effect, the approximate date within each compliance period that such reformulations or surplus trading are expected to occur, and the extent to which the VOC contents of the ACP products will be reduced (i.e., by ACP reformulation). This demonstration shall use the equations specified in 9VAC5-45-420 C for projecting the ACP emissions and ACP limits during each compliance period. This demonstration shall also include all VOC content levels and projected enforceable sales for all ACP products to be sold during each compliance period.

(7) A certification that all reductions in the VOC content of a product will be real, actual reductions that do not result from changing product names, mischaracterizing ACP product reformulations that have occurred in the past, or other attempts to circumvent the provisions of this article.

(8) Written explanations of the date-codes that will be displayed on each ACP product's container or packaging.

(9) A statement of the approximate dates by which the responsible ACP party plans to meet the applicable ACP VOC standards for each product in the ACP.

(10) An operational plan ("reconciliation of shortfalls plan") that commits the responsible ACP party to completely reconcile shortfalls, even, to the extent permitted by law, if the responsible ACP party files for bankruptcy protection. The plan for reconciliation of shortfalls shall contain all of the following:

(a) A clear and convincing demonstration of how shortfalls of up to 5.0%, 10%, 15%, 25%, 50%, 75% and 100% of the applicable ACP limit will be completely reconciled within 90 working days from the date the shortfall is determined;

(b) A listing of the specific records and other information that will be necessary to verify that the shortfalls were reconciled as specified in this subsection; and

(c) A commitment to provide a record or information requested by the board to verify that the shortfalls have been completely reconciled.

h. A declaration, signed by a legal representative for the responsible ACP party, that states that all information and operational plans submitted with the ACP application are true and correct.

2. a. In accordance with the time periods specified in subsection C of this section, the board will issue an ACP agreement approving an ACP that meets the requirements of this article. The board will specify such terms and conditions as are necessary to ensure that the emissions from the ACP products do not exceed the emissions that would have occurred if the ACP products subject to the ACP had met the VOC standards specified in 9VAC5-45-430 A. The ACP shall also include:

(1) Only those ACP products for which the enforceable sales are at least 75% of the gross sales as determined in subdivision 1 d (5) of this subsection;

(2) A reconciliation of shortfalls plan meeting the requirements of this article; and

(3) Operational terms, conditions, and data to be reported to the board to ensure that all requirements of this article are met.

b. The board will not approve an ACP submitted by a responsible ACP party if the board determines, upon review of the responsible ACP party's compliance history with past or current ACPs or the requirements for consumer products in this article, that the responsible ACP party has a recurring pattern of violations and has consistently refused to take the necessary steps to correct those violations.

C. Provisions follow concerning ACP approval time frames.

1. The board will take appropriate action on an ACP within the following time periods:

a. Within 30 working days of receipt of an ACP application, the board will inform the applicant in writing that either:

(1) The application is complete and accepted for filing, or

(2) The application is deficient, and identify the specific information required to make the application complete.

b. Within 30 working days of receipt of additional information provided in response to a determination that an ACP application is deficient, the board will inform the applicant in writing that either:

(1) The additional information is sufficient to make the application complete, and the application is accepted for filing, or

(2) The application is deficient, and identify the specific information required to make the application complete.

c. If the board finds that an application meets the requirements of subsection B of this section, then it shall issue an ACP agreement in accordance with the requirements of this article. The board will normally act to approve or disapprove a complete application within

90 working days after the application is deemed complete.

2. The board may extend the time period in subdivision 1 c of this subsection if additional information is needed.

D. Provisions follow concerning recordkeeping and availability of requested information.

1. All information specified in the ACP Agreement approving an ACP shall be maintained by the responsible ACP party for a minimum of three years after such records are generated. Such records shall be clearly legible and maintained in good condition during this period.

2. The records specified in subdivision 1 of this subsection shall be made available to the board or its authorized representative:

a. Immediately upon request, during an on-site visit to a responsible ACP party,

b. Within five working days after receipt of a written request from the board, or

c. Within a time period mutually agreed upon by both the board and the responsible ACP party.

E. Provisions follow concerning violations.

1. Failure to meet a requirement of this article or a condition of an applicable ACP agreement shall constitute a single, separate violation of this article for each day until such requirement or condition is satisfied, except as otherwise provided in subdivisions 2 through 8 of this subsection.

2. False reporting of information in an ACP application or in any supporting documentation or amendments thereto shall constitute a single, separate violation of the requirements of this article for each day that the approved ACP is in effect.

3. An exceedance during the applicable compliance period of the VOC content specified for an ACP product in the ACP agreement approving an ACP shall constitute a single, separate violation of the requirements of this article for each ACP product that exceeds the specified VOC content that is sold, supplied, offered for sale, or manufactured for use.

4. Any of the following actions shall each constitute a single, separate violation of the requirements of this article for each day after the applicable deadline until the requirement is satisfied:

a. Failure to report data or failure to report data accurately in writing to the board regarding the VOC content, LVP content, enforceable sales, or other information required by the deadline specified in the applicable ACP agreement;

b. False reporting of information submitted to the board for determining compliance with the ACP requirements;

c. Failure to completely implement the reconciliation of shortfalls plan that is set forth in the ACP agreement within 30 working days from the date of written notification of a shortfall by the board; or

d. Failure to completely reconcile the shortfall as specified in the ACP agreement within 90 working days from the date of written notification of a shortfall by the board.

5. False reporting or failure to report any of the information specified in subdivision F 2 i of this section or the sale or transfer of invalid surplus reductions shall constitute a single, separate violation of the requirements of this article for each day during the time period for which the surplus reductions are claimed to be valid.

6. Except as provided in subdivision 7 of this subsection, an exceedance of the ACP limit for a compliance period that the ACP is in effect shall constitute a single, separate violation of the requirements of this article for each day of the applicable compliance period. The board will determine whether an exceedance of the ACP limit has occurred as follows:

a. If the responsible ACP party has provided all required information for the applicable compliance period specified in the ACP agreement approving an ACP, then the board will determine whether an exceedance has occurred using the enforceable sales records and VOC content for each ACP product as reported by the responsible ACP party for the applicable compliance period.

b. If the responsible ACP party has failed to provide all the required information specified in the ACP agreement for an applicable compliance period, the board will determine whether an exceedance of the ACP limit has occurred as follows.

(1) For the missing data days, the board will calculate the total maximum historical emissions as specified in 9VAC5-45-420 C.

(2) For the remaining portion of the compliance period that are not missing data days, the board will calculate the emissions for each ACP product using the enforceable sales records and VOC content that were reported for that portion of the applicable compliance period.

(3) The ACP emissions for the entire compliance period shall be the sum of the total maximum historical emissions determined pursuant to subdivision 6 b (1) of this subsection, and the emissions determined pursuant to subdivision 6 b (2) of this subsection.

(4) The board will calculate the ACP limit for the entire compliance period using the ACP Standards applicable to each ACP product and the enforceable sales records specified in subdivision 6 b (2) of this subsection. The enforceable sales for each ACP product during missing data days, as specified in subdivision 6 b (1) of this subsection, shall be zero.

(5) An exceedance of the ACP limit has occurred when the ACP emissions, determined pursuant to subdivision 6 b (3) of this subsection, exceeds the ACP limit, determined pursuant to subdivision 6 b (4) of this subsection.

7. If a violation specified in subdivision 6 of this subsection occurs, the responsible ACP party may, pursuant to this subdivision, establish the number of violations as calculated according to the following equation:

$$NEV = \frac{(ACP\ emissions - ACP\ limit)}{40\ pounds}$$

where:

NEV = number of ACP limit violations.

ACP emissions = the ACP emissions for the compliance period.

ACP limit = the ACP limit for the compliance period.

40 pounds = number of pounds of emissions equivalent to one violation.

The responsible ACP party may determine the number of ACP limit violations pursuant to this subdivision only if it has provided all required information for the applicable compliance period, as specified in the ACP agreement approving the ACP. By choosing this option, the responsible ACP party waives all legal objections to the calculation of the ACP limit violations pursuant to this subdivision.

8. A cause of action against a responsible ACP party under this section shall be deemed to accrue on the date when the records establishing a violation are received by the board.

9. The responsible ACP party is fully liable for compliance with the requirements of this article, even if the responsible ACP party contracts with or otherwise relies on another person to carry out some or all of the requirements of this article.

F. Provisions follow concerning surplus reductions and surplus trading.

1. The board will issue surplus reduction certificates that establish and quantify, to the nearest pound of VOC reduced, the surplus reductions achieved by a responsible ACP party operating under an ACP. The surplus reductions can be bought from, sold to, or transferred to a responsible ACP party operating under an ACP, as provided in subdivision 2 of this subsection. All surplus reductions shall be calculated by the board at the end of each compliance period within the time specified in the approved ACP. Surplus reduction certificates shall not constitute instruments, securities, or another form of property.

2. The issuance, use, and trading of all surplus reductions shall be subject to the following provisions:

a. For the purposes of this article, VOC reductions from sources of VOCs other than consumer products subject to the VOC standards specified in 9VAC5-45-430 A may not be used to generate surplus reductions.

b. Surplus reductions are valid only when generated by a responsible ACP party and only while that responsible ACP party is operating under an approved ACP.

c. Surplus reductions are valid only after the board has issued an ACP agreement pursuant to subdivision 1 of this subsection.

d. Surplus reductions issued by the board may be used by the responsible ACP party who generated the surplus until the reductions expire, are traded, or until the ACP is canceled pursuant to subdivision J 2 of this section.

e. Surplus reductions cannot be applied retroactively to a compliance period prior to the compliance period in which the reductions were generated.

f. Except as provided in subdivision 2 g (2) of this subsection, only small or one-product businesses selling products under an approved ACP may purchase surplus reductions. An increase in the size of a small business or one-product business shall have no effect on surplus reductions purchased by that business prior to the date of the increase.

g. While valid, surplus reductions can be used only for the following purposes:

(1) To adjust the ACP emissions of either the responsible ACP party who generated the reductions or the responsible ACP party to which the reductions were traded, provided the surplus reductions are not to be used by a responsible ACP party to further lower its ACP emissions when its ACP emissions are equal to or less than the ACP limit during the applicable compliance period; or

(2) To be traded for the purpose of reconciling another responsible ACP party's shortfalls, provided such reconciliation is part of the reconciliation of shortfalls plan approved by the board pursuant to subdivision B 1 g (10) of this section.

h. A valid surplus reduction shall be in effect starting five days after the date of issuance by the board for a continuous period equal to the number of days in the compliance period during which the surplus reduction was generated. The surplus reduction shall then expire at the end of its effective period.

i. At least five working days prior to the effective date of transfer of surplus reductions, both the responsible ACP party that is selling surplus reductions and the responsible ACP party that is buying the surplus reductions shall, either together or separately, notify the board in writing of the transfer. The notification shall include all of the following:

(1) The date the transfer is to become effective.

(2) The date the surplus reductions being traded are due to expire.

(3) The amount (in pounds of VOCs) of surplus reductions that is being transferred.

(4) The total purchase price paid by the buyer for the surplus reductions.

(5) The contact persons, names of the companies, street and mail addresses, and phone numbers of the responsible ACP parties involved in the trading of the surplus reductions.

(6) A copy of the board-issued surplus reductions certificate, signed by both the seller and buyer of the certificate, showing transfer of all or a specified portion of the surplus reductions. The copy shall show the amount of any remaining nontraded surplus reductions, if applicable, and shall show their expiration date. The copy shall indicate that both the buyer and seller of the surplus reductions fully understand the conditions and limitations placed upon the transfer of the surplus reductions and accept full responsibility for the appropriate use of such surplus reductions as provided in this section.

j. Surplus reduction credits shall only be traded between ACP products.

3. Provisions follow concerning limited-use surplus reduction credits for early reformulations of ACP products.

a. For the purposes of this subdivision, "early reformulation" means an ACP product that is reformulated to result in a reduction in the product's VOC content, and that is sold, supplied, or offered for sale for the first time during the one-year (365 day) period immediately prior to the date on which the application for a proposed ACP is submitted to the board. Early reformulation does not include reformulated ACP products that are sold, supplied, or offered for sale more than one year prior to the date on which the ACP application is submitted to the board.

b. If requested in the application for a proposed ACP, the board will, upon approval of the ACP, issue surplus reduction credits for early reformulation of ACP products, provided that all of the following documentation has been provided by the responsible ACP party to the satisfaction of the board:

(1) Accurate documentation showing that the early reformulation reduced the VOC content of the ACP product to a level that is below the pre-ACP VOC content of the product or below the applicable VOC standard specified in 9VAC 5-45-430 A, whichever is the lesser of the two;

(2) Accurate documentation demonstrating that the early reformulated ACP product was sold in retail outlets within the time period specified in subdivision 3 a of this subsection;

(3) Accurate sales records for the early reformulated ACP product that meet the definition of enforceable sales records and that demonstrate that the enforceable sales for the ACP product are at least 75% of the gross sales for the product, as specified in subdivision B 1 d of this section; and

(4) Accurate documentation for the early reformulated ACP product that meets the requirements specified in subdivisions B 1 c and d and B 1 g (7) and (8) of this section and that identifies the specific test methods for verifying the claimed early reformulation and the statistical accuracy and precision of the test methods as specified in subdivision B 1 g (4) of this section.

c. Surplus reduction credits issued pursuant to this subsection shall be calculated separately for each early reformulated ACP product by the board according to the following equation:

$$SR = Enforceable\ Sales \times \frac{((VOC\ Content)_{initial} - (VOC\ Content)_{final})}{100}$$

where:

SR = surplus reductions for the ACP product, expressed to the nearest pound.

Enforceable sales = the enforceable sales for the early reformulated ACP product, expressed to the nearest pound of ACP product.

$VOC\ content_{initial}$ = the pre-ACP VOC content of the ACP product, or the applicable VOC standard specified in 9VAC5-45-430 A, whichever is the lesser of the two, expressed to the nearest 0.1 pounds of VOC per 100 pounds of ACP product.

$VOC\ content_{final}$ = the VOC content of the early reformulated ACP product after the early reformulation is achieved, expressed to the nearest 0.1 pounds of VOC per 100 pounds of ACP product.

d. The use of limited use surplus reduction credits issued pursuant to this subdivision shall be subject to all of the following provisions:

(1) Limited use surplus reduction credits shall be used solely to reconcile the responsible ACP party's shortfalls, if any, generated during the first compliance period occurring immediately after the issuance of the ACP agreement approving an ACP, and may not be used for another purpose;

(2) Limited use surplus reduction credits may not be transferred to, or used by, another responsible ACP party; and

(3) Except as provided in this subdivision, limited use surplus reduction credits shall be subject to all requirements applicable to surplus reductions and surplus trading as specified in subdivisions 1 and 2 of this subsection.

G. Provisions follow concerning the reconciliation of shortfalls.

1. At the end of each compliance period, the responsible ACP party shall make an initial calculation of shortfalls occurring in that compliance period as specified in the ACP agreement approving the ACP. Upon receipt of this information, the board will determine the amount of a shortfall that has occurred during the compliance period and shall notify the responsible ACP party of this determination.

2. The responsible ACP party shall implement the reconciliation of shortfalls plan as specified in the ACP agreement approving the ACP within 30 working days from the date of written notification of a shortfall by the board.

3. All shortfalls shall be completely reconciled within 90 working days from the date of written notification of a shortfall by the board by implementing the reconciliation of shortfalls plan specified in the ACP agreement approving the ACP.

4. All requirements specified in the ACP agreement approving an ACP, including all applicable ACP limits, shall remain in effect while shortfalls are in the process of being reconciled.

H. Provisions follow concerning the notification of modifications to an ACP by the responsible ACP party.

1. Board pre-approval is not required for modifications that are a change to an ACP product's: (i) product name, (ii) product formulation, (iii) product form, (iv) product function, (v) applicable product category, (vi) VOC content, (vii) LVP content, (viii) date-codes, or (ix) recommended product usage directions. The responsible ACP party shall notify the board of such changes, in writing, no later than 15 working days from the date such a change occurs. For each modification, the notification shall fully explain the following:

a. The nature of the modification;

b. The extent to which the ACP product formulation, VOC content, LVP content, or recommended usage directions will be changed;

c. The extent to which the ACP emissions and ACP limit specified in the ACP agreement will be changed for the applicable compliance period; and

d. The effective date and corresponding date-codes for the modification.

2. The responsible ACP party may propose modifications to the enforceable sales records or the reconciliation of shortfalls plan specified in the ACP agreement approving the ACP, however, such modifications require board pre-approval. Any such proposed modifications shall be fully described in writing and forwarded to the board. The responsible ACP party shall clearly demonstrate that the proposed modifications will meet the requirements of this article. The board will act on the proposed modifications using the procedure set forth in subsection C of this section. The responsible ACP party shall meet all applicable requirements of the existing ACP until such time as a proposed modification is approved in writing by the board.

3. Except as otherwise provided in subdivisions 1 and 2 of this subsection, the responsible ACP party shall notify the board, in writing, of information known by the responsible ACP party that may alter the information submitted pursuant to the requirements of subsection B of this section. The responsible ACP party shall provide such notification to the board no later than 15 working days from the date such information is known to the responsible ACP party.

I. Provisions follow concerning the modification of an ACP by the board.

1. If the board determines that: (i) the enforceable sales for an ACP product are no longer at least 75% of the gross sales for that product, (ii) the information submitted pursuant to the approval process set forth in subsection C of this section is no longer valid, or (iii) the ACP emissions are exceeding the ACP limit specified in the ACP agreement approving an ACP, then the board will modify the ACP as necessary to ensure that the ACP meets all requirements of this article and that the ACP emissions will not exceed the ACP limit.

2. If any applicable VOC standards specified in 9VAC5-45-430 A are modified by the board in a future rulemaking, the board will modify the ACP limit specified in the ACP

agreement approving an ACP to reflect the modified ACP VOC standards as of their effective dates.

J. Provisions follow concerning the cancellation of an ACP.

1. An ACP shall remain in effect until:

a. The ACP reaches the expiration date specified in the ACP agreement;

b. The ACP is modified by the responsible ACP party and approved by the board as provided in subsection H of this section;

c. The ACP is modified by the board as provided in subsection I of this section;

d. The ACP includes a product for which the VOC standard specified in 9VAC5-45-430 A is modified by the board in a future rule-making, and the responsible ACP party informs the board in writing that the ACP will terminate on the effective date of the modified standard; or

e. The ACP is cancelled pursuant to subdivision 2 of this subsection.

2. The board will cancel an ACP if any of the following circumstances occur:

a. The responsible ACP party demonstrates to the satisfaction of the board that the continuation of the ACP will result in an extraordinary economic hardship.

b. The responsible ACP party violates the requirements of the approved ACP, and the violation results in a shortfall that is 20% or more of the applicable ACP limit (i.e., the ACP emissions exceed the ACP limit by 20% or more).

c. The responsible ACP party fails to meet the requirements of subsection G of this section within the time periods specified in that subsection.

d. The responsible ACP party has demonstrated a recurring pattern of violations and has consistently failed to take the necessary steps to correct those violations.

3. Cancellations of ACPs are considered case decisions and will be processed using the procedures prescribed in 9VAC5-170-40 A 2 and applicable provisions of Article 3 (§ 2.2-4018 et seq.) of the Administrative Process Act.

4. The responsible ACP party for an ACP that is canceled pursuant to this section and who does not have a valid ACP to immediately replace the canceled ACP shall meet all of the following requirements:

a. All remaining shortfalls in effect at the time of ACP cancellation shall be reconciled in accordance with the requirements of subsection G of this section, and

b. All ACP products subject to the ACP shall be in compliance with the applicable VOC standards in 9VAC5-45-430 A immediately upon the effective date of ACP cancellation.

5. Violations incurred pursuant to subsection E of this section shall not be cancelled or affected by the subsequent cancellation or modification of an ACP pursuant to subsection H, I, or J of this section.

K. The information required by subdivisions B 1 a and b and F 2 i of this section is public information that may not be claimed as confidential. Other information submitted to the board to meet the requirements of this section shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

L. A responsible ACP party may transfer an ACP to another responsible ACP party, provided that all of the following conditions are met:

1. The board will be notified, in writing, by both responsible ACP parties participating in the transfer of the ACP and its associated ACP agreement. The written notifications shall be postmarked at least five working days prior to the effective date of the transfer and shall be signed and submitted separately by both responsible parties. The written notifications shall clearly identify the contact persons, business names, mail and street addresses, and phone numbers of the responsible parties involved in the transfer.

2. The responsible ACP party to which the ACP is being transferred shall provide a written declaration stating that the transferee shall fully comply with all requirements of the ACP agreement approving the ACP and this article.

M. In approving agreements under subsections B through L of this section, the board will take into consideration whether the applicant has been granted an ACP by CARB. A manufacturer of consumer products that has been granted an ACP agreement by the CARB under the provisions in Subchapter 8.5, Article 4, Sections 94540-94555, of Title 17 of the California Code of Regulations (see 9VAC5-20-21) may be exempt from Table 45-4A for the period of time that the CARB ACP agreement remains in effect provided that all ACP products used for emission credits within the CARB ACP agreement are contained in Table 45-4A. A manufacturer claiming such an ACP agreement on this basis must submit to the board a copy of the CARB ACP decision (i.e., the executive order), including all conditions established by CARB applicable to the exemption and certification that the manufacturer will comply with the CARB ACP decision

for those ACP products in the areas specified in 9VAC5-45-400 B.

9VAC5-45-450. Innovative products.

A. Manufacturers of consumer products may seek an innovative products exemption in accordance with the following criteria:

1. The board will exempt a consumer product from the VOC limits specified in 9VAC5-45-430 A if a manufacturer demonstrates by clear and convincing evidence that, due to some characteristic of the product formulation, design, delivery systems or other factors, the use of the product will result in less VOC emissions as compared to:

a. The VOC emissions from a representative consumer product that complies with the VOC limits specified in 9VAC5-45-430 A, or

b. The calculated VOC emissions from a noncomplying representative product, if the product had been reformulated to comply with the VOC limits specified in 9VAC5-45-430 A. VOC emissions shall be calculated using the following equation:

$$E_R = \frac{E_{NC} \times VOC_{STD}}{VOC_{NC}}$$

where:

E_R = The VOC emissions from the noncomplying representative product, had it been reformulated.

E_{NC} = The VOC emissions from the noncomplying representative product in its current formulation.

VOC_{STD} = the VOC limit specified in Table 45-4A.

VOC_{NC} = the VOC content of the noncomplying product in its current formulation.

If a manufacturer demonstrates that this equation yields inaccurate results due to some characteristic of the product formulation or other factors, an alternative method which accurately calculates emissions may be used upon approval of the board.

2. For the purposes of this subsection, "representative consumer product" means a consumer product that meets all of the following criteria:

a. The representative product shall be subject to the same VOC limit in 9VAC5-45-430 A as the innovative product;

b. The representative product shall be of the same product form as the innovative product unless the innovative product uses a new form that does not exist in the product category at the time the application is made; and

c. The representative product shall have at least a similar efficacy as other consumer products in the same product category based on tests generally accepted for that product category by the consumer products industry.

3. A manufacturer shall apply in writing to the board for an exemption claimed under subdivision A 1 of this section. The application shall include the supporting documentation that demonstrates the emissions from the innovative product, including the actual physical test methods used to generate the data and, if necessary, the consumer testing undertaken to document product usage. In addition, the applicant must provide the information necessary to enable the board to establish enforceable conditions for granting the exemption, including the VOC content for the innovative product and test methods for determining the VOC content. Information submitted to the board pursuant to this section shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

4. Within 30 days of receipt of the exemption application, the board will determine whether an application is complete.

5. Within 90 days after an application has been deemed complete, the board will determine whether, under what conditions, and to what extent an exemption from the requirements of 9VAC5-45-430 A will be permitted. The board may extend this time period if additional time is needed to reach a decision, and additional supporting documentation may be submitted by the applicant before a decision has been reached. The board will notify the applicant of the decision in writing and specify such terms and conditions as are necessary to insure that emissions from the product will meet the emissions reductions specified in subdivision 1 of this subsection, and that such emissions reductions can be enforced.

6. In granting an exemption for a product, the board will establish enforceable conditions. These conditions shall include the VOC content of the innovative product, dispensing rates, application rates, and other parameters determined by the board to be necessary. The board will also specify the test methods for determining conformance to the conditions established. The test methods shall include criteria for reproducibility, accuracy, sampling, and laboratory procedures.

7. For a product for which an exemption has been granted pursuant to this section, the manufacturer shall notify the board in writing within 30 days of a change in the product formulation or recommended product usage directions and shall also notify the board within 30 days if the

manufacturer learns of information that would alter the emissions estimates submitted to the board in support of the exemption application.

8. If the VOC limits specified in 9VAC5-45-430 A are lowered for a product category through a subsequent rulemaking, all innovative product exemptions granted for products in the product category, except as provided in this subdivision, shall have no force and effect as of the effective date of the modified VOC standard. This subdivision shall not apply to those innovative products that have VOC emissions less than the applicable lowered VOC limit and for which a written notification of the product's emissions status versus the lowered VOC limit has been submitted to and approved by the board at least 60 days before the effective date of such limits.

9. If the board believes that a consumer product for which an exemption has been granted no longer meets the criteria for an innovative product specified in subdivision 1 of this subsection, the board may modify or revoke the exemption as necessary to assure that the product will meet these criteria.

B. In granting an exemption under this section, the board will take into consideration whether the applicant has been granted an innovative product exemption by CARB. A manufacturer of consumer products that has been granted an innovative product exemption by the CARB under the innovative products provisions in Subchapter 8.5, Article 2, Section 94511, or Subchapter 8.5, Article 1, Section 94503.5 of Title 17 of the California Code of Regulations (see 9VAC5-20-21) may be exempt from Table 45-4A for the period of time that the CARB innovative products exemption remains in effect provided that all consumer products within the CARB innovative products exemption are contained in Table 45-4A. A manufacturer claiming such an exemption on this basis must submit to the board a copy of the innovative product exemption decision (i.e., the executive order), including all conditions established by CARB applicable to the exemption and certification that the manufacturer will comply with the CARB innovative product exemption decision for those products in the areas specified in 9VAC5-45-400 B.

9VAC5-45-460. Administrative requirements.

A. Provisions follow concerning product dating.

1. Each manufacturer of a consumer product subject to 9VAC5-45-430 shall clearly display on each consumer product container or package, the day, month, and year on which the product was manufactured or a code indicating such date.

2. A manufacturer who uses the following code to indicate the date of manufacture shall not be subject to the requirements of subdivision B 1 of this section, if the code is represented separately from other codes on the product container so that it is easily recognizable:

YY DDD = year year day day day

where:

YY = two digits representing the year in which the product was manufactured, and

DDD = three digits representing the day of the year on which the product was manufactured, with 001 representing the first day of the year, 002 representing the second day of the year, and so forth (i.e., the Julian date).

3. The date or date code shall be located on the container or inside the cover or cap so that it is readily observable or obtainable (by simply removing the cap or cover) without irreversibly disassembling a part of the container or packaging. For the purposes of this subdivision, information may be displayed on the bottom of a container as long as it is clearly legible without removing any product packaging.

4. This date or date code shall be displayed on each consumer product container or package no later than the effective date of the applicable standard specified in 9VAC5-45-430 A.

5. The requirements of this section shall not apply to products containing no VOCs or containing VOCs at 0.10% by weight or less.

B. Additional provisions follow concerning product dating.

1. If a manufacturer uses a code indicating the date of manufacture for a consumer product subject to 9VAC5-45-430, an explanation of the date portion of the code must be filed with the board upon request by the board.

2. If a manufacturer changes any code indicating the date of manufacture for any consumer product subject to 9VAC5-45-430 and the board has requested an explanation of any previous product dating code for that consumer product, then an explanation of the modified code shall be submitted to the board before any products displaying the modified code are sold, supplied, or offered for sale within the areas designated in 9VAC5-45-400 B.

3. No person shall erase, alter, deface, or otherwise remove or make illegible any date or code indicating the date of manufacture from any regulated product container without the express authorization of the manufacturer.

4. Date code explanations for codes indicating the date of manufacture are public information and may not be claimed as confidential.

C. Additional provisions follow concerning the most restrictive limit that applies to a product.

1. For FIFRA-registered insecticides manufactured before May 1, 2011, notwithstanding the definition of "product category" in 9VAC5-45-420 C, if anywhere on the principal display panel, a representation is made that the product may be used as or is suitable for use as a consumer product for which a lower VOC limit is specified in 9VAC5-45-430 A, then the lowest VOC limit shall apply. This requirement does not apply to general purpose cleaners, antiperspirant or deodorant products, and insecticide foggers.

2. For consumer products manufactured on or after May 1, 2010, and FIFRA-registered insecticides manufactured on or after May 1, 2011, notwithstanding the definition of "product category" in 9VAC5-45-420 C, if anywhere on the container or packaging, or on any sticker or label affixed thereto, any representation is made that the product may be used as, or is suitable for use as a consumer product for which a lower VOC limit is specified in 9VAC5-45-430 A, then the lowest VOC limit shall apply. This requirement does not apply to general purpose cleaners, antiperspirant or deodorant products, and insecticide foggers.

D. Provisions follow concerning additional labeling requirements for aerosol adhesives, adhesive removers, electronic cleaner, electrical cleaner, energized electrical cleaner, and contact adhesives.

1. In addition to the requirements specified in subsections A and C of this section and in 9VAC5-45-510, both the manufacturer and responsible party for each aerosol adhesive, adhesive remover, electronic cleaner, electrical cleaner, energized electrical cleaner, and contact adhesive product subject to this article shall ensure that all products clearly display the following information on each product container that is manufactured on or after the effective date for the product category specified in Table 45-4A.

a. The product category as specified in 9VAC5-45-430 A or an abbreviation of the category shall be displayed;

b. (1) The applicable VOC standard for the product that is specified in 9VAC5-45-430 A, except for energized electrical cleaner, expressed as a percentage by weight, shall be displayed unless the product is included in an alternative control plan approved by the board, as provided in 9VAC5-45-440, and the product exceeds the applicable VOC standard;

(2) If the product is included in an alternative control plan approved by the board, and the product exceeds the applicable VOC standard specified in 9VAC5-45-430 A, the product shall be labeled with the term "ACP" or "ACP product";

c. If the product is classified as a special purpose spray adhesive, the applicable substrate or application or an abbreviation of the substrate or application that qualifies the product as special purpose shall be displayed;

d. If the manufacturer or responsible party uses an abbreviation as allowed by this subsection, an explanation of the abbreviation must be filed with the board before the abbreviation is used.

2. The information required in subdivision 1 of this subsection shall be displayed on the product container such that it is readily observable without removing or disassembling a portion of the product container or packaging. For the purposes of this subsection, information may be displayed on the bottom of a container as long as it is clearly legible without removing product packaging.

3. No person shall remove, alter, conceal, or deface the information required in subdivision 1 of this subsection prior to final sale of the product.

9VAC5-45-470. Compliance.

The provisions of 9VAC5-45-20 (Compliance) apply.

9VAC5-45-480. Compliance schedules.

Affected owners or other persons shall comply with the provisions of this article as expeditiously as possible but in no case later than May 1, 2010.

9VAC5-45-490. Test methods and procedures.

A. The provisions of 9VAC5-45-30 (Emission testing) apply.

B. 1. Testing to determine compliance with the requirements of this article shall be performed using CARB Method 310 (see 9VAC5-20-21). Alternative methods that can accurately determine the concentration of VOCs in a subject product or its emissions may be used consistent with the approval requirements of 9VAC5-45-30 A.

2. In sections 3.5, 3.6, and 3.7 of CARB Method 310 (see 9VAC5-20-21), a process is specified for the "Initial Determination of VOC Content" and the "Final Determination of VOC Content." Information submitted to the board to meet the requirements of this section shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

C. For VOC content determinations using product formulation and records, testing to determine compliance with the requirements of this article may also be demonstrated through calculation of the VOC content from records of the amounts of constituents used to make the product pursuant to the following criteria:

1. Compliance determinations based on these records may not be used unless the manufacturer of a consumer product keeps accurate records for each day of production of the amount and chemical composition of the individual product constituents. These records must be kept for at least three years.

2. For the purposes of this subsection, the VOC content shall be calculated according to the following equation:

$$VOC\ Content = \frac{((B - C) \times 100)}{A}$$

where:

A = total net weight of unit (excluding container and packaging).

B = total weight of all VOCs per unit.

C = total weight of all exempted VOCs per unit, as specified in 9VAC5-45-410.

3. If product records appear to demonstrate compliance with the VOC limits, but these records are contradicted by product testing performed using CARB Method 310 (see 9VAC5-20-21), the results of CARB Method 310 shall take precedence over the product records and may be used to establish a violation of the requirements of this article.

D. Testing to determine whether a product is a liquid or solid shall be performed using ASTM "Standard Test Method for Determining Whether a Material is a Liquid or a Solid" (see 9VAC5-20-21).

E. Testing to determine compliance with the certification requirements for charcoal lighter material shall be performed using the procedures specified in the South Coast Air Quality Management District Rule 1174 Ignition Method Compliance Certification Protocol (see 9VAC5-20-21).

F. Testing to determine distillation points of petroleum distillate-based charcoal lighter materials shall be performed using ASTM "Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure" (see 9VAC5-20-21).

G. No person shall create, alter, falsify, or otherwise modify records in such a way that the records do not accurately reflect the constituents used to manufacture a product, the chemical composition of the individual product, and other tests, processes, or records used in connection with product manufacture.

9VAC5-45-500. Monitoring.

The provisions of 9VAC5-45-40 (Monitoring) apply.

9VAC5-45-510. Notification, records and reporting.

A. The provisions of 9VAC5-45-50 (Notification, records and reporting) apply.

B. Upon 90 days written notice, the board may require a responsible party to register and report information for a consumer product the board may specify, including, but not limited to, all or part of the information specified in subdivisions 1 through 12 of this subsection. If the responsible party does not have or does not provide the information requested by the board, the board may require the reporting of this information by another owner or other person that has the information, including, but not limited to, any formulator, manufacturer, supplier, parent company, private labeler, distributor, or repackager.

1. The company name of the responsible party and the party's address, telephone number, and designated contact person.

2. A showing satisfactory to the board under 9VAC5-170-60 B and C that supports any claim of confidentiality made pursuant to 9VAC5-170-60, §§ 10.1-1314 and 10.1-1314.1 of the Virginia Air Pollution Control Law, and other applicable state confidentiality requirements.

3. The product brand name for each consumer product subject to registration and, upon request by the board, the product label.

4. The product category to which the consumer product belongs.

5. The applicable product forms listed separately.

6. An identification of each product brand name and form as a "Household Product," "I&I Product," or both.

7. Separate sales in pounds per year, to the nearest pound, and the method used to calculate sales for each product form.

8. For registrations submitted by two companies, an identification of the company that is submitting relevant data separate from that submitted by the responsible party. All registration information from both companies shall be submitted by the date specified in this subsection.

9. For each product brand name and form, the net percent by weight of the total product, less container and packaging, composed of the following, rounded to the nearest one-tenth of a percent (0.1%):

a. Total exempt compounds;

b. Total LVP-VOCs that are not fragrances;

c. Total all other carbon-containing compounds that are not fragrances;

d. Total all noncarbon-containing compounds;

e. Total fragrance;

f. For products containing greater than 2.0% by weight fragrance:

(1) The percent of fragrances that are LVP-VOCs; and

(2) The percent of fragrances that are all other carbon-containing compounds; and

g. Total paradichlorobenzene.

10. For each product brand name and form, the identity, including the specific chemical name and associated Chemical Abstract Services (CAS) number, of the following:

a. Each exempt compound; and

b. Each LVP-VOC that is not a fragrance.

11. If applicable, the weight percent composed of propellant for each product.

12. If applicable, an identification of the type of propellant.

C. In addition to the requirements of subdivision B 10 of this section, the responsible party shall report to the board the net percentage by weight of each ozone-depleting compound that is:

1. Listed in 9VAC5-45-430 H; and

2. Contained in a product subject to registration under subsection B of this section in an amount greater than 1.0% by weight.

D. Information submitted by responsible parties pursuant to this section shall be available to the public except where the owner makes a showing satisfactory to the board under 9VAC5-170-60 B that the information meets the criteria in 9VAC5-170-60 C, in which case the information shall be handled in accordance with the procedures specified in §§ 10.1-1314 and 10.1-1314.1 of the Air Pollution Control Law of Virginia.

E. Provisions follow concerning special recordkeeping and reporting requirements for consumer products that contain perchloroethylene or methylene chloride.

1. The requirements of this subsection shall apply to all responsible parties for consumer products that are subject to 9VAC5-45-430 A and contain perchloroethylene or methylene chloride. For the purposes of this subsection, a product contains perchloroethylene or methylene chloride if the product contains 1.0% or more by weight (exclusive of the container or packaging) of either perchloroethylene or methylene chloride.

2. For each consumer product that contains perchloroethylene or methylene chloride, the responsible party shall keep records of the following information for products sold during each calendar year, beginning with the year of the applicable compliance date specified in 9VAC5-45-480, and ending with the year 2010:

a. The product brand name and a copy of the product label with legible usage instructions;

b. The product category to which the consumer product belongs;

c. The applicable product form, listed separately;

d. For each product form listed in subdivision 2 c of this subsection, the total sales during the calendar year, to the nearest pound (exclusive of the container or packaging), and the method used for calculating sales;

e. The weight percentage, to the nearest 0.10% of perchloroethylene and methylene chloride in the consumer product;

3. Upon 90 days written notice, the board may require a responsible party to report the information specified in subdivision 2 of this subsection.

4. Records required by subdivision 2 of this subsection shall be maintained by the responsible party for five calendar years from the date such records were created.

5. Alternative control plan notifications, records, and reporting shall be made as required by 9VAC5-45-440 and as required in the ACP agreement.

6. Innovative product notifications, records, and reporting shall be made as required by 9VAC5-45-450 and as required in the innovative products exemption notification letter.

Article 5
Emission Standards for Architectural and Industrial Maintenance Coatings

9VAC5-45-520. Applicability.

A. Except as provided in 9VAC5-45-530, the provisions of this article apply to any owner or other person who supplies, sells, offers for sale, or manufactures any architectural coating for use, as well as any owner or other person who applies or solicits the application of any architectural coating.

B. The provisions of this article apply only to owners and other persons in the Northern Virginia, Fredericksburg, and Richmond Volatile Organic Compound Emissions Control Areas designated in 9VAC5-20-206.

9VAC5-45-530. Exemptions.

A. The provisions of this article do not apply to:

1. Any architectural coating that is sold or manufactured for use exclusively outside of the Northern Virginia, Fredericksburg and Richmond Volatile Organic Compound Emissions Control Areas or for shipment to other manufacturers for reformulation or repackaging.

2. Any aerosol coating product.

3. Any architectural coating that is sold in a container with a volume of one liter (1.057 quart) or less.

B. For purposes of this article, the terms "supply" or "supplied" do not include internal transactions within a business or governmental entity. These terms only apply to transactions between manufacturers/commercial distributors that sell, or otherwise provide, products to businesses/governmental entities/individuals.

9VAC5-45-540. Definitions.

A. For the purpose of applying this article in the context of the Regulations for the Control and Abatement of Air Pollution and related uses, the words or terms shall have the meanings given them in subsection C of this section.

B. As used in this article, all terms not defined herein shall have the meanings given them in 9VAC5-10 (General Definitions) unless otherwise required by context.

C. Terms defined.

"Adhesive" means any chemical substance that is applied for the purpose of bonding two surfaces together other than by mechanical means.

"Aerosol coating product" means a pressurized coating product containing pigments or resins that dispenses product ingredients by means of a propellant, and is packaged in a disposable can for hand-held application, or for use in specialized equipment for ground traffic/marking applications.

"Antenna coating" means a coating labeled and formulated exclusively for application to equipment and associated structural appurtenances that are used to receive or transmit electromagnetic signals.

"Antifouling coating" means a coating labeled and formulated for application to submerged stationary structures and their appurtenances to prevent or reduce the attachment of marine or freshwater biological organisms. To qualify as an antifouling coating, the coating shall be registered with both the U.S. EPA under the Federal Insecticide, Fungicide and Rodenticide Act (7 USC § 136 et seq.) and with the Pesticide Control Board under the provisions of Chapter 39 (§ 3.2-3900 et seq.) of Title 3.2 of the Code of Virginia.

"Appurtenance" means any accessory to a stationary structure coated at the site of installation, whether installed or detached, including but not limited to bathroom and kitchen fixtures; cabinets; concrete forms; doors; elevators; fences; hand railings; heating equipment, air conditioning equipment, and other fixed mechanical equipment or stationary tools; lampposts; partitions; pipes and piping systems; rain gutters and downspouts; stairways; fixed ladders; catwalks and fire escapes; and window screens.

"Architectural coating" means a coating to be applied to stationary structures or the appurtenances at the site of installation, to portable buildings at the site of installation, to pavements, or to curbs. Coatings applied in shop applications or to nonstationary structures such as airplanes, ships, boats, railcars, and automobiles, and adhesives are not considered architectural coatings for the purposes of this article.

"ASTM" means the American Society for Testing and Materials.

"Bitumens" means black or brown materials including, but not limited to, asphalt, tar, pitch, and asphaltite that are soluble in carbon disulfide, consist mainly of hydrocarbons, and are obtained from natural deposits of asphalt or as residues from the distillation of crude petroleum or coal.

"Bituminous roof coating" means a coating that incorporates bitumens that is labeled and formulated exclusively for roofing.

"Bituminous roof primer" means a primer that consists of a coating or mastic formulated and recommended for roofing, pavement sealing, or waterproofing that incorporates bitumens.

"Bond breaker" means a coating labeled and formulated for application between layers of concrete to prevent a freshly poured top layer of concrete from bonding to the layer over which it is poured.

"Calcimine recoater" means a flat solvent borne coating formulated and recommended specifically for recoating calcimine-painted ceilings and other calcimine-painted substrates.

"Clear brushing lacquers" means clear wood finishes, excluding clear lacquer sanding sealers, formulated with nitrocellulose or synthetic resins to dry by solvent evaporation without chemical reaction and to provide a solid, protective film, which are intended exclusively for application by brush and that are labeled as specified in subdivision 5 of 9VAC5-45-560.

"Clear wood coatings" means clear and semitransparent coatings, including lacquers and varnishes, applied to wood substrates to provide a transparent or translucent solid film.

"Coating" means a material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealers, and stains.

"Colorant" means a concentrated pigment dispersion in water, solvent, or binder that is added to an architectural coating after packaging in sale units to produce the desired color.

"Concrete curing compound" means a coating labeled and formulated for application to freshly poured concrete to retard the evaporation of water.

"Concrete surface retarder" means a mixture of retarding ingredients such as extender pigments, primary pigments, resin, and solvent that interact chemically with the cement to

prevent hardening on the surface where the retarder is applied, allowing the retarded mix of cement and sand at the surface to be washed away to create an exposed aggregate finish.

"Conversion varnish" means a clear acid curing coating with an alkyd or other resin blended with amino resins and supplied as a single component or two-component product. Conversion varnishes produce a hard, durable, clear finish designed for professional application to wood flooring. The film formation is the result of an acid-catalyzed condensation reaction, effecting a transetherification at the reactive ethers of the amino resins.

"Dry fog coating" means a coating labeled and formulated only for spray application such that overspray droplets dry before subsequent contact with incidental surfaces in the vicinity of the surface coating activity.

"Exempt compound" means a compound identified as exempt under the definition of Volatile Organic Compound (VOC) in 9VAC5-10-20. Exempt compounds content of a coating shall be determined by Reference Method 24 or South Coast Air Quality Management District (SCAQMD) Method for Determination of Exempt Compounds (see 9VAC5-20-21).

"Extreme durability coating" means an air-dried coating, including fluoropolymer-based coating, that is formulated and recommended for application to exterior metal surfaces and touch-up, repair, and overcoating of precoated metal surfaces, and that meets the weathering requirements of American Architectural Manufacturers Association Voluntary Specification - Performance Requirements and Test Procedures for High Performance Organic Coatings on Aluminum Extrusions and Panels (see 9VAC5-20-21).

"Faux finishing coating" means a coating labeled and formulated as a stain or a glaze to create artistic effects including, but not limited to, dirt, old age, smoke damage, and simulated marble and wood grain.

"Fire-resistive coating" means an opaque coating labeled and formulated to protect the structural integrity by increasing the fire endurance of interior or exterior steel and other structural materials, that has been fire tested and rated by a testing agency and approved by building code officials for use in bringing assemblies of structural materials into compliance with federal, state, and local building code requirements. The fire-resistive coating shall be tested in accordance with American Society for Testing and Materials (ASTM) Standard Test Method for Fire Tests of Building Construction Materials (see 9VAC5-20-21).

"Fire-retardant coating" means a coating labeled and formulated to retard ignition and flame spread, that has been fire tested and rated by a testing agency and approved by building code officials for use in bringing building and construction materials into compliance with federal, state, and local building code requirements. The fire-retardant coating shall be tested in accordance with ASTM Standard Test Method for Surface Burning Characteristics of Building Construction Materials (see 9VAC5-20-21).

"Flat coating" means a coating that is not defined under any other definition in this article and that registers gloss less than 15 on an 85-degree meter or less than five on a 60-degree meter according to ASTM Standard Test Method for Specular Gloss (see 9VAC5-20-21).

"Floor coating" means an opaque coating that is labeled and formulated for application to flooring, including, but not limited to, decks, porches, steps, and other horizontal surfaces, that may be subjected to foot traffic.

"Flow coating" means a coating labeled and formulated exclusively for use by electric power companies or their subcontractors to maintain the protective coating systems present on utility transformer units.

"Form-release compound" means a coating labeled and formulated for application to a concrete form to prevent the freshly poured concrete from bonding to the form. The form may consist of wood, metal, or some material other than concrete.

"Graphic arts coating or sign paint" means a coating labeled and formulated for hand-application by artists using brush or roller techniques to indoor and outdoor signs (excluding structural components) and murals including letter enamels, poster colors, copy blockers, and bulletin enamels.

"High-temperature coating" means a high-performance coating labeled and formulated for application to substrates exposed continuously or intermittently to temperatures above 204°C (400°F).

"Impacted immersion coating" means a high performance maintenance coating formulated and recommended for application to steel structures subject to immersion in turbulent, debris-laden water. These coatings are specifically resistant to high-energy impact damage caused by floating ice or debris.

"Industrial maintenance coating" means a high-performance architectural coating, including primers, sealers, undercoaters, intermediate coats, and topcoats, formulated for application to substrates exposed to one or more of the following extreme environmental conditions, and labeled as specified in subdivision 4 of 9VAC5-45-560:

1. Immersion in water, wastewater, or chemical solutions (aqueous and nonaqueous solutions), or chronic exposures of interior surfaces to moisture condensation;

2. Acute or chronic exposure to corrosive, caustic, or acidic agents, or to chemicals, chemical fumes, or chemical mixtures or solutions;

3. Repeated exposure to temperatures above 121°C (250°F);

4. Repeated (frequent) heavy abrasion, including mechanical wear and repeated (frequent) scrubbing with industrial solvents, cleansers, or scouring agents; or

5. Exterior exposure of metal structures and structural components.

"Lacquer" means a clear or opaque wood coating, including clear lacquer sanding sealers, formulated with cellulosic or synthetic resins to dry by evaporation without chemical reaction and to provide a solid, protective film.

"Low-solids coating" means a coating containing 0.12 kilogram or less of solids per liter (1 pound or less of solids per gallon) of coating material.

"Magnesite cement coating" means a coating labeled and formulated for application to magnesite cement decking to protect the magnesite cement substrate from erosion by water.

"Mastic texture coating" means a coating labeled and formulated to cover holes and minor cracks and to conceal surface irregularities, and is applied in a single coat of at least 10 mils (0.010 inch) dry film thickness.

"Metallic pigmented coating" means a coating containing at least 48 grams of elemental metallic pigment, mica particles or any combination of metallic pigment or mica particles per liter of coating as applied (0.4 pounds per gallon), when tested in accordance with South Coast Air Quality Air Management District (SCAQMD) Method for Determination of Weight Percent Elemental Metal in Coatings by X-Ray Diffraction (see 9VAC5-20-21).

"Multicolor coating" means a coating that is packaged in a single container and that exhibits more than one color when applied in a single coat.

"Nonflat coating" means a coating that is not defined under any other definition in this article and that registers a gloss of 15 or greater on an 85-degree meter and 5 or greater on a 60-degree meter according to ASTM Standard Test Method for Specular Gloss (see 9VAC5-20-21).

"Nonflat high-gloss coating" means a nonflat coating that registers a gloss of 70 or above on a 60-degree meter according to ASTM Standard Test Method for Specular Gloss (see 9VAC5-20-21).

"Nonindustrial use" means any use of architectural coatings except in the construction or maintenance of any of the following: facilities used in the manufacturing of goods and commodities; transportation infrastructure, including highways, bridges, airports and railroads; facilities used in mining activities, including petroleum extraction; and utilities infrastructure, including power generation and distribution, and water treatment and distribution systems.

"Nuclear coating" means a protective coating formulated and recommended to seal porous surfaces such as steel (or concrete) that otherwise would be subject to intrusions by radioactive materials. These coatings must be resistant to long-term (service life) cumulative radiation exposure as determined by ASTM Standard Test Method for Effects of Gamma Radiation on Coatings for Use in Light-Water Nuclear Power Plants (see 9VAC5-20-21), relatively easy to decontaminate, and resistant to various chemicals to which the coatings are likely to be exposed as determined by ASTM Standard Test Method for Chemical Resistance of Coatings Used in Light-Water Nuclear Power Plants (see 9VAC5-20-21).

"Post-consumer coating" means a finished coating that would have been disposed of in a landfill, having completed its usefulness to a consumer, and does not include manufacturing wastes.

"Pretreatment wash primer" means a primer that contains a minimum of 0.5% acid, by weight, when tested in accordance with ASTM Standard Test Method for Acidity in Volatile Solvents and Chemical Intermediates Used in Paint, Varnish, Lacquer and Related Products (see 9VAC5-20-21), that is labeled and formulated for application directly to bare metal surfaces to provide corrosion resistance and to promote adhesion of subsequent topcoats.

"Primer" means a coating labeled and formulated for application to a substrate to provide a firm bond between the substrate and subsequent coats.

"Quick-dry enamel" means a nonflat coating that is labeled as specified in subdivision 8 of 9VAC5-45-560 and that is formulated to have the following characteristics:

1. Is capable of being applied directly from the container under normal conditions with ambient temperatures between 16 and 27°C (60 and 80°F);

2. When tested in accordance with ASTM Standard Methods for Drying, Curing, or Film Formation of Organic Coatings at Room Temperature (see 9VAC5-20-21), sets to touch in two hours or less, is tack free in four hours or less, and dries hard in eight hours or less by the mechanical test method; and

3. Has a dried film gloss of 70 or above on a 60-degree meter.

"Quick-dry primer sealer and undercoater" means a primer, sealer, or undercoater that is dry to the touch in 30 minutes and can be recoated in two hours when tested in accordance with ASTM Standard Methods for Drying, Curing, or Film Formation of Organic Coatings at Room Temperature (see 9VAC5-20-21).

"Recycled coating" means an architectural coating formulated such that not less than 50% of the total weight consists of secondary and post-consumer coating, with not

less than 10% of the total weight consisting of post-consumer coating.

"Residence" means areas where people reside or lodge, including, but not limited to, single and multiple family dwellings, condominiums, mobile homes, apartment complexes, motels, and hotels.

"Roof coating" means a nonbituminous coating labeled and formulated exclusively for application to roofs for the primary purpose of preventing penetration of the substrate by water or reflecting heat and ultraviolet radiation. Metallic pigmented roof coatings, which qualify as metallic pigmented coatings, shall not be considered in this category, but shall be considered to be in the metallic pigmented coatings category.

"Rust-preventive coating" means a coating formulated exclusively for nonindustrial use to prevent the corrosion of metal surfaces and labeled as specified in subdivision 6 of 9VAC5-45-560.

"Sanding sealer" means a clear or semitransparent wood coating labeled and formulated for application to bare wood to seal the wood and to provide a coat that can be abraded to create a smooth surface for subsequent applications of coatings. A sanding sealer that also meets the definition of a lacquer is not included in this category, but it is included in the lacquer category.

"Sealer" means a coating labeled and formulated for application to a substrate for one or more of the following purposes: to prevent subsequent coatings from being absorbed by the substrate, or to prevent harm to subsequent coatings by materials in the substrate.

"Secondary coating (rework)" means a fragment of a finished coating or a finished coating from a manufacturing process that has converted resources into a commodity of real economic value, but does not include excess virgin resources of the manufacturing process.

"Shellac" means a clear or opaque coating formulated solely with the resinous secretions of the lac beetle (Laciffer lacca), thinned with alcohol, and formulated to dry by evaporation without a chemical reaction.

"Shop application" means the application of a coating to a product or a component of a product in or on the premises of a factory or a shop as part of a manufacturing, production, or repairing process (e.g., original equipment manufacturing coatings).

"Solicit" means to require for use or to specify by written or oral contract.

"Specialty primer, sealer, and undercoater" means a coating labeled as specified in subdivision 7 of 9VAC5-45-560 and that is formulated for application to a substrate to seal fire, smoke or water damage; to condition excessively chalky surfaces; or to block stains. An excessively chalky surface is one that is defined as having a chalk rating of four or less as determined by ASTM Standard Test Methods for Evaluating the Degree of Chalking of Exterior Paint Films (see 9VAC5-20-21).

"Stain" means a clear, semitransparent, or opaque coating labeled and formulated to change the color of a surface, but not conceal the grain pattern or texture.

"Swimming pool coating" means a coating labeled and formulated to coat the interior of swimming pools and to resist swimming pool chemicals.

"Swimming pool repair and maintenance coating" means a rubber-based coating labeled and formulated to be used over existing rubber-based coatings for the repair and maintenance of swimming pools.

"Temperature-indicator safety coating" means a coating labeled and formulated as a color-changing indicator coating for the purpose of monitoring the temperature and safety of the substrate, underlying piping, or underlying equipment, and for application to substrates exposed continuously or intermittently to temperatures above 204°C (400°F).

"Thermoplastic rubber coating and mastic" means a coating or mastic formulated and recommended for application to roofing or other structural surfaces and that incorporates no less than 40% by weight of thermoplastic rubbers in the total resin solids and may also contain other ingredients including, but not limited to, fillers, pigments, and modifying resins.

"Tint base" means an architectural coating to which colorant is added after packaging in sale units to produce a desired color.

"Traffic marking coating" means a coating labeled and formulated for marking and striping streets, highways, or other traffic surfaces including, but not limited to, curbs, berets, driveways, parking lots, sidewalks, and airport runways.

"Undercoater" means a coating labeled and formulated to provide a smooth surface for subsequent coatings.

"Varnish" means a clear or semitransparent wood coating, excluding lacquers and shellacs, formulated to dry by chemical reaction on exposure to air. Varnishes may contain small amounts of pigment to color a surface or control the fetal sheen or gloss of the finish.

"VOC content" means the weight of VOC per volume of coating, calculated according to the procedures specified in 9VAC5-45-590 B.

"Waterproofing concrete/masonry sealer" means a clear or pigmented film-forming coating that is labeled and formulated for sealing concrete and masonry to provide resistance against water, alkalis, acids, ultraviolet light, and staining.

"Waterproofing sealer" means a coating labeled and formulated for application to a porous substrate for the primary purpose of preventing the penetration of water.

"Wood preservative" means a coating labeled and formulated to protect exposed wood from decay or insect attack, that is registered with both the U.S. EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (7 USC § 136, et seq.) and with the Pesticide Control Board under the provisions of Chapter 39 (§3.2-3900 et seq.) of Title 3.2 of the Code of Virginia.

9VAC5-45-550. Standard for volatile organic compounds.

A. Except as provided in this section, no owner or other person shall (i) manufacture, blend, or repackage for sale, (ii) supply, sell, or offer for sale, or (iii) solicit for application or apply any architectural coating with a VOC content in excess of the corresponding limit specified in Table 45-5A.

B. If anywhere on the container of any architectural coating, or any label or sticker affixed to the container, or in any sales, advertising, or technical literature supplied by a manufacturer or any person acting on behalf of a manufacturer, any representation is made that indicates that the coating meets the definition of or is recommended for use for more than one of the coating categories listed in Table 45-5A, then the most restrictive VOC content limit shall apply. This provision does not apply to the following coating categories:

Lacquer coatings (including lacquer sanding sealers);

Metallic pigmented coatings;

Shellacs;

Fire-retardant coatings;

Pretreatment wash primers;

Industrial maintenance coatings;

Low-solids coatings;

Wood preservatives;

High-temperature coatings;

Temperature-indicator safety coatings;

Antenna coatings;

Antifouling coatings;

Flow coatings;

Bituminous roof primers;

Calcimine recoaters;

Impacted immersion coatings;

Nuclear coatings;

Thermoplastic rubber coating and mastic; and

Specialty primers, sealers, and undercoaters.

Table 45-5A
VOC Content Limits for Architectural Coatings

Limits are expressed in grams of VOC per liter[1] of coating thinned to the manufacturer's maximum recommendation, excluding the volume of any water, exempt compounds, or colorant added to tint bases. "Manufacturers maximum recommendation" means the maximum recommendation for thinning that is indicated on the label or lid of the coating container.

Coating Category	VOC Content Limit
Flat Coatings	100
Nonflat Coatings	150
Nonflat High Gloss Coatings	250
Specialty Coatings:	
Antenna Coatings	530
Antifouling Coatings	400
Bituminous Roof Coatings	300
Bituminous Roof Primers	350
Bond Breakers	350
Calcimine Recoater	475
Clear Wood Coatings:	
Clear Brushing Lacquers	680
Lacquers (including lacquer sanding sealers)	550
Sanding Sealers (other than lacquer sanding sealers)	350
Conversion Varnishes	725
Varnishes (other than conversion varnishes)	350
Concrete Curing Compounds	350
Concrete Surface Retarder	780
Dry Fog Coatings	400
Extreme durability coating	400
Faux Finishing Coatings	350
Fire-Resistive Coatings	350
Fire-Retardant Coatings:	
Clear	650

Opaque	350
Floor Coatings	250
Flow Coatings	420
Form-Release Compounds	250
Graphic Arts Coatings (Sign Paints)	500
High-Temperature Coatings	420
Impacted Immersion Coating	780
Industrial Maintenance Coatings	340
Low-Solids Coatings	120
Magnesite Cement Coatings	450
Mastic Texture Coatings	300
Metallic Pigmented Coatings	500
Multi-Color Coatings	250
Nuclear Coatings	450
Pretreatment Wash Primers	420
Primers, Sealers, and Undercoaters	200
Quick-Dry Enamels	250
Quick-Dry Primers, Sealers and Undercoaters	200
Recycled Coatings	250
Roof Coatings	250
Rust Preventative Coatings	400
Shellacs:	
Clear	730
Opaque	550
Specialty Primers, Sealers, and Undercoaters	350
Stains	250
Swimming Pool Coatings	340
Swimming Pool Repair and Maintenance Coatings	340
Temperature-Indicator Safety Coatings	550
Thermoplastic Rubber Coating and Mastic	550
Traffic Marking Coatings	150
Waterproofing Sealers	250
Waterproofing Concrete/Masonry Sealers	400
Wood Preservatives	350

[1] Conversion factor: one pound of VOC per gallon (U.S.) = 119.95 grams per liter.

C. A coating manufactured prior to the applicable compliance date specified in 9VAC5-45-580, may be sold, supplied, or offered for sale for two years following the applicable compliance date. In addition, a coating manufactured before the applicable compliance date specified in 9VAC5-45-580, may be applied at any time, both before and after the applicable compliance date, so long as the coating complied with the standards in effect at the time the coating was manufactured. This subsection does not apply to any coating that does not display the date or date code required by subdivision 1 of 9VAC5-45-560.

D. All architectural coating containers used to apply the contents therein to a surface directly from the container by pouring, siphoning, brushing, rolling, padding, ragging, or other means, shall be closed when not in use. These architectural coatings containers include, but are not limited to, drums, buckets, cans, pails, trays, or other application containers. Containers of any VOC-containing materials used for thinning and cleanup shall also be closed when not in use.

E. No owner or other person who applies or solicits the application of any architectural coating shall apply a coating that contains any thinning material that would cause the coating to exceed the applicable VOC limit specified in Table 45-5A.

F. No owner or other person shall apply or solicit the application of any rust preventive coating for industrial use unless such a rust preventive coating complies with the industrial maintenance coating VOC limit specified in Table 45-5A.

G. For any coating that does not meet any of the definitions for the specialty coatings categories listed in Table 45-5A, the VOC content limit shall be determined by classifying the coating as a flat coating or a nonflat coating, based on its gloss, as defined in 9VAC5-45-540 C, and the corresponding flat or nonflat coating limit shall apply.

H. Notwithstanding the provisions of subsection A of this section, up to 10% by volume of VOC may be added to a lacquer to avoid blushing of the finish during days with relative humidity greater than 70% and temperature below 65°F, at the time of application, provided that the coating contains acetone and no more than 550 grams of VOC per liter of coating, less water and exempt compounds, prior to the addition of VOC.

9VAC5-45-560. Administrative requirements.

Each manufacturer of any architectural coatings subject to this article shall display the information listed in subdivisions 1 through 8 of this section on the coating container (or label) in which the coating is sold or distributed.

1. The date the coating was manufactured, or a date code representing the date, shall be indicated on the label, lid, or bottom of the container. If the manufacturer uses a date code for any coating, the manufacturer shall file an explanation of each code with the board.

2. A statement of the manufacturer's recommendation regarding thinning of the coating shall be indicated on the label or lid of the container. This requirement does not apply to the thinning of architectural coatings with water. If thinning of the coating prior to use is not necessary, the recommendation shall specify that the coating is to be applied without thinning.

3. Each container of any coating subject to this article shall display either the maximum or the actual VOC content of the coating, as supplied, including the maximum thinning as recommended by the manufacturer. VOC content shall be displayed in grams of VOC per liter of coating. VOC content displayed shall be calculated using product formulation data, or shall be determined using the test methods in 9VAC5-45-590 C. The equations in 9VAC5-45-590 B shall be used to calculate VOC content.

4. In addition to the information specified in subdivisions 1, 2, and 3 of this section, each manufacturer of any industrial maintenance coating subject to this article shall display on the label or the lid of the container in which the coating is sold or distributed one or more of the descriptions listed in this subdivision.

a. "For industrial use only."

b. "For professional use only."

c. "Not for residential use" or "Not intended for residential use."

5. The labels of all clear brushing lacquers shall prominently display the statements "For brush application only," and "This product shall not be thinned or sprayed."

6. The labels of all rust preventive coatings shall prominently display the statement "For Metal Substrates Only."

7. The labels of all specialty primers, sealers, and undercoaters shall prominently display one or more of the descriptions listed in this subdivision.

a. For blocking stains.

b. For fire-damaged substrates.

c. For smoke-damaged substrates.

d. For water-damaged substrates.

e. For excessively chalky substrates.

8. The labels of all quick dry enamels shall prominently display the words "Quick Dry" and the dry hard time.

9. The labels of all nonflat high-gloss coatings shall prominently display the words "High Gloss."

9VAC5-45-570. Compliance.

The provisions of subsections B, D, F, and G of 9VAC5-45-20 (Compliance) apply. The other provisions of 9VAC5-45-20 do not apply.

9VAC5-45-580. Compliance schedules.

Affected persons shall comply with the provisions of this article as expeditiously as possible but in no case later than:

1. January 1, 2005, in the Northern Virginia VOC Emissions Control Area;

2. January 1, 2008, in the Fredericksburg VOC Emissions Control Area; or

3. May 1, 2010, in the Richmond VOC Emissions Control Area.

9VAC5-45-590. Test methods and procedures.

A. The provisions of subsection G of 9VAC5-45-30 (Emission testing) apply. The other provisions of 9VAC5-45-30 do not apply.

B. For the purpose of determining compliance with the VOC content limits in Table 45-5A, the VOC content of a coating shall be determined by using the procedures described in subdivision 1 or 2 of this subsection, as appropriate. The VOC content of a tint base shall be determined without colorant that is added after the tint base is manufactured.

1. With the exception of low solids coatings, determine the VOC content in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation, excluding the volume of any water and exempt compounds. Determine the VOC content using the following equation:

$$VOC\ \ Content\ \ = \frac{(W_s - W_w - W_{ec})}{(V_m - V_w - V_{ec})}$$

where:

VOC content = grams of VOC per liter of coating

W_s = weight of volatiles, in grams

W_w = weight of water, in grams

W_{ec} = weight of exempt compounds, in grams

V_m = volume of coating, in liters

V_w = volume of water, in liters

V_{ec} = volume of exempt compounds, in liters

2. For low solids coatings, determine the VOC content in units of grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation, including the volume of any water and exempt compounds. Determine the VOC content using the following equation:

$$VOC\ \ Content\ \ (ls) = \frac{(W_s - W_w - W_{ec})}{(V_m)}$$

where:

VOC Content (ls) = the VOC content of a low solids coating in grams per liter of coating

W_s = weight of volatiles, in grams

W_w = weight of water, in grams

W_{ec} = weight of exempt compounds, in grams

V_m = volume of coating, in liters

C. To determine the physical properties of a coating in order to perform the calculations in subsection B, the reference method for VOC content is Reference Method 24 (see 9VAC5-20-21). The exempt compounds content shall be determined by SCAQMD Method for Determination of Exempt Compounds (see 9VAC5-20-21). To determine the VOC content of a coating, the manufacturer may use Reference Method 24, formulation data, or any other reasonable means for predicting that the coating has been formulated as intended (e.g., quality assurance checks, recordkeeping). However, if there are any inconsistencies between the results of a Reference Method 24 test and any other means for determining VOC content, the Reference Method 24 results will govern. The board may require the manufacturer to conduct a Reference Method 24 analysis.

D. Exempt compounds that are cyclic, branched, or linear, completely methylated siloxanes shall be analyzed as exempt compounds by Bay Area Quality Management District (BAAQMD) Method for Determination of Volatile Methylsiloxanes in Solvent-Based Coatings, Inks, and Related Materials (see 9VAC5-20-21).

E. The exempt compound parachlorobenzotrifluoride shall be analyzed as an exempt compound by BAAQMD Method for Determination of Volatile Organic Compounds in Solvent-Based Coatings and Related Materials Containing Parachlorobenzotrifluoride (see 9VAC5-20-21).

F. The content of compounds exempt under Reference Method 24 shall be determined by SCAQMD Method for Determination of Exempt Compounds, Laboratory Methods of Analysis for Enforcement Samples (see 9VAC5-20-21).

G. The VOC content of a coating shall be determined by Reference Method 24 (see 9VAC5-20-21).

H. The VOC content of coatings may be determined by either Reference Method 24 or SCAQMD Method for Determination of Exempt Compounds, Laboratory Methods of Analysis for Enforcement Samples (see 9VAC5-20-21).

I. Other test methods may be used for purposes of determining compliance with this article consistent with the approval requirements of 9VAC5-45-20 A 2.

J. Analysis of methacrylate multicomponents used as traffic marking coatings shall be conducted according to a modification of Reference Method 24 (40 CFR 59, Subpart D, Appendix A; see 9VAC5-20-21). This method has not been approved for methacrylate multicomponent coatings used for other purposes than as traffic marking coatings or for other classes of multicomponent coatings.

9VAC5-45-600. Monitoring.

The provisions of 9VAC5-45-40 (Monitoring) do not apply.

9VAC5-45-610. Notification, records and reporting.

A. The provisions of subsections E, F, and H of 9VAC5-45-50 (Notification, records and reporting) apply. The other provisions of 9VAC5-45-50 do not apply.

B. For each architectural coating that contains perchloroethylene or methylene chloride, the manufacturer shall keep records of the following information for products sold during the preceding year:

1. The product brand name and a copy of the product label with the legible usage instructions;

2. The product category listed in Table 45-5A to which the coating belongs;

3. The total sales during the calendar year to the nearest gallon;

4. The volume percentage, to the nearest 0.10% of perchloroethylene and methylene chloride in the coating.

C. Upon 90 days written notice, the board may require a responsible party to report the information specified in subsection B of this section.

D. Records required by subsection B of this section shall be maintained by the responsible party for five calendar years from the date such records were created.

Article 6
Emission Standards for Adhesives and Sealants

9VAC5-45-620. Applicability.

A. Except as provided in 9VAC5-45-630, the provisions of this article apply to any owner or other person who supplies, sells, offers for sale, or manufactures for sale any adhesive,

sealant, adhesive primer, or sealant primer that contains volatile organic compounds (VOC).

B. Except as provided in 9VAC5-45-630, the provisions of this article apply to any owner or other person who uses, applies for compensation, solicits the use of, requires the use of, or specifies the application of, any adhesive, sealant, adhesive primer, or sealant primer that contains volatile organic compounds.

C. The provisions of this article apply only to owners or other persons in the Northern Virginia, Fredericksburg, and Richmond Volatile Organic Compound Emissions Control Areas designated in 9VAC5-20-206.

9VAC5-45-630. Exemptions.

A. The provisions of this article do not apply to a manufacturer or distributor who sells, supplies, or offers for sale an adhesive, sealant, adhesive primer or sealant primer that does not comply with the VOC standards specified in 9VAC5-45-650 A provided that such manufacturer or distributor makes and keeps records demonstrating (i) that the adhesive, sealant, adhesive primer or sealant primer is intended for shipment and use outside of the volatile organic compound emissions control areas designated in 9VAC5-45-620 C, and (ii) that the manufacturer or distributor has taken reasonable prudent precautions to assure that the adhesive, sealant, adhesive primer or sealant primer is not distributed to or within those applicable volatile organic compound emissions control areas. This exemption does not apply to any adhesive, sealant, adhesive primer or sealant primer that is sold, supplied, or offered for sale by any owner or other person to a retail outlet in those applicable volatile organic compound emissions control areas.

B. The provisions of this article do not apply to the sale or use of the following compounds:

1. Adhesives, sealants, adhesive primers or sealant primers being tested or evaluated in any research and development, quality assurance or analytical laboratory, provided records are maintained as required in 9VAC5-45-730 of this article;

2. Adhesives, sealants, adhesive primers and sealant primers that are subject to standards for volatile organic compounds pursuant to Article 3 (9VAC5-45-280 et seq.), Article 4 (9VAC5-45-400 et seq.) or Article 5 (9VAC5-45-520 et seq.) of this part;

3. Adhesives and sealants that contain less than 20 grams of VOC per liter of adhesive or sealant, less water and less exempt compounds, as applied;

4. Cyanoacrylate adhesives;

5. Adhesives, sealants, adhesive primers or sealant primers (except for plastic cement welding adhesives and contact adhesives) that are sold or supplied by the manufacturer or supplier in containers with a net volume of 16 fluid ounces or less, or a net weight of one pound or less; and

6. Contact adhesives that are sold or supplied by the manufacturer or supplier in containers with a net volume of one gallon or less.

C. The provisions of this article do not apply to the use of adhesives, sealants, adhesive primers, sealant primers, surface preparation and cleanup solvents as follows:

1. Tire repair operations, provided the label of the adhesive states "For tire repair only";

2. Assembly, repair and manufacturing operations for aerospace or undersea-based weapon systems;

3. Medical equipment manufacturing operations; and

4. Plaque laminating operations in which adhesives are used to bond clear, polyester acetate laminate to wood with lamination equipment installed prior to July 1, 1992. Any owner or other person claiming exemption pursuant to this subdivision shall record and maintain monthly operational records sufficient to demonstrate compliance with this exemption in accordance with 9VAC5-45-730 of this article.

D. Except for the requirements listed in subdivisions 1 and 2 of this subsection, the provisions of this article do not apply if the total VOC emissions from all adhesives, sealants, adhesive primers and sealant primers used at the stationary source are less than 200 pounds per calendar year, or an equivalent volume.

1. The following requirements still apply:

a. 9VAC5-45-620 (Applicability);

b. 9VAC5-45-620 A (concerning prohibition from selling, supplying, offering for sale, or manufacturing for sale, noncompliant adhesives, sealants, adhesive primers or sealant primers);

c. 9VAC5-45-690 (Compliance); and

d. 9VAC5-45-700 (Compliance schedules).

2. Any owner or other person claiming exemption pursuant to this subsection shall record and maintain monthly operational records sufficient to demonstrate compliance and in accordance with 9VAC5-45-730 of this article.

E. The provisions of 9VAC5-45-650 B and 9VAC5-45-650 D do not apply to the use of any adhesives, sealants, adhesive primers, sealant primers, cleanup solvents and surface preparation solvents, provided that the total volume of noncompliant adhesives, sealants, primers, cleanup and surface preparation solvents applied facility-wide does not exceed 55 gallons per calendar year. Any owner or other person claiming exemption pursuant to this subsection shall record and maintain monthly operational records sufficient to

demonstrate compliance with this exemption in accordance with 9VAC5-45-730.

F. The provisions of 9VAC5-45-650 A do not apply to the sale of any adhesive, sealant, adhesive primer or sealant primer to an owner or other person using add-on air pollution control equipment pursuant to the provisions of 9VAC5-45-660 to comply with the requirements of this article, provided that the seller makes and keeps records in accordance with 9VAC5-45-730 E.

9VAC5-45-640. Definitions.

A. For the purpose of applying this article in the context of the Regulations for the Control and Abatement of Air Pollution and related uses, the words or terms shall have the meanings given them in subsection C of this section.

B. As used in this article, all terms not defined herein shall have the meanings given them in 9VAC5-10 (General Definitions), unless otherwise required by context.

C. Terms Defined.

"Acrylonitrile-butadiene-styrene or ABS welding adhesive" means any adhesive intended by the manufacturer to weld acrylonitrile-butadiene-styrene pipe, which is made by reacting monomers of acrylonitrile, butadiene and styrene.

"Adhesive" means any chemical substance that is applied for the purpose of bonding two surfaces together other than by mechanical means.

"Adhesive primer" means any product intended by the manufacturer for application to a substrate, prior to the application of an adhesive, to provide a bonding surface.

"Aerosol adhesive" means an adhesive packaged as an aerosol product in which the spray mechanism is permanently housed in a non-refillable can designed for handheld application without the need for ancillary hoses or spray equipment.

"Aerospace component" means for the purposes of this article, the fabricated part, assembly of parts or completed unit of any aircraft, helicopter, missile, or space vehicle, including passenger safety equipment.

"Architectural sealant or primer" means any sealant or sealant primer intended by the manufacturer to be applied to stationary structures, including mobile homes, and their appurtenances. Appurtenances to an architectural structure include, but are not limited to hand railings, cabinets, bathroom and kitchen fixtures, fences, rain gutters and downspouts, and windows.

"ASTM" means the American Society for Testing and Materials.

"Automotive glass adhesive primer" means an adhesive primer labeled by the manufacturer to be applied to automotive glass prior to installation of the glass using an adhesive/sealant. This primer improves the adhesion to pinch weld and blocks ultraviolet light.

"CARB" means the California Air Resources Board.

"Ceramic tile installation adhesive" means any adhesive intended by the manufacturer for use in the installation of ceramic tiles.

"Chlorinated polyvinyl chloride plastic" or "CPVC plastic" means a polymer of the vinyl chloride monomer that contains 67% chlorine and is normally identified with a CPVC marking.

"Chlorinated polyvinyl chloride welding adhesive" or "CPVC welding adhesive" means an adhesive labeled for welding of chlorinated polyvinyl chloride plastic.

"Cleanup solvent" means a VOC-containing material used to remove a loosely held uncured (i.e., not dry to the touch) adhesive or sealant from a substrate, or clean equipment used in applying a material.

"Computer diskette jacket manufacturing adhesive" means any adhesive intended by the manufacturer to glue the fold-over flaps to the body of a vinyl computer diskette jacket.

"Contact bond adhesive" means an adhesive that: (i) is designed for application to both surfaces to be bonded together, (ii) is allowed to dry before the two surfaces are placed in contact with each other, (iii) forms an immediate bond that is impossible, or difficult, to reposition after both adhesive-coated surfaces are placed in contact with each other, and (iv) does not need sustained pressure or clamping of surfaces after the adhesive-coated surfaces have been brought together using sufficient momentary pressure to establish full contact between both surfaces. Contact bond adhesive does not include rubber cements that are primarily intended for use on paper substrates. Contact bond adhesive also does not include vulcanizing fluids that are designed and labeled for tire repair only.

"Cove base" means a flooring trim unit, generally made of vinyl or rubber, having a concave radius on one edge and a convex radius on the opposite edge that is used in forming a junction between the bottom wall course and the floor or to form an inside corner.

"Cove base installation adhesive" means any adhesive intended by the manufacturer to be used for the installation of cove base or wall base on a wall or vertical surface at floor level.

"Cyanoacrylate adhesive" means any adhesive with a cyanoacrylate content of at least 95% by weight.

"Dry wall installation" means the installation of gypsum dry wall to studs or solid surfaces using an adhesive formulated for that purpose.

"Fiberglass" means a material consisting of extremely fine glass fibers.

"Flexible vinyl" means nonrigid polyvinyl chloride plastic with at least 5.0% by weight plasticizer content.

"Indoor floor covering installation adhesive" means any adhesive intended by the manufacturer for use in the installation of wood flooring, carpet, resilient tile, vinyl tile, vinyl backed carpet, resilient sheet and roll or artificial grass. Adhesives used to install ceramic tile and perimeter bonded sheet flooring with vinyl backing onto a nonporous substrate, such as flexible vinyl, are excluded from this category.

"Laminate" means a product made by bonding together two or more layers of material.

"Low-solids adhesive, sealant or primer" means any product that contains 120 grams or less of solids per liter of material.

"Marine deck sealant" or "marine deck sealant primer" means any sealant or sealant primer labeled for application to wooden marine decks.

"Medical equipment manufacturing" means the manufacture of medical devices, such as, but not limited to, catheters, heart valves, blood cardioplegia machines, tracheostomy tubes, blood oxygenators, and cardiatory reservoirs.

"Metal to urethane/rubber molding or casting adhesive" means any adhesive intended by the manufacturer to bond metal to high density or elastomeric urethane or molded rubber materials, in heater molding or casting processes, to fabricate products such as rollers for computer printers or other paper handling equipment.

"Multipurpose construction adhesive" means any adhesive intended by the manufacturer for use in the installation or repair of various construction materials, including but not limited to, drywall, subfloor, panel, fiberglass reinforced plastic (FRP), ceiling tile, and acoustical tile.

"Nonmembrane roof installation/repair adhesive" means any adhesive intended by the manufacturer for use in the installation or repair of nonmembrane roofs and that is not intended for the installation of prefabricated single-ply flexible roofing membrane, including, but not limited to, plastic or asphalt roof cement, asphalt roof coating, and cold application cement.

"Outdoor floor covering installation adhesive" means any adhesive intended by the manufacturer for use in the installation of floor covering that is not in an enclosure and that is exposed to ambient weather conditions during normal use.

"Panel installation" means the installation of plywood, predecorated hardboard (or tileboard), fiberglass reinforced plastic, and similar predecorated or non-decorated panels to studs or solid surfaces using an adhesive formulated for that purpose.

"Perimeter bonded sheet flooring installation" means the installation of sheet flooring with vinyl backing onto a nonporous substrate using an adhesive designed to be applied only to a strip of up to four inches wide around the perimeter of the sheet flooring.

"Plastic cement welding adhesive" means any adhesive intended by the manufacturer for use to dissolve the surface of plastic to form a bond between mating surfaces.

"Plastic cement welding adhesive primer" means any primer intended by the manufacturer for use to prepare plastic substrates prior to bonding or welding.

"Plastic foam" means foam constructed of plastics.

"Plasticizer" means a material, such as a high boiling point organic solvent, that is incorporated into a vinyl to increase its flexibility, workability, or distensibility.

"Plastics" means synthetic materials chemically formed by the polymerization of organic (carbon-based) substances. Plastics are usually compounded with modifiers, extenders, and/or reinforcers and are capable of being molded, extruded, cast into various shapes and films or drawn into filaments.

"Polyvinyl chloride plastic" or "PVC plastic" means a polymer of the chlorinated vinyl monomer that contains 57% chlorine.

"Polyvinyl chloride welding adhesive" or "PVC welding adhesive" means any adhesive intended by the manufacturer for use in the welding of PVC plastic pipe.

"Porous material" means a substance that has tiny openings, often microscopic, in which fluids may be absorbed or discharged, including, but not limited to, wood, paper, and corrugated paperboard.

"Propellant" means a fluid under pressure that expels the contents of a container when a valve is opened.

"Reactive diluent" means a liquid that is a reactive organic compound during application and one in that, through chemical and/or physical reactions, such as polymerization, 20% or more of the reactive organic compound becomes an integral part of a finished material.

"Roadway sealant" means any sealant intended by the manufacturer for application to public streets, highways and other surfaces including, but not limited to, curbs, berms, driveways and parking lots.

"Rubber" means any natural or manmade rubber substrate, including but not limited to, styrene-butadiene rubber, polychloroprene (neoprene), butyl rubber, nitrile rubber, chlorosulfonated polyethylene and ethylene propylene diene terpolymer.

"SCAQMD" means the South Coast Air Quality Management District, a part of the California Air Resources

Board, which is responsible for the regulation of air quality in the state of California.

"Sealant" means any material with adhesive properties that is formulated primarily to fill, seal, waterproof or weatherproof gaps or joints between two surfaces. Sealants include sealant primers and caulks.

"Sealant primer" means any product intended by the manufacturer for application to a substrate, prior to the application of a sealant, to enhance the bonding surface.

"Sheet-applied rubber installation" means the process of applying sheet rubber liners by hand to metal or plastic substrates to protect the underlying substrate from corrosion or abrasion. These operations also include laminating sheet rubber to fabric by hand.

"Single-ply roof membrane" means a prefabricated single sheet of rubber, normally ethylene propylene diene terpolymer, that is field applied to a building roof using one layer of membrane material.

"Single-ply roof membrane installation and repair adhesive" means any adhesive labeled for use in the installation or repair of single-ply roof membrane. Installation includes, as a minimum, attaching the edge of the membrane to the edge of the roof and applying flashings to vents, pipes and ducts that protrude through the membrane. Repair includes gluing the edges of torn membrane together, attaching a patch over a hole and reapplying flashings to vents, pipes or ducts installed through the membrane.

"Single-ply roof membrane adhesive primer" means any primer labeled for use to clean and promote adhesion of the single-ply roof membrane seams or splices prior to bonding.

"Single-ply roof membrane sealant" means any sealant labeled for application to single-ply roof membrane.

"Solvent" means organic compounds that are used as diluents, thinners, dissolvers, viscosity reducers, cleaning agents or other related uses.

"Structural glazing adhesive" means any adhesive intended by the manufacturer to apply glass, ceramic, metal, stone or composite panels to exterior building frames.

"Subfloor installation" means the installation of subflooring material over floor joists, including the construction of any load bearing joists. Subflooring is covered by a finish surface material.

"Surface preparation solvent" means a solvent used to remove dirt, oil and other contaminants from a substrate prior to the application of a primer, adhesive or sealant.

"Thin metal laminating adhesive" means any adhesive intended by the manufacturer for use in bonding multiple layers of metal to metal or metal to plastic in the production of electronic or magnetic components in which the thickness of the bond line is less than 0.25 mils.

"Tire repair" means a process that includes expanding a hole, tear, fissure or blemish in a tire casing by grinding or gouging, applying adhesive, and filling the hole or crevice with rubber.

"Tire tread adhesive" means any adhesive intended by the manufacturer for application to the back of precure tread rubber and to the casing and cushion rubber. Tire tread adhesive may also be used to seal buffed tire casings to prevent oxidation while the tire is being prepared for a new tread.

"Traffic marking tape" means preformed reflective film intended by the manufacturer for application to public streets, highways and other surfaces, including but not limited to curbs, berms, driveways, and parking lots.

"Traffic marking tape adhesive primer" means any primer intended by the manufacturer for application to surfaces prior to installation of traffic marking tape.

"Undersea-based weapons systems components" means the fabrication of parts, assembly of parts or completed units of any portion of a missile launching system used on undersea ships.

"Volatile organic compound" or "VOC" means volatile organic compound as defined in 9VAC5-10-20.

"Waterproof resorcinol glue" means a two-part resorcinol-resin-based adhesive designed for applications where the bond line must be resistant to conditions of continuous immersion in fresh or salt water.

9VAC5-45-650. Standard for volatile organic compounds.

A. Except as provided in 9VAC5-45-630, no owner or other person shall (i) sell, supply or offer for sale any adhesive, sealant, adhesive primer or sealant primer manufactured on or after the applicable compliance date specified in 9VAC5-45-700, or (ii) manufacture for sale any adhesive, sealant, adhesive primer or sealant primer on or after the date specified in 9VAC5-45-700, which contains volatile organic compounds in excess of the limits specified in Table 45-6A.

Table 45-6A

VOC Content Limits for Adhesives, Sealants, Adhesive Primers, Sealant Primers and Adhesives Applied to Particular Substrates

Adhesive, sealant, adhesive primer or sealant primer category	VOC content limit (grams VOC per liter*)
Adhesives	

ABS welding	400
Ceramic tile installation	130
Computer diskette jacket manufacturing	850
Contact bond	250
Cove base installation	150
CPVC welding	490
Indoor floor covering installation	150
Metal to urethane/rubber molding or casting	850
Multipurpose construction	200
Nonmembrane roof installation/repair	300
Other plastic cement welding	510
Outdoor floor covering installation	250
PVC welding	510
Single-ply roof membrane installation/repair	250
Structural glazing	100
Thin metal laminating	780
Tire retread	100
Perimeter bonded sheet vinyl flooring installation	660
Waterproof resorcinol glue	170
Sheet-applied rubber installation	850
Sealants	
Architectural	250
Marine deck	760
Nonmembrane roof installation/repair	300
Roadway	250
Single-ply roof membrane	450
Other	420
Adhesive Primers	
Automotive glass	700
Plastic cement welding	650
Single-ply roof membrane	250
Traffic marking tape	150
Other	250
Sealant Primers	
Non-porous architectural	250
Porous architectural	775
Marine deck	760
Other	750
Adhesives Applied to the Listed Substrate	
Flexible vinyl	250
Fiberglass	200
Metal	30
Porous material	120
Rubber	250
Other substrates	250

*The VOC content is determined using the weight of volatile compounds, less water and exempt compounds, as specified in 9VAC5-45-710 of this article.

B. Except as provided in 9VAC5-45-630 B through E and in 9VAC5-45-660, no person shall use, or apply for compensation, any adhesive, sealant, adhesive primer or sealant primer in excess of the applicable VOC content limits specified in Table 45-6A.

C. The VOC content limits in Table 45-6A for adhesives applied to particular substrates shall apply as follows.

1. If an owner or other person uses an adhesive or sealant subject to a specific VOC content limit for such adhesive or sealant in Table 45-6A, such specific limit is applicable rather than an adhesive-to-substrate limit.

2. If an adhesive is used to bond dissimilar substrates together, the applicable substrate category with the highest VOC content shall be the limit for such use.

D. No owner or other person shall use a surface preparation or cleanup solvent containing VOC unless:

1. The VOC content of the surface preparation solvent is less than 70 grams per liter, except as provided for single-ply roofing in subdivision 2 of this subsection;

2. The composite vapor pressure, excluding water and exempt compounds, of the surface preparation solvent used for applying single-ply roofing does not exceed 45 mm Hg at 20°C;

3. The composite vapor pressure of the solvent used for the removal of adhesives, sealants, or adhesive or sealant primers from surfaces other than spray application equipment is less than 45 mm Hg at 20°C, except as provided in subdivision 4 of this subsection; and

4. For the removal of adhesives, sealants, adhesive primers or sealant primers from parts of spray application equipment, the removal is performed as follows:

a. In an enclosed cleaning system, or equivalent cleaning system as determined by the test method identified in 9VAC5-45-710 I;

b. Using a solvent with a VOC content less than or equal to 70 grams of VOC per liter of material; or

c. Parts containing dried adhesive may be soaked in a solvent if (i) the composite vapor pressure of the solvent, excluding water and exempt compounds, is less than or equal to 9.5 mm Hg at 20°C, and (ii) the parts and solvent are in a closed container that remains closed except when adding parts to or removing parts from the container.

E. Any owner or other person using adhesives, sealants, adhesive primers, sealant primers, surface preparation or clean-up solvents subject to the provisions of this article shall store or dispose of all absorbent materials, such as cloth or paper, that are moistened with adhesives, sealants, primers or solvents subject to the provisions of this article, in non-absorbent containers that shall be closed except when placing materials in or removing materials from the container.

F. No owner or other person shall solicit the use, require the use or specify the application of any adhesive, sealant, adhesive primer, sealant primer, surface preparation or clean-up solvent if such use or application results in a violation of the provisions of this article. This prohibition shall apply to all written or oral contracts under which any adhesive, sealant, adhesive primer, sealant primer, surface preparation or clean-up solvent subject to this article is to be used at any location within the areas designated in 9VAC5-45-620 C.

G. The standards for single-ply roofing membrane installation and repair adhesive, single-ply roofing membrane sealant, and single-ply roofing membrane adhesive primer in Table 45-6A shall only apply according to the following schedule:

1. From May 1, 2010, to September 30, 2010;

2. From May 1, 2011, to September 30, 2011; and

3. On and after January 1, 2012.

9VAC5-45-660. Control technology guidelines.

Any owner or other person using an adhesive, sealant, adhesive primer or sealant primer subject to this article may comply with the provisions of 9VAC5-45-650 B and D using add-on air pollution control equipment if such equipment meets the following requirements:

1. The VOC emissions from the use of all adhesives, sealants, adhesive primers or sealant primers subject to this article are reduced by an overall capture and control efficiency of at least 85% by weight;

2. The combustion temperature is monitored continuously if a thermal incinerator is operated;

3. Inlet and exhaust gas temperatures are monitored continuously if a catalytic incinerator is operated;

4. Control device efficiency is monitored continuously if a carbon absorber or control device other than a thermal or catalytic incinerator is operated; and

5. Operation records sufficient to demonstrate compliance with the requirements of this section are maintained as required in 9VAC5-45-730 of this article.

9VAC5-45-670. Standard for visible emissions.

The provisions of Article 1 (9VAC5-40-60 et seq.) of 9VAC5-40 (Emission Standards for Visible Emissions and Fugitive Dust/Emissions, Rule 4-1) apply.

9VAC5-45-680. Administrative requirements.

Each manufacturer of an adhesive, sealant, adhesive primer, or sealant primer subject to the provisions of this article shall display the following information on the product container or label:

1. A statement of the manufacturer's recommendation regarding thinning, reducing, or mixing of the product, except that:

a. This requirement does not apply to the thinning of a product with water; and

b. If thinning of the product prior to use is not necessary, the recommendation must specify that the product is to be applied without thinning.

2. The maximum or the actual VOC content of the product as supplied, determined in accordance with 9VAC5-45-710, displayed in grams of VOC per liter of product.

3. The maximum or the actual VOC content of the product as applied (which includes the manufacturer's maximum recommendation for thinning), determined in accordance with 9VAC5-45-710, displayed in grams of VOC per liter of product.

9VAC5-45-690. Compliance.

The provisions of 9VAC5-45-20 (Compliance) apply.

9VAC5-45-700. Compliance schedules.

Affected owners or other persons shall comply with the provisions of this article as expeditiously as possible but in no case later than May 1, 2010.

9VAC5-45-710. Test methods and procedures.

A. The provisions of 9VAC5-45-30 (Emission testing) apply.

B. Except as provided in subsections D, E and F of this section, the VOC and solids content of all nonaerosol adhesives, adhesive primers and cleanup solvents shall be determined using either Reference Method 24 or SCAQMD "Determination of Volatile Organic Compounds (VOC) In Various Materials" (see 9VAC5-20-21).

C. The organic content of exempt organic compounds shall be determined using ASTM "Standard Test Method for Determination of Dichloromethane and 1,1,1-Trichloroethane in Paints and Coatings by Direct Injection into a Gas Chromatograph" (see 9VAC5-20-21), as applicable.

D. The VOC content of any plastic welding cement adhesive or primer shall be determined using SCAQMD "Determination of Volatile Organic Compounds (VOC) in Materials Used for Pipes and Fittings" (see 9VAC5-20-21).

E. To determine if a diluent is a reactive diluent, the percentage of the reactive organic compound that becomes an integral part of the finished materials shall be determined using SCAQMD "Determination of Volatile Organic Compounds (VOC) in Materials Used for Pipes and Fittings" (see 9VAC5-20-21).

F. The composite vapor pressure of organic compounds in cleaning materials shall be determined by quantifying the amount of each compound in the blend using gas chromatographic analysis (ASTM "Standard Practice for Packed Column Gas Chromatography") for organics and ASTM "Standard Test Method for Water Content of Coatings by Direct Injection Into a Gas Chromatograph" for water content (see 9VAC5-20-21), as applicable, and the following equation:

$$Pp_c = \frac{\sum_{i=1}^{n} (W_i)(VP_i) / Mw_i}{W_w / Mw_w + \sum_{i=1}^{n} W_e / Mw_e + \sum_{i=1}^{n} W_i / Mw_i}$$

where:

Pp_c = VOC composite partial pressure at 20°C, in mm Hg.

W_i = Weight of the "i"th VOC compound, in grams, as determined by ASTM "Standard Practice for Packed Column Gas Chromatography" (see 9VAC5-20-21).

W_w = Weight of water, in grams as determined by ASTM "Standard Test Method for Water Content of Coatings by Direct Injection Into a Gas Chromatograph" (see 9VAC5-20-21).

W_e = Weight of the "i"th exempt compound, in grams, as determined by ASTM "Standard Practice for Packed Column Gas Chromatography" (see 9VAC5-20-21).

Mw_i = Molecular weight of the "i"th VOC compound, in grams per g-mole, as given in chemical reference literature.

Mw_w = Molecular weight of water, 18 grams per g-mole.

Mw_e = Molecular weight of the "i"th exempt compound, in grams per g-mole, as given in chemical reference literature.

Vp_i = Vapor pressure of the "i"th VOC compound at 20°C, in mm Hg, as determined by subsection G of this section.

G. The vapor pressure of each single component compound may be determined from ASTM "Standard Test Method for Vapor Pressure-Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteniscope" (see 9VAC5-20-21), from chemical reference literature or from additional sources acceptable to the board.

H. If air pollution control equipment is used to meet the requirements of 9VAC5-45-650, the owner or operator shall make the following determinations:

1. The measurement of capture efficiency shall be conducted and reported in accordance with the EPA Technical Document "Guidelines for Determining Capture Efficiency" (see 9VAC5-20-21).

2. The control efficiency shall be determined in accordance with Reference Methods 25, 25A, 25B or CARB Method 100 (see 9VAC5-20-21), as appropriate.

I. The active and passive solvent losses from spray gun cleaning systems shall be determined using SCAQMD's "General Test Method for Determining Solvent Losses from Spray Gun Cleaning Systems" (see 9VAC5-20-21). The test solvent for this determination shall be any lacquer thinner with a minimum vapor pressure of 105 mm of Hg at 20°C, and the minimum test temperature shall be 15°C.

J. For adhesives that do not contain reactive diluents, the VOC content of adhesive in grams per liter, less water and exempt compounds, shall be calculated according to the following equation:

$$VOC = \frac{W_s - W_w - W_e}{V_m - V_w - V_e}$$

where:

VOC = VOC content of adhesive, in grams per liter.

W_s = weight of volatile compounds, in grams.

W_w = weight of water, in grams.

W_e = weight of exempt compounds, in grams.

V_m = volume of material, in liters.

V_w = volume of water, in liters.

V_e = volume of exempt compounds, in liters.

K. For adhesives that contain reactive diluents, the VOC content of the adhesive is determined after curing. The VOC content of adhesive in grams per liter, less water and exempt compounds, shall be calculated according to the following equation:

$$VOC = \frac{Wrs - Wrw - Wre}{Vrm - Vrw - Vre}$$

where:

VOC = VOC content of adhesive, in grams per liter.

Wrs = weight of volatile compounds not consumed during curing, in grams.

Wrw = weight of water not consumed during curing, in grams.

Wre = weight of exempt compounds not consumed during curing, in grams.

Vrm = volume of material not consumed during curing, in liters.

Vrw = volume of water not consumed during curing, in liters.

Vre = volume of exempt compounds not consumed during curing, in liters.

L. The VOC content of materials, in grams per liter, shall be calculated according to the following equation:

$$VOC = \frac{Ws - Ww - We}{Vm}$$

where:

VOC = VOC content of materials, in grams per liter.

Ws = weight of volatile compounds, in grams.

Ww = weight of water, in grams.

We = weight of exempt compounds, in grams.

Vm = volume of material, in liters.

M. Percent VOC by weight shall be calculated according to the following equation:

$$\%\ VOC\ by\ weight = \frac{Wv}{W} \times 100$$

where:

Wv = weight of VOC in grams.

W = weight of material in grams.

9VAC5-45-720. Monitoring.

The provisions of 9VAC5-45-40 (Monitoring) apply.

9VAC5-45-730. Notification, records and reporting.

A. The provisions of 9VAC5-45-50 (Notification, records and reporting) apply.

B. Each owner or other person subject to this article shall maintain records demonstrating compliance with this article, including, but not limited to, the following information:

1. A list of each adhesive, sealant, adhesive primer, sealant primer cleanup solvent and surface preparation solvent in use or in storage;

2. A data sheet or material list that provides the material name, manufacturer identification, and material application for each product on the list;

3. Catalysts, reducers or other components used in each product on the list and the mix ratio;

4. The VOC content of each product on the list, as supplied;

5. The final VOC content or vapor pressure of each product on the list, as applied; and

6. The monthly volume of each adhesive, sealant, adhesive primer, sealant primer, cleanup or surface preparation solvent used.

C. Any owner or other person who complies with the provisions of 9VAC5-45-650 B through the use of add-on air pollution control equipment shall record the key operating parameters for the control equipment, including, but not limited to, the following information:

1. The volume used per day of each adhesive, sealant, adhesive primer, sealant primer, or solvent that is subject to a VOC content limit in Table 45-6A and that exceeds such limit;

2. On a daily basis, the combustion temperature, inlet and exhaust gas temperatures or control device efficiency, as appropriate, pursuant to 9VAC5-45-660;

3. Daily hours of operation; and

4. All maintenance performed including the date and type of maintenance.

D. For adhesives, sealants, adhesive primers and sealant primers subject to the laboratory testing exemption pursuant to 9VAC5-45-630 B 1 of this article, the person conducting the testing shall make and maintain records of all such materials used, including, but not limited to (i) the product

name, (ii) the product category of the material or type of application, and (iii) the VOC content of each material.

E. Any owner or other person that is subject to the provisions of this article and who sells an adhesive, sealant, adhesive primer or sealant primer that is subject to the provisions of this article but does not comply with the VOC content limits in Table 45-6A, shall make and keep records as follows:

1. The name of, and contact information for, each owner or other person to whom such noncompliant product is sold, and

2. The amount of each such noncompliant product that is sold to that owner or other person per calendar year.

F. Any owner of other person claiming an exemption for plaque laminating equipment pursuant to 9VAC5-45-630 C 4 shall keep records sufficient to demonstrate that the exemption applies. Such records shall include, but are not limited to, (i) the installation date of the plaque laminating equipment, (ii) monthly records of the types of laminate and substrate used and the VOC content of each adhesive used by the equipment during the month, and (iii) certification by a responsible official of the company that there is no compliant adhesive available for this purpose.

G. All records made to determine compliance with the provisions of this article shall be maintained for five years from the date such record is created and shall be made available to the board within 90 days of a request.

9VAC5-45-740. Registration.

The provisions of 9VAC5-20-160 (Registration) apply, except that the following provisions also apply:

1. Any owner or other person subject to the provisions of this article who complies with the provisions of 9VAC5-45-650 B through the use of add-on air pollution control equipment shall register such operations with the board and update such registration information.

2. The information required for registration shall be determined by the board and shall be provided in the manner specified by the board. Registration information shall include, but is not limited to, (i) contact information for the owner or other person (name, mailing address and phone number) and (ii) the type of add-on control equipment used to comply with the provisions of 9VAC5-45-650 B. All registration information and updates to such registration information submitted to the board are subject to the provisions of 9VAC5-20-230 (Certification of documents).

9VAC5-45-750. Facility and control equipment maintenance or malfunction.

The provisions of 9VAC5-20-180 (Facility and control equipment maintenance or malfunction) apply.

Article 7
Emission Standards For Asphalt Paving Operations

9VAC5-45-760. Applicability.

A. The provisions of this article apply to any owner or other person who manufactures, mixes, stores, uses, or applies any liquefied asphalt for paving operations.

B. The provisions of this article apply only to owners and other persons in volatile organic compound emissions control areas designated in 9VAC5-20-206.

9VAC5-45-770. Definitions.

A. For the purpose of applying this article in the context of Regulations for the Control and Abatement of Air Pollution and related uses, the words or terms shall have the meanings given them in subsection C of this section.

B. As used in this article, all terms not defined herein shall have the meanings given them in 9VAC5-10 (General Definitions), unless otherwise required by context.

C. Terms defined.

"Asphalt" means a dark-brown to black cementitious material (solid, semisolid, or liquid in consistency) in which the predominating constituents are bitumens that occur in nature as such or that are obtained as residue in refining petroleum.

"Cutback asphalt" means asphalt cement that has been liquefied by blending with petroleum solvents (diluents). Upon exposure to atmospheric conditions the diluents evaporate, leaving the asphalt cement to perform its function.

"Emulsified asphalt" means an emulsion of asphalt cement and water that contains a small amount of an emulsifying agent; a heterogeneous system containing two normally immiscible phases (asphalt and water) in which the water forms the continuous phase of the emulsion, and minute globules of asphalt form the discontinuous phase.

"Paving operation" means the process of covering an area with stone, concrete, asphalt or other material in order to construct or maintain a firm, level surface for travel, access, or parking. Paving operations do not include the use of coatings to seal residential driveways.

"Penetrating prime coat" means an application of low-viscosity liquid asphalt to an absorbent surface. It is used to prepare an untreated base for an asphalt surface. The prime penetrates the base and fills the surface voids, hardens the top, and helps bind it to the overlying asphalt course. It also reduces the necessity of maintaining an untreated base course prior to placing the asphalt pavement.

9VAC5-45-780. Standard for volatile organic compounds.

A. No owner or other person shall cause or permit the manufacture, mixing, storage, use, or application of liquefied

asphalt for paving operations unless such asphalt is of the emulsified asphalt type.

B. Regardless of the provisions of subsection A of this section, the manufacture, mixing, storage, use, or application of cutback asphalt is permitted under any of the following circumstances:

1. When stockpile storage greater than one month is necessary;

2. When use or application during the months of November through March is necessary;

3. When use or application as a penetrating prime coat or tack coat is necessary; or

4. When the user can demonstrate that there are no volatile organic compound emissions from the asphalt under conditions of normal use.

C. The provisions of subsection A of this section do not preclude the manufacture, mixing, storage, use, or application of heated asphalt cement as a component in asphaltic concrete mixing or for priming in surface treatment.

D. Notwithstanding the provisions of subsection A of this section, the manufacture, mixing, storage, use, or application of emulsified asphalt containing volatile organic compounds is permitted provided the annual average of volatile organic compound content for all emulsified asphalts used does not exceed 6.0% of volatile organic compounds by volume.

9VAC5-45-790. Standard for visible emissions.

The provisions of Article 1 (9VAC5-40-60 et seq.) of Part II of 9VAC5-40 (Existing Stationary Sources) apply.

9VAC5-45-800. Standard for fugitive dust/emissions.

The provisions of Article 1 (9VAC5-40-60 et seq.) of Part II of 9VAC5-40 (Existing Stationary Sources) apply.

9VAC5-45-810. Standard for odor.

The provisions of Article 2 (9VAC5-40-130 et seq.) of Part II of 9VAC5-40 (Existing Stationary Sources) apply.

9VAC5-45-820. Compliance.

The provisions of 9VAC5-45-20 (Compliance) apply.

9VAC5-45-830. Test methods and procedures.

The provisions of 9VAC5-45-30 (Emission testing) apply.

9VAC5-45-840. Monitoring.

The provisions of 9VAC5-45-40 (Monitoring) do not apply.

9VAC5-45-850. Notification, records and reporting.

The provisions of 9VAC5-45-50 (Notification, records and reporting) apply.

VA.R. Doc. No. R08-1111; Filed December 1, 2009, 3:56 p.m.

Final Regulation

REGISTRAR'S NOTICE: The State Air Pollution Control Board is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 3, which excludes regulations that consist only of changes in style or form or corrections of technical errors. The State Air Pollution Control Board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **9VAC5-40. Existing Stationary Sources (amending 9VAC5-40-7420).**

Statutory Authority: § 10.1-1308 of the Code of Virginia; §§ 110, 111, 123, 129, 171, 172 and 182 of the Clean Air Act (40 CFR Parts 51 and 60).

Effective Date: January 20, 2010.

Agency Contact: Karen G. Sabasteanski, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4426, FAX (804) 698-4510, or email karen.sabasteanski@deq.virginia.gov.

Background:

Section 182 of the federal Clean Air Act requires that state implementation plans require reasonably available control technology (RACT) for stationary sources of volatile organic compounds and nitrogen oxides. RACT is the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technologic and economic feasibility. Subpart X to 40 CFR Part 51, which covers the implementation of the 8-hour ozone standard, requires that nonattainment areas meet the requirements of 40 CFR 51.900(f) including RACT and major source applicability cut-offs for purposes of RACT.

Summary:

The amendments correct two inaccurate cross references in the Virginia regulation (Article 51 of 9VAC5 Chapter 40) that implements Subpart X of 40 CFR Part 51.

9VAC5-40-7420. Standard for nitrogen oxides (eight-hour ozone standard).

A. No owner or other person shall cause or permit to be discharged from any affected facility any nitrogen oxides (NO_X) emissions in excess of that resultant from using RACT.

B. Unless the owner demonstrates otherwise to the satisfaction of the board, facilities to which the presumptive RACT provisions of 9VAC5-40-7430 are applicable shall comply with the provisions of subsection A of this section by the use of presumptive RACT.

C. The provisions of this section apply to all facilities that (i) are within a stationary source in the emissions control areas

specified in Table 4-51E and (ii) are within a stationary source that has a theoretical potential to emit at the applicable source thresholds specified in Table 4-51E.

TABLE 4-51E.
Notification and Compliance Dates for Facilities Located in NO_X Emissions Control Areas for Which There is No Presumptive RACT.

Emissions Control Area	Source Threshold	Notification Date	Compliance Date
Northern Virginia	≥ 100 tpy	March 1, 2007	April 1, 2009

D. For facilities subject to the provisions of this section and for which there is no presumptive RACT definition, the owners shall, by the notification dates specified in Table 4-51E, (i) notify the board of their applicability status, (ii) commit to making a determination as to what constitutes RACT for the facilities and (iii) provide a schedule acceptable to the board for making this determination and for achieving compliance with the emission standard as expeditiously as possible but no later than the compliance dates specified in Table 4-51E.

E. For facilities subject to the provisions of this section and for which there is a presumptive RACT definition, the owners shall, by the notification dates specified in Table 4-51F, (i) notify the board of their applicability status, (ii) commit to accepting the presumptive RACT emission limits as RACT for the applicable facilities or to submitting a demonstration as provided in subsection B of this section and (iii) provide a schedule acceptable to the board for submitting the demonstration no later than the demonstration dates specified in Table 4-51F, and for achieving compliance with the emission standard as expeditiously as possible but no later than the compliance dates specified in Table 4-51F.

TABLE 4-51F.
Notification and Compliance Dates for Facilities Located in NO_X Emissions Control Areas for Which Presumptive RACT is Defined.

Emissions Control Area	Source Threshold	Notification Date	Demonstration Date	Compliance Date
Northern Virginia	≥ 100 tpy	March 1, 2007	June 1, 2007	April 1, 2009

F. Nothing in this article shall exempt any facility subject to the provisions of ~~9VAC5-40-7390~~ 9VAC5-40-7410 from being subject to the provisions of this section. The board may reevaluate any RACT determination made under 9VAC5-40-7410 and require compliance with a new RACT determination as necessary to implement this section.

G. Upon the request of the board, the owner of a facility subject to or exempt from the provisions of ~~9VAC5-40-7390~~ 9VAC5-40-7410 shall provide such information as the board deems necessary to determine if the facility is subject to this section.

VA.R. Doc. No. R10-2078; Filed December 1, 2009, 3:58 p.m.

Final Regulation

REGISTRAR'S NOTICE: The following regulatory action is exempt from the Administrative Process Act in accordance with § 2.2-4006 A 4 c of the Code of Virginia, which excludes regulations that are necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation. The State Air Pollution Control Board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Titles of Regulations: **9VAC5-50. New and Modified Stationary Sources (amending 9VAC5-50-400, 9VAC5-50-410).**

9VAC5-60. Hazardous Air Pollutant Sources (amending 9VAC5-60-60, 9VAC5-60-90, 9VAC5-60-100).

Statutory Authority: § 10.1-1308 of the Code of Virginia; § 112 of the Clean Air Act; 40 CFR Parts 61 and 63.

Effective Date: January 20, 2010.

Agency Contact: Karen G. Sabasteanski, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4426, FAX (804) 698-4510, or email karen.sabasteanski@deq.virginia.gov.

Summary:

The amendments update state regulations that incorporate by reference certain federal regulations to reflect the Code of Federal Regulations as published on July 1, 2009. Below is a list of the new standards in the federal regulations that are being incorporated into the regulations by reference.

1. 40 CFR Part 60, Standards of performance for new stationary sources: Two new NSPSs are being incorporated: Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry for Which Construction, Reconstruction, or Modification Commenced After November 7, 2006 (Subpart VVa, 40 CFR 60.480a-60.489a); and Equipment Leaks of VOC in Petroleum Refineries for which Construction, Reconstruction, or Modification Commenced After November 7, 2006 (Subpart GGGa, 40 CFR 60.590a-60.593a). The date of the Code of Federal Regulations book being incorporated by reference is also being updated to the latest version.

2. 40 CFR Part 61, National emissions standards for hazardous air pollutants - No new NESHAPs are being incorporated; however, the date of the Code of Federal

Regulations book being incorporated by reference is being updated to the latest version.

3. 40 CFR Part 63, national emissions standards for hazardous air pollutants for source categories: Two new MACTs are being incorporated: Plating and Polishing Operations, Area Sources (Subpart WWWWWW, 40 CFR 63.11504-63.11513), and Ferroalloys Production Facilities, Area Sources (Subpart YYYYYY, 40 CFR 63.11524-63.11543). Two new MACTs are not being incorporated at this time: Nine Metal Fabrication and Finishing Source Categories, Area Sources (Subpart XXXXXX, 40 CFR 63.11514-63.11523), and Aluminum, Copper, and Other Nonferrous Foundries, Area Sources (Subpart ZZZZZZ, 40 CFR 63.11544-63.11558); those standards are listed with a note that enforcement of the standard rests with the federal Environmental Protection Agency. The date of the Code of Federal Regulations book being incorporated by reference is being updated to the latest version.

Article 5
Environmental Protection Agency Standards of Performance for New Stationary Sources (Rule 5-5)

9VAC5-50-400. General.

The U.S. Environmental Protection Agency Regulations on Standards of Performance for New Stationary Sources (NSPSs), as promulgated in 40 CFR Part 60 and designated in 9VAC5-50-410 are, unless indicated otherwise, incorporated by reference into the regulations of the board as amended by the word or phrase substitutions given in 9VAC5-50-420. The complete text of the subparts in 9VAC5-50-410 incorporated herein by reference is contained in 40 CFR Part 60. The 40 CFR section numbers appearing under each subpart in 9VAC5-50-410 identify the specific provisions of the subpart incorporated by reference. The specific version of the provision adopted by reference shall be that contained in the CFR ~~(2008)~~ (2009) in effect July 1, ~~2008~~ 2009. In making reference to the Code of Federal Regulations, 40 CFR Part 60 means Part 60 of Title 40 of the Code of Federal Regulations; 40 CFR 60.1 means 60.1 in Part 60 of Title 40 of the Code of Federal Regulations.

9VAC5-50-410. Designated standards of performance.

Subpart A - General Provisions.

40 CFR 60.1 through 40 CFR 60.3, 40 CFR 60.7, 40 CFR 60.8, 40 CFR 60.11 through 40 CFR 60.15, 40 CFR 60.18 through 40 CFR 60.19

(applicability, definitions, units and abbreviations, notification and recordkeeping, performance tests, compliance, circumvention, monitoring requirements, modification, reconstruction, general control device requirements, and general notification and reporting requirements)

Subpart B - Not applicable.

Subpart C - Not applicable.

Subpart Ca - Reserved.

Subpart Cb - Not applicable.

Subpart Cc - Not applicable.

Subpart Cd - Not applicable.

Subpart Ce - Not applicable.

Subpart D - Fossil-Fuel Fired Steam Generators for which Construction is Commenced after August 17, 1971.

40 CFR 60.40 through 40 CFR 60.46

(fossil-fuel fired steam generating units of more than 250 million Btu per hour heat input rate, and fossil-fuel fired and wood-residue fired steam generating units capable of firing fossil fuel at a heat input rate of more than 250 million Btu per hour)

Subpart Da - Electric Utility Steam Generating Units for which Construction is Commenced after September 18, 1978.

40 CFR 60.40a through 40 CFR 60.49a

(electric utility steam generating units capable of combusting more than 250 million Btu per hour heat input of fossil fuel (either alone or in combination with any other fuel); electric utility combined cycle gas turbines capable of combusting more than 250 million Btu per hour heat input in the steam generator)

Subpart Db - Industrial-Commercial-Institutional Steam Generating Units.

40 CFR 60.40b through 40 CFR 60.49b

(industrial-commercial-institutional steam generating units which have a heat input capacity from combusted fuels of more than 100 million Btu per hour)

Subpart Dc - Small Industrial-Commercial-Institutional Steam Generating Units.

40 CFR 60.40c through 40 CFR 60.48c

(industrial-commercial-institutional steam generating units which have a heat input capacity of 100 million Btu per hour or less, but greater than or equal to 10 million Btu per hour)

Subpart E - Incinerators.

40 CFR 60.50 through 40 CFR 60.54

(incinerator units of more than 50 tons per day charging rate)

Subpart Ea - Municipal Waste Combustors for which Construction is Commenced after December 20, 1989, and on or before September 20, 1994

40 CFR 60.50a through 40 CFR 60.59a

(municipal waste combustor units with a capacity greater than 250 tons per day of municipal-type solid waste or refuse-derived fuel)

Subpart Eb - Large Municipal Combustors for which Construction is Commenced after September 20, 1994, or for which Modification or Reconstruction is Commenced after June 19, 1996

40 CFR 60.50b through 40 CFR 60.59b

(municipal waste combustor units with a capacity greater than 250 tons per day of municipal-type solid waste or refuse-derived fuel)

Subpart Ec - Hospital/Medical/Infectious Waste Incinerators for which Construction is Commenced after June 20, 1996

40 CFR 60.50c through 40 CFR 60.58c

(hospital/medical/infectious waste incinerators that combust any amount of hospital waste and medical/infectious waste or both)

Subpart F - Portland Cement Plants.

40 CFR 60.60 through 40 CFR 60.64

(kilns, clinker coolers, raw mill systems, finish mill systems, raw mill dryers, raw material storage, clinker storage, finished product storage, conveyor transfer points, bagging and bulk loading and unloading systems)

Subpart G - Nitric Acid Plants.

40 CFR 60.70 through 40 CFR 60.74

(nitric acid production units)

Subpart H - Sulfuric Acid Plants.

40 CFR 60.80 through 40 CFR 60.85

(sulfuric acid production units)

Subpart I - Hot Mix Asphalt Facilities.

40 CFR 60.90 through 40 CFR 60.93

(dryers; systems for screening, handling, storing and weighing hot aggregate; systems for loading, transferring and storing mineral filler; systems for mixing asphalt; and the loading, transfer and storage systems associated with emission control systems)

Subpart J - Petroleum Refineries.

40 CFR 60.100 through 40 CFR 60.106

(fluid catalytic cracking unit catalyst regenerators, fluid catalytic cracking unit incinerator-waste heat boilers and fuel gas combustion devices)

Subpart K - Storage Vessels for Petroleum Liquids for which Construction, Reconstruction, or Modification Commenced after June 11, 1973, and prior to May 19, 1978.

40 CFR 60.110 through 40 CFR 60.113

(storage vessels with a capacity greater than 40,000 gallons)

Subpart Ka - Storage Vessels for Petroleum Liquids for which Construction, Reconstruction, or Modification Commenced after May 18, 1978, and prior to July 23, 1984.

40 CFR 60.110a through 40 CFR 60.115a

(storage vessels with a capacity greater than 40,000 gallons)

Subpart Kb - Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for which Construction, Reconstruction, or Modification Commenced after July 23, 1984.

40 CFR 60.110b through 40 CFR 60.117b

(storage vessels with capacity greater than or equal to 10,566 gallons)

Subpart L - Secondary Lead Smelters.

40 CFR 60.120 through 40 CFR 60.123

(pot furnaces of more than 550 pound charging capacity, blast (cupola) furnaces and reverberatory furnaces)

Subpart M - Secondary Brass and Bronze Production Plants.

40 CFR 60.130 through 40 CFR 60.133

(reverberatory and electric furnaces of 2205 pound or greater production capacity and blast (cupola) furnaces of 550 pounds per hour or greater production capacity)

Subpart N - Primary Emissions from Basic Oxygen Process Furnaces for which Construction is Commenced after June 11, 1973.

40 CFR 60.140 through 40 CFR 60.144

(basic oxygen process furnaces)

Subpart Na - Secondary Emissions from Basic Oxygen Process Steelmaking Facilities for which Construction is Commenced after January 20, 1983.

40 CFR 60.140a through 40 CFR 60.145a

(facilities in an iron and steel plant: top-blown BOPFs and hot metal transfer stations and skimming stations used with bottom-blown or top-blown BOPFs)

Subpart O - Sewage Treatment Plants.

40 CFR 60.150 through 40 CFR 60.154

(incinerators that combust wastes containing more than 10% sewage sludge (dry basis) produced by municipal sewage treatment plants or incinerators that charge more than 2205 pounds per day municipal sewage sludge (dry basis))

Subpart P - Primary Copper Smelters.

40 CFR 60.160 through 40 CFR 60.166

(dryers, roasters, smelting furnaces, and copper converters)

Subpart Q - Primary Zinc Smelters.

40 CFR 60.170 through 40 CFR 60.176

(roasters and sintering machines)

Subpart R - Primary Lead Smelters

40 CFR 60.180 through 40 CFR 60.186

(sintering machines, sintering machine discharge ends, blast furnaces, dross reverberatory furnaces, electric smelting furnaces and converters)

Subpart S - Primary Aluminum Reduction Plants.

40 CFR 60.190 through 40 CFR 60.195

(potroom groups and anode bake plants)

Subpart T - Phosphate Fertilizer Industry: Wet-Process Phosphoric Acid Plants.

40 CFR 60.200 through 40 CFR 60.204

(reactors, filters, evaporators, and hot wells)

Subpart U - Phosphate Fertilizer Industry: Superphosphoric Acid Plants.

40 CFR 60.210 through 40 CFR 60.214

(evaporators, hot wells, acid sumps, and cooling tanks)

Subpart V - Phosphate Fertilizer Industry: Diammonium Phosphate Plants.

40 CFR 60.220 through 40 CFR 60.224

(reactors, granulators, dryers, coolers, screens, and mills)

Subpart W - Phosphate Fertilizer Industry: Triple Superphosphate Plants.

40 CFR 60.230 through 40 CFR 60.234

(mixers, curing belts (dens), reactors, granulators, dryers, cookers, screens, mills, and facilities which store run-of-pile triple superphosphate)

Subpart X - Phosphate Fertilizer Industry: Granular Triple Superphosphate Storage Facilities.

40 CFR 60.240 through 40 CFR 60.244

(storage or curing piles, conveyors, elevators, screens and mills)

Subpart Y - Coal Preparation Plants.

40 CFR 60.250 through 40 CFR 60.254

(plants which process more than 200 tons per day: thermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), coal storage systems, and coal transfer and loading systems)

Subpart Z - Ferroalloy Production Facilities.

40 CFR 60.260 through 40 CFR 60.266

(electric submerged arc furnaces which produce silicon metal, ferrosilicon, calcium silicon, silicomanganese zirconium, ferrochrome silicon, silvery iron, high-carbon ferrochrome, charge chrome, standard ferromanganese, silicomanganese, ferromanganese silicon or calcium carbide; and dust-handling equipment)

Subpart AA - Steel Plants: Electric Arc Furnaces Constructed after October 21, 1974, and on or before August 17, 1983.

40 CFR 60.270 through 40 CFR 60.276

(electric arc furnaces and dust-handling systems that produce carbon, alloy or specialty steels)

Subpart AAa - Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels Constructed after August 17, 1983.

40 CFR 60.270a through 40 CFR 60.276a

(electric arc furnaces, argon-oxygen decarburization vessels, and dust-handling systems that produce carbon, alloy, or specialty steels)

Subpart BB - Kraft Pulp Mills.

40 CFR 60.280 through 40 CFR 60.285

(digester systems, brown stock washer systems, multiple effect evaporator systems, black liquor oxidation systems, recovery furnaces, smelt dissolving tanks, lime kilns, condensate strippers and kraft pulping operations)

Subpart CC - Glass Manufacturing Plants.

40 CFR 60.290 through 40 CFR 60.296

(glass melting furnaces)

Subpart DD - Grain Elevators.

40 CFR 60.300 through 40 CFR 60.304

(grain terminal elevators/grain storage elevators: truck unloading stations, truck loading stations, barge and ship unloading stations, barge and ship loading stations, railcar unloading stations, railcar loading stations, grain dryers, and all grain handling operations)

Subpart EE - Surface Coating of Metal Furniture.

40 CFR 60.310 through 40 CFR 60.316

(metal furniture surface coating operations in which organic coatings are applied)

Subpart FF - (Reserved)

Subpart GG - Stationary Gas Turbines.

40 CFR 60.330 through 40 CFR 60.335

(stationary gas turbines with a heat input at peak load equal to or greater than 10 million Btu per hour, based on the lower heating value of the fuel fired)

Subpart HH - Lime Manufacturing Plants.

40 CFR 60.340 through 40 CFR 60.344

(each rotary lime kiln)

Subparts II through JJ - (Reserved)

Subpart KK - Lead-Acid Battery Manufacturing Plants.

40 CFR 60.370 through 40 CFR 60.374

(lead-acid battery manufacturing plants that produce or have the design capacity to produce in one day (24 hours) batteries containing an amount of lead equal to or greater than 6.5 tons: grid casting facilities, paste mixing facilities, three-process operation facilities, lead oxide manufacturing facilities, lead reclamation facilities, and other lead-emitting operations)

Subpart LL - Metallic Mineral Processing Plants.

40 CFR 60.380 through 40 CFR 60.386

(each crusher and screen in open-pit mines; each crusher, screen, bucket elevator, conveyor belt transfer point, thermal dryer, product packaging station, storage bin, enclosed storage area, truck loading station, truck unloading station, railcar loading station, and railcar unloading station at the mill or concentrator with the following exceptions. All facilities located in underground mines are exempted from the provisions of this subpart. At uranium ore processing plants, all facilities subsequent to and including the benefication of uranium ore are exempted from the provisions of this subpart)

Subpart MM - Automobile and Light Duty Truck Surface Coating Operations.

40 CFR 60.390 through 40 CFR 60.397

(prime coat operations, guide coat operations, and top-coat operations)

Subpart NN - Phosphate Rock Plants.

40 CFR 60.400 through 40 CFR 60.404

(phosphate rock plants which have a maximum plant production capacity greater than 4 tons per hour: dryers, calciners, grinders, and ground rock handling and storage facilities, except those facilities producing or preparing phosphate rock solely for consumption in elemental phosphorous production)

Subpart OO - (Reserved)

Subpart PP - Ammonium Sulfate Manufacture.

40 CFR 60.420 through 40 CFR 60.424

(ammonium sulfate dryer within an ammonium sulfate manufacturing plant in the caprolactum by-product, synthetic, and coke oven by-product sectors of the ammonium sulfate industry)

Subpart QQ - Graphic Arts Industry: Publication Rotogravure Printing.

40 CFR 60.430 through 40 CFR 60.435

(publication rotogravure printing presses, except proof presses)

Subpart RR - Pressure Sensitive Tape and Label Surface Coating Operations.

40 CFR 60.440 through 40 CFR 60.447

(pressure sensitive tape and label material coating lines)

Subpart SS - Industrial Surface Coating: Large Appliances.

40 CFR 60.450 through 40 CFR 60.456

(surface coating operations in large appliance coating lines)

Subpart TT - Metal Coil Surface Coating.

40 CFR 60.460 through 40 CFR 60.466

(metal coil surface coating operations: each prime coat operation, each finish coat operation, and each prime and finish coat operation combined when the finish coat is applied wet on wet over the prime coat and both coatings are cured simultaneously)

Subpart UU - Asphalt Processing and Asphalt Roofing Manufacture.

40 CFR 60.470 through 40 CFR 60.474

(each saturator and each mineral handling and storage facility at asphalt roofing plants; and each asphalt storage tank and each blowing still at asphalt processing plants, petroleum refineries, and asphalt roofing plants)

Subpart VV - Equipment Leaks of Volatile Organic Compounds in the Synthetic Organic Chemicals Manufacturing Industry <u>for which Construction, Reconstruction, or Modification Commenced After January 5, 1981, and On or Before November 7, 2006</u>.

40 CFR 60.480 through 40 CFR 60.489

(all equipment within a process unit in a synthetic organic chemicals manufacturing plant)

<u>Subpart VVa - Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry for Which Construction, Reconstruction, or Modification Commenced After November 7, 2006.</u>

<u>40 CFR 60.480a through 40 CFR 60.489a</u>

<u>(all equipment within a process unit in a synthetic organic chemicals manufacturing plant)</u>

Subpart WW - Beverage Can Surface Coating Industry.

40 CFR 60.490 through 40 CFR 60.496

(beverage can surface coating lines: each exterior base coat operation, each overvarnish coating operation, and each inside spray coating operation)

Subpart XX - Bulk Gasoline Terminals.

40 CFR 60.500 through 40 CFR 60.506

(total of all loading racks at a bulk gasoline terminal which deliver liquid product into gasoline tank trucks)

Subparts YY through ZZ - (Reserved)

Subpart AAA - New Residential Wood Heaters.

40 CFR 60.530 through 40 CFR 60.539b

(wood heaters)

Subpart BBB - Rubber Tire Manufacturing Industry.

40 CFR 60.540 through 40 CFR 60.548

(each undertread cementing operation, each sidewall cementing operation, each tread end cementing operation, each bead cementing operation, each green tire spraying operation, each Michelin-A operation, each Michelin-B operation, and each Michelin-C automatic operation)

Subpart CCC - (Reserved)

Subpart DDD - Volatile Organic Compound (VOC) Emissions from the Polymer Manufacturing Industry.

40 CFR 60.560 through 40 CFR 60.566

(for polypropylene and polyethylene manufacturing using a continuous process that emits continuously or intermittently: all equipment used in the manufacture of these polymers. For polystyrene manufacturing using a continuous process that emits continuously: each material recovery section. For poly(ethylene terephthalate) manufacturing using a continuous process that emits continuously: each polymerization reaction section; if dimethyl terephthalate is used in the process, each material recovery section is also an affected facility; if terephthalic acid is used in the process, each raw materials preparation section is also an affected facility. For VOC emissions from equipment leaks: each group of fugitive emissions equipment within any process unit, excluding poly(ethylene terephthalate) manufacture.)

Subpart EEE - (Reserved)

Subpart FFF - Flexible Vinyl and Urethane Coating and Printing.

40 CFR 60.580 through 40 CFR 60.585

(each rotogravure printing line used to print or coat flexible vinyl or urethane products)

Subpart GGG - Equipment Leaks of VOC in Petroleum Refineries <u>for which Construction, Reconstruction, or Modification Commenced After January 4, 1983, and On or Before November 7, 2006</u>.

40 CFR 60.590 through 40 CFR 60.593

(each compressor, valve, pump pressure relief device, sampling connection system, open-ended valve or line, and flange or other connector in VOC service)

<u>Subpart GGGa - Equipment Leaks of VOC in Petroleum Refineries for which Construction, Reconstruction, or Modification Commenced After November 7, 2006.</u>

<u>40 CFR 60.590a through 40 CFR 60.593a</u>

<u>(each compressor, valve, pump pressure relief device, sampling connection system, open-ended valve or line, and flange or other connector in VOC service)</u>

Subpart HHH - Synthetic Fiber Production Facilities.

40 CFR 60.600 through 40 CFR 60.604

(each solvent-spun synthetic fiber process that produces more than 500 megagrams of fiber per year)

Subpart III - Volatile Organic Compound (VOC) Emissions from the Synthetic Organic Chemical Manufacturing Industry (SOCMI) Air Oxidation Unit Processes.

40 CFR 60.610 through 40 CFR 60.618

(each air oxidation reactor not discharging its vent stream into a recovery system and each combination of an air oxidation reactor or two or more air oxidation reactors and the recovery system into which the vent streams are discharged)

Subpart JJJ - Petroleum Dry Cleaners.

40 CFR 60.620 through 40 CFR 60.625

(facilities located at a petroleum dry cleaning plant with a total manufacturers' rated dryer capacity equal to or greater than 84 pounds: petroleum solvent dry cleaning dryers, washers, filters, stills, and settling tanks)

Subpart KKK - Equipment Leaks of VOC from Onshore Natural Gas Processing Plants.

40 CFR 60.630 through 40 CFR 60.636

(each compressor in VOC service or in wet gas service; each pump, pressure relief device, open-ended valve or line, valve, and flange or other connector that is in VOC service or in wet gas service, and any device or system required by this subpart)

Subpart LLL - Onshore Natural Gas Processing: Sulfur Dioxide Emissions.

40 CFR 60.640 through 40 CFR 60.648

(facilities that process natural gas: each sweetening unit, and each sweetening unit followed by a sulfur recovery unit)

Subpart MMM - (Reserved)

Subpart NNN - Volatile Organic Compound (VOC) Emissions from Synthetic Organic Chemical Manufacturing Industry (SOCMI) Distillation Operations.

40 CFR 60.660 through 40 CFR 60.668

(each distillation unit not discharging its vent stream into a recovery system, each combination of a distillation unit or of two or more units and the recovery system into which their vent streams are discharged)

Subpart OOO - Nonmetallic Mineral Processing Plants.

40 CFR 60.670 through 40 CFR 60.676

(facilities in fixed or portable nonmetallic mineral processing plants: each crusher, grinding mill, screening operation, bucket elevator, belt conveyor, bagging operation, storage bin, enclosed truck or railcar loading station)

Subpart PPP - Wool Fiberglass Insulation Manufacturing Plants.

40 CFR 60.680 through 40 CFR 60.685

(each rotary spin wool fiberglass insulation manufacturing line)

Subpart QQQ - VOC Emissions from Petroleum Refinery Wastewater Systems.

40 CFR 60.690 through 40 CFR 60.699

(individual drain systems, oil-water separators, and aggregate facilities in petroleum refineries)

Subpart RRR - Volatile Organic Compound Emissions from Synthetic Organic Chemical Manufacturing Industry (SOCMI) Reactor Processes.

40 CFR 60.700 through 40 CFR 60.708

(each reactor process not discharging its vent stream into a recovery system, each combination of a reactor process and the recovery system into which its vent stream is discharged, and each combination of two or more reactor processes and the common recovery system into which their vent streams are discharged)

Subpart SSS - Magnetic Tape Coating Facilities.

40 CFR 60.710 through 40 CFR 60.718

(each coating operation and each piece of coating mix preparation equipment)

Subpart TTT - Industrial Surface Coating: Surface Coating of Plastic Parts for Business Machines.

40 CFR 60.720 through 40 CFR 60.726

(each spray booth in which plastic parts for use in the manufacture of business machines receive prime coats, color coats, texture coats, or touch-up coats)

Subpart UUU - Calciners and Dryers in Mineral Industries.

40 CFR 60.730 through 40 CFR 60.737

(each calciner and dryer at a mineral processing plant)

Subpart VVV - Polymeric Coating of Supporting Substrates Facilities.

40 CFR 60.740 through 40 CFR 60.748

(each coating operation and any onsite coating mix preparation equipment used to prepare coatings for the polymeric coating of supporting substrates)

Subpart WWW - Municipal Solid Waste Landfills.

40 CFR 60.750 through 40 CFR 60.759

(municipal solid waste landfills for the containment of household and RCRA Subtitle D wastes)

Subpart AAAA - Small Municipal Waste Combustors for which Construction is Commenced after August 30, 1999, or for which Modification or Reconstruction is Commenced after June 6, 2001

40 CFR 60.1000 through 40 CFR 60.1465

(municipal waste combustor units with a capacity less than 250 tons per day and greater than 35 tons per day of municipal solid waste or refuse-derived fuel)

Subpart BBBB - Not applicable.

Subpart CCCC - Commercial/Industrial Solid Waste Incinerators for which Construction is Commenced after November 30, 1999, or for which Modification or Construction is Commenced on or after June 1, 2001

40 CFR 60.2000 through 40 CFR 60.2265

(an enclosed device using controlled flame combustion without energy recovery that is a distinct operating unit of any commercial or industrial facility, or an air curtain incinerator without energy recovery that is a distinct operating unit of any commercial or industrial facility)

Subpart DDDD - Not applicable.

Subpart EEEE - Other Solid Waste Incineration Units for Which Construction is Commenced After December 9, 2004, or for Which Modification or Reconstruction Is Commenced on or After June 16, 2006.

40 CFR 60.2880 through 40 CFR 60.2977

(very small municipal waste combustion units with the capacity to combust less than 35 tons per day of municipal solid waste or refuse-derived fuel, and institutional waste incineration units owned or operated by an organization

having a governmental, educational, civic, or religious purpose)

Subpart FFFF - Reserved.

Subpart GGGG - Reserved.

Subpart HHHH - Reserved.

Subpart IIII - Stationary Compression Ignition Internal Combustion Engines.

40 CFR 60.4200 through 40 CFR 60.4219

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Subpart JJJJ - Stationary Spark Ignition Internal Combustion Engines.

40 CFR 60.4230 through 40 CFR 60.4248

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Subpart KKKK - Stationary Combustion Turbines.

40 CFR 60.4300 through 40 CFR 60.4420

(stationary combustion turbine with a heat input at peak load equal to or greater than 10.7 gigajoules (10 MMBtu) per hour)

Appendix A - Test methods.

Appendix B - Performance specifications.

Appendix C - Determination of Emission Rate Change.

Appendix D - Required Emission Inventory Information.

Appendix E - (Reserved)

Appendix F - Quality Assurance Procedures.

Appendix G - (Not applicable)

Appendix H - (Reserved)

Appendix I - Removable label and owner's manual.

Part II
Emission Standards

Article 1
Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants (Rule 6-1)

9VAC5-60-60. General.

The Environmental Protection Agency (EPA) Regulations on National Emission Standards for Hazardous Air Pollutants (NESHAP), as promulgated in 40 CFR Part 61 and designated in 9VAC5-60-70 are, unless indicated otherwise, incorporated by reference into the regulations of the board as amended by the word or phrase substitutions given in 9VAC5-60-80. The complete text of the subparts in 9VAC5-60-70 incorporated herein by reference is contained in 40 CFR Part 61. The 40 CFR section numbers appearing under each subpart in 9VAC5-60-70 identify the specific provisions of the subpart incorporated by reference. The specific version of the provision adopted by reference shall be that contained in the CFR ~~(2008)~~ (2009) in effect July 1, ~~2008~~ 2009. In making reference to the Code of Federal Regulations, 40 CFR Part 61 means Part 61 of Title 40 of the Code of Federal Regulations; 40 CFR 61.01 means 61.01 in Part 61 of Title 40 of the Code of Federal Regulations.

Article 2
Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants for Source Categories (Rule 6-2)

9VAC5-60-90. General.

The Environmental Protection Agency (EPA) National Emission Standards for Hazardous Air Pollutants for Source Categories (Maximum Achievable Control Technologies, or MACTs) as promulgated in 40 CFR Part 63 and designated in 9VAC5-60-100 are, unless indicated otherwise, incorporated by reference into the regulations of the board as amended by the word or phrase substitutions given in 9VAC5-60-110. The complete text of the subparts in 9VAC5-60-100 incorporated herein by reference is contained in 40 CFR Part 63. The 40 CFR section numbers appearing under each subpart in 9VAC5-60-100 identify the specific provisions of the subpart incorporated by reference. The specific version of the provision adopted by reference shall be that contained in the CFR ~~(2008)~~ (2009) in effect July 1, ~~2008~~ 2009. In making reference to the Code of Federal Regulations, 40 CFR Part 63 means Part 63 of Title 40 of the Code of Federal Regulations; 40 CFR 63.1 means 63.1 in Part 63 of Title 40 of the Code of Federal Regulations.

9VAC5-60-100. Designated emission standards.

Subpart A - General Provisions.

40 CFR 63.1 through 40 CFR 63.11; 40 CFR 63.16

(applicability, definitions, units and abbreviations, prohibited activities and circumvention, construction and reconstruction, compliance with standards and maintenance requirements, performance testing requirements, monitoring requirements, notification requirements, recordkeeping and reporting requirements, control device requirements, performance track provisions)

Subpart B - Not applicable.

Subpart C - List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List.

40 CFR 63.60, 40 CFR 63.61, 40 CFR 63.62 and 40 CFR 63.63

(deletion of caprolactam from the list of hazardous air pollutants, deletion of methyl ethyl ketone from the list of hazardous air pollutants, redefinition of glycol ethers listed as hazardous air pollutants, deletion of ethylene glycol monobutyl ether)

Subpart D - Not applicable.

Subpart E - Not applicable.

Subpart F - Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry.

40 CFR 63.100 through 40 CFR 63.106

(chemical manufacturing process units that manufacture as a primary product one or more of a listed chemical; use as a reactant or manufacture as a product, by-product, or co-product, one or more of a listed organic hazardous air pollutant; and are located at a plant site that is a major source as defined in § 112 of the federal Clean Air Act)

Subpart G - Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater.

40 CFR 63.110 through 40 CFR 63.152

(all process vents, storage vessels, transfer operations, and wastewater streams within a source subject to Subpart F, 40 CFR 63.100 through 40 CFR 63.106)

Subpart H - Organic Hazardous Air Pollutants for Equipment Leaks.

40 CFR 63.160 through 40 CFR 63.182

(pumps, compressors, agitators, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, connectors, surge control vessels, bottoms receivers, instrumentation systems, and control devices or systems that are intended to operate in organic hazardous air pollutant service 300 hours or more during the calendar year within a source subject to the provisions of a specific subpart in 40 CFR Part 63)

Subpart I - Organic Hazardous Air Pollutants for Certain Processes Subject to the Negotiated Regulation for Equipment Leaks.

40 CFR 63.190 through 40 CFR 63.192

(emissions of designated organic hazardous air pollutants from processes specified in this subpart that are located at a plant site that is a major source as defined in § 112 of the federal Clean Air Act)

Subpart J - Polyvinyl Chloride and Copolymers Production.

40 CFR 63.210 through 40 CFR 63.217

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Subpart K - Reserved.

Subpart L - Coke Oven Batteries.

40 CFR 63.300 through 40 CFR 63.313

(existing by-product coke oven batteries at a coke plant, and existing nonrecovery coke oven batteries located at a coke plant)

Subpart M - Perchlorethylene Dry Cleaning Facilities.

40 CFR 63.320 through 40 CFR 63.325

(each dry cleaning facility that uses perchlorethylene)

Subpart N - Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks.

40 CFR 63.340 through 40 CFR 63.347

(each chromium electroplating or chromium anodizing tank at facilities performing hard chromium electroplating, decorative chromium electroplating, or chromium anodizing)

Subpart O - Ethylene Oxide Commercial Sterilization and Fumigation Operations.

40 CFR 63.360 through 40 CFR 63.367

(sterilization sources using ethylene oxide in sterilization or fumigation operations)

Subpart P - Reserved.

Subpart Q - Industrial Process Cooling Towers.

40 CFR 63.400 through 40 CFR 63.406

(industrial process cooling towers that are operated with chromium-based water treatment chemicals)

Subpart R - Gasoline Distribution Facilities.

40 CFR 63.420 through 40 CFR 63.429

(bulk gasoline terminals and pipeline breakout stations)

Subpart S - Pulp and Paper Industry.

40 CFR 63.440 through 40 CFR 63.458

(processes that produce pulp, paper, or paperboard, and use the following processes and materials: kraft, soda, sulfite, or semi-chemical pulping processes using wood; or mechanical pulping processes using wood; or any process using secondary or nonwood fibers)

Subpart T - Halogenated Solvent Cleaning.

40 CFR 63.460 through 40 CFR 63.469

(each individual batch vapor, in-line vapor, in-line cold, and batch cold solvent cleaning machine that uses any solvent containing methylene chloride, perchlorethylene, trichloroethylene, 1,1,1-trichloroethane, carbon tetrachloride, or chloroform)

Subpart U - Group I Polymers and Resins.

40 CFR 63.480 through 40 CFR 63.506

(elastomer product process units that produce butyl rubber, halobutyl rubber, epichlorohydrin elastomers, ethylene propylene rubber, Hypalon™, neoprene, nitrile butadiene rubber, nitrile butadiene latex, polysulfide rubber, polybutadiene rubber/styrene butadiene rubber by solution, styrene butadiene latex, and styrene butadiene rubber by emulsion)

Subpart V - Reserved.

Subpart W - Epoxy Resins Production and Non-Nylon Polyamides Production.

40 CFR 63.520 through 40 CFR 63.527

(manufacturers of basic liquid epoxy resins and wet strength resins)

Subpart X - Secondary Lead Smeltering.

40 CFR 63.541 through 40 CFR 63.550

(at all secondary lead smelters: blast, reverbatory, rotary, and electric smelting furnaces; refining kettles; agglomerating furnaces; dryers; process fugitive sources; and fugitive dust sources)

Subpart Y - Marine Tank Vessel Tank Loading Operations.

40 CFR 63.560 through 40 CFR 63.567

(marine tank vessel unloading operations at petroleum refineries)

Subpart Z - Reserved.

Subpart AA - Phosphoric Acid Manufacturing Plants.

40 CFR 63.600 through 40 CFR 63.610

(wet-process phosphoric acid process lines, evaporative cooling towers, rock dryers, rock calciners, superphosphoric acid process lines, purified acid process lines)

Subpart BB - Phosphate Fertilizers Production Plants.

40 CFR 63.620 through 40 CFR 63.631

(diammonium and monoammonium phosphate process lines, granular triple superphosphate process lines, and granular triple superphosphate storage buildings)

Subpart CC - Petroleum Refineries.

40 CFR 63.640 through 40 CFR 63.654

(storage tanks, equipment leaks, process vents, and wastewater collection and treatment systems at petroleum refineries)

Subpart DD - Off-Site Waste and Recovery Operations.

40 CFR 63.680 through 40 CFR 63.697

(operations that treat, store, recycle, and dispose of waste received from other operations that produce waste or recoverable materials as part of their manufacturing processes)

Subpart EE - Magnetic Tape Manufacturing Operations.

40 CFR 63.701 through 40 CFR 63.708

(manufacturers of magnetic tape)

Subpart FF - Reserved.

Subpart GG - Aerospace Manufacturing and Rework Facilities.

40 CFR 63.741 through 40 CFR 63.752

(facilities engaged in the manufacture or rework of commercial, civil, or military aerospace vehicles or components)

Subpart HH - Oil and Natural Gas Production Facilities.

40 CFR 63.760 through 40 CFR 63.779

(facilities that process, upgrade, or store hydrocarbon liquids or natural gas; ancillary equipment and compressors intended to operate in volatile hazardous air pollutant service)

Subpart II - Shipbuilding and Ship Repair (Surface Coating).

40 CFR 63.780 through 40 CFR 63.788

(shipbuilding and ship repair operations)

Subpart JJ - Wood Furniture Manufacturing Operations.

40 CFR 63.800 through 40 CFR 63.819

(finishing materials, adhesives, and strippable spray booth coatings; storage, transfer, and application of coatings and solvents)

Subpart KK - Printing and Publishing Industry.

40 CFR 63.820 through 40 CFR 63.831

(publication rotogravure, product and packaging rotogravure, and wide-web printing processes)

Subpart LL - Primary Aluminum Reduction Plants.

40 CFR 63.840 through 40 CFR 63.859

(each pitch storage tank, potline, paste production plant, or anode bulk furnace associated with primary aluminum production)

Subpart MM - Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite and Stand-Alone Semichemical Pulp Mills.

40 CFR 63.860 through 40 CFR 63.868

(chemical recovery systems, direct and nondirect contact evaporator recovery furnace systems, lime kilns, sulfite combustion units, semichemical combustion units)

Subpart NN - Reserved.

Subpart OO - Tanks--Level 1.

40 CFR 63.900 through 40 CFR 63.907

(for off-site waste and recovery operations, fixed-roof tanks)

Subpart PP - Containers.

40 CFR 63.920 through 40 CFR 63.928

(for off-site waste and recovery operations, containers)

Subpart QQ - Surface Impoundments.

40 CFR 63.940 through 40 CFR 63.948

(for off-site waste and recovery operations, surface impoundment covers and vents)

Subpart RR - Individual Drain Systems.

40 CFR 63.960 through 40 CFR 63.966

(for off-site waste and recovery operations, inspection and maintenance of individual drain systems)

Subpart SS - Closed Vent Systems, Control Devices, Recovery Devices and Routing to a Fuel Gas System or a Process.

40 CFR 63.980 through 40 CFR 63.999

(closed vent systems, control devices, recovery devices, and routing to a fuel gas system or a process, when associated with facilities subject to a referencing subpart)

Subpart TT - Equipment Leaks - Control Level 1.

40 CFR 63.1000 through 40 CFR 63.1018

(control of air emissions from equipment leaks when associated with facilities subject to a referencing subpart)

Subpart UU - Equipment Leaks - Control Level 2.

40 CFR 63.1019 through 40 CFR 63.1039

(control of air emissions from equipment leaks when associated with facilities subject to a referencing subpart: pumps, compressors, agitators, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, connectors, instrumentation systems, closed vent systems and control devices)

Subpart VV - Oil-Water Separators and Organic-Water Separators.

40 CFR 63.1040 through 40 CFR 63.1049

(for off-site waste and recovery operations, oil-water separators and organic-water separator roofs and vents)

Subpart WW - Storage Vessels (Tanks) - Control Level 2.

40 CFR 63.1060 through 40 CFR 63.1066

(storage vessels associated with facilities subject to a referencing subpart)

Subpart XX - Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste.

40 CFR 63.1080 through 40 CFR 63.1098

(any cooling tower system or once-through cooling water system)

Subpart YY - Generic Maximum Achievable Control Technology Standards.

40 CFR 63.1100 through 40 CFR 63.1113

(acetal resins production, acrylic and modacrylic fibers production, hydrogen fluoride production, polycarbonate production)

Subpart ZZ - Reserved.

Subpart AAA - Reserved.

Subpart BBB - Reserved.

Subpart CCC - Steel Pickling - Hydrogen Chloride Process Facilities and Hydrochloric Acid Regeneration Plants.

40 CFR 63.1155 through 40 CFR 63.1174

(steel pickling facilities that pickle carbon steel using hydrochloric acid solution, hydrochloric acid regeneration plants)

Subpart DDD - Mineral Wool Production.

40 CFR 63.1175 through 40 CFR 63.1199

(cupolas and curing ovens at mineral wool manufacturing facilities)

Subpart EEE - Hazardous Waste Combustors.

40 CFR 63.1200 through 40 CFR 63.1221

(hazardous waste combustors)

Subpart FFF - Reserved.

Subpart GGG - Pharmaceutical Production.

40 CFR 63.1250 through 40 CFR 63.1261

(pharmaceutical manufacturing operations)

Subpart HHH - Natural Gas Transmission and Storage Facilities.

40 CFR 63.1270 through 40 CFR 63.1289

(natural gas transmission and storage facilities that transport or store natural gas prior to entering the pipeline to a local distribution company or to a final end user)

Subpart III - Flexible Polyurethane Foam Production.

40 CFR 63.1290 through 40 CFR 63.1309

(flexible polyurethane foam or rebond processes)

Subpart JJJ - Group IV Polymers and Resins.

40 CFR 63.1310 through 40 CFR 63.1335

(facilities which manufacture acrylonitrile butadiene styrene resin, styrene acrylonitrile resin, methyl methacrylate butadiene styrene resin, polystyrene resin, poly(ethylene terephthalate) resin, or nitrile resin)

Subpart KKK - Reserved.

Subpart LLL - Portland Cement Manufacturing.

40 CFR 63.1340 through 40 CFR 63.1359

(kilns; in-line kilns/raw mills; clinker coolers; raw mills; finish mills; raw material dryers; raw material, clinker, or finished product storage bins; conveying system transfer points; bagging systems; bulk loading or unloading systems)

Subpart MMM - Pesticide Active Ingredient Production.

40 CFR 63.1360 through 40 CFR 63.1369

(pesticide active ingredient manufacturing process units, waste management units, heat exchange systems, and cooling towers)

Subpart NNN - Wool Fiberglass Manufacturing.

40 CFR 63.1380 through 40 CFR 63.1399

(glass melting furnaces, rotary spin wool fiberglass manufacturing lines producing bonded wool fiberglass building insulation or bonded heavy-density product)

Subpart OOO - Amino/Phenolic Resins Production.

40 CFR 63.1400 through 40 CFR 63.1419

(unit operations, process vents, storage vessels, equipment subject to leak provisions)

Subpart PPP - Polyether Polyols Production.

40 CFR 63.1420 through 40 CFR 63.1439

(polyether polyol manufacturing process units)

Subpart QQQ - Primary Copper Smelting.

40 CFR 63.1440 through 40 CFR 63.1-1459

(batch copper converters, including copper concentrate dryers, smelting furnaces, slag cleaning vessels, copper converter departments, and the entire group of fugitive emission sources)

Subpart RRR - Secondary Aluminum Production.

40 CFR 63.1500 through 40 CFR 63.1520

(scrap shredders; thermal chip dryers; scrap dryers/delacquering kilns/decoating kilns; group 2, sweat, dross-only furnaces; rotary dross coolers; processing units)

Subpart SSS - Reserved.

Subpart TTT - Primary Lead Smelting.

40 CFR 63.1541 through 40 CFR 63.1550

(sinter machines, blast furnaces, dross furnaces, process fugitive sources, fugitive dust sources)

Subpart UUU - Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units.

40 CFR 63.1560 through 40 CFR 63.1579

(petroleum refineries that produce transportation and heating fuels or lubricants, separate petroleum, or separate, crack, react, or reform an intermediate petroleum stream, or recover byproducts from an intermediate petroleum stream)

Subpart VVV - Publicly Owned Treatment Works.

40 CFR 63.1580 through 40 CFR 63.1595

(intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment)

Subpart WWW - Reserved.

Subpart XXX - Ferroalloys Production: Ferromanganese and Silicomanganese.

40 CFR 63.1620 through 40 CFR 63.1679

(submerged arc furnaces, metal oxygen refining processes, crushing and screening operations, fugitive dust sources)

Subpart YYY - Reserved.

Subpart ZZZ - Reserved.

Subpart AAAA - Municipal Solid Waste Landfills.

40 CFR 63.1930 through 40 CFR 63.1990

(municipal solid waste landfills that have accepted waste since November 8, 1987, or have additional capacity for waste deposition)

Subpart BBBB - Reserved.

Subpart CCCC - Manufacturing of Nutritional Yeast.

40 CFR 63.2130 through 40 CFR 63.2192

(fermentation vessels)

Subpart DDDD - Plywood and Composite Wood Products.

40 CFR 63.2230 through 40 CFR 63.2292

(manufacture of plywood and composite wood products by bonding wood material or agricultural fiber with resin under heat and pressure to form a structural panel or engineered wood product)

Subpart EEEE - Organic Liquids Distribution (Nongasoline).

40 CFR 63.2330 through 40 CFR 63.2406

(transfer of noncrude oil liquids or liquid mixtures that contain organic hazardous air pollutants, or crude oils downstream of the first point of custody, via storage tanks, transfer racks, equipment leak components associated with pipelines, and transport vehicles

Subpart FFFF - Miscellaneous Organic Chemical Manufacturing.

40 CFR 63.2430 through 40 CFR 63.2550

(reaction, recovery, separation, purification, or other activity, operation, manufacture, or treatment that are used to produce a product or isolated intermediate)

Subpart GGGG - Solvent Extraction for Vegetable Oil Production.

40 CFR 63.2830 through 40 CFR 63.2872

(vegetable oil production processes)

Subpart HHHH--Wet-formed Fiberglass Mat Production.

40 CFR 63.2980 through 63.3079

(wet-formed fiberglass mat drying and curing ovens)

Subpart IIII - Surface Coating of Automobiles and Light-Duty Trucks.

40 CFR 63.3080 through 40 CFR 63.3176.

(application of topcoat to new automobile or new light-duty truck bodies or body parts)

Subpart JJJJ - Paper and Other Web Coating.

40 CFR 63.3280 through 40 CFR 63.3420

(web coating lines engaged in the coating of metal webs used in flexible packaging and in the coating of fabric substrates for use in pressure-sensitive tape and abrasive materials)

Subpart KKKK - Surface Coating of Metal Cans.

40 CFR 63.3480 through 40 CFR 63.3561

(application of coatings to a substrate using spray guns or dip tanks, including one- and two-piece draw and iron can body coating; sheetcoating; three-piece can body assembly coating; and end coating)

Subpart LLLL - Reserved.

Subpart MMMM - Surface Coating of Miscellaneous Metal Parts and Products.

40 CFR 63.3880 through 40 CFR 63.3981

(application of coatings to industrial, household, and consumer products)

Subpart NNNN - Surface Coating of Large Appliances.

40 CFR 63.4080 through 40 CFR 63.4181

(surface coating of a large appliance part or product, including cooking equipment; refrigerators, freezers, and refrigerated cabinets and cases; laundry equipment; dishwashers, trash compactors, and water heaters; and HVAC units, air-conditioning, air-conditioning and heating combination units, comfort furnaces, and electric heat pumps)

Subpart OOOO - Printing, Coating, and Dyeing of Fabrics and Other Textiles.

40 CFR 63.4280 through 40 CFR 63.4371

(printing, coating, slashing, dyeing, or finishing of fabric and other textiles)

Subpart PPPP - Surface Coating of Plastic Parts and Products.

40 CFR 63.4480 through 40 CFR 63.4581

(application of coating to a substrate using spray guns or dip tanks, including motor vehicle parts and accessories for automobiles, trucks, recreational vehicles; sporting and recreational goods; toys; business machines; laboratory and medical equipment; and household and other consumer products)

Subpart QQQQ - Surface Coating of Wood Building Products.

40 CFR 63.4680 through 40 CFR 63.4781

(finishing or laminating of wood building products used in the construction of a residential, commercial, or institutional building)

Subpart RRRR - Surface Coating of Metal Furniture.

40 CFR 63.4880 through 40 CFR 63.4981

(application of coatings to substrate using spray guns and dip tanks)

Subpart SSSS - Surface Coating of Metal Coil.

40 CFR 63.5080 through 40 CFR 63.5209

(organic coating to surface of metal coil, including web unwind or feed sections, work stations, curing ovens, wet sections, and quench stations)

Subpart TTTT - Leather Finishing Operations.

40 CFR 63.5280 through 40 CFR 63.5460

(multistage application of finishing materials to adjust and improve the physical and aesthetic characteristics of leather surfaces)

Subpart UUUU - Cellulose Products Manufacturing.

40 CFR 63.5480 through 40 CFR 63.5610

(cellulose food casing, rayon, cellulosic sponge, cellophane manufacturing, methyl cellulose, hydroxypropyl methyl cellulose, hydroxypropyl cellulose, hydroxyethyl cellulose, and carboxymethyl cellulose manufacturing industries)

Subpart VVVV - Boat Manufacturing.

40 CFR 63.5680 through 40 CFR 63.5779

(resin and gel coat operations, carpet and fabric adhesive operations, aluminum recreational boat surface coating operations)

Subpart WWWW - Reinforced Plastic Composites Production.

40 CFR 63.5780 through 40 CFR 63.5935

(reinforced or nonreinforced plastic composites or plastic molding compounds using thermostat resins and gel coats that contain styrene)

Subpart XXXX - Rubber Tire Manufacturing.

40 CFR 63.5980 through 40 CFR 63.6015

(production of rubber tires and components including rubber compounds, sidewalls, tread, tire beads, tire cord and liners)

Subpart YYYY - Stationary Combustion Turbines.

40 CFR 63.6080 through 40 CFR 63.6175

(simple cycle, regenerative/recuperative cycle, cogeneration cycle, and combined cycle stationary combustion turbines)

Subpart ZZZZ - Stationary Reciprocating Internal Combustion Engines.

40 CFR 63.6580 through 40 CFR 63.6675.

(any stationary internal combustion engine that uses reciprocating motion to convert heat energy into mechanical work)

(NOTE: Authority to enforce provisions related to affected facilities located at a major source as defined in 40 CFR 63.6675 is being retained by the Commonwealth. Authority to enforce the area source provisions of the above standard is being retained by EPA. The provisions of this subpart as they apply to area sources are not incorporated by reference into these regulations)

Subpart AAAAA - Lime Manufacturing Plants.

40 CFR 63.7080 through 40 CFR 63.7143.

(manufacture of lime product, including calcium oxide, calcium oxide with magnesium oxide, or dead burned dolomite, by calcination of limestone, dolomite, shells or other calcareous substances)

Subpart BBBBB - Semiconductor Manufacturing.

40 CFR 63.7180 through 40 CFR 63.7195

(semiconductor manufacturing process units used to manufacture p-type and n-type semiconductors and active solid-state devices from a wafer substrate)

Subpart CCCCC - Coke Ovens: Pushing, Quenching, and Battery Stacks.

40 CFR 63.7280 through 40 CFR 63.7352

(pushing, soaking, quenching, and battery stacks at coke oven batteries)

Subpart DDDDD - Industrial, Commercial, and Institutional Boilers and Process Heaters.

40 CFR 63.7480 through 40 CFR 63.7575

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Subpart EEEEE - Iron and Steel Foundries.

40 CFR 63.7680 through 40 CFR 63.7765

(metal melting furnaces, scrap preheaters, pouring areas, pouring stations, automated conveyor and pallet cooling lines, automated shakeout lines, and mold and core making lines)

Subpart FFFFF - Integrated Iron and Steel Manufacturing.

40 CFR 63.7780 through 40 CFR 63.7852

(each sinter plant, blast furnace, and basic oxygen process furnace at an integrated iron and steel manufacturing facility)

Subpart GGGGG - Site Remediation.

40 CFR 63.7880 through 40 CFR 63.7957

(activities or processes used to remove, destroy, degrade, transform, immobilize, or otherwise manage remediation material)

Subpart HHHHH - Miscellaneous Coating Manufacturing.

40 CFR 63.7980 through 40 CFR 63.8105

(process vessels; storage tanks for feedstocks and products; pumps, compressors, agitators, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, connectors, and instrumentation systems; wastewater tanks and transfer racks)

Subpart IIIII - Mercury Cell Chlor-Alkali Plants.

40 CFR 63.8180 through 40 CFR 63.8266

(byproduct hydrogen streams, end box ventilation system vents, and fugitive emission sources associated with cell rooms, hydrogen systems, caustic systems, and storage areas for mercury-containing wastes)

Subpart JJJJJ - Brick and Structural Clay Products Manufacturing.

40 CFR 63.8380 through 40 CFR 63.8515

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Subpart KKKKK - Ceramics Manufacturing.

40 CFR 63.8530 through 40 CFR 63.8665

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Subpart LLLLL - Asphalt Processing and Asphalt Roof Manufacturing.

40 CFR 63.8680 through 40 CFR 63.8698

(preparation of asphalt flux at stand-alone asphalt processing facilities, petroleum refineries, and asphalt roofing facilities)

Subpart MMMMM - Flexible Polyurethane Foam Fabrication Operations.

40 CFR 63.8780 through 40 CFR 63.8830

(flexible polyurethane foam fabrication plants using flame lamination or loop slitter adhesives)

Subpart NNNNN - Hydrochloric Acid Production.

40 CFR 63.8980 through 40 CFR 63.9075

(HCl production facilities that produce a liquid HCl product)

Subpart OOOOO - Reserved.

Subpart PPPPP - Engine Test Cells and Stands.

40 CFR Subpart 63.9280 through 40 CFR 63.9375

(any apparatus used for testing uninstalled stationary or uninstalled mobile (motive) engines)

Subpart QQQQQ - Friction Materials Manufacturing Facilities.

40 CFR 63.9480 through 40 CFR 63.9579

(friction materials manufacturing facilities that use a solvent-based process)

Subpart RRRRR - Taconite Iron Ore Processing.

40 CFR 63.9580 through 40 CFR 63.9652

(ore crushing and handling, ore dryer stacks, indurating furnace stacks, finished pellet handling, and fugitive dust)

Subpart SSSSS - Refractory Products Manufacturing.

40 CFR 63.9780 through 40 CFR 63.9824

(manufacture of refractory products, including refractory bricks and shapes, monolithics, kiln furniture, crucibles, and other materials for liming furnaces and other high temperature process units)

Subpart TTTTT - Primary Magnesium Refining.

40 CFR 63.9880 through 40 CFR 63.9942

(spray dryer, magnesium chloride storage bin scrubber, melt/reactor system, and launder off-gas system stacks)

Subpart UUUUU - Reserved.

Subpart VVVVV - Reserved.

Subpart WWWWW - Hospital Ethylene Oxide Sterilizer Area Sources.

40 CFR 63.10382 through 40 CFR 63.10448

(any enclosed vessel that is filled with ethylene oxide gas or an ethylene oxide/inert gas mixture for the purpose of sterilization)

Subpart XXXXX - Reserved.

Subpart YYYYY - Electric Arc Furnace Steelmaking Facility Area Sources.

40 CFR 63.10680 through 40 CFR 63.10692

(a steel plant that produces carbon, alloy, or specialty steels using an electric arc furnace)

Subpart ZZZZZ - Iron and Steel Foundries Area Sources.

40 CFR 63.10880 through 40 CFR 63.10906

(a facility that melts scrap, ingot, and/or other forms of iron and/or steel and pours the resulting molten metal into molds to produce final or near final shape products for introduction into commerce)

Subpart AAAAAA - Reserved.

Subpart BBBBBB - Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities, Area Sources.

40 CFR 63.11080 through 40 CFR 63.11100

(gasoline storage tanks, gasoline loading racks, vapor collection-equipped gasoline cargo tanks, and equipment components in vapor or liquid gasoline service)

Subpart CCCCCC - Gasoline Dispensing Facilities, Area Sources.

40 CFR 63.11110 through 40 CFR 63.11132

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Subpart DDDDDD - Polyvinyl Chloride and Copolymers Production Area Sources.

40 CFR 63.11140 through 40 CFR 63.11145

(plants that produce polyvinyl chloride or copolymers)

Subpart EEEEEE - Primary Copper Smelting Area Sources.

40 CFR 63.11146 through 40 CFR 63.11152

(any installation or any intermediate process engaged in the production of copper from copper sulfide ore concentrates through the use of pyrometallurgical techniques)

Subpart FFFFFF - Secondary Copper Smelting Area Sources.

40 CFR 63.11153 through 40 CFR 63.11159

(a facility that processes copper scrap in a blast furnace and converter or that uses another pyrometallurgical purification process to produce anode copper from copper scrap, including low-grade copper scrap)

Subpart GGGGGG - Primary Nonferrous Metals Area Sources--Zinc, Cadmium, and Beryllium.

40 CFR 63.11160 through 40 CFR 63.11168

(cadmium melting furnaces used to melt cadmium or produce cadmium oxide from the cadmium recovered in the zinc production; primary beryllium production facilities engaged in the chemical processing of beryllium ore to produce beryllium metal, alloy, or oxide, or performing any of the intermediate steps in these processes; and primary zinc production facilities engaged in the production, or any intermediate process in the production, of zinc or zinc oxide from zinc sulfide ore concentrates through the use of pyrometallurgical techniques)

Subpart HHHHHH - Paint Stripping and Miscellaneous Surface Coating Operations Area Sources.

40 CFR 63.11169 through 40 CFR 63.11180

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Subpart IIIIII - Reserved.

Subpart JJJJJJ - Reserved.

Subpart KKKKKK - Reserved.

Subpart LLLLLL - Acrylic and Modacrylic Fibers Production Area Sources.

40 CFR 63.11393 through 40 CFR 63.11399

(production of either of the following synthetic fibers composed of acrylonitrile units: acrylic fiber or modacrylic fiber)

Subpart MMMMMM - Carbon Black Production Area Sources.

40 CFR 63.11400 through 40 CFR 63.11406

(carbon black production process units including all waste management units, maintenance wastewater, and equipment components that contain or contact HAP that are associated with the carbon black production process unit)

Subpart NNNNNN - Chemical Manufacturing Area Sources: Chromium Compounds.

40 CFR 63.11407 through 40 CFR 63.11413

(any process that uses chromite ore as the basic feedstock to manufacture chromium compounds, primarily sodium dichromate, chromic acid, and chromic oxide)

Subpart OOOOOO - Flexible Polyurethane Foam Production and Fabrication Area Sources.

40 CFR 63.11414 through 40 CFR 63.11420

(a facility where pieces of flexible polyurethane foam are cut, bonded, and/or laminated together or to other substrates)

Subpart PPPPPP - Lead Acid Battery Manufacturing Area Sources.

40 CFR 63.11421 through 40 CFR 63.11427

(grid casting facilities, paste mixing facilities, three-process operation facilities, lead oxide manufacturing facilities, lead reclamation facilities, and any other lead-emitting operation that is associated with the lead acid battery manufacturing plant)

Subpart QQQQQQ - Wood Preserving Area Sources.

40 CFR 63.11428 through 40 CFR 63.11434

(pressure or thermal impregnation of chemicals into wood to provide effective long-term resistance to attack by fungi, bacteria, insects, and marine borers)

Subpart RRRRRR - Clay Ceramics Manufacturing Area Sources.

40 CFR 63.11435 through 40 CFR 63.11447

(manufacture of pressed tile, sanitaryware, dinnerware, or pottery with an atomized glaze spray booth or kiln that fires glazed ceramic ware)

Subpart SSSSSS - Glass Manufacturing Area Sources.

40 CFR 63.11448 through 40 CFR 63.11461

(manufacture of flat glass, glass containers, or pressed and blown glass by melting a mixture of raw materials to produce molten glass and form the molten glass into sheets, containers, or other shapes)

Subpart TTTTTT - Secondary Nonferrous Metals Processing Area Sources.

40 CFR 63.11462 through 40 CFR 63.11474

(all crushing and screening operations at a secondary zinc processing facility and all furnace melting operations located at any secondary nonferrous metals processing facility)

Subpart UUUUUU - Reserved.

Subpart VVVVVV - Reserved.

Subpart WWWWWW - ~~Reserved~~ Plating and Polishing Operations, Area Sources.

40 CFR 63.11504 through 40 CFR 63.11513

(new and existing tanks, thermal spraying equipment, and mechanical polishing equipment used in non-chromium electroplating, electroless or non-electrolytic plating, non-electrolytic metal coating, dry mechanical polishing, electroforming, and electropolishing)

Subpart XXXXXX - ~~Reserved~~ Nine Metal Fabrication and Finishing Source Categories, Area Sources.

40 CFR 63.11514 through 40 CFR 63.11523

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Subpart YYYYYY - ~~Reserved~~ Ferroalloys Production Facilities, Area Sources.

40 CFR 63.11524 through 40 CFR 63.11543

(manufacture of silicon metal, ferrosilicon, ferrotitanium using the aluminum reduction process, ferrovanadium, ferromolybdenum, calcium silicon, silicomanganese zirconium, ferrochrome silicon, silvery iron, high-carbon ferrochrome, charge chrome, standard ferromanganese, silicomanganese, ferromanganese silicon, calcium carbide or other ferroalloy products using electrometallurgical operations including electric arc furnaces or other reaction vessels)

Subpart ZZZZZZ - ~~Reserved~~ Aluminum, Copper, and Other Nonferrous Foundries, Area Sources.

40 CFR 63.11544 through 40 CFR 63.11558

(NOTE: Authority to enforce the above standard is being retained by EPA and it is not incorporated by reference into these regulations.)

Appendix A - Test Methods.

Appendix B - Sources Defined for Early Reduction Provisions.

Appendix C - Determination of the Fraction Biodegraded (F_{bio}) in a Biological Treatment Unit.

Appendix D - Alternative Validation Procedure for EPA Waste and Wastewater Methods.

VA.R. Doc. No. R10-2072; Filed December 1, 2009, 3:58 p.m.

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TITLE 12. HEALTH

STATE BOARD OF HEALTH

Proposed Regulation

Title of Regulation: **12VAC5-66. Regulations Governing Durable Do Not Resuscitate Orders (amending 12VAC5-66-10, 12VAC5-66-40 through 12VAC5-66-80).**

Statutory Authority: § 32.1-12 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: February 19, 2010.

Agency Contact: Michael Berg, Compliance Director, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7615, FAX (804) 864-7580, or email michael.berg@vdh.virginia.gov.

Basis: Section 32.1-12 of the Code of Virginia provides the Board of Health with the authority to promulgate regulations to carry out the provisions of Virginia laws administered by it. Section 54.1-2987.1 of the Code of Virginia directs the board to promulgate regulations regarding durable do not resuscitate (DDNR) orders.

Purpose: The current process for honoring DDNR orders is hampered by the inability of various healthcare providers to understand the process of complying with an individual patient's end-of-life decision. The purpose of these changes is to (i) allow the use of a less restrictive type of specialized form, (ii) improve the ability to use other valid written orders from the patient's physician, and (iii) allow the use of legible electronic copies of DDNR forms. By reducing confusion and streamlining the efficiency of the process in recognizing and honoring a patient's end-of-life decisions, the public's health, safety, and welfare is better ensured.

Substance: Substantive changes include the ability for physicians or licensed healthcare facilities to obtain the Board of Health DDNR form via the Internet and to allow legible electronic copies of DDNR orders to be recognized and exchanged between healthcare entities.

Issues: By enacting the proposed changes, there are no disadvantages to the public or the Commonwealth. Advantages to the public include increasing the likelihood that healthcare providers will honor patients' end-of-life decisions in both out-of-hospital and in-hospital settings.

The Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Health (Board) proposes to amend its durable do not resuscitate (DDNR) regulations by adding several definitions, specifying that DDNR forms may be obtained from the Office of Emergency Medical Services' website and allowing legible electronic copies of DDNR orders to be used and recognized as valid by healthcare facilities.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Current regulations require DDNR order forms to be a "unique document printed on distinctive paper". Current Board policy, however, allows authorized individuals to obtain DDNR order forms from the Office of Emergency Medical Services' website. The Board proposes to amend these regulations to remove language that requires orders to be printed on special paper and to specifically state that forms can be obtained electronically or in hard copy form from the Office of Emergency Medical Services. No regulated entity is likely to incur any costs on account of these regulatory changes. To the extent that these regulations have caused confusion because they seemed to contradict current Board policy, these regulatory changes will provide the benefits of consistency and clarity.

Current regulations require DDNR orders to be displayed at a patient's current location and require original DDNR orders to travel with that patient (from a nursing home where the usually reside to a hospital where they are receiving temporary care, for instance). Current regulations allow photocopies of DDNR orders for informational purposes only. Current regulations specifically prohibit photocopied DDNR orders from being used as a basis to withhold cardiopulmonary resuscitation. This current limitation has proved problematic for patients who are transported between facilities as their orders are frequently misplaced and new orders have to be obtained and filled out. To address this issue, the Board proposes to allow health care personnel to honor legible photocopies of DDNR orders so that they may be used in lieu of the original orders. This change will benefit both patients and health care personnel; patients will have a greater chance of having their wishes for end of life care honored and health care personnel will no longer have to act contrary to patient wishes in cases where they know their patients have DDNR orders but they do not have the original with them.

Businesses and Entities Affected. The Virginia Department of Health reports that these regulatory changes will affect more than 100 inpatient and outpatient hospitals, 265 nursing facilities and all health care providers that care for patients who have DDNR orders. These proposed regulations will also affect all patients who now have DDNR orders or who will have them at some point in the fulure.

Localities Particularly Affected. No locality will be particularly affected by this proposed regulatory action.

Projected Impact on Employment. This regulatory action will likely have no impact on employment in the Commonwealth.

Effects on the Use and Value of Private Property. This regulatory action will likely have no effect on the use or value of private property in the Commonwealth.

Small Businesses: Costs and Other Effects. Small businesses in the Commonwealth are unlikely to incur any costs on account of this regulatory action.

Small Businesses: Alternative Method that Minimizes Adverse Impact. Small businesses in the Commonwealth are unlikely to incur any costs on account of this regulatory action.

Real Estate Development Costs. This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 36 (06). Section 2.2-4007.04 requires that such economic impact analyses 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, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive

or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to the Department of Planning and Budget's Economic Impact: The agency concurs substantially with the economic impact analysis submitted by the Department of Planning and Budget.

Summary:

Since the inception of the Durable Do Not Resuscitate (DDNR) program, the use and understanding of the intent and applicability of DDNR orders have undergone continuous and evolving interpretation. These amendments to the regulations regarding DDNR orders add several definitions, specify that DDNR forms may be obtained from the Office of Emergency Medical Services' website, and allow legible electronic copies of DDNR orders to be used and recognized as valid by healthcare facilities.

Part I
Definitions

12VAC5-66-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Agent" means an adult appointed by the declarant under an advance directive, executed or made in accordance with the provisions of § 54.1-2983 of the Code of Virginia to make health care decisions for him.

"Alternate Durable DNR" means a Durable DNR bracelet or necklace issued by a vendor approved by the Virginia Office of Emergency Medical Services. A Durable DNR Order Form must be obtained by the patient, from a physician, to obtain Durable DNR jewelry.

"Board" means the State Board of Health.

"Cardiac arrest" means the cessation of a functional heartbeat.

"Commissioner" means the State Health Commissioner.

"Durable Do Not Resuscitate Order Form" or "Durable DNR Order Form" means a written physician's order issued pursuant to § 54.1-2987.1 of the Code of Virginia in a form or forms authorized by the board to withhold cardiopulmonary resuscitation from an individual in the event of cardiac or respiratory arrest. For purposes of this chapter, cardiopulmonary resuscitation shall include cardiac compression, endotracheal intubation and other advanced airway management, artificial ventilation, ~~and~~ defibrillation, administration of cardiac resuscitative medications, and related procedures. As the terms "advance directive" and "Durable Do Not Resuscitate Order" are used in this article, a Durable Do Not Resuscitate Order Form or other DNR Order is not and shall not be construed as an advance directive. When used in these regulations, the term "Durable DNR Order Form" shall include any authorized ~~alternate form of identification~~ Alternate Durable DNR Jewelry issued in conjunction with an original Durable DNR Order ~~form~~ Form.

"Emergency Medical Services" or "EMS" means the services rendered by an agency licensed by the Virginia Office of Emergency Medical Services, an equivalent agency licensed by another state or a similar agency of the federal government when operating within this Commonwealth.

"Emergency medical services agency" or "EMS agency" means any ~~person~~ agency, licensed to engage in the business, service, or regular activity, whether or not for profit, of transporting and/or rendering immediate medical care to such persons who are sick, injured, wounded or otherwise incapacitated or helpless.

"Incapable of making an informed decision" means the inability of an adult patient, because of mental illness, mental retardation, or any other mental or physical disorder that precludes communication or impairs judgment and that has been diagnosed and certified in writing by his physician with whom he has a bona fide physician/patient relationship and a second physician or licensed clinical psychologist after personal examination of such patient, to make an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment because he is unable to understand the nature, extent or probable consequences of the proposed medical decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision. For purposes of this article, persons who are deaf, dysphasic or have other communication disorders, who are otherwise mentally competent and able to communicate by means other than speech, shall not be considered incapable of making an informed decision.

"Office of EMS" or "OEMS" means the Virginia Office of Emergency Medical Services. The Virginia Office of Emergency Medical Services is a state office located within the Virginia Department of Health (VDH).

"Other Do Not Resuscitate Order" or "Other DNR Order" means a written physician's order on a form other than the authorized state standardized Durable DNR Form. An Other DNR form must contain all the information required in subdivision 1 of 12VAC5-66-40 to be covered by these regulations.

"Person authorized to consent on the patient's behalf" means any person authorized by law to consent on behalf of the patient incapable of making an informed decision or, in the case of a minor child, the parent or parents having custody of the child or the child's legal guardian or as otherwise provided by law.

"Physician" means a person licensed to practice medicine in the Commonwealth of Virginia or in the jurisdiction where the treatment is to be rendered or withheld.

"Qualified emergency medical services personnel" means personnel certified to practice as defined by § 32.1-111.1 of the Code of Virginia when acting within the scope of their certification.

"Qualified health care facility" means a facility, program, or organization operated or licensed by the State Board of Health or by the Department of Behavioral Health and Developmental Services (DBHDS) or operated, licensed, or owned by another state agency.

"Qualified health care personnel" means any qualified emergency medical services personnel and any licensed healthcare provider or practitioner functioning in any facility, program or organization operated or licensed by the State Board of Health~~,~~ or by ~~the Department of Mental Health, Mental Retardation and Substance Abuse Services~~ DBHDS or operated, licensed, or owned by another state agency.

"Respiratory arrest" means cessation of breathing.

Part III
Requirements and Provisions

12VAC5-66-40. The Durable Do Not Resuscitate Order Form.

The Durable DNR Order Form shall be a ~~unique~~ standardized document ~~printed on distinctive paper,~~ as approved by the board and consistent with these regulations. The following requirements and provisions shall apply to the approved Durable DNR Order Form.

1. Content of the Form - A Durable DNR Order Form shall contain, from a physician with whom the patient has a bona fide physician/patient relationship, a do not resuscitate determination, signature and the date of issue, the signature of the patient or, if applicable, the person authorized to consent on the patient's behalf.

2. Effective Period for a Signed Durable DNR Order Form - A signed Durable DNR Order shall remain valid until revoked.

3. ~~Original~~ Durable DNR Order Form - ~~An original~~ A Durable DNR Order or an ~~alternate form~~ Alternate Durable DNR Jewelry that complies with 12VAC5-66-50 shall be valid for the purposes of withholding or withdrawing cardiopulmonary resuscitation by qualified health care personnel in the event of cardiac or respiratory arrest.

4. Availability of the Durable DNR Order Form. The ~~original~~ Durable DNR Order ~~or an alternate form~~ Form that complies with 12VAC5-66-50 or an Alternate Durable DNR that complies with 12VAC5-66-60 shall be maintained and ~~displayed~~ readily available at the patient's current location or residence ~~in one of the places designated on the form, or should accompany the patient, if traveling. Photocopies of the Durable DNR Order may be given to other providers or persons for information, with the express consent of the patient or the patient's designated agent or the person authorized to consent on the patient's behalf. However, such photocopies of the Durable DNR Order are not valid for withholding cardiopulmonary resuscitation~~. Within any facility, program or organization operated or licensed by the State Board of Health or by DBHDS or operated, licensed, or owned by another state agency, the Durable DNR Order Form, Alternate Durable DNR, or an Other Durable DNR Order should be readily available to the patient.

5. Qualified health care personnel may honor a legible photocopy of a Durable DNR Form or Other Durable DNR Order.

6. A patient who is traveling outside his home or between health care facilities should have an original or photocopied Durable DNR Order Form or Other Durable DNR Order accompany him.

~~4.~~ 7. Revocation of a Durable DNR Order Form - A Durable DNR Order may be revoked at any time by the patient (i) by ~~physical cancellation~~ physically destroying the Durable DNR Order Form or ~~destruction by the patient or~~ having another person in his presence and at his direction ~~of~~ destroy the Durable DNR Order Form and/or any alternate form of identification~~;~~ or (ii) by oral expression of intent to revoke. The Durable DNR Order may also be revoked by the patient's designated agent or the person authorized to consent on the patient's behalf unless that person knows the patient would object to such revocation. If an Other Durable DNR Order exists and a patient or his authorized agent revokes the Durable DNR, health care personnel should assure the revocation is honored by updating or destroying the Other Durable DNR Order.

~~5.~~ 8. Distribution of Durable DNR Order Forms - ~~Authorized~~ The authorized Virginia Durable DNR ~~Forms, with instructions,~~ Order Form shall be a standardized form available ~~only to physicians~~ for download via the Internet from the Office of Emergency Medical Services website. The downloadable form will contain directions for completing the form and three identical Durable DNR Order Forms: one form to be kept by the patient, the second to be placed in the patient's permanent medical record, and the third to be used for requesting an Alternate Durable DNR.

9. Hard copies of the Durable DNR Order Form shall also be made available to physicians or licensed health care facilities by the Office of EMS. The Office of EMS may utilize a vendor to print and distribute the Durable DNR Order Form and a nominal fee can be charged to cover printing and shipping fees.

12VAC5-66-50. Authorized alternate ~~forms of~~ Durable DNR ~~Order identification~~ jewelry.

The board authorizes the ~~issuance~~ use of ~~alternate forms of~~ Alternate Durable DNR ~~Order identification~~ Jewelry in conjunction with the issuance of Durable DNR ~~Orders~~ Order Forms. These ~~alternate forms~~ Alternate Durable DNR Jewelry items shall be uniquely-designed and uniquely-identifiable bracelets and necklaces that are available only from a vendor approved by the Virginia Department of Health, Office of EMS. ~~These alternate forms of identification~~ The Alternate Durable DNR Jewelry must be purchased from the approved vendor by the person to whom a Durable DNR Order Form applies, or ~~that~~ the person authorized to consent on the patient's behalf~~, and in conjunction with a~~. An original Durable DNR Order Form must be obtained from a physician and provided to the vendor in order to receive Alternate Durable DNR Jewelry. Such a necklace or bracelet may be utilized either to validate the Durable DNR Order Form or in place of an original Durable DNR Order Form in the event that the original order is not readily available at the site where the person to whom the order applies is found. In order to be honored by qualified health care personnel in place of the ~~original~~ standard Durable DNR Order Form, ~~this alternate form of identification~~ the Alternate Durable DNR Jewelry must contain the minimum information approved by the State Board of Health in 12VAC5-66-60.

12VAC5-66-60. Other DNR Orders.

~~A. Nothing in these regulations shall be construed to preclude licensed health care practitioners from following any other written orders of a physician not to resuscitate a patient in the event of cardiac or respiratory arrest.~~

~~B. Additionally, nothing in these regulations or in the definition of Durable DNR Orders provided in § 54.1-2982 of the Code of Virginia shall be construed to limit the authorization of qualified health care personnel to follow Do Not Resuscitate Orders other than Durable DNR Orders that are written by a physician. Such other DNR Orders issued in this manner, to be honored by EMS personnel, shall~~

A. Qualified health care personnel can honor do not resuscitate (DNR) orders by a physician that are written in a format other than using the standardized Durable DNR Order Form to not resuscitate a patient in the event of a cardiac or respiratory arrest when the patient is currently admitted to a hospital or other qualified health care facility. If an Other Durable DNR Order is used, it must contain the same information as listed in subdivision 1 of 12VAC5-66-40 ~~and the time of issuance by the physician in accordance with accepted medical practice, for patients who are currently admitted to a hospital or other health care facility~~.

~~C.~~ B. Nothing in these regulations shall prohibit qualified health care personnel from following any direct verbal order issued by a licensed physician not to resuscitate a patient in cardiac or respiratory arrest when such physician is physically present ~~in attendance of such patient~~.

Part IV
Implementation Procedures

12VAC5-66-70. Issuance of a Durable DNR Order Form or Other DNR Order.

A. A Durable DNR Order Form or Other DNR Order may be issued to a patient by a physician, with whom the patient has established a bona fide physician/patient relationship, as defined by the Board of Medicine in their current guidelines, only with the consent of the patient or, if the patient is a minor or is otherwise incapable of making an informed decision regarding consent for such an order, upon the request of and with the consent of the person authorized to consent on the patient's behalf.

B. The use of the authorized Durable DNR Order Form is encouraged to provide uniformity throughout the health care continuum.

C. The authorized Durable DNR Order Form can be honored by qualified health care providers in any setting.

D. Patients who are not within a qualified health care facility must have an authorized Durable DNR Order Form to be honored by qualified health care providers.

E. Other DNR Orders can be honored any time when a patient is within a qualified health care facility or during transfer between qualified health care facilities when the patient remains attended by qualified health care providers.

~~B.~~ F. The physician shall explain to the patient or the person authorized to consent on the patient's behalf, the alternatives available~~, including issuance of a Durable DNR Order~~. If the option of a Durable DNR Order is agreed upon, the physician shall have the following responsibilities:

1. Explain when the Durable DNR Form is valid.

2. Explain how to and who may revoke the Durable DNR.

3. Document the patient's full legal name.

4. Document the execution date of the Durable DNR.

~~1.~~ 5. Obtain the signature of the patient or the person authorized to consent on the patient's behalf on all three forms, the patients copy, medical record copy, and the copy used for obtaining DNR Jewelry.

~~2. Execute and date the Physician Order on the Durable DNR Order Form.~~

6. Make sure that the physician's name is clearly printed and the form is signed.

7. Note the contact telephone number for the issuing physician.

~~3.~~ 8. Issue the original Durable DNR Order Form, patient and DNR Jewelry copies to the patient and maintain the medical record copy in the patient's medical file.

~~4. Explain how to and who may revoke the Durable DNR Order.~~

~~C.~~ G. The person to whom a Durable DNR order applies or the person authorized to consent on the patient's behalf must present the following information to the approved vendor in order to purchase and be issued an approved Alternate Durable DNR necklace or bracelet. The necklace or bracelet must contain the following information:

1. The following words: Do Not Resuscitate;

~~1.~~ 2. The patient's full legal name;

~~2. The Durable DNR number on the Virginia Durable DNR form or a number unique to the patient that is assigned by the vendor;~~

3. The physician's name and phone number; and

4. The Virginia Durable DNR issuance date.

12VAC5-66-80. Durable DNR Order Form implementation procedures.

A. Qualified health care personnel shall comply with the following general procedures and published Virginia Durable DNR Order Implementation Protocols when caring for a patient who is in cardiac or respiratory arrest and who is known or suspected to have a Durable DNR Order in effect.

B. Initial assessment and intervention. Perform routine patient assessment and resuscitation or intervention until ~~the~~ a valid Durable DNR Order Form or ~~other~~ Other DNR Order ~~validity status is~~ can be confirmed, as follows:

1. Determine the presence of a Durable DNR Order Form ~~or,~~ an approved ~~alternate form of~~ Alternate Durable DNR ~~identification~~ Jewelry, or Other DNR Order.

2. If the patient is within a qualified health care facility, any qualified health care personnel may honor a written physician's order that contains the items noted in 12VAC5-66-40 (a do not resuscitate determination, signature and the date of issue, the signature of the patient or, if applicable, the person authorized to consent on the patient's behalf).

~~2.~~ 3. Determine that the Durable DNR item is not altered.

~~3.~~ 4. Verify, through driver's license or other identification with photograph and signature or by positive identification by a family member or other person who knows the patient, that the patient in question is the one for whom the Durable DNR Order Form or ~~other~~ Other DNR Order was issued.

~~4. If no Durable DNR Order or approved alternate form of identification is found, ask a family member or other person to look for the original Durable DNR Order Form or other written DNR order.~~

5. If a Durable DNR Order Form or Alternate Durable DNR is not immediately available, care should be provided until a valid Durable DNR Form, Alternate Durable DNR, or Other DNR Order can be produced.

~~5.~~ 6. If ~~the Durable~~ any type of DNR Order ~~or approved alternate form of identification is not intact or has been altered or other DNR Order is produced, the qualified health care personnel~~ is presented to qualified health care personnel, it shall ~~consider the Durable DNR Order to~~ be ~~invalid~~ considered valid.

C. Resuscitative measures to be withheld or withdrawn. In the event of cardiac or respiratory arrest of a patient with a valid Durable DNR Order Form, Alternate Durable DNR Jewelry, or Other DNR Order under the criteria set forth ~~above~~ in subsection B of this section, the following procedures should be withheld or withdrawn by qualified health care personnel unless otherwise directed by a physician physically present at the patient location:

1. Cardiopulmonary Resuscitation (CPR);

~~2. Endotracheal Intubation or other advanced airway management;~~

~~3.~~ 2. Artificial ventilation;

~~4.~~ 3. Defibrillation; ~~or~~

4. Endotracheal Intubation or other advanced airway management including supra-glottic devices such as the LMA, or other airway devices that pass beyond the oral pharynx, such as the Combi Tube, PTL etc.; or

5. Continuation of related procedures or cardiac resuscitation medications as prescribed by the patient's physician or medical protocols.

D. Procedures to provide comfort care or to alleviate pain. In order to provide comfort care or to alleviate pain for a patient with a valid Durable DNR Order ~~or other DNR Order~~ of any type, the following interventions may be provided, depending on the needs of the particular patient:

1. Airway management ~~(excluding intubation or advanced~~, including positioning, nasal or pharyngeal airway ~~management)~~ placement;

2. Suctioning;

3. Supplemental oxygen delivery devices;

4. Pain medications or intravenous fluids;

5. Bleeding control;

6. Patient positioning; or

7. Other therapies deemed necessary to provide comfort care or to alleviate pain.

E. Revocation.

1. These regulations shall not authorize any qualified health care personnel to follow a Durable DNR Order for any patient who is able to, and does, express to such qualified health care personnel the desire to be resuscitated in the event of cardiac or respiratory arrest.

If the patient is a minor or is otherwise incapable of making an informed decision, the expression of the desire that the patient be resuscitated by the person authorized to consent on the patient's behalf shall so revoke the qualified health care personnel's authority to follow a Durable DNR Order or other DNR Order.

2. The expression of such desire to be resuscitated prior to cardiac or respiratory arrest shall constitute revocation of the order; however, a new order may be issued upon consent of the patient or the person authorized to consent on the patient's behalf.

3. The provisions of this section shall not authorize any qualified emergency medical services personnel or licensed health care provider or practitioner who is attending the patient at the time of cardiac or respiratory arrest to provide, continue, withhold or withdraw treatment if such provider or practitioner knows that taking such action is protested by the patient incapable of making an informed decision. No person shall authorize providing, continuing, withholding or withdrawing treatment pursuant to this section that such person knows, or upon reasonable inquiry ought to know, is contrary to the religious beliefs or basic values of a patient incapable of making an informed decision or the wishes of such patient fairly expressed when the patient was capable of making an informed decision.

F. Documentation. When following a Durable DNR Order or other DNR Order for a particular patient, qualified health care personnel shall document in the patient's medical record the care rendered or withheld in the following manner:

1. Use standard patient care reporting documents (i.e. patient chart, pre-hospital patient care report).

2. Describe assessment of patient's status.

3. Document which identification (Durable DNR Order Form, Alternate Durable DNR, or ~~other~~ Other DNR Order or alternate form of identification) was used to confirm Durable DNR status and that it was intact, not altered, not canceled or not officially revoked.

4. Record the name of the patient's physician who issued the Durable DNR Order ~~Number and name of patient's physician~~ Form, or Other DNR Order.

5. If the patient is being transported, keep the Durable DNR Order, Alternate Durable DNR, or Other DNR Order with the patient.

G. General considerations. The following general principles shall apply to implementation of Durable DNR Orders.

1. If there is misunderstanding with family members or others present at the patient's location or if there are other concerns about following the Durable DNR Order or other DNR Order, contact the patient's physician or EMS medical control for guidance.

2. If there is any question about the validity of a Durable DNR Order, resuscitative measures should be administered until the validity of the Durable DNR Order is established.

VA.R. Doc. No. R08-1132; Filed December 1, 2009, 3:52 p.m.

DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

Final Regulation

Titles of Regulations: **12VAC30-50. Amount, Duration, and Scope of Medical and Remedial Care Services (amending 12VAC30-50-140, 12VAC30-50-150, 12VAC30-50-180; adding 12VAC30-50-228, 12VAC30-50-491).**

12VAC30-60. Standards Established and Methods Used to Assure High Quality Care (adding 12VAC30-60-180, 12VAC30-60-185).

12VAC30-80. Methods and Standards for Establishing Payment Rates; Other Types of Care (adding 12VAC30-80-32).

12VAC30-120. Waivered Services (amending 12VAC30-120-310, 12VAC30-120-380).

Statutory Authority: §§ 32.1-324 and 32.1-325 of the Code of Virginia.

Effective Date: January 21, 2010.

Agency Contact: Catherine Hancock, Policy & Research Division, Department of Medical Assistance Services, 600 East Broad Street, Richmond, VA 23219, telephone (804) 225-4272, FAX (804) 786-1680, or email catherine.hancock@dmas.virginia.gov.

Summary:

This regulatory action establishes limited coverage of substance abuse treatment services for children and adults. Chapter 847 of the 2007 Acts of Assembly, Item 302 PPP, requires that the Department of Medical Assistance Services (DMAS) amend the State Plan for Medical Assistance to provide coverage of substance abuse treatment services for children and adults effective July 1, 2007. These services include emergency services, evaluation and assessment services, outpatient services, intensive outpatient services, targeted case management services, day treatment services, and opioid treatment services.

MEDALLION Primary Care Case Management (PCCM) recipients now have substance abuse services covered by Medicaid. Unlike most other managed care Medicaid services, substance abuse services do not require a referral by the primary care physician. Medallion II recipients who are enrolled in a Managed Care Organization (MCO) will have outpatient services (excluding intensive outpatient services) and assessment and evaluation services covered by the MCOs. All other mandated substance abuse services to be covered (emergency services (crisis), intensive outpatient services, day treatment services, opioid treatment services, and substance abuse case management services) have been carved out of the services provided by the Medicaid MCOs and will now be covered as fee-for-service by DMAS.

Changes to the proposed regulation include (i) adding language regarding substance abuse services (SAS) and outpatient SAS under Early Periodic Screening, Diagnosis, and Treatment to note that additional services are available when the specified limits have been exceeded; (ii) requiring that providers of outpatient SAS be qualified in clinical evaluation; treatment planning; referral; service coordination; counseling; client, family, and community education; documentation; and professional and ethical responsibilities; (iii) adding a notice that nicotine or caffeine abuse or dependence are not covered; (iv) adding federally required assurances regarding case management; and (v) detailing methodologies for the various provider types associated with SAS.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

12VAC30-50-140. Physician's services whether furnished in the office, the patient's home, a hospital, a skilled nursing facility or elsewhere.

A. Elective surgery as defined by the Program is surgery that is not medically necessary to restore or materially improve a body function.

B. Cosmetic surgical procedures are not covered unless performed for physiological reasons and require Program prior approval.

C. Routine physicals and immunizations are not covered except when the services are provided under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program and when a well-child examination is performed in a private physician's office for a foster child of the local social services department on specific referral from those departments.

D. Outpatient psychiatric services.

1. Psychiatric services are limited to an initial availability of 26 sessions, without prior authorization during the first treatment year. An additional extension of up to 26 sessions during the first treatment year must be prior authorized by DMAS or its designee. The availability is further restricted to no more than 26 sessions each succeeding year when prior authorized by DMAS or its designee. Psychiatric services are further restricted to no more than three sessions in any given seven-day period. Consistent with § 6403 of the Omnibus Budget Reconciliation Act of 1989, medically necessary psychiatric services shall be covered when prior authorized by DMAS or its designee for individuals younger than 21 years of age when the need for such services has been identified in an EPSDT screening.

2. Psychiatric services can be provided by psychiatrists or by a licensed clinical social worker, licensed professional counselor, licensed clinical nurse specialist-psychiatric, or a licensed marriage and family therapist under the direct supervision of a psychiatrist.*

3. Psychological and psychiatric services shall be medically prescribed treatment that is directly and specifically related to an active written plan designed and signature-dated by either a psychiatrist or by a licensed clinical social worker, licensed professional counselor, licensed clinical nurse specialist-psychiatric, or licensed marriage and family therapist under the direct supervision of a psychiatrist.*

4. Psychological or psychiatric services shall be considered appropriate when an individual meets the following criteria:

a. Requires treatment in order to sustain behavioral or emotional gains or to restore cognitive functional levels that have been impaired;

b. Exhibits deficits in peer relations, dealing with authority; is hyperactive; has poor impulse control; is clinically depressed or demonstrates other dysfunctional clinical symptoms having an adverse impact on attention and concentration, ability to learn, or ability to participate in employment, educational, or social activities;

c. Is at risk for developing or requires treatment for maladaptive coping strategies; and

d. Presents a reduction in individual adaptive and coping mechanisms or demonstrates extreme increase in personal distress.

5. Psychological or psychiatric services may be provided in an office or a mental health clinic.

E. Any procedure considered experimental is not covered.

F. Reimbursement for induced abortions is provided in only those cases in which there would be a substantial endangerment of health or life to the mother if the fetus was carried to term.

G. Physician visits to inpatient hospital patients over the age of 21 are limited to a maximum of 21 days per admission within 60 days for the same or similar diagnoses or treatment plan and is further restricted to medically necessary authorized (for enrolled providers)/approved (for nonenrolled providers) inpatient hospital days as determined by the Program.

EXCEPTION: SPECIAL PROVISIONS FOR ELIGIBLE INDIVIDUALS UNDER 21 YEARS OF AGE: Consistent with 42 CFR 441.57, payment of medical assistance services shall be made on behalf of individuals under 21 years of age, who are Medicaid eligible, for medically necessary stays in general hospitals and freestanding psychiatric facilities in excess of 21 days per admission when such services are rendered for the purpose of diagnosis and treatment of health conditions identified through a physical examination. Payments for physician visits for inpatient days shall be limited to medically necessary inpatient hospital days.

H. (Reserved.)

I. Reimbursement shall not be provided for physician services provided to recipients in the inpatient setting whenever the facility is denied reimbursement.

J. (Reserved.)

K. For the purposes of organ transplantation, all similarly situated individuals will be treated alike. Transplant services for kidneys, corneas, hearts, lungs, and livers shall be covered for all eligible persons. High dose chemotherapy and bone marrow/stem cell transplantation shall be covered for all eligible persons with a diagnosis of lymphoma, breast cancer, leukemia, or myeloma. Transplant services for any other medically necessary transplantation procedures that are determined to not be experimental or investigational shall be limited to children (under 21 years of age). Kidney, liver, heart, and bone marrow/stem cell transplants and any other medically necessary transplantation procedures that are determined to not be experimental or investigational require preauthorization by DMAS. Cornea transplants do not require preauthorization. The patient must be considered acceptable for coverage and treatment. The treating facility and transplant staff must be recognized as being capable of providing high quality care in the performance of the requested transplant. Standards for coverage of organ transplant services are in 12VAC30-50-540 through 12VAC30-50-580.

L. Breast reconstruction/prostheses following mastectomy and breast reduction.

1. If prior authorized, breast reconstruction surgery and prostheses may be covered following the medically necessary complete or partial removal of a breast for any medical reason. Breast reductions shall be covered, if prior authorized, for all medically necessary indications. Such procedures shall be considered noncosmetic.

2. Breast reconstruction or enhancements for cosmetic reasons shall not be covered. Cosmetic reasons shall be defined as those which are not medically indicated or are intended solely to preserve, restore, confer, or enhance the aesthetic appearance of the breast.

M. Admitting physicians shall comply with the requirements for coverage of out-of-state inpatient hospital services. Inpatient hospital services provided out of state to a Medicaid recipient who is a resident of the Commonwealth of Virginia shall only be reimbursed under at least one the following conditions. It shall be the responsibility of the hospital, when requesting prior authorization for the admission, to demonstrate that one of the following conditions exists in order to obtain authorization. Services provided out of state for circumstances other than these specified reasons shall not be covered.

1. The medical services must be needed because of a medical emergency;

2. Medical services must be needed and the recipient's health would be endangered if he were required to travel to his state of residence;

3. The state determines, on the basis of medical advice, that the needed medical services, or necessary supplementary resources, are more readily available in the other state;

4. It is general practice for recipients in a particular locality to use medical resources in another state.

N. In compliance with 42 CFR 441.200, Subparts E and F, claims for hospitalization in which sterilization, hysterectomy or abortion procedures were performed shall be subject to review of the required DMAS forms corresponding to the procedures. The claims shall suspend for manual review by DMAS. If the forms are not properly completed or not attached to the bill, the claim will be denied or reduced according to DMAS policy.

O. Prior authorization is required for the following nonemergency outpatient procedures: Magnetic Resonance Imaging (MRI), including Magnetic Resonance Angiography (MRA), Computerized Axial Tomography (CAT) scans, including Computed Tomography Angiography (CTA), or Positron Emission Tomography (PET) scans performed for the purpose of diagnosing a disease process or physical injury. The referring physician ordering nonemergency outpatient Magnetic Resonance Imaging (MRI), Computerized Axial Tomography (CAT) scans, or Positron Emission Tomography (PET) scans must obtain prior authorization from the Department of Medical Assistance Services (DMAS) for those scans. The servicing provider will not be reimbursed for the scan unless proper prior authorization is obtained from DMAS by the referring physician.

P. Outpatient substance abuse treatment services shall be limited to an initial availability of 26 therapy sessions without prior authorization during the first treatment year. An additional extension of up to 26 sessions during the first treatment year must be prior authorized by DMAS or its designee. The availability is further restricted to no more than 26 therapy sessions each succeeding year when prior authorized by DMAS or its designee. Outpatient substance abuse treatment services are further restricted to no more than three sessions in any given seven-day period. Consistent with § 6403 of the Omnibus Budget Reconciliation Act of 1989, medically necessary substance abuse services shall be covered when prior authorized by DMAS or its designee for individuals younger than 21 years of age when the need for such services has been identified in an EPSDT screening [and the above limits have been exceeded].

1. Outpatient substance abuse services shall be provided by medical doctors or by doctors of osteopathy who have completed three years of post-graduate residency training in psychiatry; or by a physician or doctor of osteopathy who is certified in addiction medicine. The provider must also be qualified by training and experience in all of the following areas of substance abuse/addiction counseling: clinical evaluation; treatment planning; referral; service coordination; counseling; client, family, and community education; documentation; [and] professional and ethical responsibilities. Outpatient substance abuse treatment services are further defined in 12VAC30-50-228.

2. Psychological and psychiatric substance abuse services shall be prescribed treatment that is directly and specifically related to an active written plan designed and signature-dated by one of the professionals listed in subdivision 1 of this subsection.

3. Psychological or psychiatric substance abuse services shall be considered appropriate when an individual meets the criteria for an Axis I substance-related disorder. Nicotine or caffeine abuse or dependence shall not be covered. The Axis I substance-related disorder shall meet American Society of Addiction Medicine (ASAM) Level of Care Criteria as prescribed in Patient Placement Criteria for the Treatment of Substance-Related [~~Disorders/ASAMPPC 2)~~ Disorders (ASAM PPC-2R)], Second Edition.

4. Psychological or psychiatric substance abuse services may be provided in an office or a clinic under the direction of a physician.

*Licensed clinical social workers, licensed professional counselors, licensed clinical nurse specialists-psychiatric, and licensed marriage and family therapists may also directly enroll or be supervised by psychologists as provided for in 12VAC30-50-150.

12VAC30-50-150. Medical care by other licensed practitioners within the scope of their practice as defined by state law.

A. Podiatrists' services.

1. Covered podiatry services are defined as reasonable and necessary diagnostic, medical, or surgical treatment of disease, injury, or defects of the human foot. These services must be within the scope of the license of the podiatrists' profession and defined by state law.

2. The following services are not covered: preventive health care, including routine foot care; treatment of structural misalignment not requiring surgery; cutting or removal of corns, warts, or calluses; experimental procedures; acupuncture.

3. The Program may place appropriate limits on a service based on medical necessity or for utilization control, or both.

B. Optometrists' services. Diagnostic examination and optometric treatment procedures and services by ophthalmologists, optometrists, and opticians, as allowed by the Code of Virginia and by regulations of the Boards of Medicine and Optometry, are covered for all recipients. Routine refractions are limited to once in 24 months except as may be authorized by the agency.

C. Chiropractors' services are not provided.

D. Other practitioners' services; psychological services, psychotherapy. Limits and requirements for covered services are found under Outpatient Psychiatric Services (see 12VAC30-50-140 D).

1. These limitations apply to psychotherapy sessions provided, within the scope of their licenses, by licensed clinical psychologists or licensed clinical social workers/licensed professional counselors/licensed clinical nurse specialists-psychiatric/licensed marriage and family therapists who are either independently enrolled or under the direct supervision of a licensed clinical psychologist. Psychiatric services are limited to an initial availability of 26 sessions without prior authorization. An additional extension of up to 26 sessions during the first treatment year must be prior authorized by DMAS or its designee. The availability is further restricted to no more than 26 sessions each succeeding treatment year when prior authorized by DMAS or its designee. Psychiatric services are further restricted to no more than three sessions in any given seven-day period.

2. Psychological testing is covered when provided, within the scope of their licenses, by licensed clinical psychologists or licensed clinical social workers/licensed professional counselors/licensed clinical nurse specialists-psychiatric, marriage and family therapists who are either

independently enrolled or under the direct supervision of a licensed clinical psychologist.

E. Outpatient substance abuse services are limited to an initial availability of 26 sessions without prior authorization during the first treatment year. An additional extension of up to 26 sessions is available during the first treatment year and must be prior authorized by DMAS or its designee. The availability is further restricted to no more than 26 sessions each succeeding year when prior authorized by DMAS or its designee. Outpatient substance abuse services are further restricted to no more than three sessions in any given seven-day period. Consistent with § 6403 of the Omnibus Budget Reconciliation Act of 1989, medically necessary substance abuse services shall be covered when prior authorized by DMAS or its designee for individuals younger than 21 years of age when the need for such services has been identified in an EPSDT screening [and the above limits have been exceeded].

1. Outpatient substance abuse services shall be provided by a licensed clinical psychologist, licensed clinical social worker, licensed professional counselor, licensed psychiatric clinical nurse specialist, a licensed psychiatric nurse practitioner, a licensed marriage and family therapist, a licensed substance abuse treatment practitioner, or an individual who holds a bachelor's degree and certification as a substance abuse counselor (CSAC) who is under the direct supervision of one of the licensed practitioners listed in this section, or an individual who holds a [~~Bachelor's~~ bachelor's] degree and is a certified addictions counselor (CAC) who is under the direct supervision of one of the licensed practitioners listed in this section. [The provider must also be qualified in all of the following areas of substance abuse/addiction counseling: clinical evaluation; treatment planning; referral; service coordination; counseling; client, family, and community education; documentation; and professional and ethical responsibilities.] Outpatient substance abuse treatment services are further defined in 12VAC30-50-228.

2. Psychological and psychiatric substance abuse services shall be prescribed treatment that is directly and specifically related to an active written plan designed and signature-dated by one of the professionals listed in subdivision 1 of this subsection.

3. Psychological or psychiatric substance abuse services shall be considered appropriate when an individual meets criteria for an Axis I substance-related disorder. Nicotine or caffeine abuse or dependence shall not be covered. The Axis I substance-related disorder shall meet American Society of Addiction Medicine (ASAM) Level of Care Criteria as prescribed in Patient Placement Criteria for the Treatment of Substance-Related [~~Disorders/ASAMPPC-2)~~ Disorders (ASAM PPC-2R)], Second Edition.

4. Psychological or psychiatric substance abuse services may be provided in an office or a clinic.

12VAC30-50-180. Clinic services.

A. Reimbursement for induced abortions is provided in only those cases in which there would be a substantial endangerment of health or life to the mother if the fetus were carried to term.

B. Clinic services means preventive, diagnostic, therapeutic, rehabilitative, or palliative items or services that:

1. Are provided to outpatients;

2. Are provided by a facility that is not part of a hospital but is organized and operated to provide medical care to outpatients; and

3. Except in the case of nurse-midwife services, as specified in 42 CFR 440.165, are furnished by or under the direction of a physician or dentist.

C. Reimbursement to community mental health clinics for medical psychotherapy services is provided only when performed by a qualified therapist. For purposes of this section, a qualified therapist is:

1. A licensed physician who has completed three years of post-graduate residency training in psychiatry;

2. An individual licensed by one of the boards administered by the Department of Health Professions to provide medical psychotherapy services including: licensed clinical psychologists, licensed clinical social workers, licensed professional counselors, clinical nurse specialists-psychiatric, or licensed marriage and family therapists; or

3. An individual who holds a master's or doctorate degree, who has completed all coursework necessary for licensure by one of the appropriate boards as specified in subdivision 2 of this subsection, and who has applied for a license but has not yet received such license, and who is currently supervised in furtherance of the application for such license, in accordance with requirements or regulations promulgated by DMAS, by one of the licensed practitioners listed in subdivisions 1 and 2 of this subsection.

D. Coverage of community mental health clinics for substance abuse treatment services, as further defined in 12VAC30-50-228, is provided only when performed by a qualified therapist and consistent with an active written plan designed and signature-dated. For purposes of providing this service a qualified therapist shall be:

1. [~~Medical doctors~~ Physicians] and doctors of osteopathy who have completed three years of post-graduate residency training in psychiatry or by a physician or doctor of osteopathy who is certified in addiction medicine.

2. A licensed clinical psychologist, licensed clinical social worker, licensed professional counselor, licensed psychiatric clinical nurse specialist, a licensed psychiatric nurse practitioner, a licensed marriage and family therapist, or a licensed substance abuse treatment practitioner. The provider must also be qualified by training and experience in all of the following areas of substance abuse/addiction counseling: clinical evaluation; treatment planning; referral; service coordination; counseling; client, family, and community education; documentation; [and] professional and ethical responsibilities.

3. An individual who holds a master's or doctorate degree, who has completed all coursework necessary for licensure by the respective board, and who has applied for a license but has not yet received such license, and who is currently supervised in furtherance of the application for such license, in accordance with requirements or regulations promulgated by DMAS, by one of the licensed practitioners listed in this subsection.

4. An individual who holds a bachelor's degree in any field and certification as a substance abuse counselor (CSAC) or an individual who holds a bachelor's degree and is a certified addictions counselor (CAC) who is under the direct supervision of one of the licensed practitioners listed in subdivision [~~A 1~~ C 1] or 2 of this subsection.

12VAC30-50-228. Community substance abuse treatment services.

A. Services to be covered shall include crisis intervention, day treatment services in nonresidential settings, intensive outpatient services, and opioid treatment services. These services shall be rendered to Medicaid recipients consistent with the criteria specified in 12VAC30-60-250. Individuals shall not receive any combination of day treatment, opioid treatment, and intensive outpatient services concurrently. To be reimbursed by Medicaid, covered services shall meet the following definitions:

1. Emergency (crisis) intervention. This service shall provide immediate substance abuse care, available 24 hours a day, seven days per week, to assist recipients who are experiencing acute dysfunction requiring immediate clinical attention. This service's objectives shall be to prevent exacerbation of a condition, to prevent injury to the recipient or others, and to provide treatment in the context of the least restrictive setting. This service includes therapeutic intervention, stabilization, and referral assistance over the telephone or face-to-face for individuals seeking services for themselves or others. Services are provided in clinics, offices, homes [,] and other community locations.

a. An assessment must be conducted to assess the crisis situation. The assessment must document the need for the service.

b. Crisis intervention activities, limited annually to 180 hours, may include short-term counseling designed to stabilize the recipient, providing access to further immediate assessment and follow-up, and linking the recipient with ongoing care to prevent future crises. Crisis intervention services may include office visits, home visits, telephone contacts, and face-to-face support or monitoring or other client-related activities for the prevention of institutionalization.

c. Assessment and counseling may be provided by a Qualified Substance Abuse Professional (QSAP) as defined in 12VAC30-60-180, or a certified prescreener described in 12VAC30-50-226.

d. Monitoring and face-to-face support may be provided by a QSAP, a certified prescreener, or a paraprofessional. A paraprofessional, as described in 12VAC30-50-226, must be under the supervision of a QSAP and provide services in accordance with a plan of care.

2. Substance abuse day treatment, intensive outpatient, and opioid treatment services. These services shall include the major psychiatric, psychological and psycho-educational modalities to include: individual, group counseling and family therapy; education about the effects of alcohol and other drugs on the physical, emotional, and social functioning of the individual; relapse prevention; [or] occupational and recreational therapy, or other therapies. Family therapy must be focused on the Medicaid eligible individual. To be reimbursed by Medicaid, these covered services shall meet the following definitions:

a. Day treatment services shall be provided in a nonresidential setting and shall be provided in sessions of two or more consecutive hours per day, which may be scheduled multiple times per week to provide a minimum of 20 hours up to a maximum of 30 hours of skilled treatment services per week. This service should be provided to those recipients who do not require the intensive level of care of inpatient or residential services but require more intensive services than outpatient services. Day treatment is the provision of coordinated, intensive, comprehensive, and multidisciplinary treatment to individuals through a combination of diagnostic, medical psychiatric and psychosocial interventions. The maximum annual limit is 1,300 hours. Day treatment services may not be provided concurrently with intensive outpatient services or opioid treatment services.

b. Intensive outpatient services for recipients are provided in a nonresidential setting and may be scheduled multiple times per week, with a maximum of 19 hours of skilled treatment services per week. This service should be provided to those recipients who do not require the intensive level of care of inpatient, residential, or day treatment services, but require more intensive

services than outpatient services. Intensive outpatient services are provided in a concentrated manner, and generally involve multiple outpatient visits per week over a period of time for individuals requiring stabilization. These services include monitoring and multiple group therapy sessions during the week, [and] individual and family therapy which are focused on the Medicaid eligible individual. The maximum annual limit is 600 hours. Intensive outpatient services may not be provided concurrently with day treatment services or opioid treatment services.

c. Opioid treatment means an intervention strategy that combines treatment with the administering or dispensing of opioid agonist treatment medication. An individual specific, physician-ordered dose of medication is administered or dispensed either for detoxification or maintenance treatment. Opioid treatment shall be provided in daily sessions with a maximum of 600 hours per year. Day treatment and intensive outpatient services may not be provided concurrently with opioid treatment. Opioid treatment service covers psychological and psycho-educational services. Medication costs for opioid agonists shall be billed separately. An individual-specific, physician-ordered dose of medication may be administered or dispensed either for detoxification or maintenance treatment.

d. Staff qualifications for day treatment, intensive outpatient, and opioid treatment services shall be as follows:

(1) Individual and group counseling, and family therapy, and occupational and recreational therapy must be provided by at least a QSAP.

(2) A QSAP or a paraprofessional, under the supervision of a QSAP, may provide education about the effects of alcohol and other drugs on the physical, emotional [,] and social functioning of the individual [~~,~~ ;] relapse prevention [~~,~~ ; and] occupational and recreational activities. A QSAP must be onsite when a paraprofessional is providing services.

(3) Paraprofessionals must participate in supervision as described in 12VAC30-60-250.

B. Evaluations required. Prior to initiation of day treatment, intensive outpatient, or opioid treatment services, an evaluation shall be conducted by at least a QSAP. The minimum evaluation will consist of a structured objective assessment of the impact of substance use or dependence on the recipient's functioning in the following areas: drug use, alcohol use, legal system involvement, employment and/or school issues, and medical, family-social, and psychiatric issues. If indicated by history or structured assessment, a psychological examination and psychiatric examination shall be included as part of this evaluation. The assessment must be a written report as specified at 12VAC30-60-250 and must document the medical necessity for the service.

C. Consistent with § 6403 of the Omnibus Budget Reconciliation Act of 1989, medically necessary substance abuse services shall be covered when prior authorized by DMAS or its designee for individuals younger than 21 years of age when the need for such services has been identified in an EPSDT screening and the above limits have been exceeded.

12VAC30-50-491. Case management services for individuals who have an Axis I substance-related disorder.

A. Target group: The Medicaid eligible recipient shall meet the [~~current DSM~~ Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)] diagnostic criteria for an Axis I substance-related disorder. [Nicotine or caffeine abuse or dependence shall not be covered.] An active client for case management shall mean a recipient for whom there is a plan of care in effect which requires regular direct or recipient-related contacts or communication or activity with the recipient, family or service providers, including at least one face-to-face contact with the recipient every 90 days.

B. Services will be provided to the entire state.

C. Comparability of services: Services are not comparable in amount, duration, and scope. Authority of § 1915(g)(1) of the Act is invoked to provide services without regard to the requirements of § 1902(a)(10)(B) of the Act.

D. Definition of services: Substance abuse case management services assist recipients in accessing needed medical, psychiatric, psychological, social, educational, vocational, and other supports essential to meeting basic needs. The maximum service limit for case management services is 52 hours per year. Case management services are not reimbursable for recipients residing in institutions, including institutions for mental disease.

Services to be provided shall include:

1. Assessment and planning services, to include developing an Individual Service Plan (does not include performing assessments for severity of substance abuse or dependence, medical, psychological and psychiatric assessment, but does include referral for such assessment);

2. Linking the recipient to services and supports specified in the Individual Service Plan. When available, assessment and evaluation information should be integrated into the Individual Service Plan within two weeks of completion. The Individual Service Plan shall utilize accepted patient placement criteria and shall be fully completed within 30 days of initiation of service;

3. Assisting the recipient directly for the purpose of locating, developing, or obtaining needed services and resources;

4. Coordinating services and service planning with other agencies and providers involved with the recipient;

5. Enhancing community integration by contacting other entities to arrange community access and involvement, including opportunities to learn community living skills, and use vocational, civic, and recreational services;

6. Making collateral contacts with the recipients' significant others to promote implementation of the service plan and community adjustment;

7. Follow-up and monitoring to assess ongoing progress and to ensure services are delivered; and

8. Education regarding the need for services identified in the Individualized Service Plan (ISP).

Nicotine or caffeine abuse or dependence shall not be covered.

E. Qualifications of providers:

1. The provider of substance abuse case management services must meet the following criteria:

a. The enrolled provider must have the administrative and financial management capacity to meet state and federal requirements;

b. The enrolled provider must have the ability to document and maintain individual case records in accordance with state and federal requirements;

c. The enrolled provider must be licensed by [~~DMHMRSAS~~ the Department of Behavioral Health and Developmental Services (DBHDS)] as a provider of substance abuse case management services.

2. Providers may bill Medicaid for substance abuse case management only when the services are provided by a professional or professionals who meet at least one of the following criteria:

a. At least a bachelor's degree in one of the following fields (social work, psychology, psychiatric rehabilitation, sociology, counseling, vocational rehabilitation, human services counseling) and has at least one year of substance abuse related clinical experience providing direct services to persons with a diagnosis of mental illness or substance abuse;

b. Licensure by the Commonwealth as a registered nurse or as a practical nurse with at least one year of clinical experience.

c. At least a bachelor's degree in any field and certification as a substance abuse counselor (CSAC) or has at least a bachelor's degree in any field and is a certified addictions counselor (CAC).

F. The state assures that the provision of case management services will not restrict a recipient's free choice of providers in violation of § 1902(a)(23) of the Act.

1. Eligible recipients shall have free choice of the providers of case management services.

2. Eligible recipients shall have free choice of the providers of other services under the plan.

G. Payment for substance abuse treatment case management services under the Plan does not duplicate payments for other case management made to public agencies or private entities under other Title XIX program authorities for this same purpose.

[H. The state assures that the individual will not be compelled to receive case management services, condition receipt of case management services on the receipt of other Medicaid services, or condition receipt of other Medicaid services on receipt of case management services.

I. The state assures that providers of case management service do not exercise the agency's authority to authorize or deny the provision of other services under the plan.

J. The state assures that case management is only provided by and reimbursed to community case management providers.

K. The state assures that case management does not include the following:

1. The direct delivery of an underlying medical, educational, social, or other service to which an eligible individual has been referred.

2. Activities for which an individual may be eligible, that are integral to the administration of another nonmedical program, except for case management that is included in an individualized education program or individualized family service plan consistent with § 1903(c)of the Social Security Act.]

DOCUMENTS INCORPORATED BY REFERENCE (12VAC30-50)

Diagnostic and Statistical Manual of Mental Disorders ~~III R (DSM III R~~ [,] Fourth Edition DSM-IV-TR [, copyright 2000, American Psychiatric Association].

Length of Stay by Diagnosis and Operation, Southern Region, 1996, HCIA, Inc.

Guidelines for Perinatal Care, 4th Edition, August 1997, American Academy of Pediatrics and the American College of Obstetricians and Gynecologists.

Virginia Supplemental Drug Rebate Agreement Contract and Addenda.

Office Reference Manual (Smiles for Children), prepared by DMAS' Dental Benefits Administrator, copyright 2005 (www.dmas.virginia.gov/downloads/pdfs/dental-office_reference_manual_0 6-09-05.pdf).

Patient Placement Criteria for the Treatment of Substance-Related Disorders [~~(ASAMPPC 2)~~ ASAM PPC-2R], Second Edition, [copyright 2001,] American Society of Addiction Medicine.

12VAC30-60-180. Utilization review of community substance abuse treatment services.

A. To be eligible to receive these substance abuse treatment services, Medicaid recipients must meet the Diagnostic [and] Statistical Manual [of Mental Disorders (DSM-IV-TR)] diagnostic criteria for an Axis I Substance Use Disorder, with the exception of nicotine or caffeine abuse or dependence. A diagnosis of nicotine or caffeine abuse or dependence alone shall not be sufficient for approval of these services. American Society of Addiction Medicine (ASAM) criteria [as prescribed in Patient Placement Criteria for the Treatment of Substance Abuse-Related Disorders (ASAM PPC-2R)] shall be used to determine the appropriate level of treatment. Referrals for medical examinations shall be made consistent with the Early Periodic Screening and Diagnosis Screening Schedule.

B. Provider qualifications.

1. For Medicaid reimbursed Substance Abuse Day Treatment, Substance Abuse Intensive Outpatient Services, Opioid Treatment Services, a Qualified Substance Abuse Professional (QSAP) is defined as:

a. An individual who has completed master's level training in psychology, social work, counseling, or rehabilitation who also either:

(1) Is certified as a substance abuse counselor by the Virginia Board of Counseling;

(2) Is [~~a~~] certified [as an] addictions counselor by the Substance Abuse Certification Alliance of Virginia; or

(3) Holds any certification from the National Association of Alcoholism and Drug Abuse Counselors, or the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Inc (IC & RC);

b. An individual licensed by the appropriate board of the Virginia Department of Health Professions as either a professional counselor, clinical social worker, registered nurse, psychiatric clinical nurse specialist, [~~a~~] psychiatric nurse practitioner, marriage and family therapist, clinical psychologist, or physician who is qualified by training and experience in all of the following areas of addiction counseling: clinical evaluation; treatment planning; referral; service coordination; counseling; client, family, and community education; documentation; [and] professional and ethical responsibilities;

c. An individual who is licensed as a substance abuse treatment practitioner by the Virginia Board of Counseling;

d. An individual who is certified as either a clinical supervisor by the Substance Abuse Certification Alliance of Virginia or as a Master Addiction Counselor by the National Association of Alcoholism and Drug Abuse Counselors or [~~from~~ by] the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Inc (IC & RC) [~~,~~]

e. An individual who has completed master's level training in psychology, social work, counseling, or rehabilitation and is certified as a Master Addiction Counselor by the National Association of Alcoholism and Drug Abuse Counselors or [~~from~~ by] the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Inc (IC & RC) [~~,~~ ;]

f. An individual who has completed a bachelor's degree and is certified as a Substance Abuse Counselor by the Board of Counseling;

g. An individual who has completed a bachelor's degree and is certified as an Addictions Counselor by the Substance Abuse Certification Alliance of Virginia; [or]

h. An individual who has completed a bachelor's degree and is certified as a Level II Addiction Counselor by the National Association of Alcoholism and Drug Abuse Counselors or by the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Inc (IC & RC).

[~~i.~~] If staff providing services meet only the criteria specified in subdivisions 1 f through h of this subsection, they must be supervised every two weeks by a professional who meets one of the criteria specified in subdivisions 1 a through e of this subsection. Supervision shall include documented face-to-face meetings between the supervisor and the professional providing the services. Documentation shall include review and approval of the plan of care for each recipient to whom services were provided but shall not require that the supervisor be onsite at the time the treatment service is provided.

2. In order to provide substance abuse treatment services, a paraprofessional (peer support specialist) must meet the following qualifications:

a. An associate's degree in one of the following related fields (social work, psychology, psychiatric

rehabilitation, sociology, counseling, vocational rehabilitation, [or] human services counseling) and has at least one year of experience providing direct services to persons with a diagnosis of mental illness or substance abuse;

b. An associate's or higher degree, in an unrelated field and at least three years experience providing direct services to persons with a diagnosis of mental illness, substance abuse, gerontology clients, or special education clients. The experience may include supervised internships, practicums, and field experience.

c. A minimum of 90 hours classroom training in behavioral health and 12 weeks of experience under the direct personal supervision of a QSAP providing services to persons with mental illness or substance abuse and at least one year of clinical experience (including the 12 weeks of supervised experience).

d. College credits (from an accredited college) earned toward a bachelor's degree in a human service field that is equivalent to an associate's degree and one year's clinical experience.

e. Licensure by the Commonwealth as a practical nurse with at least one year of clinical experience.

3. Paraprofessionals must participate in clinical supervision with a QSAP at least twice a month. Supervision shall include documented face-to-face meetings between the supervisor and the professional providing the services. Supervision may occur individually or in a group.

4. All providers of substance abuse treatment services must adhere to the requirements of 42 CFR Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records.

5. Day treatment providers must be licensed by the Virginia Department of [~~Mental Health, Mental Retardation, and Substance Abuse Services~~ Behavioral Health and Developmental Services (DBHDS)] as providers of day treatment services. Intensive outpatient providers must be licensed by the [~~Virginia Department of Mental Health, Mental Retardation, and Substance Services~~ DBHDS] as providers of outpatient substance abuse services. The enrolled provider of opioid treatment services must be licensed as a provider of opioid treatment services by [~~the Department of Mental Health, Mental Retardation and Substance Abuse Treatment Services~~ DBHDS].

C. Evaluations/assessments of the recipient shall be required for day treatment, intensive outpatient, and opioid treatment services. A structured interview shall be documented as a written report that provides recommendations substantiated by the findings of the evaluation and shall document the need for the specific service. Evaluations shall be reimbursed as part of day treatment, intensive outpatient, and opioid treatment services. The structured interview must be conducted by a qualified substance abuse professional as defined above.

D. Individual Service Plan (ISP) for day treatment, intensive outpatient, and opioid treatment services.

1. An initial ISP must be developed. A comprehensive ISP must be fully developed within 30 calendar days of admission to the service.

2. A comprehensive Individual Service Plan shall be developed with the recipient, in consultation with the individual's family, as appropriate, and must address: (i) a summary or reference to the evaluation; (ii) short-term and long-term goals and measurable objectives for addressing each identified individually specific need; (iii) services and supports and frequency of service to accomplish the goals and objectives; (iv) target dates for accomplishment of goals and objectives; (v) estimated duration of service; [and] (vi) the role of other agencies if the plan is a shared responsibility and the staff responsible for the coordination and the integration of services, including designated persons of other agencies if the plan is a shared responsibility. The ISP must be reviewed at least every 90-calendar days and must be modified as appropriate.

E. Individuals shall not receive any combination of day treatment, opioid treatment [,] and intensive outpatient services concurrently.

F. Crisis intervention. Admission to crisis intervention services is indicated following a marked reduction in the recipient's psychiatric, adaptive, or behavioral functioning or an extreme increase in personal distress that is related to the use of alcohol or other drugs. Crisis intervention may be the initial contact with a recipient.

1. The provider of crisis intervention services shall be licensed as a provider of Substance Abuse Outpatient Services by [~~DMHMRSAS~~ DBHDS]. Providers may bill Medicaid for substance abuse crisis intervention only when the services are provided by either a professional or professionals who meet at least one of the criteria listed herein.

2. Only recipient-related activities provided in association with a face-to-face contact shall be reimbursable.

3. An ISP shall not be required for newly admitted recipients to receive this service. Inclusion of crisis intervention as a service on the ISP shall not be required for the service to be provided on an emergency basis.

4. Other than the annual service limits, there shall be no restrictions (regarding numbers of contacts or a given time period to be covered) for reimbursement for unscheduled crisis contacts. An ISP must be developed within 30 days of service initiation.

5. For recipients receiving scheduled, short-term counseling as part of the crisis intervention service, the ISP must reflect the short-term counseling goals.

6. Crisis intervention services may be provided outside of the clinic and billed, provided the provision of out-of-clinic services is clinically or programmatically appropriate for the recipient's needs, and it is included on the ISP. Travel by staff to provide out-of-clinic services shall not be reimbursable. Crisis intervention may involve contacts with the family or significant others.

7. Documentation must include the efforts at resolving the crisis to prevent institutional admissions.

12VAC30-60-185. Utilization review of case management.

A. Utilization review: community substance abuse treatment services.

1. The Medicaid recipient shall meet the [~~current~~] Diagnostic [and] Statistical Manual [of Mental Disorders (DSM-IV-TR)] criteria for an Axis I substance-related disorder. Nicotine or caffeine abuse or dependence shall not be covered.

2. Reimbursement shall be provided only for "active" case management. An active client for case management shall mean an individual for whom there is a plan of care in effect that requires regular direct or client-related contacts or activity or communication with the client or families, significant others, service providers, and others including a minimum of one face-to-face client contact within a 90-day period.

3. Except for a 30-day period following the initiation of this case management service by the recipient, in order to continue receiving case management services, the Medicaid recipient must be receiving another substance abuse treatment service [~~:~~.]

4. Billing can be submitted for an active recipient only for months in which direct or client-related contacts, activity, or communications occur.

5. There is a maximum annual service limit of 52 hours for case management services.

6. An initial Individual Service Plan (ISP) must be completed and must document the need for active case management before case management services can be billed. A comprehensive ISP shall be fully developed within 30 days of initiation of this service, which requires regular direct or recipient-related contacts or activity or communication with the recipient or families, significant others, service providers, and others including a minimum of one face-to-face client contact every 90 days. The case manager shall review the ISP every 90 days for the purpose of updating it or otherwise modifying it as appropriate for the recipient's changing condition.

7. The ISP shall be updated at least every 90 days or within seven days of a change in the recipient's treatment.

B. Utilization review: substance abuse treatment case management services.

1. Utilization review general requirements. On-site utilization reviews shall be conducted. Reimbursement shall be provided only for "active" case management clients. An active client for case management shall mean an individual for whom there is a plan of care in effect that requires regular direct or client-related contacts or activity or communication with the client or families, significant others, service providers, and others including a minimum of one face-to-face client contact within a 90-day period. Billing can be submitted only for months in which direct or client-related contacts, activity or communications occur.

2. The Medicaid eligible individual shall meet the [~~current~~] Diagnostic and Statistical Manual of Mental Disorders [DSM-IV-TR)] criteria for an Axis I Substance Abuse Disorder, with the exception of nicotine or caffeine abuse or dependence. A diagnosis of nicotine or caffeine abuse or dependence alone shall not be sufficient for reimbursement of these services.

3. The maximum annual limit for substance abuse treatment case management shall be 52 hours per year. Case management shall not be billed for persons in institutions for mental disease. Substance abuse treatment case management shall not be billed concurrently with any other type of Medicaid reimbursed case management.

4. The ISP must document the need for case management and be fully completed within 30 days of initiation of the service and the case manager shall review the ISP every three months. Such reviews must be documented in the client's record. The review will be due by the last day of the third month following the month in which the last review was completed. If needed a grace period will be granted up to the last day of the fourth month following the month of the last review. When the review was completed in a grace period, the next subsequent review shall be scheduled three months from the month the review was due and not the date of actual review.

5. The ISP shall be updated at least annually.

6. The provider of case management services shall be licensed by DBHDS as a provider of case management services.

DOCUMENTS INCORPORATED BY REFERENCE (12VAC30-60)

Virginia Medicaid Nursing Home Manual, Department of Medical Assistance Services.

Virginia Medicaid Rehabilitation Manual, Department of Medical Assistance Services.

Virginia Medicaid Hospice Manual, Department of Medical Assistance Services.

Virginia Medicaid School Division Manual, Department of Medical Assistance Services.

[Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV-TR), copyright 2000, American Psychiatric Association.

Patient Placement Criteria for the Treatment of Substance-Related Disorders (ASAM PPC-2R), Second Edition, copyright 2001, American Society on Addiction Medicine, Inc.]

12VAC30-80-32. Reimbursement for substance abuse services.

1. Outpatient psychotherapy services for assessment and evaluation or treatment of substance abuse furnished by physicians shall be reimbursed using the methodology in 12VAC30-80-190. For nonphysicians, they shall be reimbursed at the same levels specified in 12VAC30-50-140 and 12VAC30-50-150.

2. Rates for other substance abuse services shall be based on the agency fee schedule for 15 minute units of service. The Medicaid and commercial rates for similar services as well as the cost for providing services shall be considered when establishing the fee schedules so that payments shall be consistent with economy, efficiency, and quality of care. For each level of professional necessary to provide services described in 12VAC30-50-228 and 12VAC30-50-491, separate rates shall be established for licensed professionals, qualified substance abuse professionals (QSAP) and paraprofessionals. The same rates shall be paid to public and private providers.

[3. Community substance abuse services: Rehabilitation services. Rates for community substance abuse rehabilitation services shall be based on the agency fee schedule for 15 minute units of service. Separate rates shall be established for licensed professionals, qualified substance abuse professionals (QSAP) and paraprofessionals as described in 12VAC30-50-228. The Medicaid and commercial rates for similar services as well as the cost for providing services shall be considered when establishing the fee schedules so that payments shall be consistent with economy, efficiency, and quality of care. The same rates shall be paid to governmental and private providers. The agency's rates were set as of July 1, 2007, and are effective for services on or after that date. All rates are published on the DMAS website at: www.dmas.virginia.gov.

4. Outpatient substance abuse services: Physician services. Outpatient psychotherapy services for assessment and evaluation or treatment of substance abuse furnished by physicians, as described in 12VAC30-50-140, shall be reimbursed using the methodology described in this section and in 12VAC30-80-190. The same rates shall be paid to governmental and private providers. These services are reimbursed based on the Common Procedural Terminology (CPT) Codes. The agency's rates were set as of July 1, 2007, and are updated as described in 12VAC30-80-190. All rates are published on the DMAS website at: www.dmas.virginia.gov.

5. Outpatient substance abuse services: Other providers, including Licensed Mental Health Professionals (LMHP). Outpatient substance abuse services furnished by other licensed practitioners, as described in 12VAC30-50-150, shall be reimbursed using the methodology described in section 12VAC30-80-30 and in 12VAC30-80-190 and based upon the percentages set forth below. The same rates shall be paid to governmental and private providers. The agency's rates were set as of July 1, 2007, and are updated as described in 12VAC30-80-190. All rates are published on the DMAS website website at: www.dmas.virginia.gov.

a. Services of a licensed clinical psychologist shall be reimbursed at 90% of the reimbursement rate for psychiatrists.

b. Services provided by independently enrolled licensed clinical social workers, licensed professional counselors, licensed marriage and family therapists, psychiatric nurse practitioners, licensed substance abuse treatment practitioner, or licensed clinical nurse specialists-psychiatric shall be reimbursed at 75% of the reimbursement rate for licensed clinical psychologists.

6. Substance abuse services: Clinic services. Outpatient psychotherapy services for assessment and evaluation or treatment of substance abuse furnished by clinics as described in 12VAC30-50-150, shall be reimbursed using the methodology described in 12VAC30-80-30 and in 12VAC30-80-190. The fee schedule in effect, as of July 1, 2007, is an aggregate that is approximately 80% of the Medicare rates for these services. The same rates shall be paid to governmental and private providers. The agency's rates were set as of July 1, 2007, and are updated as described in 12VAC30-80-190. All rates are published on the DMAS website at: www.dmas.virginia.gov.

7. Substance abuse services: Case management services. Substance abuse case management services furnished by professionals as described in 12VAC30-50-140, 12VAC30-50-150 and in 12VAC30-50-491, shall be reimbursed based on the agency fee schedule for 15 minute units of service. The Medicaid and commercial rates for similar services as well as the cost for providing services shall be considered when establishing the fee schedules so that payments shall be consistent with economy, efficiency, and quality of care. The same rates shall be paid to governmental and private providers. The agency's rates were set as of July 1, 2007, and are effective for services

on or after that date. All rates are published on the DMAS website at: www.dmas.virginia.gov.]

12VAC30-120-310. Services exempted from MEDALLION referral requirements.

A. The following services shall be exempt from the referral requirements of MEDALLION:

1. Obstetrical and gynecological services (pregnancy and pregnancy related);

2. Psychiatric and psychological services, to include but not be limited to mental health, mental retardation services;

3. Family planning services;

4. Routine newborn services;

5. Annual or routine vision examinations (under age 21);

6. Emergency services;

7. EPSDT well-child exams;

8. Immunizations (health departments only);

9. All school health services provided pursuant to the Individuals with Disabilities Education Act (IDEA);

10. Services for the treatment of sexually transmitted diseases;

11. Targeted case management services;

12. Transportation services;

13. Pharmacy services;

14. Substance abuse treatment ~~for pregnant women~~ services; and

15. MR waiver services and MH community rehabilitation services.

B. While reimbursement for these services may not require a referral, an authorization, or a referral and an authorization by the PCP, the PCP must continue to track and document them to ensure continuity of care.

12VAC30-120-380. Medallion II MCO responsibilities.

A. The MCO shall provide, at a minimum, all medically necessary covered services provided under the State Plan for Medical Assistance and further defined by written DMAS regulations, policies and instructions, except as otherwise modified or excluded in this part.

1. Nonemergency services provided by hospital emergency departments shall be covered by MCOs in accordance with rates negotiated between the MCOs and the emergency departments.

2. Services that shall be provided outside the MCO network shall include those services identified and defined by the contract between DMAS and the MCO. Services reimbursed by DMAS include dental and orthodontic services for children up to age 21; for all others, dental services (as described in 12VAC30-50-190), school health services (as defined in 12VAC30-120-360), community mental health services (rehabilitative, targeted case management and the following substance abuse ~~services).~~ treatment services: emergency services (crisis); intensive outpatient services; day treatment services; substance abuse case management services; and opioid treatment services), as defined in 12VAC30-50-228 and 12VAC30-50-491 [,] and long-term care services provided under the § 1915(c) home-based and community-based waivers including related transportation to such authorized waiver services.

3. The MCOs shall pay for emergency services and family planning services and supplies whether they are provided inside or outside the MCO network.

B. Except for those services specifically carved out in subsection A of this section, EPSDT services shall be covered by the MCO. The MCO shall have the authority to determine the provider of service for EPSDT screenings.

C. The MCOs shall report data to DMAS under the contract requirements, which may include data reports, report cards for clients, and ad hoc quality studies performed by the MCO or third parties.

D. Documentation requirements.

1. The MCO shall maintain records as required by federal and state law and regulation and by DMAS policy. The MCO shall furnish such required information to DMAS, the Attorney General of Virginia or his authorized representatives, or the State Medicaid Fraud Control Unit on request and in the form requested.

2. Each MCO shall have written policies regarding enrollee rights and shall comply with any applicable federal and state laws that pertain to enrollee rights and shall ensure that its staff and affiliated providers take those rights into account when furnishing services to enrollees in accordance with 42 CFR 438.100.

E. The MCO shall ensure that the health care provided to its clients meets all applicable federal and state mandates, community standards for quality, and standards developed pursuant to the DMAS managed care quality program.

F. The MCOs shall promptly provide or arrange for the provision of all required services as specified in the contract between the state and the contractor. Medical evaluations shall be available within 48 hours for urgent care and within 30 calendar days for routine care. On-call clinicians shall be available 24 hours per day, seven days per week.

G. The MCOs must meet standards specified by DMAS for sufficiency of provider networks as specified in the contract between the state and the contractor.

H. Each MCO and its subcontractors shall have in place, and follow, written policies and procedures for processing requests for initial and continuing authorizations of service. Each MCO and its subcontractors shall ensure that any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the enrollee's condition or disease. Each MCO and its subcontractors shall have in effect mechanisms to ensure consistent application of review criteria for authorization decisions and shall consult with the requesting provider when appropriate.

I. In accordance with 42 CFR 447.50 through 42 CFR 447.60, MCOs shall not impose any cost sharing obligations on enrollees except as set forth in 12VAC30-20-150 and 12VAC30-20-160.

J. An MCO may not prohibit, or otherwise restrict, a health care professional acting within the lawful scope of practice, from advising or advocating on behalf of an enrollee who is his patient in accordance with 42 CFR 438.102.

K. An MCO that would otherwise be required to reimburse for or provide coverage of a counseling or referral service is not required to do so if the MCO objects to the service on moral or religious grounds and furnishes information about the service it does not cover in accordance with 42 CFR 438.102.

VA.R. Doc. No. R07-262; Filed December 1, 2009, 1:31 p.m.

Proposed Regulation

Title of Regulation: **12VAC30-50. Amount, Duration, and Scope of Medical and Remedial Care Services (amending 12VAC30-50-226, 12VAC30-50-420, 12VAC30-50-430).**

Statutory Authority: §§ 32.1-324 and 32.1-325 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: February 19, 2010.

Agency Contact: Catherine Hancock, Policy Division, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 225-4272, FAX (804) 786-1650, or email catherine.hancock@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the Director of Department of Medical Assistance Services to administer and amend the Plan for Medical Assistance according to the board's requirements. The Medicaid authority as established by § 1902 (a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services. Item 306 OO of the 2009 Appropriation Act directed DMAS to implement prior authorization requirements for community mental health services for children and adults.

Purpose: The purpose of this action is to require prior authorization for certain already-covered community mental health services in order to ensure that such services are rendered based on medical necessity and Medicaid service criteria. This regulatory action will help protect the health, safety, and welfare of Medicaid recipients by minimizing inappropriate utilization of unnecessary services.

Substance: The agency is proposing this regulatory action to comply with Item 306 OO of the 2009 Appropriation Act that gives DMAS authority to implement prior authorization for community-based mental health services for children and adults. In recent years the utilization of certain community-based mental health services has increased substantially. In order to address these expected increases in utilization, the General Assembly provided DMAS authority to implement prior authorization of these services in order to ensure that such services are provided based on Medicaid service criteria.

This action implements new prior authorization for community mental health services for children and adults. DMAS already has regulations that address prior authorization for other services. Therefore, those aspects of the Item 306 OO of the 2009 Appropriation Act are already in operation and need not be addressed in this action. The particular change implemented is the addition of a prior authorization requirement to case management services for seriously mentally ill adults and emotionally disturbed children (12VAC30-50-420) and for youth at risk of serious emotional disturbance (12VAC30-50-430). In addition, DMAS is adding this same requirement to the following services detailed in 12VAC30-50-226: Day treatment/partial hospitalization services, psychosocial rehabilitation, intensive community treatment, and mental health support services.

Issues: There are no advantages or disadvantages to citizens of implementing these provisions. The advantage to the agency will be improved control of utilization of these rapidly escalating services. A possible disadvantage to the providers or businesses that render these services is that now they will have to obtain prior authorization from DMAS' contractor before these services can be rendered. Some providers may see this as a barrier to service delivery.

The Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 781, Item 306 OO of the 2009 Acts of Assembly, the proposed changes implement a prior authorization review program for 1) case management services for seriously ill adults and emotionally disturbed

children, 2) youth at risk of serious emotional disturbance, and 3) day treatment/partial hospitalization services, psychological rehabilitation, intensive community treatment, and mental health support services.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Pursuant to Chapter 781, Item 306 OO of the 2009 Acts of Assembly, the proposed changes implement a prior authorization review program for 1) case management services for seriously ill adults and emotionally disturbed children, 2) youth at risk of serious emotional disturbance, and 3) day treatment/partial hospitalization services, psychological rehabilitation, intensive community treatment, and mental health support services.

Under the proposed regulations, prior authorization will be required for reimbursement to ensure that the services are provided to those who truly need them. Prior authorization is a well known cost-containment mechanism. DMAS estimates that it will cost $1.8 million per year in total funds to implement the prior authorization program through a contractor. The savings in term of reduced expenditures is expected to be about $3.6 million per year in total funds.

Businesses and Entities Affected. The proposed regulations apply to case management, day treatment/partial hospitalization services, psychological rehabilitation, intensive community treatment, and mental health support services. In fiscal year 2008 there were 311,383 people with a serious mental illness in Virginia. Also, there are approximately 491 Medicaid providers of these services.

Localities Particularly Affected. The proposed regulations apply throughout the Commonwealth.

Projected Impact on Employment. The proposed prior authorization program will create additional demand for labor to administer the prior authorization program. However, a reduction in demand for the affected service providers is also expected. The net of the two opposing effects on employment is unknown.

Effects on the Use and Value of Private Property. The proposed regulations do not have a direct effect on the use and value of private property. However, increased demand for administrative services may have a positive effect on the asset value of the contracted prior authorization businesses and reduced demand for affected services may have a negative effect on the asset value of affected Medicaid services businesses.

Small Businesses: Costs and Other Effects. All of the 491 affected providers are believed to be small businesses. So, the costs and other affects discussed above apply to them.

Small Businesses: Alternative Method that Minimizes Adverse Impact. Given the legislative language, there does not seem to be an alternative method that would minimize the adverse impact.

Real Estate Development Costs. The proposed regulations are not anticipated to have an impact on real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 36 (06). Section 2.2-4007.04 requires that such economic impact analyses 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, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to the Department of Planning and Budget's Economic Impact Analysis: The Department of Medical Assistance Services concurs with the economic impact analysis prepared by the Department of Planning and Budget regarding the regulations concerning Community Mental Health Services Prior Authorization (12VAC30-50-226, 12VAC30-50-420, and 12VAC30-50-430).

Summary:

Pursuant to Chapter 781, Item 306 OO of the 2009 Acts of Assembly, the proposed changes implement a prior authorization review program for (i) case management services for seriously ill adults and emotionally disturbed children; (ii) youth at risk of serious emotional disturbance; and (iii) day treatment/partial hospitalization services, psychological rehabilitation, intensive community treatment, and mental health support services.

12VAC30-50-226. Community mental health services.

A. Definitions. The following words and terms when used in these regulations shall have the following meanings unless the context clearly indicates otherwise:

"Certified prescreener" means an employee of the local community services board or its designee who is skilled in the assessment and treatment of mental illness and who has completed a certification program approved by ~~DMHMRSAS~~ DBHDS.

"Clinical experience" means practical experience in providing direct services to individuals with mental illness or mental retardation or the provision of direct geriatric services or special education services. Experience may include supervised internships, practicums, and field experience.

"Code" means the Code of Virginia.

"DBHDS" means the Department of Behavioral Health and Developmental Services consistent with Chapter 3 (§ 37.2-300 et seq.) of Title 37.2 of the Code of Virginia.

"DMAS" means the Department of Medical Assistance Services consistent with Chapter 10 (§ 32.1-323 et seq.) of Title 32.1 of the Code of Virginia.

~~"DMHMRSAS" means Department of Mental Health, Mental Retardation and Substance Abuse Services consistent with Chapter 1 (§ 37.1-39 et seq.) of Title 37.1 of the Code of Virginia.~~

"Human services field" means social work, gerontology, psychology, psychiatric rehabilitation, special education, sociology, counseling, vocational rehabilitation, and human services counseling or other degrees deemed equivalent by DMAS.

"Individual" means the patient, client, or recipient of services set out herein.

"Individual service plan" or "ISP" means a comprehensive and regularly updated statement specific to the individual being treated containing, but not necessarily limited to, his treatment or training needs, his goals and measurable objectives to meet the identified needs, services to be provided with the recommended frequency to accomplish the measurable goals and objectives, and estimated timetable for achieving the goals and objectives. The provider shall include the individual in the development of the ISP. To the extent that the individual's condition requires assistance for participation, assistance shall be provided. The ISP shall be updated as the needs and progress of the individual changes.

"Licensed Mental Health Professional" or "LMHP" means an individual licensed in Virginia as a physician, a clinical psychologist, a professional counselor, a clinical social worker, or a psychiatric clinical nurse specialist.

"Qualified mental health professional" or "QMHP" means a clinician in the human services field who is trained and experienced in providing psychiatric or mental health services to individuals who have a psychiatric diagnosis. If the QMHP is also one of the defined licensed mental health professionals, the QMHP may perform the services designated for the Licensed Mental Health Professionals unless it is specifically prohibited by their licenses. These QMHPs may be either a:

1. Physician who is a doctor of medicine or osteopathy and is licensed in Virginia;

2. Psychiatrist who is a doctor of medicine or osteopathy, specializing in psychiatry and is licensed in Virginia;

3. Psychologist who has a master's degree in psychology from an accredited college or university with at least one year of clinical experience;

4. Social worker who has a master's or bachelor's degree from a school of social work accredited or approved by the Council on Social Work Education and has at least one year of clinical experience;

5. Registered nurse who is licensed as a registered nurse in the Commonwealth and has at least one year of clinical experience; or

6. Mental health worker who has at least:

a. A bachelor's degree in human services or a related field from an accredited college and who has at least one year of clinical experience;

b. Registered Psychiatric Rehabilitation Provider (RPRP) registered with the International Association of Psychosocial Rehabilitation Services (IAPSRS) as of January 1, 2001;

c. A bachelor's degree from an accredited college in an unrelated field with an associate's degree in a human services field. The individual must also have three years clinical experience;

d. A bachelor's degree from an accredited college and certification by the International Association of Psychosocial Rehabilitation Services (IAPSRS) as a Certified Psychiatric Rehabilitation Practitioner (CPRP);

e. A bachelor's degree from an accredited college in an unrelated field that includes at least 15 semester credits (or equivalent) in a human services field. The individual must also have three years clinical experience; or

f. Four years clinical experience.

"Qualified paraprofessional in mental health" or "QPPMH" means an individual who meets at least one of the following criteria:

1. Registered with the International Association of Psychosocial Rehabilitation Services (IAPSRS) as an Associate Psychiatric Rehabilitation Provider (APRP), as of January 1, 2001~~;~~ .

2. Has an associate's degree in one of the following related fields (social work, psychology, psychiatric rehabilitation, sociology, counseling, vocational rehabilitation, human

services counseling) and has at least one year of experience providing direct services to persons with a diagnosis of mental illness~~;~~ .

3. An associate's or higher degree, in an unrelated field and at least three years experience providing direct services to persons with a diagnosis of mental illness, gerontology clients, or special education clients. The experience may include supervised internships, practicums and field experience.

4. A minimum of 90 hours classroom training in behavioral health and 12 weeks of experience under the direct personal supervision of a QMHP providing services to persons with mental illness and at least one year of clinical experience (including the 12 weeks of supervised experience).

5. College credits (from an accredited college) earned toward a bachelor's degree in a human service field that is equivalent to an associate's degree and one year's clinical experience.

6. Licensure by the Commonwealth as a practical nurse with at least one year of clinical experience.

B. Mental health services. The following services, with their definitions, shall be covered: day treatment/partial hospitalization, psychosocial rehabilitation, crisis services, intensive community treatment (ICT), and mental health supports. Staff travel time shall not be included in billable time for reimbursement.

1. Day treatment/partial hospitalization services shall be provided in sessions of two or more consecutive hours per day, which may be scheduled multiple times per week, to groups of individuals in a nonresidential setting. These services, limited annually to 780 units, include the major diagnostic, medical, psychiatric, psychosocial and psychoeducational treatment modalities designed for individuals who require coordinated, intensive, comprehensive, and multidisciplinary treatment but who do not require inpatient treatment. One unit of service shall be defined as a minimum of two but less than four hours on a given day. Two units of service shall be defined as at least four but less than seven hours in a given day. Three units of service shall be defined as seven or more hours in a given day. Authorization is required for Medicaid reimbursement.

a. Day treatment/partial hospitalization services shall be time limited interventions that are more intensive than outpatient services and are required to stabilize an individual's psychiatric condition. The services are delivered when the individual is at risk of psychiatric hospitalization or is transitioning from a psychiatric hospitalization to the community.

b. Individuals qualifying for this service must demonstrate a clinical necessity for the service arising from mental, behavioral, or emotional illness that results in significant functional impairments in major life activities. Individuals must meet at least two of the following criteria on a continuing or intermittent basis:

(1) Experience difficulty in establishing or maintaining normal interpersonal relationships to such a degree that they are at risk of hospitalization or homelessness or isolation from social supports;

(2) Experience difficulty in activities of daily living such as maintaining personal hygiene, preparing food and maintaining adequate nutrition, or managing finances to such a degree that health or safety is jeopardized;

(3) Exhibit behavior that requires repeated interventions or monitoring by the mental health, social services, or judicial system; or

(4) Exhibit difficulty in cognitive ability such that they are unable to recognize personal danger or recognize significantly inappropriate social behavior.

c. Individuals shall be discharged from this service when they are no longer in an acute psychiatric state and other less intensive services may achieve psychiatric stabilization.

d. Admission and services for time periods longer than 90 calendar days must be authorized based upon a face-to-face evaluation by a physician, psychiatrist, licensed clinical psychologist, licensed professional counselor, licensed clinical social worker, or psychiatric clinical nurse specialist.

2. Psychosocial rehabilitation shall be provided at least two or more hours per day to groups of individuals in a nonresidential setting. These services, limited annually to 936 units, include assessment, education to teach the patient about the diagnosed mental illness and appropriate medications to avoid complication and relapse, opportunities to learn and use independent living skills and to enhance social and interpersonal skills within a supportive and normalizing program structure and environment. One unit of service is defined as a minimum of two but less than four hours on a given day. Two units are defined as at least four but less than seven hours in a given day. Three units of service shall be defined as seven or more hours in a given day. Authorization is required for Medicaid reimbursement.

Individuals qualifying for this service must demonstrate a clinical necessity for the service arising from mental, behavioral, or emotional illness that results in significant functional impairments in major life activities. Services are provided to individuals: (i) who without these services would be unable to remain in the community or (ii) who

meet at least two of the following criteria on a continuing or intermittent basis:

a. Experience difficulty in establishing or maintaining normal interpersonal relationships to such a degree that they are at risk of psychiatric hospitalization, homelessness, or isolation from social supports;

b. Experience difficulty in activities of daily living such as maintaining personal hygiene, preparing food and maintaining adequate nutrition, or managing finances to such a degree that health or safety is jeopardized;

c. Exhibit such inappropriate behavior that repeated interventions by the mental health, social services, or judicial system are necessary; or

d. Exhibit difficulty in cognitive ability such that they are unable to recognize personal danger or significantly inappropriate social behavior.

3. Crisis intervention shall provide immediate mental health care, available 24 hours a day, seven days per week, to assist individuals who are experiencing acute psychiatric dysfunction requiring immediate clinical attention. This service's objectives shall be to prevent exacerbation of a condition, to prevent injury to the client or others, and to provide treatment in the context of the least restrictive setting. Crisis intervention activities shall include assessing the crisis situation, providing short-term counseling designed to stabilize the individual, providing access to further immediate assessment and follow-up, and linking the individual and family with ongoing care to prevent future crises. Crisis intervention services may include office visits, home visits, preadmission screenings, telephone contacts, and other client-related activities for the prevention of institutionalization.

a. Individuals qualifying for this service must demonstrate a clinical necessity for the service arising from an acute crisis of a psychiatric nature that puts the individual at risk of psychiatric hospitalization. Individuals must meet at least two of the following criteria at the time of admission to the service:

(1) Experience difficulty in establishing or maintaining normal interpersonal relationships to such a degree that they are at risk of psychiatric hospitalization, homelessness, or isolation from social supports;

(2) Experience difficulty in activities of daily living such as maintaining personal hygiene, preparing food and maintaining adequate nutrition, or managing finances to such a degree that health or safety is jeopardized;

(3) Exhibit such inappropriate behavior that immediate interventions by mental health, social services, or the judicial system are necessary; or

(4) Exhibit difficulty in cognitive ability such that they are unable to recognize personal danger or significantly inappropriate social behavior.

b. The annual limit for crisis intervention is 720 units per year. A unit shall equal 15 minutes.

4. Intensive community treatment (ICT), initially covered for a maximum of 26 weeks based on an initial assessment with continuation reauthorized for an additional 26 weeks annually based on written assessment and certification of need by a qualified mental health provider (QMHP), shall be defined as medical psychotherapy, psychiatric assessment, medication management, and case management activities offered to outpatients outside the clinic, hospital, or office setting for individuals who are best served in the community. The annual unit limit shall be 130 units with a unit equaling one hour. Authorization is required for Medicaid reimbursement. To qualify for ICT, the individual must meet at least one of the following criteria:

a. The individual must be at high risk for psychiatric hospitalization or becoming or remaining homeless due to mental illness or require intervention by the mental health or criminal justice system due to inappropriate social behavior.

b. The individual has a history (three months or more) of a need for intensive mental health treatment or treatment for co-occurring serious mental illness and substance use disorder and demonstrates a resistance to seek out and utilize appropriate treatment options.

(1) An assessment that documents eligibility and the need for this service must be completed prior to the initiation of services. This assessment must be maintained in the individual's records.

(2) A service plan must be initiated at the time of admission and must be fully developed within 30 days of the initiation of services.

5. Crisis stabilization services for nonhospitalized individuals shall provide direct mental health care to individuals experiencing an acute psychiatric crisis which may jeopardize their current community living situation. Authorization may be for up to a 15-day period per crisis episode following a documented face-to-face assessment by a QMHP which is reviewed and approved by an LMHP within 72 hours. The maximum limit on this service is up to eight hours (with a unit being one hour) per day up to 60 days annually. The goals of crisis stabilization programs shall be to avert hospitalization or rehospitalization, provide normative environments with a high assurance of safety and security for crisis intervention, stabilize individuals in psychiatric crisis, and mobilize the resources of the community support system and family members and others for on-going maintenance and rehabilitation. The

services must be documented in the individual's records as having been provided consistent with the ISP in order to receive Medicaid reimbursement. The crisis stabilization program shall provide to recipients, as appropriate, psychiatric assessment including medication evaluation, treatment planning, symptom and behavior management, and individual and group counseling. This service may be provided in any of the following settings, but shall not be limited to: (i) the home of a recipient who lives with family or other primary caregiver; (ii) the home of a recipient who lives independently; or (iii) community-based programs licensed by ~~DMHMRSAS~~ DBHDS to provide residential services but which are not institutions for mental disease (IMDs). This service shall not be reimbursed for (i) recipients with medical conditions that require hospital care; (ii) recipients with primary diagnosis of substance abuse; or (iii) recipients with psychiatric conditions that cannot be managed in the community (i.e., recipients who are of imminent danger to themselves or others). Services must be documented through daily notes and a daily log of times spent in the delivery of services. Individuals qualifying for this service must demonstrate a clinical necessity for the service arising from an acute crisis of a psychiatric nature that puts the individual at risk of psychiatric hospitalization. Individuals must meet at least two of the following criteria at the time of admission to the service:

a. Experience difficulty in establishing and maintaining normal interpersonal relationships to such a degree that the individual is at risk of psychiatric hospitalization, homelessness, or isolation from social supports;

b. Experience difficulty in activities of daily living such as maintaining personal hygiene, preparing food and maintaining adequate nutrition, or managing finances to such a degree that health or safety is jeopardized;

c. Exhibit such inappropriate behavior that immediate interventions by the mental health, social services, or judicial system are necessary; or

d. Exhibit difficulty in cognitive ability such that the individual is unable to recognize personal danger or significantly inappropriate social behavior.

6. Mental health support services shall be defined as training and supports to enable individuals to achieve and maintain community stability and independence in the most appropriate, least restrictive environment. Authorization is required for Medicaid reimbursement. These services may be authorized for six consecutive months. This program shall provide the following services in order to be reimbursed by Medicaid: training in or reinforcement of functional skills and appropriate behavior related to the individual's health and safety, activities of daily living, and use of community resources; assistance with medication management; and monitoring health, nutrition, and physical condition.

a. Individuals qualifying for this service must demonstrate a clinical necessity for the service arising from a condition due to mental, behavioral, or emotional illness that results in significant functional impairments in major life activities. Services are provided to individuals who without these services would be unable to remain in the community. The individual must have two of the following criteria on a continuing or intermittent basis:

(1) Have difficulty in establishing or maintaining normal interpersonal relationships to such a degree that the individual is at risk of psychiatric hospitalization or homelessness or isolation from social supports;

(2) Require help in basic living skills such as maintaining personal hygiene, preparing food and maintaining adequate nutrition or managing finances to such a degree that health or safety is jeopardized;

(3) Exhibit such inappropriate behavior that repeated interventions by the mental health, social services, or judicial system are necessary; or

(4) Exhibit difficulty in cognitive ability such that they are unable to recognize personal danger or recognize significantly inappropriate social behavior.

b. The individual must demonstrate functional impairments in major life activities. This may include individuals with a dual diagnosis of either mental illness and mental retardation, or mental illness and substance abuse disorder.

c. The yearly limit for mental health support services is 372 units. One unit is one hour but less than three hours.

12VAC30-50-420. Case management services for seriously mentally ill adults and emotionally disturbed children.

A. Target Group: The Medicaid eligible individual shall meet the ~~DMHMRSAS~~ DBHDS definition for "serious mental illness," or "serious emotional disturbance in children and adolescents."

1. An active client for case management shall mean an individual for whom there is a plan of care in effect which requires regular direct or client-related contacts or communication or activity with the client, family, service providers, significant others and others including at least one face-to-face contact every 90 days. Billing can be submitted for an active client only for months in which direct or client-related contacts, activity or communications occur. Authorization is required for Medicaid reimbursement.

2. There shall be no maximum service limits for case management services. Case management shall not be billed for individuals who are in institutions for mental disease.

B. Services will be provided to the entire state.

C. Comparability of Services: Services are not comparable in amount, duration, and scope. Authority of § 1915(g)(1) of the Act is invoked to provide services without regard to the requirements of § 1902(a)(10)(B) of the Act.

D. Definition of Services: Mental health services. Case management services assist individual children and adults, in accessing needed medical, psychiatric, social, educational, vocational, and other supports essential to meeting basic needs. Services to be provided include:

1. Assessment and planning services, to include developing an Individual Service Plan (does not include performing medical and psychiatric assessment but does include referral for such assessment);

2. Linking the individual to services and supports specified in the individualized service plan;

3. Assisting the individual directly for the purpose of locating, developing or obtaining needed services and resources;

4. Coordinating services and service planning with other agencies and providers involved with the individual.

5. Enhancing community integration by contacting other entities to arrange community access and involvement, including opportunities to learn community living skills, and use vocational, civic, and recreational services;

6. Making collateral contacts with the individuals' significant others to promote implementation of the service plan and community adjustment;

7. Follow-up and monitoring to assess ongoing progress and to ensure services are delivered; and

8. Education and counseling which guides the client and develops a supportive relationship that promotes the service plan.

E. Qualifications of Providers:

1. Services are not comparable in amount, duration, and scope. Authority of § 1915(g)(1) of the Act is invoked to limit case management providers for individuals with mental retardation and individuals with serious/chronic mental illness to the Community Services Boards only to enable them to provide services to serious/chronically mentally ill or mentally retarded individuals without regard to the requirements of § 1902(a)(10)(B) of the Act.

2. To qualify as a provider of services through DMAS for rehabilitative mental health case management, the provider of the services must meet certain criteria. These criteria shall be:

a. The provider must have the administrative and financial management capacity to meet state and federal requirements;

b. The provider must have the ability to document and maintain individual case records in accordance with state and federal requirements;

c. The services shall be in accordance with the Virginia Comprehensive State Plan for Mental Health, Mental Retardation and Substance Abuse Services;

d. The provider must be licensed as a provider of case management services by the ~~DMHMRSAS~~ DBHDS; and

e. Persons providing case management services must have knowledge of:

(1) Services, systems, and programs available in the community including primary health care, support services, eligibility criteria and intake processes, generic community resources, and mental health, mental retardation, and substance abuse treatment programs;

(2) The nature of serious mental illness, mental retardation, and substance abuse depending on the population served, including clinical and developmental issues;

(3) Different types of assessments, including functional assessments, and their uses in service planning;

(4) Treatment modalities and intervention techniques, such as behavior management, independent living skills training, supportive counseling, family education, crisis intervention, discharge planning, and service coordination;

(5) The service planning process and major components of a service plan;

(6) The use of medications in the care or treatment of the population served; and

(7) All applicable federal and state laws, state regulations, and local ordinances.

f. Persons providing case management services must have skills in:

(1) Identifying and documenting an individual's needs for resources, services, and other supports;

(2) Using information from assessments, evaluations, observation, and interviews to develop individual service plans;

(3) Identifying services and resources within the community and established service system to meet the individual's needs; and documenting how resources,

services, and natural supports, such as family, can be utilized to achieve an individual's personal habilitative/rehabilitative and life goals; and

(4) Coordinating the provision of services by public and private providers.

g. Persons providing case management services must have abilities to:

(1) Work as team members, maintaining effective inter- and intra-agency working relationships;

(2) Work independently, performing position duties under general supervision; and

(3) Engage and sustain ongoing relationships with individuals receiving services.

3. Providers may bill Medicaid for mental health case management only when the services are provided by qualified mental health case managers.

F. The state assures that the provision of case management services will not restrict an individual's free choice of providers in violation of § 1902(a)(23) of the Act.

1. Eligible recipients will have free choice of the providers of case management services.

2. Eligible recipients will have free choice of the providers of other medical care under the plan.

G. Payment for case management services under the plan shall not duplicate payments made to public agencies or private entities under other program authorities for this same purpose.

H. Case management services may not be billed concurrently with intensive community treatment services, treatment foster care case management services or intensive in-home services for children and adolescents.

12VAC30-50-430. Case management services for youth at risk of serious emotional disturbance.

A. Target group: Medicaid eligible individuals who meet the ~~DMHMRSAS~~ DBHDS definition of youth at risk of serious emotional disturbance.

1. An active client shall mean an individual for whom there is a plan of care in effect which requires regular direct or client-related contacts or communication or activity with the client, family, service providers, significant others and others including at least one face-to-face contact every 90-days. Billing can be submitted for an active client only for months in which direct or client-related contacts, activity or communications occur. Authorization is required for Medicaid reimbursement.

2. There shall be no maximum service limits for case management services. Case management services must not be billed for individuals who are in institutions for mental disease.

B. Services will be provided in the entire state.

C. Comparability of services: Services are not comparable in amount, duration, and scope. Authority of § 1915(g)(1) of the Act is invoked to provide services without regard to the requirements of § 1902(a)(10)(B) of the Act.

D. Definition of services: Mental health services. Case management services assist youth at risk of serious emotional disturbance in accessing needed medical, psychiatric, social, educational, vocational, and other supports essential to meeting basic needs. Services to be provided include:

1. Assessment and planning services, to include developing an Individual Service Plan;

2. Linking the individual directly to services and supports specified in the treatment/services plan;

3. Assisting the individual directly for the purpose of locating, developing or obtaining needed service and resources;

4. Coordinating services and service planning with other agencies and providers involved with the individual;

5. Enhancing community integration by contacting other entities to arrange community access and involvement, including opportunities to learn community living skills, and use vocational, civic, and recreational services;

6. Making collateral contacts which are nontherapy contacts with an individual's significant others to promote treatment and/or community adjustment;

7. Following up and monitoring to assess ongoing progress and ensuring services are delivered; and

8. Education and counseling which guides the client and develops a supportive relationship that promotes the service plan.

E. Qualifications of providers.

1. Services are not comparable in amount, duration, and scope. Authority of § 1915(g)(1) of the Act is invoked to limit case management providers, to the community services boards only, to enable them to provide services to serious/chronically mentally ill or mentally retarded individuals without regard to the requirements of § 1902(a)(10)(B) of the Act. To qualify as a provider of case management services to youth at risk of serious emotional disturbance, the provider of the services must meet the following criteria:

a. The provider must meet state and federal requirements regarding its capacity for administrative and financial management;

b. The provider must document and maintain individual case records in accordance with state and federal requirements;

c. The provider must provide services in accordance with the Virginia Comprehensive State Plan for Mental Health, Mental Retardation and Substance Abuse Services;

d. The provider must be licensed as a provider of case management services by the ~~DMHMRSAS~~ DBHDS; and

e. Persons providing case management services must have knowledge of:

(1) Services, systems, and programs available in the community including primary health care, support services, eligibility criteria and intake processes, generic community resources, and mental health, mental retardation, and substance abuse treatment programs;

(2) The nature of serious mental illness, mental retardation and/or substance abuse depending on the population served, including clinical and developmental issues;

(3) Different types of assessments, including functional assessments, and their uses in service planning;

(4) Treatment modalities and intervention techniques, such as behavior management, independent living skills training, supportive counseling, family education, crisis intervention, discharge planning, and service coordination;

(5) The service planning process and major components of a service plan;

(6) The use of medications in the care or treatment of the population served; and

(7) All applicable federal and state laws, state regulations, and local ordinances.

f. Persons providing case management services must have skills in:

(1) Identifying and documenting an individual's need for resources, services, and other supports;

(2) Using information from assessments, evaluations, observation, and interviews to develop individual service plans;

(3) Identifying services and resources within the community and established service system to meet the individual's needs; and documenting how resources, services, and natural supports, such as family, can be utilized to achieve an individual's personal habilitative/ rehabilitative and life goals; and

(4) Coordinating the provision of services by diverse public and private providers.

g. Persons providing case management services must have abilities to:

(1) Work as team members, maintaining effective inter- and intra-agency working relationships;

(2) Work independently performing position duties under general supervision; and

(3) Engage and sustain ongoing relationships with individuals receiving services.

F. Providers may bill Medicaid for mental health case management to youth at risk of serious emotional disturbance only when the services are provided by qualified mental health case managers.

G. The state assures that the provision of case management services will not restrict an individual's free choice of providers in violation of § 1902(a)(23) of the Act.

1. Eligible recipients will have free choice of the providers of case management services.

2. Eligible recipients will have free choice of the providers of other medical care under the plan.

H. Payment for case management services under the plan must not duplicate payments made to public agencies or private entities under other program authorities for this same purpose.

I. Case management may not be billed concurrently with intensive community treatment services, treatment foster care case management services, or intensive in-home services for children and adolescents.

VA.R. Doc. No. R09-1937; Filed November 25, 2009, 11:08 a.m.

TITLE 14. INSURANCE

STATE CORPORATION COMMISSION

Final Regulation

REGISTRAR'S NOTICE: The State Corporation Commission is exempt from the Administrative Process Act in accordance with § 2.2-4002 A 2 of the Code of Virginia, which exempts courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.

Title of Regulation: **14VAC5-90. Rules Governing Advertisement of Accident and Sickness Insurance (amending 14VAC5-90-170).**

Statutory Authority: §§ 12.1-13 and 38.2-223 of the Code of Virginia.

Effective Date: January 1, 2010.

Agency Contact: Jacqueline Cunningham, Deputy Commissioner, Bureau of Insurance, State Corporation Commission, Life and Health Division, 1300 East Main Street, P.O. Box 1157, Richmond, VA 23218, telephone (804) 371-9074, FAX (804) 371-9944, or email jackie.cunningham@scc.virginia.gov.

Summary:

The amendment to the regulation eliminates the requirement for insurers to file a Certificate of Advertising Compliance with its Annual Statement filing. Subsection B of 14VAC5-90-170 is deleted, as well as accompanying Form R04.

AT RICHMOND, NOVEMBER 23, 2009

COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION

CASE NO. INS-2009-00221

Ex Parte: In the matter of Adopting
Amendments to the Rules Governing
Advertisement of Accident and
Sickness Insurance

ORDER ADOPTING AMENDMENTS TO RULES

By Order entered herein October 8, 2009, all interested persons were ordered to take notice that subsequent to November 16, 2009, the State Corporation Commission ("Commission") would consider the entry of an order adopting amendments proposed by the Bureau of Insurance ("Bureau") to the Commission's Rules Governing Advertisement of Accident and Sickness Insurance ("Rules"), set forth in Chapter 90 of Title 14 of the Virginia Administrative Code, unless on or before November 16, 2009, any person objecting to the adoption of the proposed amendments filed a request for hearing with the Clerk of the Commission ("Clerk").

The Order to Take Notice also required all interested persons to file their comments in support of or in opposition to the proposed amendments on or before November 16, 2009.

No comments and no request for hearing were filed with the Clerk.

The Bureau does not recommend further changes to the proposed amendments, and further recommends that the amended Rules be adopted as proposed.

The amendment of 14 VAC 5-90-170 is necessary because the certification statement contained in subsection B has not improved the quality of advertisement by the companies. Advertisement quality is better served through the minimum standards set forth in the regulations. Therefore, the Bureau recommends that subsection B be deleted, as well as the associated Form R04.

THE COMMISSION, having considered the Bureau's recommendation for amending the Rules as proposed, is of the opinion that the attached amendments to the Rules should be adopted.

THEREFORE IT IS ORDERED THAT:

(1) The amendments to Chapter 90 of Title 14 of the Virginia Administrative Code entitled "Rules Governing Advertisement of Accident and Sickness Insurance," amended at 14VAC 5-90-170 and Form R04, which are attached hereto and made a part hereof, should be, and they are hereby, ADOPTED to be effective January 1, 2010.

(2) AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to Jacqueline K. Cunningham, Deputy Commissioner, Bureau of Insurance, State Corporation Commission who forthwith shall give further notice of the adoption of the amendments to the Rules by mailing a copy of this Order, including a clean copy of the attached final amended Rules, to all insurers licensed by the Commission to write accident and sickness insurance in the Commonwealth of Virginia, and certain other interested parties designated by the Bureau of Insurance.

(3) The Commission's Division of Information Resources shall cause a copy of this Order, together with the amended Rules, to be forwarded to the Virginia Registrar of the Regulations for appropriate publication in the Virginia Register of Regulations and shall make this Order and the attached amended Rules available on the Commission's website, http://www.scc.virginia.gov/case.

(4) The Bureau shall file with the Clerk of the Commission an affidavit of compliance with the notice requirements of paragraph (2) above.

14VAC5-90-170. Enforcement procedures; advertising file; ~~certificate of compliance;~~ corrective advertising.

A. Each insurer shall maintain at its home or principal office a complete file containing every printed, published or prepared advertisement of its individual policies and typical printed, published or prepared advertisements of its blanket, franchise and group policies hereafter disseminated in this or any other state, whether or not licensed in another state, with a notation attached to each advertisement that indicates the manner and extent of distribution and the form number of any policy advertised. The file shall be subject to regular and periodical inspection by the commission. All the advertisements shall be maintained in a file for the longer of four years or until the filing of the next regular report on examination of the insurer.

~~B. Each insurer required to file an Annual Statement with the commission shall file with its Annual Statement, a Certificate of Advertising Compliance executed by an~~

~~authorized officer of the insurer stating that, to the best of the officer's knowledge, information, and belief, the advertisements that were disseminated by the insurer during the preceding statement year complied or were made to comply in all respects with the provisions of this chapter and Title 38.2 of the Code of Virginia as implemented and interpreted by this chapter.~~

~~C.~~ B. If the commission finds, after notice and opportunity to be heard, as provided in § 38.2-219 of the Code of Virginia, that any advertisement is in violation of the provisions of this chapter and that the violation was to substantially deceive or to mislead the public, the commission may, in addition to any other remedy or monetary penalty it may otherwise impose, order the insurer responsible for the dissemination of such advertisement to publish at the insurer's expense, a corrective advertisement in a form to be approved by the commission. If an insurer fails to publish a corrective advertisement as required by the commission, the commission may cause a corrective advertisement to be published, and the insurer shall, in addition to any other penalty that may have been imposed, reimburse the commission for the expenses incurred in connection with the publication of the advertisement.

FORMS (14VAC5-90) (Repealed.)

~~Certificate of Advertising Compliance, Form R04 (eff. 11/03).~~

VA.R. Doc. No. R10-2173; Filed December 1, 2009, 1:03 p.m.

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TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF DENTISTRY

Proposed Regulation

Title of Regulation: **18VAC60-20. Regulations Governing the Practice of Dentistry and Dental Hygiene (amending 18VAC60-20-10, 18VAC60-20-15, 18VAC60-20-16, 18VAC60-20-20, 18VAC60-20-30, 18VAC60-20-50, 18VAC60-20-60, 18VAC60-20-70, 18VAC60-20-105, 18VAC60-20-170, 18VAC60-20-190, 18VAC60-20-200, 18VAC60-20-210, 18VAC60-20-220, 18VAC60-20-230; adding 18VAC60-20-61, 18VAC60-20-72).**

Statutory Authority: §§ 54.1-2400 and 54.1-2729.01 of the Code of Virginia.

Public Hearing Information:

January 22, 2010 - 1 p.m. - Perimeter Center, 9960 Mayland Drive, 2nd Floor, Board Room 3, Richmond, VA

Public Comment Deadline: February 19, 2010.

Agency Contact: Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4538, FAX (804) 527-4428, or email sandra.reen@dhp.virginia.gov.

Basis: Section 54.1-2400 of the Code of Virginia provides the Board of Dentistry the authority to promulgate regulations to administer the regulatory system. The specific statutory authority for promulgation of regulations pertaining to dental assistants II (DA II) is found in § 54.1-2729.01 of the Code of Virginia.

Purpose: In its proposed regulatory action, the board has specified the qualifications for registration to practice as a DA II as required by Chapters 84 and 264 of the 2008 Acts of Assembly. Dental assistants will have expanded duties beyond chairside assisting and taking radiographs, which are the typical duties currently delegated to a dental assistant, to include some patient care duties currently performed by a dentist. In conformity with the legislation, a person will be required to hold certification from a national credentialing body, complete an educational program, receive training as prescribed by the board and be registered with the board in order to qualify as a DA II or expanded duty dental assistant.

Dentists have expressed interest in expanded duties for assistants as a means of providing care to a greater number of patients. In some areas of the state, there is a reported shortage of hygienists available for employment in dental offices, so certain aspects of patient care could be delegated to "expanded duty dental assistants," which would enable the dentist to focus on care that necessitates a higher level of knowledge and skill.

To ensure the services can be safely provided by a DA II, the board has set in the regulation the evidence of minimal competency that a dental assistant must demonstrate to be registered and authorized to perform expanded duties. Qualifications include specified hours of didactic education, clinical training and experience, and examination in modules for the performance of specific duties delegated under direct supervision. While the applicant will have to demonstrate clinical knowledge and skills to be registered as a DA II, the dentist will have to be present in the facility, will have to examine the patient both before and after treatment by a DA II and will remain responsible for the care of the patient. Such requirements are necessary to ensure the health and safety of dental patients, while increasing the number of qualified dental personnel and access to care.

Substance:

18VAC60-20-10. Definitions are added for a "dental assistant II," "direct supervision," and "indirect supervision." The definitions of "direction" and "general supervision" are amended.

18VAC60-20-20. The annual renewal fee for a DA II is $50; the inactive registration is $25. Late fees are $20 for an active

registration and $10 for inactive registration. The reinstatement fee for a lapsed registration is $125, for a revoked registration is $300, and for a suspended registration is $250.

18VAC60-20-30. The application fee for a DA II is $100. Other miscellaneous fees, which are set at the actual cost to the board, are identical for the DA II as for other regulated professions.

18VAC60-20-50. DA IIs are added to the list of practitioners required to maintain training in basic cardiopulmonary resuscitation.

In subsection F, a requirement is added for a DA II to attest to current DANB certification (or other national accrediting body if approved by the ADA) in order to renew registration.

18VAC60-20-61. Educational requirements for dental assistants II.

Subsection A specifies that a prerequisite for entry into an educational program is current certification as a CDA.

Subsection B establishes the hours and subject areas of training and experience, as follows:

Subdivision 1 sets 50 hours of didactic coursework in dental anatomy and operative dentistry.

Subdivision 2 sets the hours of laboratory training required for each of the expanded duties.

Subdivision 3 sets the hours of clinical experience applying the techniques learned in the preclinical coursework and laboratory that may be completed at a dental office.

Subdivision 4 establishes the competency examinations required for completion of an education program.

Subsection C requires all treatment of patients by a student to be under the direct and immediate supervision of a dentist, who is responsible for performance of duties. The dentist is required to attest to successful completion and clinical competencies by the student.

18VAC60-20-70. The certification requirement for a DA II is added to this section in subsection C. As required by law, a DA II must have a national credential recognized by the ADA, which is currently a Certified Dental Assistant (CDA) conferred by DANB based on passage of an examination on chairside assisting, radiation health and safety, and infection control.

18VAC60-20-72. Requirements for registration by endorsement include (i) current national certification, (ii) current authorization to perform expanded duties in another state, and (iii) qualifications substantially equivalent to the education and training in specific duties required in Virginia or documented experience in the restorative and prosthetic expanded duties for at least 24 of the past 48 months preceding application.

18VAC60-20-105. The requirements for obtaining an inactive registration and for reactivating back to active status are added in subsection C, which provides that current national certification is required for reactivation.

18VAC60-20-190. The duties that may be delegated to a registered DA II are set out in subsection C of 18VAC60-20-230. Since those duties are currently listed in 18VAC60-20-190 as "non-delegable" and may only be performed by a licensed dentist, this section is amended to allow for delegation to a DA II.

18VAC60-20-200. The current ratio is no more than two hygienists per dentists at any one time. With the registration of DA IIs, the ratio has been expanded to allow a total of four dental hygienists or DA IIs in any combination.

18VAC60-20-210 and 18VAC60-20-220. Since the definition of "direction" has been amended to include the level of supervision that a dentist is required to exercise in delegating to a dental hygienist, the provisions of 18VAC60-20-210, specifying the duties of a dental hygienist, are amended to differentiate between those that may be under indirect supervision and those that may be under general supervision. Subsection C in 18VAC60-20-210 is deleted because the amended definition of direction refers to a level of supervision required for the services provided, which is set out in 18VAC60-20-220.

18VAC60-20-230. Subsection C is added to specify the duties that are delegable to a DA II who has qualified by education, training, and examination must be under direction and direct supervision (as defined in 18VAC60-20-10). Those duties are:

1. Placing, packing, carving, and polishing of amalgam restorations;

2. Placing and shaping composite resin restorations;

3. Taking final impressions and use of a non-epinephrine retraction cord; and

4. Final cementation of crowns and bridges after adjustment and fitting by the dentist.

Issues: The primary advantage of this proposal to the public is more accessibility for dental care by persons who are qualified by education, training, and examination to perform certain restorative and prosthetic dental functions. The ability of dental practices to provide services to populations of patients is enhanced with expanded duty dental assistants and with an increase in the ratio of dentists to dental hygienists or DA IIs from two per dentist to four per dentist. To the extent dental assistants acquire the additional qualifications and credentials for expanded functions as a DA II, the regulation has the potential to improve accessibility and reduce costs. If a DA II is appropriately trained and clinically competent, and if the dentist provides direct supervision as specified in regulation, there should be no disadvantages.

There are no disadvantages of these provisions to the agency or the Commonwealth. More specificity about direction and the levels of supervision should allow board staff to direct persons with questions about those issues to the regulations.

The Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Chapters 84 and 264 of the 2008 Acts of the Assembly created the new professional registration called dental assistant II (DA II). Pursuant to this legislation the Board of Dentistry (Board) proposes to specify requirements for registration and the scope of practice for a DA II. Further, the Board proposes to permit dentists to: 1) utilize a total of four dental hygienists or DA II in any combination practicing under direction or general supervision at one and the same time, and 2) delegate some duties to dental hygienists under general supervision with or without the dentist being present.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Chapters 84 and 264 of the 2008 Acts of the Assembly created Code of Virginia § 54.1-2729.01.B which states that:

> A person who (i) has met the educational and training requirements prescribed by the Board; (ii) holds a certification from a credentialing organization recognized by the American Dental Association; and (iii) has met any other qualifications for registration as prescribed in regulations promulgated by the Board may practice as a dental assistant II. A dental assistant II may perform duties not otherwise restricted to the practice of a dentist or dental hygienist under the direction of a licensed dentist that are reversible, intraoral procedures specified in regulations promulgated by the Board.

The Board proposes to permit a DA II to perform the following procedures under the direction and direct supervision of a dentist which under current regulations may only be performed by a dentist: 1) performing pulp capping procedures, 2) packing and carving of amalgam restorations, 3) placing and shaping composite resin restorations, 4) taking final impressions, 5) use of a non-epinephrine retraction cord, and 6) final cementation of crowns and bridges after adjustment and fitting by the dentist. The DA II would need to have successfully completed the extensive coursework, laboratory training, clinical experience and examinations specified in the proposed regulations prior to performing these procedures.

In both the current and proposed regulations a dental assistant is defined as "any unlicensed person under the supervision of a dentist who renders assistance for services provided to the patient as authorized under this chapter but shall not include an individual serving in purely a secretarial or clerical capacity." The proposed amendments to these regulations do not change requirements or opportunities for dental assistants. The proposed amendments and the enabling legislation essentially create a new registered profession called "dental assistant II" which is permitted to perform a subset of duties which can now only be performed by dentists. Given the required extensive training and supervision by dentists, public safety is unlikely to be compromised by permitting the practice of the DA II. To the extent that that individuals pursue and obtain DA II registration, and dentists choose to hire such individuals to perform these procedures, access to dental care for the public may increase for the public. Thus, this proposal produces a net benefit.

The current regulations state that "No dentist shall have more than two dental hygienists practicing under direction or general supervision at one and the same time …" The Board proposes to amend the language to state that "A dentist may utilize up to a total of four dental hygienists or dental assistants II in any combination practicing under direction or general supervision at one and the same time …" This proposed change may moderately increase employment and increase access to dental care for the public and is unlikely to create significant health risk for the public.

The Board also proposes to specify that the dental hygienist may perform certain duties under general supervision with or without the dentist being present. Currently, the regulations specify that general supervision is only possible "without the dentist present." Allowing the hygienist to perform duties that meet the criteria for practice under general supervision when the dentist is present will allow the hygienist to see certain patients under general supervision but not require the dentist to see the patient at any point during the appointment (as is required under indirect supervision). This will enable dental staff to use their time more efficiently and should not create public health risk. Thus the proposal creates benefit without apparent cost.

Businesses and Entities Affected. The proposed amendments potentially affect dental practices. There are 5,850 active licensed dentists in Virginia.[1] Potentially providers of training for the DA II are affected as well. Potential training entities include universities, community colleges, and proprietary schools.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The current regulations state that "No dentist shall have more than two dental hygienists practicing under direction or general supervision at one and the same time …" The Board proposes to amend the language to state that "A dentist may utilize up to a total of four dental hygienists or dental assistants II in any combination practicing under direction or general supervision at one and the same time …" This proposed change may moderately increase employment.

Effects on the Use and Value of Private Property. The creation of the DA II registration will allow individuals with such registration to perform some procedures under the supervision of a dentist that may now only be performed by dentists. To the extent that individuals pursue and obtain DA II registration, and dentists choose to hire such individuals to perform these procedures, some dental practices will change and potentially increase in value. The proposal to allow dentists to delegate certain duties to dental hygienists under general supervision that under the current regulations may only be performed by dental hygienists when the dentist is not present in the office may enable dental staff to use their time more efficiently and thus may moderately increase the value of some dental practices.

Small Businesses: Costs and Other Effects. The proposed amendments will not increase costs for small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments are unlikely to adversely affect small businesses.

Real Estate Development Costs. The proposed amendments are unlikely to significantly affect real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 36 (06). Section 2.2-4007.04 requires that such economic impact analyses 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, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

[1] Source: Department of Health Professions

Agency's Response to the Department of Planning and Budget's Economic Impact Analysis: The Board of Dentistry concurs with the analysis of the Department of Planning and Budget for the proposed regulation, 18VAC60-20, Regulations Governing the Practice of Dentistry and Dental Hygiene, relating to registration and practice of dental assistants II.

Summary:

The Board of Dentistry has amended its regulations to specify requirements for the registration and the scope of practice of a dental assistant II (DA II) in accordance with Chapters 84 and 264 of the 2008 Acts of Assembly. The regulations establish (i) definitions for supervision, (ii) fees for registration and renewal, (iii) qualifications (including education, clinical training, examination and national certification), (iv) continuing competency requirements, and (v) duties that may be delegated to a DA II.

CHAPTER 20
REGULATIONS GOVERNING ~~THE~~ DENTAL PRACTICE ~~OF DENTISTRY AND DENTAL HYGIENE~~

Part I
General Provisions

18VAC60-20-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"ADA" means the American Dental Association.

"Advertising" means a representation or other notice given to the public or members thereof, directly or indirectly, by a dentist on behalf of himself, his facility, his partner or associate, or any dentist affiliated with the dentist or his facility by any means or method for the purpose of inducing purchase, sale or use of dental methods, services, treatments, operations, procedures or products, or to promote continued or increased use of such dental methods, treatments, operations, procedures or products.

"Analgesia" means the diminution or elimination of pain in the conscious patient.

"Anxiolysis" means the diminution or elimination of anxiety through the use of pharmacological agents in a dosage that does not cause depression of consciousness.

"Conscious sedation" means a minimally depressed level of consciousness that retains the patient's ability to independently and continuously maintain an airway and respond appropriately to physical stimulation and verbal commands, produced by pharmacological or nonpharmacological methods, including inhalation, parenteral, transdermal or enteral, or a combination thereof.

"Deep sedation/general anesthesia" means an induced state of depressed consciousness or unconsciousness accompanied by a complete or partial loss of protective reflexes, including the inability to continually maintain an airway independently and/or respond purposefully to physical stimulation or verbal command and is produced by a pharmacological or nonpharmacological method or a combination thereof.

"Dental assistant" means any unlicensed person under the supervision of a dentist who renders assistance for services provided to the patient as authorized under this chapter but shall not include an individual serving in purely a secretarial or clerical capacity.

"Dental assistant II" means a person under the direction of a dentist who is registered to perform reversible, intraoral procedures as specified in this chapter.

"Direct supervision" means that the dentist examines the patient and records diagnostic findings prior to delegating restorative or prosthetic treatment and related services to dental assistant II for completion the same day or at a later date. The dentist prepares the tooth or teeth to be restored and remains in the operatory or an area immediately adjacent to the operatory in order to be immediately available to the dental assistant II for guidance or assistance during the delivery of treatment and related services. The dentist examines the patient to evaluate the treatment and services before the patient is dismissed.

"Direction" means ~~the dentist examines the patient and is present for observation, advice, and control over the performance of dental services~~ the level of supervision that a dentist is required to exercise with a dental hygienist and with a dental assistant or that a dental hygienist is required to exercise with a dental assistant to direct and oversee the delivery of treatment and related services.

"Enteral" is any technique of administration in which the agent is absorbed through the gastrointestinal tract or oral mucosa (i.e., oral, rectal, sublingual).

"General supervision" means that ~~the dentist has examined the patient and issued a written order for the specific, authorized services to be provided by a dental hygienist when the dentist is not present in the facility while the services are being provided~~ a dentist completes a periodic comprehensive examination of the patient and issues a written order for hygiene treatment that states the specific services to be provided by a dental hygienist during one or more subsequent appointments when the dentist may or may not be present. The order may authorize the dental hygienist to supervise a dental assistant who prepares the patient for treatment and prepares the patient for dismissal following treatment.

"Indirect supervision" means the dentist examines the patient at some point during the appointment, and is continuously present in the office to advise and assist a dental hygienist or a dental assistant who is (i) delivering hygiene treatment, (ii) preparing the patient for examination or treatment by the dentist or dental hygienist, or (iii) preparing the patient for dismissal following treatment.

"Inhalation" is a technique of administration in which a gaseous or volatile agent, including nitrous oxide, is introduced into the pulmonary tree and whose primary effect is due to absorption through the pulmonary bed.

"Inhalation analgesia" means the inhalation of nitrous oxide and oxygen to produce a state of reduced sensibility to pain without the loss of consciousness.

"Local anesthesia" means the loss of sensation or pain in the oral cavity or the maxillofacial or adjacent and associated structures generally produced by a topically applied or injected agent without depressing the level of consciousness.

"Parenteral" means a technique of administration in which the drug bypasses the gastrointestinal tract (i.e., intramuscular, intravenous, intranasal, submucosal, subcutaneous, or intraocular).

"Radiographs" means intraoral and extraoral x-rays of hard and soft tissues to be used for purposes of diagnosis.

18VAC60-20-15. Recordkeeping.

A dentist shall maintain patient records for not less than three years from the most recent date of service for purposes of review by the board to include the following:

1. Patient's name and date of treatment;

2. Updated health history;

3. Diagnosis and treatment rendered;

4. List of drugs prescribed, administered, dispensed and the quantity;

5. Radiographs;

6. Patient financial records;

7. Name of the dentist and the dental hygienist or the dental assistant II providing service; and

8. Laboratory work orders which meet the requirements of § 54.1-2719 of the Code of Virginia.

18VAC60-20-16. Address of record; posting of licenses or registrations.

A. Address of record. At all times, each licensed dentist ~~and~~, dental hygienist, and dental assistant II shall provide the board with a current address of record. All required notices mailed by the board to any ~~such~~ licensee or registrant shall be validly given when mailed to the latest address of record given ~~by the licensee~~. All changes in the address of record or in the public address, if different from the address of record, shall be furnished to the board in writing within 30 days of such changes.

B. Posting of license or registration. A copy of the registration of a dental assistant II shall either be posted in an operatory in which the person is providing services to the public or in the patient reception area where it is clearly visible to patients and accessible for reading.

Part II
~~Licensure~~ Renewal and Fees

18VAC60-20-20. ~~License renewal~~ Renewal and reinstatement.

A. Renewal fees. Every person holding an active or inactive license or a dental assistant II registration or a full-time faculty license shall, on or before March 31, renew his license or registration. Every person holding a teacher's license, temporary resident's license, a restricted volunteer license to practice dentistry or dental hygiene, or a temporary permit to practice dentistry or dental hygiene shall, on or before June 30, request renewal of his license.

1. The fee for renewal of an active license or permit to practice or teach dentistry shall be $285, and the fee for renewal of an active license or permit to practice or teach dental hygiene shall be $75. The fee for renewal of registration as a dental assistant II shall be $50.

2. The fee for renewal of an inactive license shall be $145 for dentists and $40 for dental hygienists. The fee for renewal of an inactive registration as a dental assistant II shall be $25.

3. The fee for renewal of a restricted volunteer license shall be $15.

4. The application fee for temporary resident's license shall be $60. The annual renewal fee shall be $35 a year. An additional fee for late renewal of licensure shall be $15.

B. Late fees. Any person who does not return the completed form and fee by the deadline required in subsection A of this section shall be required to pay an additional late fee of $100 for dentists with an active license ~~and~~, $25 for dental hygienists with an active license, and $20 for a dental assistant II with active registration. The late fee shall be $50 for dentists with an inactive license ~~and~~, $15 for dental hygienists with an inactive license, and $10 for a dental assistant II with an inactive registration. The board shall renew a license or dental assistant II registration if the renewal form, renewal fee, and late fee are received within one year of the deadline required in subsection A of this section.

C. Reinstatement fees and procedures. The license or registration of any person who does not return the completed renewal form and fees by the deadline required in subsection A of this section shall automatically expire and become invalid and his practice ~~of dentistry/dental hygiene~~ as a dentist, dental hygienist, or dental assistant II shall be illegal.

1. Any person whose license or dental assistant II registration has expired for more than one year and who wishes to reinstate such license or registration shall submit to the board a reinstatement application and the reinstatement fee of $500 for dentists ~~and~~, $200 for dental hygienists or $125 for dental assistants II.

2. With the exception of practice with a restricted volunteer license as provided in §§ 54.1-2712.1 and 54.1-2726.1 of the Code of Virginia, practicing in Virginia with an expired license or registration may subject the licensee to disciplinary action by the board.

3. The executive director may reinstate such expired license or registration provided that the applicant can demonstrate continuing competence, that no grounds exist pursuant to § 54.1-2706 of the Code of Virginia and 18VAC60-20-170 to deny said reinstatement, and that the applicant has paid the unpaid reinstatement fee and any fines or assessments. Evidence of continuing competence shall include hours of continuing education as required by subsection H of 18VAC60-20-50 and may also include evidence of active practice in another state or in federal service or current specialty board certification.

D. Reinstatement of a license or dental assistant II registration previously revoked or indefinitely suspended. Any person whose license or registration has been revoked shall submit to the board for its approval a reinstatement application and fee of $1,000 for dentists ~~and~~, $500 for dental hygienists and $300 for dental assistants II. Any person whose license or registration has been indefinitely suspended shall submit to the board for its approval a reinstatement application and fee of $750 for dentists ~~and~~, $400 for dental hygienists, and $250 for dental assistants II.

18VAC60-20-30. Other fees.

A. Dental licensure application fees. The application fee for a dental license by examination, a license to teach dentistry, a full-time faculty license, or a temporary permit as a dentist shall be $400. The application fee for dental license by credentials shall be $500.

B. Dental hygiene licensure application fees. The application fee for a dental hygiene license by examination, a license to teach dental hygiene, or a temporary permit as a dental hygienist shall be $175. The application fee for dental hygienist license by endorsement shall be $275.

C. Dental assistant II registration application fee. The application fee for registration as a dental assistant II shall be $100.

~~C. Duplicate wall~~ D. Wall certificate. Licensees desiring a duplicate wall certificate or a dental assistant II desiring a wall certificate shall submit a request in writing stating the necessity for ~~such duplicate~~ a wall certificate, accompanied by a fee of $60.

~~D.~~ E. Duplicate license or registration. Licensees or registrants desiring a duplicate license or registration shall submit a request in writing stating the necessity for such duplicate ~~license~~, accompanied by a fee of $20. If a licensee or registrant maintains more than one office, a notarized photocopy of a license or registration may be used.

~~E.~~ F. Licensure or registration certification. Licensees or registrants requesting endorsement or certification by this board shall pay a fee of $35 for each endorsement or certification.

~~F.~~ G. Restricted license. Restricted license issued in accordance with § 54.1-2714 of the Code of Virginia shall be at a fee of $285.

~~G.~~ H. Restricted volunteer license. The application fee for licensure as a restricted volunteer dentist or dental hygienist issued in accordance with § 54.1-2712.1 or § 54.1-2726.1 of the Code of Virginia shall be $25.

~~H.~~ I. Returned check. The fee for a returned check shall be $35.

~~I.~~ J. Inspection fee. The fee for an inspection of a dental office shall be $350.

18VAC60-20-50. Requirements for continuing education.

A. ~~After April 1, 1995, a~~ A dentist or a dental hygienist shall be required to have completed a minimum of 15 hours of approved continuing education for each annual renewal of licensure. A dental assistant II shall be required to maintain current certification from the Dental Assisting National Board or another national credentialing organization recognized by the American Dental Association.

1. ~~Effective June 29, 2006, a~~ A dentist, ~~or~~ a dental hygienist, or a dental assistant II shall be required to maintain evidence of successful completion of training in basic cardiopulmonary resuscitation.

2. ~~Effective June 29, 2006, a~~ A dentist who administers or a dental hygienist who monitors patients under general anesthesia, deep sedation or conscious sedation shall complete four hours every two years of approved continuing education directly related to administration or monitoring of such anesthesia or sedation as part of the hours required for licensure renewal.

3. Continuing education hours in excess of the number required for renewal may be transferred or credited to the next renewal year for a total of not more than 15 hours.

B. An approved continuing dental education program shall be relevant to the treatment and care of patients and shall be:

1. Clinical courses in ~~dentistry and dental hygiene~~ dental practice; or

2. Nonclinical subjects that relate to the skills necessary to provide dental or dental hygiene services and are supportive of clinical services (i.e., patient management, legal and ethical responsibilities, stress management). Courses not acceptable for the purpose of this subsection include, but are not limited to, estate planning, financial planning, investments, and personal health.

C. Continuing education credit may be earned for verifiable attendance at or participation in any courses, to include audio and video presentations, which meet the requirements in subdivision B 1 of this section and which are given by one of the following sponsors:

1. American Dental Association and National Dental Association, their constituent and component/branch associations;

2. American Dental Hygienists' Association and National Dental Hygienists Association, their constituent and component/branch associations;

3. American Dental Assisting Association, its constituent and component/branch associations;

4. American Dental Association specialty organizations, their constituent and component/branch associations;

5. American Medical Association and National Medical Association, their specialty organizations, constituent, and component/branch associations;

6. Academy of General Dentistry, its constituent and component/branch associations;

7. Community colleges with an accredited dental hygiene program if offered under the auspices of the dental hygienist program;

8. A college or university that is accredited by an accrediting agency approved by the U.S. Department of Education or a hospital or health care institution accredited by the Joint Commission on Accreditation of Health Care Organizations;

9. The American Heart Association, the American Red Cross, the American Safety and Health Institute and the American Cancer Society;

10. A medical school which is accredited by the American Medical Association's Liaison Committee for Medical Education or a dental school or dental specialty residency program accredited by the Commission on Dental Accreditation of the American Dental Association;

11. State or federal government agencies (i.e., military dental division, Veteran's Administration, etc.);

12. The Commonwealth Dental Hygienists' Society;

13. The MCV Orthodontic and Research Foundation;

14. The Dental Assisting National Board; or

15. A regional testing agency (i.e., Central Regional Dental Testing Service, Northeast Regional Board of Dental Examiners, Southern Regional Testing Agency, or Western Regional Examining Board) when serving as an examiner.

D. A licensee is exempt from completing continuing education requirements and considered in compliance on the first renewal date following the licensee's initial licensure.

E. The board may grant an exemption for all or part of the continuing education requirements due to circumstances beyond the control of the licensee, such as temporary disability, mandatory military service, or officially declared disasters.

F. A licensee is required to provide information on compliance with continuing education requirements in his annual license renewal. A dental assistant II is required to attest to current certification by the Dental Assisting National Board or another national credentialing organization recognized by the American Dental Association. Following the renewal period, the board may conduct an audit of licensees or registrants to verify compliance. Licensees or registrants selected for audit must provide original documents certifying that they have fulfilled their continuing education requirements by the deadline date as specified by the board.

G. All licensees or registrants are required to maintain original documents verifying the date and subject of the program or activity. Documentation must be maintained for a period of four years following renewal.

H. A licensee who has allowed his license to lapse, or who has had his license suspended or revoked, must submit evidence of completion of continuing education equal to the requirements for the number of years in which his license has not been active, not to exceed a total of 45 hours. Of the required hours, at least 15 must be earned in the most recent 12 months and the remainder within the 36 months preceding an application for reinstatement. A dental assistant II who has allowed his registration to lapse or who has had his registration suspended or revoked must submit evidence of current certification from a credentialing organization recognized by the American Dental Association to reinstate his registration.

I. Continuing education hours required by board order shall not be used to satisfy the continuing education requirement for license or registration renewal or reinstatement.

J. Failure to comply with continuing education requirements or current certification requirements may subject the licensee or registrant to disciplinary action by the board.

Part III
Entry ~~and Licensure~~ Requirements

18VAC60-20-60. ~~Education~~ Educational requirements for dentists and dental hygienists.

A. Dental licensure. An applicant for dental licensure shall be a graduate and a holder of a diploma or a certificate from a dental program accredited by the Commission on Dental Accreditation of the American Dental Association, which consists of either a pre-doctoral dental education program or at least a 12-month post-doctoral advanced general dentistry program or a post-doctoral dental education program in any other specialty.

B. Dental hygiene licensure. An applicant for dental hygiene licensure shall have graduated from or have been issued a certificate by a program of dental hygiene accredited by the Commission on Dental Accreditation of the American Dental Association.

18VAC60-20-61. Educational requirements for dental assistants II.

A. A prerequisite for entry into an educational program preparing a person for registration as a dental assistant II shall be current certification as a Certified Dental Assistant (CDA) conferred by the Dental Assisting National Board.

B. To be registered as a dental assistant II, a person shall complete the following requirements from an educational program accredited by the Commission on Dental Accreditation of the American Dental Association:

1. At least 50 hours of didactic course work in dental anatomy and operative dentistry that may be completed on-line.

2. Laboratory training that may be completed in the following modules with no more than 20% of the specified instruction to be completed as homework in a dental office:

a. At least 40 hours of placing, packing, carving, and polishing of amalgam restorations;

b. At least 60 hours of placing and shaping composite resin restorations;

c. At least 20 hours of taking final impressions and use of a non-epinephrine retraction cord; and

d. At least 30 hours of final cementation of crowns and bridges after adjustment and fitting by the dentist.

3. Clinical experience applying the techniques learned in the preclinical coursework and laboratory training that may be completed in a dental office in the following modules:

a. At least 80 hours of placing, packing, carving, and polishing of amalgam restorations;

b. At least 120 hours of placing and shaping composite resin restorations;

c. At least 40 hours of taking final impressions and use of a non-epinephrine retraction cord; and

d. At least 60 hours of final cementation of crowns and bridges after adjustment and fitting by the dentist.

4. Successful completion of the following competency examinations given by the accredited educational programs:

a. A written examination at the conclusion of the 50 hours of didactic coursework;

b. A practical examination at the conclusion of each module of laboratory training; and

c. A comprehensive written examination at the conclusion of all required coursework, training, and experience for each of the corresponding modules.

C. All treatment of patients shall be under the direct and immediate supervision of a licensed dentist who is responsible for the performance of duties by the student. The dentist shall attest to successful completion of the clinical competencies and restorative experiences.

18VAC60-20-70. Licensure examinations; registration certification.

A. Dental examinations.

1. All applicants shall have successfully completed Part I and Part II of the examinations of the Joint Commission on National Dental Examinations prior to making application to this board.

2. All applicants to practice dentistry shall satisfactorily pass the complete board-approved examinations in dentistry. Applicants who successfully completed the board-approved examinations five or more years prior to the date of receipt of their applications for licensure by this board may be required to retake the examinations or take board-approved continuing education unless they demonstrate that they have maintained clinical, ethical and legal practice for 48 of the past 60 months immediately prior to submission of an application for licensure.

3. If the candidate has failed any section of a board-approved examination three times, the candidate shall complete a minimum of 14 hours of additional clinical training in each section of the examination to be retested in order to be approved by the board to sit for the examination a fourth time.

B. Dental hygiene examinations.

1. All applicants are required to successfully complete the dental hygiene examination of the Joint Commission on National Dental Examinations prior to making application to this board for licensure.

2. All applicants to practice dental hygiene shall successfully complete the board-approved examinations in dental hygiene, except those persons eligible for licensure pursuant to 18VAC60-20-80.

3. If the candidate has failed any section of a board-approved examination three times, the candidate shall complete a minimum of seven hours of additional clinical training in each section of the examination to be retested in order to be approved by the board to sit for the examination a fourth time.

C. Dental assistant II certification. All applicants for registration as a dental assistant II shall provide evidence of a current credential as a Certified Dental Assistant (CDA) conferred by the Dental Assisting National Board or another certification from a credentialing organization recognized by the American Dental Association and acceptable to the board, which was granted following passage of an examination on general chairside assisting, radiation health and safety, and infection control.

~~C.~~ D. All applicants who successfully complete the board-approved examinations five or more years prior to the date of receipt of their applications for licensure or registration by this board may be required to retake the board-approved examinations or take board-approved continuing education unless they demonstrate that they have maintained clinical, ethical, and legal practice for 48 of the past 60 months immediately prior to submission of an application for licensure or registration.

~~D.~~ E. All applicants for licensure by examination or registration as a dental assistant II shall be required to attest that they have read and understand and will remain current with the applicable Virginia dental and dental hygiene laws and the regulations of this board.

18VAC60-20-72. Registration by endorsement as a dental assistant II.

A. An applicant for registration by endorsement as a dental assistant II shall provide evidence of the following:

1. Hold current certification as a Certified Dental Assistant (CDA) conferred by the Dental Assisting National Board or another national credentialing organization recognized by the American Dental Association;

2. Be currently authorized to perform expanded duties as a dental assistant in another state, territory, District of Columbia, or possession of the United States;

3. Hold a credential, registration, or certificate with qualifications substantially equivalent in hours of instruction and course content to those set forth in 18VAC60-20-61 or if the qualifications were not substantially equivalent the dental assistant can document experience in the restorative and prosthetic expanded duties set forth in 18VAC60-20-230 for at least 24 of the

past 48 months preceding application for registration in Virginia.

B. An applicant shall also:

1. Be certified to be in good standing from each state in which he is currently registered, certified, or credentialed or in which he has ever held a registration, certificate, or credential;

2. Be of good moral character;

3. Not have committed any act that would constitute a violation of § 54.1-2706 of the Code of Virginia; and

4. Attest to having read and understand and to remain current with the laws and the regulations governing dental practice in Virginia.

18VAC60-20-105. Inactive license or registration.

A. Any dentist or dental hygienist who holds a current, unrestricted license in Virginia may, upon a request on the renewal application and submission of the required fee, be issued an inactive license. With the exception of practice with a restricted volunteer license as provided in §§ 54.1-2712.1 and 54.1-2726.1 of the Code of Virginia, the holder of an inactive license shall not be entitled to perform any act requiring a license to practice dentistry or dental hygiene in Virginia.

B. An inactive license may be reactivated upon submission of the required application, payment of the current renewal fee, and documentation of having completed continuing education hours equal to the requirement for the number of years in which the license has been inactive, not to exceed a total of 45 hours. Of the required hours, at least 15 must be earned in the most recent 12 months and the remainder within the 36 months immediately preceding the application for activation. The board reserves the right to deny a request for reactivation to any licensee who has been determined to have committed an act in violation of § 54.1-2706 of the Code of Virginia.

C. Any dental assistant II who holds a current, unrestricted registration in Virginia may upon a request on the renewal application and submission of the required fee be issued an inactive registration. The holder of an inactive registration shall not be entitled to perform any act requiring registration to practice as a dental assistant II in Virginia. An inactive registration may be reactivated upon submission of evidence of current certification from the national credentialing organization recognized by the American Dental Association. The board reserves the right to deny a request for reactivation to any registrant who has been determined to have committed an act in violation of § 54.1-2706 of the Code of Virginia.

Part V
Unprofessional Conduct

18VAC60-20-170. Acts constituting unprofessional conduct.

The following practices shall constitute unprofessional conduct within the meaning of § 54.1-2706 of the Code of Virginia:

1. Fraudulently obtaining, attempting to obtain or cooperating with others in obtaining payment for services;

2. Performing services for a patient under terms or conditions which are unconscionable. The board shall not consider terms unconscionable where there has been a full and fair disclosure of all terms and where the patient entered the agreement without fraud or duress;

3. Misrepresenting to a patient and the public the materials or methods and techniques the licensee uses or intends to use;

4. Committing any act in violation of the Code of Virginia reasonably related to the practice of dentistry and dental hygiene;

5. Delegating any service or operation which requires the professional competence of a dentist ~~or~~, dental hygienist, or dental assistant II to any person who is not a dentist ~~or~~, dental hygienist, or dental assistant II as authorized by this chapter;

6. Certifying completion of a dental procedure that has not actually been completed;

7. Knowingly or negligently violating any applicable statute or regulation governing ionizing radiation in the Commonwealth of Virginia, including, but not limited to, current regulations promulgated by the Virginia Department of Health; and

8. Permitting or condoning the placement or exposure of dental x-ray film by an unlicensed person, except where the unlicensed person has complied with 18VAC60-20-195.

Part VI
Direction and Delegation of Duties

18VAC60-20-190. Nondelegable duties; dentists.

Only licensed dentists shall perform the following duties:

1. Final diagnosis and treatment planning;

2. Performing surgical or cutting procedures on hard or soft tissue;

3. Prescribing or parenterally administering drugs or medicaments, except a dental hygienist, who meets the requirements of 18VAC60-20-81, may parenterally

administer Schedule VI local anesthesia to patients 18 years of age or older;

4. Authorization of work orders for any appliance or prosthetic device or restoration to be inserted into a patient's mouth;

5. Operation of high speed rotary instruments in the mouth;

~~6. Performing pulp capping procedures;~~

~~7.~~ 6. Administering and monitoring general anesthetics and conscious sedation except as provided for in § 54.1-2701 of the Code of Virginia and 18VAC60-20-108 C, 18VAC60-20-110 F, and 18VAC60-20-120 F;

~~8.~~ 7. Condensing, contouring or adjusting any final, fixed or removable prosthodontic appliance or restoration in the mouth with the exception of placing, packing, and carving amalgam and composite resins by dental assistants II with advanced training as specified in 18VAC60-20-61 B;

~~9.~~ 8. Final positioning and attachment of orthodontic bonds and bands; and

~~10. Taking impressions for master casts to be used for prosthetic restoration of teeth or oral structures;~~

~~11.~~ 9. Final ~~cementation~~ adjustment and fitting of crowns and bridges~~; and~~ in preparation for final cementation.

~~12. Placement of retraction cord.~~

18VAC60-20-200. Utilization of dental hygienists and dental assistants II.

~~No dentist shall have more than two~~ A dentist may utilize up to a total of four dental hygienists or dental assistants II in any combination practicing under direction or general supervision at one and the same time, with the exception that a dentist may issue written orders for services to be provided by dental hygienists under general supervision in a free clinic, a public health program, or on a voluntary basis.

18VAC60-20-210. Requirements for direction and general supervision.

A. In all instances and on the basis of his diagnosis, a licensed dentist assumes ultimate responsibility for determining~~, on the basis of his diagnosis,~~ the specific treatment the patient will receive ~~and~~, which aspects of treatment will be delegated to qualified personnel, and the direction required for such treatment, in accordance with this chapter and the Code of Virginia.

B. Dental hygienists shall engage in their respective duties only while in the employment of a licensed dentist or governmental agency or when volunteering services as provided in 18VAC60-20-200. Persons acting within the scope of a license issued to them by the board under § 54.1-2725 of the Code of Virginia to teach dental hygiene and those persons licensed pursuant to § 54.1-2722 of the Code of Virginia providing oral health education and preliminary dental screenings in any setting are exempt from this section.

~~C. Duties delegated to a dental hygienist under direction shall only be performed when the dentist is present in the facility and examines the patient during the time services are being provided~~.

~~D.~~ C. Duties that are delegated to a dental hygienist under general supervision shall only be performed if the following requirements are met:

1. The treatment to be provided shall be ordered by a dentist licensed in Virginia and shall be entered in writing in the record. The services noted on the original order shall be rendered within a specific time period, not to exceed 10 months from the date the dentist last examined the patient. Upon expiration of the order, the dentist shall have examined the patient before writing a new order for treatment.

2. The dental hygienist shall consent in writing to providing services under general supervision.

3. The patient or a responsible adult shall be informed prior to the appointment that ~~no~~ a dentist ~~will~~ may not be present, that no anesthesia can be administered, and that only those services prescribed by the dentist will be provided.

4. Written basic emergency procedures shall be established and in place, and the hygienist shall be capable of implementing those procedures.

~~E.~~ D. General supervision shall not preclude the use of direction when, in the professional judgment of the dentist, such direction is necessary to meet the individual needs of the patient.

18VAC60-20-220. Dental hygienists.

A. The following duties shall only be delegated to dental hygienists under direction ~~with the dentist being present~~ and may be performed under indirect supervision:

1. Scaling and/or root planing of natural and restored teeth using hand instruments, rotary instruments and ultrasonic devices under anesthesia ~~administered by the dentist~~.

2. Performing an initial examination of teeth and surrounding tissues including the charting of carious lesions, periodontal pockets or other abnormal conditions for assisting the dentist in the diagnosis.

3. Administering nitrous oxide or local anesthesia by dental hygienists qualified in accordance with the requirements of 18VAC60-20-81.

B. The following duties shall only be delegated to dental hygienists and may be delegated by written order in accordance with § 54.1-3408 of the Code of Virginia to be

performed under general supervision ~~without~~ when the dentist ~~being~~ may not be present:

1. Scaling and/or root planing of natural and restored teeth using hand instruments, rotary instruments and ultrasonic devices.

2. Polishing of natural and restored teeth using air polishers.

3. Performing a clinical examination of teeth and surrounding tissues including the charting of carious lesions, periodontal pockets or other abnormal conditions for further evaluation and diagnosis by the dentist.

4. Subgingival irrigation or subgingival application of topical Schedule VI medicinal agents.

5. Duties appropriate to the education and experience of the dental hygienist and the practice of the supervising dentist, with the exception of those listed in subsection A of this section and those listed as nondelegable in 18VAC60-20-190.

C. Nothing in this section shall be interpreted so as to prevent a licensed dental hygienist from providing educational services, assessment, screening or data collection for the preparation of preliminary written records for evaluation by a licensed dentist.

18VAC60-20-230. Delegation to dental assistants.

A. Duties appropriate to the training and experience of the dental assistant and the practice of the supervising dentist may be delegated to a dental assistant under the direction or under general supervision required in 18VAC60-20-210, with the exception of those listed as nondelegable in 18VAC60-20-190 and those which may only be delegated to dental hygienists as listed in 18VAC60-20-220.

B. Duties delegated to a dental assistant under general supervision shall be under the direction of the dental hygienist who supervises the implementation of the dentist's orders by examining the patient, observing the services rendered by an assistant and being available for consultation on patient care.

C. The following duties may only be delegated under the direction and direct supervision of a dentist to a dental assistant II who has completed the coursework, corresponding module of laboratory training, corresponding module of clinical experience, and examinations specified in 18VAC60-20-61:

1. Performing pulp capping procedures;

2. Packing and carving of amalgam restorations;

3. Placing and shaping composite resin restorations;

4. Taking final impressions;

5. Use of a non-epinephrine retraction cord; and

6. Final cementation of crowns and bridges after adjustment and fitting by the dentist.

VA.R. Doc. No. R09-1526; Filed December 2, 2009, 10:25 a.m.

BOARD OF LONG-TERM CARE ADMINISTRATORS

Final Regulation

REGISTRAR'S NOTICE: The Board of Long-Term Care Administrators is claiming an exemption from Article 2 (§ 2.2-4006 et seq.) of the Administrative Process Act pursuant to § 2.2-4007.2 of the Code of Virginia. Section 2.2-4007.2 provides that if an agency chooses to amend a regulation to provide the alternative of submitting required documents or payments by electronic means, such action shall be exempt from the operation of Article 2 provided the amended regulation is (i) adopted by December 31, 2010, and (ii) consistent with federal and state law and regulations.

Titles of Regulations: **18VAC95-20. Regulations Governing the Practice of Nursing Home Administrators (amending 18VAC95-20-170, 18VAC95-20-230).**

18VAC95-30. Regulations Governing the Practice of Assisted Living Facility Administrators (amending 18VAC95-30-60, 18VAC95-30-130).

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Effective Date: January 20, 2010.

Agency Contact: Lisa Russell Hahn, Executive Director, Board of Long-Term Care Administrators, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4595, FAX (804) 527-4413, or email ltc@dhp.virginia.gov.

Summary:

The amendments to 18VAC95-20 and 18VAC95-30 are adopted by the Board of Long-Term Care Administrators to facilitate electronic submissions of applications and renewals. Requirements for all documents to be submitted in one package are eliminated to allow the application to be submitted electronically by the applicants and other documents (licensure verification, transcripts, exam scores, etc.) to be sent directly from the source. All references to a renewal application are amended to use the term renewal form, since renewal of a license or certificate can now be accomplished on-line by completion of an electronic form and submission of a fee.

Part II
Renewals and Reinstatements

18VAC95-20-170. Renewal requirements.

A. A person who desires to renew his license or preceptor registration for the next year shall, not later than the expiration date of March 31 of each year, submit a completed renewal ~~application~~ form and fee.

B. The renewal ~~application~~ form and fee shall be received no later than the expiration date. Postmarks shall not be considered.

C. A nursing home administrator license or preceptor registration not renewed by the expiration date shall be invalid.

18VAC95-20-230. Application package.

A. An application for licensure shall be submitted after the applicant completes the qualifications for licensure.

B. An individual seeking licensure as a nursing home administrator or registration as a preceptor shall submit ~~simultaneously~~:

1. A completed application as provided by the board;

2. Additional documentation as may be required by the board to determine eligibility of the applicant;

3. The applicable fee; and

4. An attestation that he has read and understands and will remain current with the applicable Virginia laws and regulations relating to the administration of nursing homes.

C. With the exception of school transcripts, examination scores, and verifications from other state boards, all parts of the application package shall be submitted at the same time. An incomplete package shall be retained by the board for one year, after which time the application shall be destroyed and a new application and fee shall be required.

Part II
Renewals and Reinstatements

18VAC95-30-60. Renewal requirements.

A. A person who desires to renew his license or preceptor registration for the next year shall, not later than the expiration date of March 31 of each year, submit a completed renewal ~~application~~ form and fee.

B. The renewal ~~application~~ form and fee shall be received no later than the expiration date. Postmarks shall not be considered.

C. An assisted living facility administrator license or preceptor registration not renewed by the expiration date shall be invalid.

18VAC95-30-130. Application package.

A. An application for licensure shall be submitted after the applicant completes the qualifications for licensure.

B. An individual seeking licensure as an assisted living facility administrator or registration as a preceptor shall submit ~~simultaneously~~:

1. A completed application as provided by the board;

2. Additional documentation as may be required by the board to determine eligibility of the applicant;

3. The applicable fee; and

4. An attestation that he has read and understands and will remain current with the applicable Virginia laws and the regulations relating to assisted living facilities.

C. With the exception of school transcripts, examination scores, and verifications from other state boards, all parts of the application package shall be submitted at the same time. An incomplete package shall be retained by the board for one year, after which time the application shall be destroyed and a new application and fee shall be required.

VA.R. Doc. No. R10-2076; Filed December 2, 2009, 10:24 a.m.

TITLE 24. TRANSPORTATION AND MOTOR VEHICLES

MOTOR VEHICLE DEALER BOARD

Proposed Regulation

Title of Regulation: **24VAC22-40. Independent Motor Vehicle Dealer Operator Recertification Regulations (adding 24VAC22-40-10 through 24VAC22-40-70).**

Statutory Authority: §§ 46.2-1506 and 46.2-1506.1 of the Code of Virginia.

Public Hearing Information:

January 27, 2010 - 10 a.m. - Department of Motor Vehicles, 2300 West Broad Street, Room 119, Richmond, VA

Public Comment Deadline: February 19, 2010.

Agency Contact: Bruce Gould, Executive Director, Motor Vehicle Dealer Board, 2201 West Broad Street, Suite 104, Richmond, VA 23220, telephone (804) 367-1100, FAX (804) 367-1053, or email bruce.gould@mvdb.virginia.gov.

Basis: Section 46.2-1506 of the Code of Virginia provides the Motor Vehicle Board with the general authority to promulgate regulations. Section 46.2-1506.1 of the Code of Virginia specifically allows the board to promulgate regulations for additional training or conditions for renewal of certificates or licenses.

Purpose: Federal and state laws and court decisions are in constant change. Recertification requirements for independent (used) car dealers will not only help used car dealers keep up with these changes, but also refresh their knowledge of "old" laws and regulations.

Educated dealers are more likely to comply with the law, thereby enhancing public safety and increasing consumer

protection. In addition, education enhances the professionalism of the motor vehicle sales industry, which also improves the welfare and safety of the public.

Substance: The proposed regulations outline how often dealer operators will need to recertify by either successfully completing a course or by successfully passing an exam. They provide an orderly schedule to transition existing and future independent dealer operators into a three year recertification cycle. The proposed regulations allow for entities outside of state government to develop and offer continuing education courses with the approval of the board.

Issues: Since January 1, 2006, by statute, the dealer operator of any new independent motor vehicle dealership has been required to successfully complete a course of study before taking the independent dealer operator qualification test. These regulations are the next logical step as they require dealer operators to keep up with laws, regulations, and guidelines through continuing education in either a formal class or self-study.

The advantage to the public is that educated dealers are less likely to have problems with consumers and regulators. In addition, education enhances the professionalism of the motor vehicle sales industry.

A possible disadvantage is that some dealer operators will feel compelled to take continuing education courses or passing an exam they otherwise would not have done. However, the concept of recertification and continuing education is supported by the Virginia Independent Automobile Dealers Association (VIADA). Requiring continuing education is a trend that many other states are following as it increases consumer protection.

The Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Motor Vehicle Dealer Board (Board) proposes to require independent dealer operators to every three years do one of the following in order to maintain licensure: complete a continuing education course or pass an examination. The Board also proposes to delineate the criteria for approved continuing education courses. The courses, and the examination, must cover the following topics: 1) ethical practice, 2) record keeping, 3) recent changes to state and federal laws and regulations, 4) relevant longer-standing federal regulations, 5) titling and registration requirements including use of dealer related license plates, 6) offsite sales, 7) financing, 8) dealer practices, 9) salespersons licenses, and 10) advertising.

Result of Analysis. There is insufficient data to accurately compare the magnitude of the benefits versus the costs. Detailed analysis of the benefits and costs can be found in the next section.

Estimated Economic Impact. Section § 46.2-1511 of the Code of Virginia states that "No license shall be issued to any independent motor vehicle dealer, … unless the dealer operator holds a valid certificate of qualification issued by the Board." Among other requirements, § 46.2-1511 mandates that "applicants for an original independent dealer operator certificate of qualification … satisfactorily complete a course of study prior to taking the examination."

The Board proposes to require that independent dealer operators either complete a continuing education course or pass an examination every three years in order to maintain licensure. The proposed regulations set out the criteria for Board-approved continuing education courses. Criteria include curriculum and a minimum of six hours of instruction. Under the proposed regulations, vendors may charge no more than $250 to course participants. Additionally, there is a $25 fee to be paid to the Board. The Board anticipates that vendors will set a fee in the $150-$200 range, and that classes will be made available on-line and in community colleges. Courses on-line would of course eliminate travel costs. Given the expected fee range, opportunity to avoid travel costs, and keeping in mind that the proposed regulations will require completing a course once every three years, the average per annum cost for each dealer would be under $100 plus the value of two hours of their time. The proposed examination would cover the same content areas required for the continuing education courses and would have a $50 fee. Any independent dealer operator taking and failing the exam would be required to complete a course in order to maintain licensure.

The proposed continuing education/examination requirement will likely result in many dealer operators becoming more cognizant of changes to federal and state laws (statutory and administrative) and court decisions, as well as being reminded of longer-standing law and procedures. To the extent that greater knowledge of the law leads to greater compliance with the law, Virginia's citizens will likely benefit through greater consumer protection and enhanced public safety. For example, dealer operators are required to follow policies that are designed to detect and thwart identity thieves. Further, Federal Executive Order 13224 – "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism" requires that dealer operators "make an effort to ensure that they are not doing business with restricted individuals or entities." The Federal government maintains lists of restricted individuals. If dealer operators encounter such individuals they are to report this information to the federal government. Thus, increased compliance with Federal Executive Order 13224 might help the tracking of potential terrorists. Since the overall level of current understanding of law by dealer operators is not known, the magnitude by which their knowledge of the law may be increased cannot be accurately estimated with currently available information. Also, the

extent to which greater awareness of the law will lead to greater compliance is also unknown. Thus the magnitude of the benefit of the proposed requirements cannot be accurately estimated, though it is likely significant.

Businesses and Entities Affected. The approximate 3,000 independent motor vehicle dealers in the Commonwealth are affected by the proposed regulations. All or nearly all are small business. Potential providers of continuing education for independent motor vehicle dealers are affected as well. The Board anticipates that at least two vendors will offer courses. Community colleges and the Virginia Independent Automobile Dealers Association are likely providers.[1]

Localities Particularly Affected. The proposed amendments apply statewide and do not disproportionately affect particular localities.

Projected Impact on Employment. The proposal to require independent dealer operators to complete a continuing education course (or pass an examination) every three years in order to maintain licensure will likely moderately increase employment for organizations that potentially will provide such services.

Effects on the Use and Value of Private Property. Under the proposed regulations, once every three years independent motor vehicle dealers would either have to: 1) pay a fee in the $150-$200 range to a vendor, a $25 fee to the Board, and have at least six hours of the dealer operator's time occupied in training, or 2) pass an examination and pay a $50 fee.

Small Businesses: Costs and Other Effects. Under the proposed regulations, once every three years independent motor vehicle dealers would either have to: 1) pay a fee in the $150-$200 range to a vendor, a $25 fee to the Board, and have at least six hours of the dealer operator's time occupied in training, or 2) pass an examination and pay a $50 fee.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposal to allow licensees to test out of taking continuing education courses if they already possess the requisite knowledge does minimize adverse impact.

Real Estate Development Costs. The proposed amendments are unlikely to significantly affect real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 36 (06). Section 2.2-4007.04 requires that such economic impact analyses 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, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

[1] Source: Motor Vehicle Dealer Board

Agency's Response to the Department of Planning and Budget's Economic Impact Analysis: The Motor Vehicle Dealer Board concurs with the analysis of the Department of Planning and Budget.

Summary:

The dealer operator is the individual who is in charge of the day-to-day operations of a motor vehicle dealership. For most independent (used) dealers, this individual is the owner. These regulations would require independent dealer operators to recertify every three years by either completing a course of study or passing an exam. The regulations also establish criteria for entities that provide continuing education.

CHAPTER 40
INDEPENDENT MOTOR VEHICLE DEALER OPERATOR RECERTIFICATION REGULATIONS

Part I
General Provisions

24VAC22-40-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Anniversary month" means the month in which a person became a certified dealer operator.

"Board" means the Motor Vehicle Dealer Board.

"Certificate of qualification" means a designation issued by the board acknowledging that the individual has been certified by the board as dealer operator pursuant to § 46.2-1511 of the Code of Virginia.

"Course" means a course of study leading to recertification for independent dealer operators offered by correspondence, electronically, or in person.

"Course provider" or "provider" means any person or entity presenting or offering one or more recertification education courses.

"Exam" or "examination" means a test administered by the board.

"Executive director" means the executive director of the board.

"Franchise motor vehicle dealer" means a dealer in new motor vehicles that has a franchise agreement with a manufacturer or distributor of new motor vehicles, trailers, or semitrailers.

"Independent dealer operator" means the individual who works at the established place of business of an independent dealer and who is responsible for and in charge of day-to-day operations of that place of business.

"Independent motor vehicle dealer" or "independent dealer" means a dealer in used motor vehicles who is not also licensed as a franchise motor vehicle dealer.

"Original application" means an application for an independent dealer operator certificate of qualification from an applicant who has never been issued an independent dealer operator certificate of qualification in Virginia or whose Virginia independent dealer operator certificate of qualification has been expired for more than 60 days.

"Recertification" means completing the requirements of this chapter to recertify a dealer operator certificate of qualification.

24VAC22-40-20. General.

A. The board shall transmit a recertification notice to the home address or email address of record of independent dealer operators at least 90 days prior to the expiration date of the certificate of qualification. Failure to receive a recertification notice does not absolve the dealer operator from the recertification requirements.

B. Independent dealer operators must maintain an original copy of the proof of completing a recertification course or exam for a period of five years.

C. Continuing education or a course required by a disciplinary order may not be used to satisfy recertification requirements.

Part II
Recertification

24VAC22-40-30. Recertification schedule.

A. Independent dealer operator certificates of qualification are valid for 36 months and shall expire on the last day of the thirty-sixth month. Certificates of qualification shall be deemed not to have expired if the recertification is completed within 60 days of the expiration date.

B. All independent dealer operators must recertify according to the following schedule:

1. Independent dealer operators certified after January 1, 2010, must complete the recertification requirement within 36 months of the anniversary month of their original qualification and every 36 months from their anniversary month thereafter.

2. Independent dealer operators who were certified between January 1, 2006, and December 31, 2009, must complete the recertification requirement by their 2013 anniversary month and every 36 months from their anniversary month thereafter.

3. Independent dealer operators who were certified between January 1, 1995, and December 31, 2005, must complete the recertification requirement by their 2012 anniversary month and every 36 months from their anniversary month thereafter.

4. Independent dealer operators whose original qualification date is prior to January 1, 1995, must complete the recertification requirement by their 2011 anniversary month and every 36 months from their anniversary month thereafter.

C. Independent dealer operators may complete the recertification requirement up to six months prior to the expiration date of their certificate of qualification.

D. The executive director may for good cause grant an extension for the completion of the recertification requirements provided a written request from the dealer operator is received by the executive director at least 15 days prior to the expiration date. Such extension shall not relieve the licensee of the recertification requirement.

E. Any application received from an applicant whose certificate has expired shall be considered an original application.

F. For independent dealer operators who have served outside of the United States in the armed services of the United States, the certification shall be deemed not to have expired if the recertification requirement has been completed not more than 90 days from the date they are no longer serving outside the United States in the armed services of the United States.

24VAC22-40-40. Recertification requirements.

To become recertified, an independent dealer operator must either:

1. Successfully complete a board-approved course; or

2. Successfully complete an examination administered by the board. Any independent dealer operator taking and failing the exam must then successfully complete a course in order to become recertified.

Part III
Course Providers

24VAC22-40-50. Course approval.

A. The board may approve a course provider under the following provisions:

1. The provider has submitted an application to the board prior to offering the program.

2. The submitted application includes at a minimum the following information:

a. Name of provider;

b. Proposed course schedule including locations (as applicable);

c. Charges to participants;

d. Description of program content and objectives;

e. Credentials of faculty members;

f. Method of delivery;

g. Evaluation procedure;

h. Mechanism for recordkeeping; and

i. Any such information as the board deems necessary to assure quality and compliance.

3. Course curriculum must include but is not limited to the following:

a. Ethical practice;

b. Recordkeeping;

c. Recent state and federal laws and regulations;

d. Review of relevant federal regulations;

e. Titling and registration requirements including use of dealer related license plates;

f. Offsite sales;

g. Financing;

h. Dealer practices;

i. Salespersons licenses; and

j. Advertising.

4. At least six hours of each course offering if in person or the equivalent of six hours for electronic and correspondence based courses, as approved by the executive director, must be directly related to the scope of dealer operators. A course containing content which promotes, sells, or offers goods, products, or services shall not be approved. However, the provider of a course may promote goods, products, or services at the conclusion of a course provided that it is made clear to participants that the course has concluded and that attendance at any additional presentations are optional.

B. The board shall notify the provider within 60 days following the receipt of a completed application of approval or disapproval of a program.

C. The board shall periodically review and monitor programs.

D. Any changes in the information previously provided about an approved program or provider must be submitted to the board. Failure to do so may cause the board to withdraw its approval of the course provider or program.

E. The executive director has the authority to suspend the approval of any course or provider and the board may withdraw approval for good cause.

24VAC22-40-60. Course provider responsibilities.

The provider of an approved program shall be responsible for the following:

1. Providing to each participant who successfully completes the required recertification course a certificate with at minimum, (i) the name of the provider; (ii) name of the participant; and (iii) the date of completion.

2. Maintaining all records on courses and its participants for a period of five years and making those records available to the board upon request.

3. Entering names of participants completing the course into a database as directed by the board within five days of the participant completing the course.

4. Collecting the recertification application fee from applicants and transmitting such fee to the board as directed by the board within 15 days of receiving the fee from the applicant.

Part IV
Fees

24VAC22-40-70. Fees.

A. The recertification application fee shall be $25 for taking the course and shall be paid directly to the course provider.

B. The fee for returned checks shall be $35.

C. In addition to the recertification application fee, course providers may charge applicants a course fee of no more than $250.

D. The recertification application fee for taking the exam shall be $50 and shall be paid at the time the exam is administered.

VA.R. Doc. No. R08-1219; Filed December 1, 2009, 2:01 p.m.

DEPARTMENT OF TRANSPORTATION

Fast-Track Regulation

Title of Regulation: **24VAC30-155. Traffic Impact Analysis Regulations (amending 24VAC30-155-10, 24VAC30-155-30 through 24VAC30-155-80, 24VAC30-155-100; repealing 24VAC30-155-90).**

Statutory Authority: § 15.2-2222.1 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comments: Public comments may be submitted until January 20, 2010.

Effective Date: February 4, 2010.

Agency Contact: Robert W. Hofrichter, Assistant Director for Land Use, Asset Management Division, Department of Transportation, 1401 E. Broad St., Richmond, VA 23219, telephone (804) 662-9612, FAX (804) 662-9405, or email robert.hofrichter@vdot.virginia.gov.

Basis: Section 15.2-2222.1 of the Code of Virginia requires the Department of Transportation (VDOT) to develop traffic impact analysis regulations for development proposals with a substantial impact on the state highway network.

Purpose: The purpose of the proposed amendments are to:

1. Ensure that the traffic impacts of developments such as transit-oriented development and those located within urban development areas are accurately determined without placing an additional burden on persons proposing such developments.

The existing regulation contains provisions that are appropriate for determining the traffic impacts of suburban and rural developments. The regulation requires additional approvals from VDOT to use trip generation methodology that accurately determines traffic impacts of urban developments.

Compact mixed-use development concentrated near existing growth and infrastructure can help reduce the demand for transportation capacity. The proposed amendments would provide for a streamlined analysis process for these types of developments.

2. Ensure that applicable provisions of the Secondary Street Acceptance Requirements (24VAC30-92), the Access Management Regulations: Principal Arterials (24VAC30-72), and Access Management Regulations: Minor Arterials, Collectors, and Local Streets (24VAC30-73) are included in the traffic impact analyses.

Rationale for Using Fast-Track Process: The rationale for using this process is to facilitate prompt implementation of the amended regulatory provisions. The general purpose of the action is to encourage local governments to develop small area plans when they initially designate their urban development areas. Properly implemented urban development areas will help reduce demand for transportation capacity in the future; however, the existing regulatory language can make this type of proactive planning difficult. Because the amendments are intended to ease the burden of compliance on regulated parties, as well as provide updated references to other pertinent regulations, VDOT does not consider this action to be controversial.

Local governments have until 2011 to designate urban development areas in their comprehensive plans pursuant to § 15.2-2223.1 of the Code of Virginia. The Secretary of Transportation's Office of Intermodal Planning and Investment recently initiated a grant program for local governments to develop small area plans for their urban development areas, and it is anticipated that local governments will develop similar plans to help developer-funded transportation improvements move forward in conjunction with the development of their urban development areas.

Substance: The purpose of the proposed amendments is to ensure that the traffic impacts of developments, such as transit oriented development and those located within urban development areas, are accurately determined without placing an additional burden on persons proposing such developments. The revisions require that VDOT approve a trip generation methodology that accurately determines the traffic impacts of urban developments.

In addition, the proposed amendments provide local governments with the option of conducting a single analysis for all parcels that are part of a small area plan for an urban development area or a transit oriented development. Concentrated, compact development can provide benefits for the transportation system through reduced demand for transportation capacity. However, these benefits are not always quantified when pieces of a small area plan are considered individually. Further, the single analysis completed for the small area plan may be eligible to serve as the traffic impact statement and the supplemental traffic impact analysis required for a development proposal at the zoning and site plan/subdivision plat stages of the development process.

The proposed amendments will also ensure that the applicable provisions of the Secondary Street Acceptance Requirements and the Access Management Regulations: Principal Arterials (24VAC30-72) and Access Management Regulations: Minor Arterials, Collectors, and Local Streets (24VAC30-73) are included in the traffic impact analyses.

Issues: The proposed amendments provide advantages to local governments and the business community by creating a streamlined process for the analysis of traffic impacts for developments in small area plans. Local governments are not required to use the new streamlined process but may use the existing process if they so desire under the amendments. The

optional streamlined process can help reduce the cost and time necessary to comply with the requirements of the existing regulation. Since the streamlined process is optional, there are no disadvantages to the regulated community.

The Commonwealth will likely benefit not only from increased planning for development patterns that reduce the impact of the demand for transportation capacity, but also from reduced review of traffic impact analysis for development proposals located in small area plans. VDOT will benefit from having a regulation that accurately references applicable regulations affecting traffic impact assessments. There are no disadvantages to the Commonwealth.

The Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Commonwealth Transportation Board (Board) proposes to allow more flexibility for local governments that develop small area plans for all of or a portion of an urban development area designated pursuant to § 15.2-2223.1 of the Code of Virginia, or for a transit oriented development. Under the proposed regulations local governments may complete a single traffic impact statement (TIS) for all parcels included in the small area plan at the comprehensive plan stage of the development process. This traffic impact analysis would be used for the TIS required for any parcel within the small area plan at the rezoning stage of the development proposal provided the rezoning is in substantial conformance with the small area plan.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. By permitting local governments to complete a single TIS for all parcels included in the small area plan at the comprehensive plan stage of the development process, and to use this TIS for the TIS required for any parcel within the small area plan at the rezoning stage of the development proposal provided the rezoning is in substantial conformance with the small area plan, the Board's proposed amendments will significantly reduce the number of traffic impact analyses required for developments located within small area plans. The Virginia Department of Transportation (VDOT) estimates that there will be potentially 15 to 40 fewer TIS required due to this proposed change. VDOT estimates that TIS preparation costs range from $1,000 to $75,000 per statement. Both the current and proposed regulations state that TIS "data collection shall be by the locality, developer, or owner, as determined by the locality and the locality shall prepare or have the developer or owner prepare the TIS." In practice, localities typically require the developer or owner to prepare the TIS.[1] Thus, the proposed amendments will likely reduce TIS preparation costs for developers and property owners somewhere in the range of $15,000 to $3,000,000 annually. Developers and property owners typically hire engineering firms to prepare the TIS. The reduced need for the TIS will commensurately reduce demand for their services.

Additionally, VDOT charges a $1,000 fee to review the TIS. Thus, the proposal will also likely reduce fees charged to developers of property within small area plans for all of or a portion of an urban development area by $15,000 to $40,000 per annum.

Businesses and Entities Affected. The 71 local governments in Virginia with designated urban development areas, the developers who work in those localities and engineering firms which are hired to produce traffic impact analyses are particularly affected by the proposed amendments.

Localities Particularly Affected. The proposed amendments particularly affect the 71 localities with designated urban development areas.

Projected Impact on Employment. The proposed amendments will not likely produce a large net impact on employment. The reduced development costs within designated urban development areas may moderately increase development and employment there; but there may also be moderately reduced work hours for employees of traffic engineering firms as well with reduced demand for traffic impact statements.

Effects on the Use and Value of Private Property. The proposed amendments will reduce the frequency that traffic impact statements are required. This will reduce costs for businesses and individuals developing land, but will also reduce business for engineering firms that prepare such reports. The lower costs may moderately encourage development within urban development areas.

Small Businesses: Costs and Other Effects. The proposed amendments will reduce the frequency that traffic impact statements are required. This will reduce costs for small businesses developing land, but will also reduce business for small engineering firms that prepare such reports.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments do not produce a net adverse impact for small businesses.

Real Estate Development Costs. The proposed amendments moderately reduce real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 36 (06). Section 2.2-4007.04 requires that such economic impact analyses 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, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to

implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

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[1] Source: Virginia Department of Transportation

Agency's Response to the Department of Planning and Budget's Economic Impact Analysis: The Virginia Department of Transportation concurs with the economic impact analysis prepared by the Department of Planning and Budget concerning the action entitled "Small Area Plan Streamlined Analysis" to revise the Traffic Impact Analysis Regulations (24VAC30-155).

Summary:

The proposed amendments allow more flexibility for local governments that develop small area plans for all of or a portion of an urban development area designated pursuant to § 15.2-2223.1 of the Code of Virginia, or for a transit-oriented development. Under the proposed regulations local governments may complete a single traffic impact statement (TIS) for all parcels included in the small area plan at the comprehensive plan stage of the development process. This traffic impact analysis would be used for the TIS required for any parcel within the small area plan at the rezoning stage of the development proposal provided the rezoning is in substantial conformance with the small area plan.

24VAC30-155-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Connectivity index" means the number of ~~links divided by the number of nodes~~ street segments divided by the number of intersections. Only street segments and intersections within a network addition as well as any street segment or intersection outside of the network addition that is connected to street segments within the network addition or that has been connected or will be connected pursuant to 24VAC30-92-60 C 7 to the network addition through the extension of an existing stub out shall be used to calculate a network addition's connectivity index.

~~"Link" means (i) a segment of roadway, alley, or rear lane that is between two nodes or (ii) a stub out or connection to an existing stub out.~~

"Floor area ratio" means the ratio of the total floor area of a building or buildings on a parcel to the size of the parcel where the building or buildings are located.

"Intersection" means, only for the purposes of calculating connectivity index, a juncture of three or more street segments or the terminus of a street segment such as a cul-de-sac or other dead end. The terminus of a stub out shall not constitute an intersection for the purposes of this chapter. The juncture of a street with only a stub out, and the juncture of a street with only a connection to the end of an existing stub out, shall not constitute an intersection for the purposes of this chapter, unless such stub out is the only facility providing service to one or more lots within the development.

"Locality" means any local government, pursuant to § 15.2-2223 of the Code of Virginia, that must prepare and recommend a comprehensive plan for the physical development of the territory within its jurisdiction.

~~"Node" means an intersection of three or more links or the terminus of a link, such as the end of a cul de sac or dead end. The terminus of a stub out shall not constitute a node for the purposes of this chapter. The intersection of a street with only a stub out and the intersection of a street with only a connection with an existing stub out shall not constitute a node for the purposes of this chapter unless such stub out provides service to lots within the development.~~

"Network addition" means a group of interconnected street segments and intersections shown in a plan of development that is connected to the state highway system and meets the requirements of the Secondary Street Acceptance Requirements (24VAC30-92).

"Pedestrian facility coverage" means the ratio of: (length of pedestrian facilities, such as sidewalks, foot paths, and multiuse trails, along both sides of a roadway) divided by (length of roadway multiplied by two).

"Redevelopment site" means any existing use that generates traffic and is intended to be developed as a different or more dense land use.

"Service level" means a measure of the quality, level or comfort of a service calculated using methodologies approved by VDOT.

"Small area plan" means a plan of development for multiple contiguous properties that guides land use, zoning, transportation, urban design, open space, and capital improvements at a high level of detail within an urban development area or for a transit-oriented development that is at least 1/2 square mile in size unless otherwise approved by VDOT due to proximity to existing moderate to high density developments. A small area plan shall include the following:

(i) densities of at least four residential units per acre and at least a floor area ratio of 0.4 or some proportional combination thereof; (ii) mixed-use neighborhoods, including mixed housing types and integration of residential, office, and retail development; (iii) reduction of front and side yard building setbacks; and (iv) pedestrian-friendly road design and connectivity of road and pedestrian networks.

"State-controlled highway" means a highway in Virginia that is part of the interstate, primary, or secondary systems of state highways and that is maintained by the state under the direction and supervision of the Commonwealth Transportation Commissioner. Highways for which localities receive maintenance payments pursuant to §§ 33.1-23.5:1 and 33.1-41.1 of the Code of Virginia and highways maintained by VDOT in accordance with §§ 33.1-31, 33.1-32, 33.1-33, and 33.1-68 of the Code of Virginia are not considered state-controlled highways for the purposes of determining whether a specific land development proposal package must be submitted to meet the requirements of this regulation.

"Street segment" means (i) a section of roadway or alley that is between two intersections or (ii) a stub out or connection to the end of an existing stub out.

"Stub out" means a transportation facility (i) whose right-of-way terminates at a parcel abutting the development, (ii) that consists of a short segment that is intended to serve current and future development by providing continuity and connectivity of the public street network, (iii) that based on the spacing between the stub out and other streets or stub outs, and the current terrain there is a reasonable expectation that connection with a future street is possible, and (iv) that is constructed to ~~at least the end of the radius of the intersection with the adjoining street and the right-of-way is graded and dedicated to~~ the property line.

"Traffic impact statement" means the document showing how a proposed development will relate to existing and future transportation facilities.

"Transit-oriented development" means an area of commercial and residential development at moderate to high densities within 1/2 mile of a station for heavy rail, light rail, commuter rail, or bus rapid transit transportation and includes the following: (i) densities of at least four residential units per acre and at least a floor area ratio of 0.4 or some proportional combination thereof; (ii) mixed-use neighborhoods, including mixed housing types and integration of residential, office, and retail development; (iii) reduction of front and side yard building setbacks; and (iv) pedestrian-friendly road design and connectivity of road and pedestrian networks.

"Transportation demand management" means a combination of measures that reduce vehicle trip generation and improve transportation system efficiency by altering demand, including but not limited to the following: expanded transit service, employer-provided transit benefits, bicycle and pedestrian investments, ridesharing, staggered work hours, telecommuting, and parking management including parking pricing.

"Urban development area" means an area designated on a local comprehensive plan pursuant to § 15.2-2223.1 of the Code of Virginia that includes the following: (i) densities of at least four residential units per acre and at least a floor area ratio of 0.4 or some proportional combination thereof; (ii) mixed-use neighborhoods, including mixed housing types and integration of residential, office, and retail development; (iii) reduction of front and side yard building setbacks; and (iv) pedestrian-friendly road design and connectivity of road and pedestrian networks.

"VDOT" means the Virginia Department of Transportation, the Commonwealth Transportation Commissioner, or a designee.

24VAC30-155-30. Comprehensive plan and comprehensive plan amendment.

A. Plan and amendment submittal. Prior to adoption of any comprehensive plan pursuant to § 15.2-2223 of the Code of Virginia, any part of a comprehensive plan pursuant to § 15.2-2228 of the Code of Virginia, or any amendment to any comprehensive plan as described in § 15.2-2229 of the Code of Virginia, including small area plans, if required by this section of this chapter, the locality shall submit such plan or amendment to VDOT for review and comment, such submission should take place at least 100 days prior to anticipated final action by the locality. The Virginia Department of Transportation shall, upon request, provide localities with technical assistance in preparing the transportation plan of the comprehensive plan. The comprehensive plan or comprehensive plan amendment package shall be submitted to VDOT, if it is reasonably anticipated to result in substantial changes or impacts to the existing transportation network. For the purposes of this section, a substantial impact shall be defined as a change that would allow the generation of 5,000 additional vehicle trips per day on state-controlled highways assuming the highest density of permissible use in accordance with the Institute of Transportation Engineers Trip Generation Handbook (see 24VAC30-155-100) or, subject to the approval of VDOT, the regional model as adopted by the local Metropolitan Planning Organization, and substantial changes shall include those changes that materially alter future transportation infrastructure, travel patterns, or the ability to improve future transportation facilities on state-controlled highways.

B. Required elements. The submission by the locality to VDOT shall contain sufficient information so that VDOT may evaluate the system of new and expanded transportation facilities, outlined in the transportation plan, that are needed to support the current and planned development of the territory covered by the plan. In order to conduct this

evaluation, the package submitted to VDOT shall contain the following items:

1. For a comprehensive plan or a transportation plan, the locality shall provide one copy of the following:

a. A cover sheet, containing:

(1) Contact information for the locality, and

(2) Summary of major changes made to the comprehensive plan or transportation plan;

b. The proposed comprehensive plan or transportation plan, and the following elements:

(1) Inventory – an inventory (written or graphic) of the existing transportation network, which shall include at a minimum all roadways within the Federal Aid system.

(2) Assumptions – planning assumptions shall be detailed, since these assumptions directly influence the demand placed on the transportation system. Population growth, employment growth, location of critical infrastructure such as water and sewer facilities, among others, are examples of planning assumptions that may be addressed.

(3) Needs assessment – written or graphic evaluation of the transportation system's current and projected performance and conditions. The needs assessment identifies specific deficiencies.

(4) Recommendations – proposed improvements or additions to the transportation infrastructure. Recommendations should be specific so that the need, location and nature of the proposed improvements are clear and understandable. Localities are encouraged to include pedestrian, bicycle, transit, rail and other multimodal recommendations as they deem appropriate. The transportation plan shall include a map showing road and transportation improvements, taking into account the current and future needs of residents in the locality while considering the current and future needs of the planning district within which the locality is situated. Recommended improvements shall include cost estimates as available from VDOT.

2. For an amendment to a comprehensive plan or transportation plan, the locality shall provide one copy of the following:

a. A cover sheet, containing:

(1) Contact information for the locality;

(2) Summary of proposed amendment or amendments to the comprehensive plan or transportation plan; and

(3) Overview of reasoning and purpose for amendments.

b. Application forms and documentation presented to or prepared by the local jurisdiction,

c. Associated maps or narratives that depict and detail the amendment under consideration,

d. Any changes to the planning assumptions associated with the amendment,

e. Local assessment of the potential impacts the amendment may have on the transportation system, and

f. Those elements identified in subdivision 1 b of this subsection that VDOT determines are needed in order to review and comment on impacts to state-controlled highways.

C. Small area plans for urban development areas and transit oriented developments. A locality that develops a small area plan for all or a portion of an urban development area or transit-oriented development and corresponding amendments to their comprehensive plan, as described in § 15.2-2229 of the Code of Virginia, that will have a substantial impact on the state transportation network pursuant to this section of the regulation, may in lieu of submitting a comprehensive plan amendment package as required under subsection B of this section submit a small area plan package.

The small area plan package submitted by the locality to VDOT shall contain sufficient information and data so that VDOT may determine the location of the area impacted by the small area plan, its size, its impact on state-controlled highways, and the methodology and assumptions used in the analysis of the impact. Submittal of an incomplete small area plan package shall be considered deficient in meeting the submission requirements of § 15.2-2222.1 of the Code of Virginia and shall be returned to the locality and the applicant, if applicable, identifying the deficiencies noted. A small area plan package submitted to VDOT shall contain the following items:

1. A cover sheet containing:

a. Contact information for locality;

b. Small area plan location, highways and transit facilities adjacent to site, and parcel number or numbers;

c. Proposal summary with development names, size, and proposed zoning;

2. A traffic impact statement prepared in accordance with 24VAC30-155-60; and

3. A plan of development for the area encompassed by the small area plan.

D. Review process. VDOT may~~,~~ pursuant to § 15.2-2222.1 of the Code of Virginia~~,~~ request a meeting with the locality to discuss the plan or amendment. The request must be made within 30 days of receipt of the proposal. VDOT must provide written comments to the locality within 90 days of ~~VDOT's~~ the receipt of the plan or plan amendment or by such later deadline as may be agreed to by the parties. VDOT will

conduct its review and provide official comments to the locality for inclusion in the official public record of the locality. VDOT shall also make such comments available to the public. Nothing in this section shall prohibit a locality from acting on a comprehensive plan or plan amendment if VDOT's comments on the submission have not been received within the timelines in this section.

~~D.~~ E. Concurrent consideration. For the purposes of this regulation, when a related comprehensive plan or comprehensive plan amendment and a rezoning proposal that cover the same geographical area are being considered concurrently by a locality, only a rezoning package as required under 24VAC30-155-40 shall be prepared and provided to VDOT for review.

24VAC30-155-40. Rezoning.

A. Proposal submittal. The locality shall submit a package to VDOT within 10 business days of receipt of a complete application for a rezoning proposal if the proposal substantially affects transportation on state-controlled highways. All trip generation calculations used for the purposes of determining if a proposal meets the criteria shall be based upon the rates or equations published in the Institute of Transportation Engineers Trip Generation (see 24VAC30-155-100), and shall not be reduced through internal capture rates. For redevelopment sites, trips currently generated by existing development that will be removed may be deducted from the total site trips that are generated by the proposed land use.

1. For the purposes of this section, a residential rezoning proposal shall substantially affect transportation on state-controlled highways if it meets or exceeds one or more of the following trip generation criteria:

a. Within a jurisdiction in which VDOT has maintenance responsibility for the secondary highway system, if the proposal generates more than 100 vehicle trips per peak hour of the generator at the site's connection to a state-controlled highway. For a site that does not have an entrance onto a state-controlled highway, the site's connection is assumed to be wherever the road network that the site connects with attaches to a state-controlled highway. In cases where the site has multiple entrances to highways, volumes on all entrances shall be combined for the purposes of this determination; or

b. Within a jurisdiction in which VDOT does not have maintenance responsibility for the local highway system, if the proposal generates more than 100 vehicle trips per peak hour of the generator and whose nearest property line is within 3,000 feet, measured along public roads or streets, of a connection to a state-controlled highway; or

c. The proposal generates more than 200 daily vehicle trips on a state-controlled highway and, once the site generated trips are distributed to the receiving highway, the proposal's vehicle trips on a highway exceeds the daily traffic volume such highway presently carries. For the purposes of determining whether a proposal must be submitted to VDOT, the traffic carried on the state-controlled highway shall be assumed to be the most recently published amount measured in the last traffic count conducted by VDOT or the locality on that highway. In cases where the site has access to multiple highways, each receiving highway shall be evaluated individually for the purposes of this determination.

2. For the purposes of this section, all other rezoning proposals shall substantially affect transportation on state-controlled highways if they meet or exceed one or more of the following trip generation criteria:

a. Within a jurisdiction in which VDOT has maintenance responsibility for the secondary highway system, if the proposal generates more than 250 vehicle trips per peak hour of the generator or 2,500 vehicle trips per day at the site's connection to a state-controlled highway. For a site that does not have an entrance onto a state-controlled highway, the site's connection is assumed to be wherever the road network that the site connects with attaches to a state-controlled highway. In cases where the site has multiple entrances to highways, volumes on all entrances shall be combined for the purposes of this determination; or

b. Within a jurisdiction in which VDOT does not have maintenance responsibility for the local highway system, if the proposal generates more than 250 vehicle trips per peak hour of the generator or 2,500 vehicle trips per day and whose nearest property line is within 3,000 feet, measured along public roads or streets, of a connection to a state-controlled highway.

B. Required proposal elements. The package submitted by the locality to VDOT shall contain sufficient information and data so that VDOT may determine the location of the rezoning, its size, its impact on state-controlled highways, and methodology and assumptions used in the analysis of the impact. Submittal of an incomplete package shall be considered deficient in meeting the submission requirements of § 15.2-2222.1 of the Code of Virginia and shall be returned to the locality and the applicant, if applicable, identifying the deficiencies noted. A package submitted to VDOT shall contain the following items:

1. A cover sheet containing:

a. Contact information for locality and developer (or owner) if applicable;

b. Rezoning location, highways adjacent to site, and parcel number or numbers;

c. Proposal summary with development name, size, and proposed zoning; and

d. A statement regarding the proposal's compliance with the comprehensive plan.

2. A traffic impact statement prepared in accordance with 24VAC30-155-60.

3. A concept plan of the proposed development.

C. Rezoning proposals associated with small area plans.

1. A traffic impact statement prepared for a small area plan pursuant to 24VAC30-155-30 C shall serve as the traffic impact statement required pursuant to this section for any rezoning proposals developed in furtherance of the adopted small area plan and related comprehensive plan amendments provided the following:

a. That the small area plan package is accompanied by a cover letter that includes a statement that the assumptions made in the traffic impact statement prepared for the small area plan remain generally valid.

b. That the following are accurate:

(1) The rezoning proposal is in substantial conformance with the adopted small area plan. A deviation in density must be greater than 10% to be considered no longer in substantial conformance with the adopted small area plan.

(2) The character and volume of the trip generation by the proposed uses are similar to those proposed by the small area plan.

(3) All other assumptions made in the traffic impact statement prepared for the small area plan remain generally valid.

2. In instances where the assumptions made in the traffic impact statement prepared for the small area plan are no longer valid, the traffic impact statement may be updated. If the traffic impact statement is updated, it shall serve as the traffic impact statement required pursuant to this section for any rezoning proposals developed in furtherance of the adopted small area plan and related comprehensive plan amendments.

D. Review process. After formal submission of a rezoning proposal for review, VDOT may, pursuant to § 15.2-2222.1 of the Code of Virginia, request a meeting with the locality and rezoning applicant to discuss potential modifications to the proposal to address any concerns or deficiencies. The request must be made within 45 days of receipt by VDOT of the proposal. VDOT must provide written comments to the locality within 45 days of VDOT's receipt of the proposal if no meeting is scheduled or has been requested or within 120 days of the receipt of the proposal otherwise. VDOT shall conduct its review and provide official comments to the locality for inclusion in the official public record. VDOT shall also make such comments available to the public. Nothing in this section shall prohibit a locality from acting on a rezoning proposal if VDOT's comments on the submission have not been received within the timelines in this section.

24VAC30-155-50. Subdivision plat, site plan, plan of development.

A. Proposal submittal. The locality shall submit a package to VDOT within 10 business days of receipt of a complete development proposal if the proposal substantially affects transportation on state-controlled highways. All trip generation calculations used for the purposes of determining if a proposal meets these requirements shall be based upon the rates or equations published in the Institute of Transportation Engineers Trip Generation (see 24VAC30-155-100), and shall not be reduced through internal capture rates. For redevelopment sites, trips currently generated by existing development that will be removed may be deducted from the total site trips that are generated by the proposed land use.

1. For the purposes of this section, a residential development proposal shall substantially affect transportation on state-controlled highways if it meets or exceeds one or more of the following trip generation criteria:

a. Within a jurisdiction in which VDOT has maintenance responsibility for the secondary highway system, if the proposal generates more than 100 vehicle trips per peak hour of the generator at the site's connection to a state-controlled highway. For a site that does not have an entrance onto a state-controlled highway, the site's connection is assumed to be wherever the road network that the site connects with attaches to a state-controlled highway. In cases where the site has multiple entrances to highways, volumes on all entrances shall be combined for the purposes of this determination; or

b. Within a jurisdiction in which VDOT does not have maintenance responsibility for the local highway system, if the proposal generates more than 100 vehicle trips per peak hour of the generator and has an entrance that is within 3,000 feet, measured along public roads or streets, of a connection to a state-controlled highway; or

c. The proposal generates more than 200 daily vehicle trips on a state-controlled highway and, once the site-generated trips are distributed to the receiving highway, the proposal's vehicle trips on such highway exceeds the daily traffic volume the highway presently carries. For the purposes of determining whether a proposal must be submitted to VDOT, the traffic carried on the state-controlled highway shall be assumed to be the most recently published amount measured in the last traffic count conducted by VDOT or the locality on that highway. In cases where the site has access to multiple highways, each receiving highway shall be evaluated individually for the purposes of this determination.

2. For the purposes of this section, all other development proposals shall substantially affect transportation on state-controlled highways if they meet or exceed one or more of the following trip generation criteria:

a. Within a jurisdiction in which VDOT has maintenance responsibility for the secondary highway system, if the proposal generates more than 250 vehicle trips per peak hour of the generator or 2,500 vehicle trips per day at the site's connection to a state-controlled highway. For a site that does not have an entrance onto a state-controlled highway, the site's connection is assumed to be wherever the road network that the site connects with attaches to a state-controlled highway. In cases where the site has multiple entrances to highways, volumes on all entrances shall be combined for the purposes of this determination; or

b. Within a jurisdiction in which VDOT does not have maintenance responsibility for the local highway system, if the proposal generates more than 250 vehicle trips per peak hour of the generator or 2,500 vehicle trips per day and has an entrance that is within 3,000 feet, measured along public roads or streets, of a connection to a state-controlled highway.

B. Required proposal elements.

1. The package submitted by the locality to VDOT shall contain sufficient information and data so that VDOT may determine the location of the development, its size, its impact on state-controlled highways, and methodology and assumptions used in the analysis of the impact. Submittal of an incomplete package shall be considered deficient in meeting the submission requirements of § 15.2-2222.1 of the Code of Virginia and shall be returned to the locality and the applicant, if applicable, identifying the deficiencies noted. A package submitted to VDOT shall contain the following items.

a. A cover sheet containing:

(1) Contact information for locality and developer (or owner);

(2) Development location, highways connected to, and parcel number or numbers; and

(3) Proposal summary with development name and size in acres.

b. A supplemental traffic analysis, as defined in 24VAC30-155-50 C.

c. A concept plan of the proposed development.

C. Supplemental traffic analysis. For the purposes of this subsection, a supplemental traffic analysis will be defined as follows:

1. In cases where a traffic impact statement has been submitted to VDOT in accordance with 24VAC30-155-30 C, that statement shall serve as the supplemental traffic impact analysis for the purposes of this section for any site plan, subdivision plat, or plan of development proposals developed in furtherance of the adopted small area plan and related comprehensive plan amendments provided the following:

a. That such package is accompanied by a cover letter that includes a statement that the assumptions made in the traffic impact statement prepared for the small area plan remain generally valid and a copy of the traffic impact statement is included in the submission.

b. That the following are accurate:

(1) The rezoning site plan is in substantial conformance with the adopted small area plan. A deviation in density must be greater than 10% to be considered no longer in substantial conformance with the adopted small area plan.

(2) The character and volume of the trip generation by the proposed uses are similar to those proposed by the small area plan.

(3) All other assumptions made in the traffic impact statement prepared for the small area plan remain generally valid.

2. In cases where a rezoning traffic impact statement has been submitted to VDOT in accordance with 24VAC30-155-40, if all assumptions made in the traffic impact statement prepared for the rezoning remain valid and if the submission of the subdivision plat, site plan, or plan of development to the locality occurs within two years of the locality's approval of the rezoning proposal, the supplemental traffic analysis shall be a letter that provides VDOT with the following information:

a. A statement that the impacts analyzed in the development's rezoning traffic impact statement have not materially changed nor have the adverse impacts on state-controlled highways increased.

b. The date of the VDOT letter providing the locality comments on the rezoning.

~~2.~~ 3. In cases where a rezoning traffic impact statement has been submitted to VDOT in accordance with 24VAC30-155-40, if all assumptions made in the traffic impact statement prepared for the rezoning have not materially changed, the adverse impacts of the proposal on state-controlled highways have not increased and if the submission of the subdivision plat, site plan, or plan of development to the locality occurs more than two years of the locality's approval of the rezoning, the supplemental traffic analysis shall be a letter that provides VDOT with the following information:

a. A statement that the impacts analyzed in the development's rezoning traffic impact statement have not materially changed nor have the adverse impacts on state-controlled highways increased;

b. The date of the VDOT letter providing the locality comments on the rezoning;

c. Documentation supporting the statement that the development's rezoning traffic impact statement is still valid; and

d. A copy of the original traffic impact statement.

After review of such letter, VDOT may require submission in accordance with subdivision ~~4~~ 5 of this subsection.

~~3.~~ 4. In cases where the small area plan traffic impact statement has not been submitted to VDOT in accordance with 24VAC30-155-30 or the rezoning traffic impact statement has not been submitted to VDOT in accordance with 24VAC30-155-40, the supplemental traffic analysis shall contain the information required for rezoning traffic impact statements with 100 to 499 peak hour trips. If the subdivision plat, site plan, or plan of development will generate less than 100 peak hour trips then the lowest required elements for the rezoning traffic impact statement shall be used.

~~4.~~ 5. In cases where ~~a~~ the small area plan traffic impact statement has been submitted to VDOT in accordance with 24VAC30-155-30 and the conditions analyzed have materially changed such that the adverse impacts of the proposal on state-controlled highways have increased, the rezoning traffic impact statement has been submitted to VDOT in accordance with 24VAC30-155-40 and the conditions analyzed in such traffic impact statement have materially changed such that the adverse impacts of the proposal on state-controlled highways have increased or if required pursuant to subdivision ~~2~~ 3 of this subsection, the supplemental traffic analysis shall contain those elements required for rezoning traffic impact statements with 100 to 499 peak hour trips, as determined by VDOT. If the subdivision plat, site plan, or plan of development will generate less than 100 peak hour trips then the lowest required elements for the rezoning traffic impact statement shall be used.

~~5.~~ 6. In cases where rezoning occurred after January 1, 2002, but prior to the implementation of this regulation, VDOT, at its discretion, may evaluate traffic impact statements or studies performed as part of the rezoning action. If, in the opinion of VDOT staff with the concurrence of the locality, the traffic impact analysis work that was performed encompasses the major elements of work required by this regulation and the underlying assumptions of the study remain valid the previously prepared study may be deemed to meet the requirements of this regulation. VDOT staff may also, upon request of the submitter, allow a previously prepared study to be updated to incorporate additional areas of analysis or revisions to assumptions to enhance the accuracy of the study and may deem such updated study to encompass the major elements of work required by this regulation.

D. Review process. After formal submission of a subdivision plat, site plan, or plan of development to VDOT for review, VDOT may, pursuant to § 15.2-2222.1 of the Code of Virginia, request a meeting with the locality to discuss potential modifications to the proposal to address any concerns or deficiencies. The request must be made within 30 days of receipt by VDOT of the proposal. The submission of the proposal to VDOT shall toll all times for local review set out in Chapter 22 (§ 15.2-2200 et seq.) of Title 15.2 of the Code of Virginia until the locality has received VDOT's final comments. VDOT must provide written comments to the locality within 30 days of VDOT's receipt of the proposal if no meeting is scheduled or within 90 days of the receipt of the proposal otherwise. VDOT will conduct its review and provide official comments to the locality for inclusion in the official public record. VDOT shall also make such comments available to the public. Nothing in this section shall prohibit a locality from acting on a subdivision plat, site plan, or plan of development if VDOT's comments on the submission have not been received within the timelines in this section.

24VAC30-155-60. Traffic impact statement.

A. A ~~Traffic~~ traffic impact statement (TIS) assesses the impact of a proposed development on the transportation system and recommends improvements to lessen or negate those impacts. It shall (i) identify any traffic issues associated with access from the site to the existing transportation network, (ii) outline solutions to potential problems, (iii) address the sufficiency of the future transportation network, and (iv) present improvements to be incorporated into the proposed development.

If a TIS is required, data collection shall be by the locality, developer, or owner, as determined by the locality and the locality shall prepare or have the developer or owner prepare the TIS. If the locality prepares the TIS it shall provide a copy of the complete TIS to the applicant when one is provided to VDOT. The completed TIS shall be submitted to VDOT.

The data and analysis contained in the TIS shall be organized and presented in a manner acceptable to VDOT and consistent with this regulation. Submittal of an incomplete TIS or one prepared using unapproved methodology or assumptions shall be considered deficient in meeting the submission requirements of § 15.2-2222.1 of the Code of Virginia and shall be returned to the locality and the applicant, if applicable, identifying the deficiencies noted by VDOT.

B. Scope of work meeting.

1. For proposals that generate less than 1,000 vehicle trips per peak hour of the generator representatives of the locality, the applicant, or the locality and the applicant may request a scope of work meeting with VDOT to discuss the required elements of a TIS for any project and VDOT shall reply to such request within 30 days of its receipt of such a request and provide a date, time and location for such a scope of work meeting to both the locality and the applicant, if applicable.

2. For proposals that generate 1,000 or more vehicle trips per peak hour of the generator representatives of the locality and applicant, if applicable, shall hold a scope of work meeting with VDOT to discuss the required elements of a TIS. Once a locality or applicant has contacted VDOT regarding the scheduling of a scope of work meeting, VDOT shall reply to both the locality and the applicant, if applicable, and provide a date, time and location for such a meeting.

At a scope of work meeting pursuant to this section, the locality, the applicant and VDOT shall review the elements, methodology and assumptions to be used in the preparation of the TIS, and identify any other related local requirements adopted pursuant to law. The results of the initial scoping meeting may be adjusted in accordance with sound professional judgment and the requirements of this regulation if agreed upon by VDOT, the locality, and applicant, if applicable.

C. Required elements. The required elements and scope of a TIS are dependent upon the scale and potential impact of the specific development proposal being addressed by the TIS as determined by VDOT in its sole discretion.

1. At a minimum, the TIS shall include the elements shown in the table below. The site generated peak hour trips in the table below shall be based upon the gross vehicle trip generation of the site less internal capture and shall take into account bicycle, pedestrian, and transit reductions. When the type of development proposed would indicate significant potential for walking, bike or transit trips either on- or off-site, the TIS shall estimate multimodal trips. All distances in the table below shall be measured along roads or streets.

Item	Site Generated Peak Hour Trips			
	Less than 100	100 to 499	500 to 999	1,000 or more
Background information				
List of all nonexistent transportation improvements assumed in the analysis	Required	Required	Required	Required
Map of site location, description of the parcel, general terrain features, and location within the jurisdiction and region.	Required	Required	Required	Required
Description of geographic scope/ limits of study area.	Within 1,000 ft of site	Within 2,000 feet of site and any roadway on which 50 or more of the new peak hour vehicle trips generated by the proposal are distributed – not to exceed one mile	Within 2,000 feet of site and any roadway on which 10% or more of the new vehicle trips generated by the proposal are distributed – not to exceed two miles	To be determined by VDOT in consultation with the locality
Plan at an engineering scale of the existing and proposed site uses.	Required	Required	Required	Required
Description and map or diagram of nearby uses, including parcel zoning.	Required	Required	Required	Required
Description and map or diagram of existing roadways.	Required	Required	Required	Required

Description and map or diagram of programmed improvements to roadways, intersections, and other transportation facilities within the study area.	Required	Required	Required	Required
Analysis of Existing Conditions				
Collected daily and peak hour of the generator traffic volumes, tabulated and presented on diagrams with counts provided in an appendix.	Only diagrams required	Required	Required	Required
Analyses for intersections and roadways identified by VDOT. Delay and Level of Service (LOS) are tabulated and LOS is presented on diagrams for each lane group.	Only diagrams required	Required	Required	Required
When the type of development proposed would indicate significant potential for walking, bike or transit trips either on - or off - site, analyses of pedestrian and bicycle facilities, and bus route or routes and segment or segments, tabulated and presented on diagrams, if facilities or routes exist	At frontage, only diagrams required	Within 2,000 feet of site	Within 2,000 feet of site	To be determined by VDOT in consultation with the locality
Speed Study	If requested by VDOT	If requested by VDOT	If requested by VDOT	If requested by VDOT
Crash history near site	If requested by VDOT	If requested by VDOT	If requested by VDOT	If requested by VDOT
Sight distance	If requested by VDOT	If requested by VDOT	If requested by VDOT	If requested by VDOT
Analysis of Future Conditions without Development				
Description of and justification for the method and assumptions used to forecast future traffic volumes.	Optional	Required	Required	Required

Analyses for intersections and roadways as identified by VDOT. Delay and Level of Service (LOS) are tabulated and LOS is presented on diagrams for each lane group.	Optional	Required	Required	Required
When the type of development proposed would indicate significant potential for walking, bike or transit trips either on - or off - site, analyses of pedestrian and bicycle facilities, and bus route or routes and segment or segments tabulated and presented on diagrams, if facilities or routes exist or are planned.	At frontage, only diagrams required	Within 2,000 feet of site	Within 2,000 feet of site	To be determined by VDOT in consultation with the locality at the scope of work meeting
Trip Generation				
Site trip generation, with tabulated data, broken out by analysis year for multi-phase developments, and including justification for deviations from ITE rates, if appropriate.	Required	Required	Required	Required
Description and justification of internal capture reductions for mixed use developments and pass-by trip reductions, if appropriate, including table of calculations used.	Required	Required	Required	Required
Site Traffic Distribution and Assignment				
Description of methodology used to distribute trips, with supporting data.	Required	Required	Required	Required
Description of the direction of approach for site generated traffic and diagrams showing the traffic assignment to the road network serving the site for the appropriate time periods.	Required	Required	Required	Required

Analysis of Future Conditions With Development				
Forecast daily and peak hour of the generator traffic volumes on the highway network in the study area, site entrances and internal roadways, tabulated and presented on diagrams.	Current traffic + site generated traffic	Future background + site generated traffic, at each expected phase and at build - out or six years after start, whichever is later	Future background + site generated traffic, at each expected phase, at build - out, and six years after build - out, which may be extended or reduced by VDOT in consultation with the locality	At a minimum the future background + site generated traffic, at each expected phase, at build - out, and six years after build - out; may be extended by VDOT in consultation with the locality
Analyses for intersections and roadways identified by VDOT. Delay and Level of Service (LOS) are tabulated and LOS presented on diagrams for each lane group.	Only diagrams required	Required	Required	Required
When the type of development proposed would indicate significant potential for walking, bike or transit trips either on - or off - site, analyses of pedestrian and bicycle facilities, and bus route or routes and segment or segments tabulated and presented on diagrams, if facilities or routes exist or are planned.	At frontage, only diagrams required	Within 2,000 feet of site	Within 2,000 feet of site	To be determined by VDOT in consultation with the locality
Recommended Improvements				
Description and diagram of the location, nature, and extent of proposed improvements, with preliminary cost estimates as available from VDOT.	Required	Required	Required	Required
Description of methodology used to calculate the effects of travel demand management (TDM) measures, if proposed, with supporting data.	Required if TDM proposed	Required if TDM proposed	Required if TDM proposed	Required if TDM proposed
Analyses for all proposed and modified intersections in the study area under the forecast and site traffic.	Only diagrams required	Required	Required	Required

Delay, and Level of Service (LOS) are tabulated and LOS presented on diagrams for each lane group. For intersections expected to be signalized, MUTCD Signal Warrant analysis or ITE Manual for Traffic Signal Design, as determined by VDOT, presented in tabular form.				
When the type of development proposed would indicate significant potential for walking, bike or transit trips either on - or off - site, analyses of pedestrian and bicycle facilities, and bus route or routes and segment or segments tabulated and presented on diagrams, if facilities or routes exist or are planned.	At frontage, only diagrams required	Within 2,000 feet of site	Within 2,000 feet of site	To be determined by VDOT in consultation with the locality
Conclusions				
Clear, concise description of the study findings.	Required	Required	Required	Required

Notwithstanding the geographic scope noted above, the geographic scope of the study noted above may be reduced or enlarged based upon layout of the local transportation network, the geographical size of the development, and the traffic volume on the existing network, as determined by VDOT in consultation with the locality and the applicant, if applicable. Typically, analysis will be conducted for any roadway on which the additional trips generated by the proposal have a materially detrimental impact on traffic conditions. The analysis presented in the TIS need not include all roadway and roadway segments located within the geographic scope of the study as determined by VDOT.

2. A TIS for a development proposal that only meets the low volume road submission criterion (24VAC30-155-40 A 1 c and 24VAC30-155-50 A 1 c) shall, at a minimum, consist of the following elements, unless otherwise directed by VDOT.

a. All elements contained in the ~~background information~~ Background Information portion of the above table, except the geographic scope/limits of study area is limited to the highway fronting the proposed development and the closest intersection, in each direction if applicable, of that highway with a highway that has an average daily traffic volume higher than the fronting highway.

b. A roadway safety inventory study of the roadway segment or segments between the site entrance to the nearest intersections with the higher traffic volume highways, to include such elements as, but not limited to, speed limit, existing warning signs, pavement and shoulder type, pavement and shoulder width, intersection sight distances, and safe horizontal curve speeds.

c. Daily and peak hour traffic volumes presented on diagrams, with counts provided in an appendix, for the fronting highway at the site, at the highway's intersections with the higher volume highway, and for the higher volume highways at their intersection with the fronting highway.

d. All relevant elements contained in the ~~trip generation~~ Trip Generation portion of the above table.

e. Projected daily and peak hour of the generator traffic volumes assuming build-out of the proposal, presented on diagrams for the receiving highway at the site, at the highway's intersection with the higher volume highways,

and for the higher volume highways at their intersections with the receiving highway.

f. Delay and level of service analysis for the intersections of the receiving highway with the higher volume highways.

g. A comparison of the existing geometrics of the fronting highway under proposed build-out traffic conditions with the geometric standards, based upon functional classification and volume, contained in the Road Design Manual (see 24VAC30-155-100).

D. Methodology and standard assumptions. A TIS shall be prepared based upon methodology and assumptions noted below or as may be agreed upon by VDOT based upon the results of a scope of work meeting held by VDOT pursuant to this section.

1. Data collection. Preparers shall collect traffic data in accordance with the identified study area. The count data shall include at a minimum, weekday 24-hour counts, and directional turning movement counts during AM and PM peak times of the day. The 24-hour counts shall include vehicle classification counts. With approval of VDOT, data collected by the transportation professional preparer within the last 24 months may be used, likewise for data from the VDOT count program.

The preparer shall monitor traffic operations during data collection to ensure extraneous events such as vehicle crashes or special event traffic do not affect integrity of count data. Preparers collecting data for utilization in traffic impact studies shall normally avoid data collection during the following instances:

a. Holidays or times of the year when the traffic patterns are deemed to be unrepresentative of typical conditions, unless required by VDOT or the locality, or both.

b. Summer months if school or schools in proximity.

c. Fridays and weekends unless required by VDOT or the locality, or both.

d. Other times of the year contingent upon existing adjacent land use activities.

e. During times of inclement weather.

2. Trip generation. Estimates of trip generation by a proposed development shall be prepared using the Institute of Transportation Engineers Trip Generation (see 24VAC30-155-100), unless VDOT agrees to allow the use of alternate trip generation rates based upon alternate published guides or local trip generation studies. VDOT shall at all times after July 1, 2011, have at least one non-ITE trip generation methodology or alternative rate approved for the use in preparation of small area plan traffic impact statements pursuant to 24VAC30-155-30 C that recognizes the benefits of reduced vehicle trip generation and vehicle miles traveled from developments that meet the criteria for a small area plan pursuant to this regulation. Rezoning proposals shall assume the highest vehicle trip generating use allowable under the proposed zoning classification. In determining which trip generation process (equation or rate) may be used, the preparer shall follow the guidance presented in the Trip Generation Handbook – an ITE Proposed Recommended Practice (see 24VAC30-155-100), which is summarized here. Regression equations to calculate trips as a result of development shall be utilized, provided the following is true:

a. Independent variable falls within range of data; and

b. Either the data plot has at least 20 points; or

c. R^2 greater than 0.75, equation falls within data cluster in plot and standard deviation greater than 110% of weighted average rate.

If the above criteria are not met, then the preparer can use average trip rates, provided at least one of the following applies:

d. At least three data points exist;

e. Standard deviation less than 110% of weighted average rate;

f. R^2 less than 0.75 or no regression equation provided; or

g. Weighted average rate falls within data cluster in plot.

3. Internal capture and pass-by trips.

a. Internal capture rates consider site trips "captured" within a ~~multiuse~~ mixed use development, recognizing that trips from one land use can access another land use within a site development without having to access the adjacent street system. ~~Multiuse~~ Mixed use developments include a combination of residential and nonresidential uses or a combination of nonresidential uses only. Internal capture allows reduction of site trips from adjacent intersections and roadways. For traffic impact statements prepared for small area plans pursuant to 24VAC30-155-30 C the internal capture rate or rates may be based on the non-ITE trip generation methodology approved by VDOT. Unless otherwise approved by VDOT, the following internal capture rates should be used if appropriate:

(1) Residential with a mix of nonresidential components - use the smaller of 15% of residential or 15% nonresidential trips generated.

(2) Residential with office use - use the smaller of 5.0% of residential or 5.0% of office trips generated.

(3) Residential with retail use - for AM peak hour, use the smaller of 5.0% residential or 5.0% retail trips generated; for PM peak hour, use the smaller of 10%

residential or 10% retail trips generated; for 24-hour traffic, use the smaller of 15% residential or 15% retail trips generated.

(4) Hotel/motel with office use - use 15% of hotel/motel trips, unless the overall volume of the office traffic is more than the overall volume of hotel/motel traffic use in which case use the smaller of 10% of the hotel/motel traffic or the office traffic.

(5) Multiuse development with more than five million square feet of office and retail - internal capture rate should be determined in consultation with and approval of VDOT.

(6) Some combination of the above, if approved by VDOT.

b. Pass-by trip reductions consider site trips drawn from the existing traffic stream on an adjacent street, recognizing that trips drawn to a site would otherwise already traverse the adjacent street regardless of existence of the site. Pass-by trip reductions allow a percentage reduction in the forecast of trips otherwise added to the adjacent street from the proposed development. The reduction applies only to volumes on adjacent streets, not to ingress or egress volumes at entrances serving the proposed site. Unless otherwise approved by VDOT, the following pass-by trip reductions may be used:

(1) Shopping center - 25% of trips generated may be considered pass-by.

(2) Convenience stores, service stations, fast food restaurants, and similar land uses - 40% of trip generated may be considered pass-by.

(3) For traffic impact statements prepared for small area plans pursuant to 24VAC30-155-30 C, the pass-by trip reductions may be based on the non-ITE trip generation methodology approved by VDOT.

4. Trip distribution. In the absence of more detailed information, trip distribution shall be in accordance with logical regional travel patterns as suggested by existing highway directional split and intersection movements or population and destination site distribution and shall recognize the effects of increased street connectivity if such streets meet the requirements of the Secondary Street Acceptance Requirements (see 24VAC30-155-100). If more detailed information is available from trip origin/destination studies, marketing studies, or regional planning models, this may be used to distribute trips upon approval of VDOT.

5. Planning horizon. In general, the analysis years shall be related to (i) the opening date of the proposed development, (ii) build-out of major phases of a multiyear development, (iii) long-range transportation plans, and (iv) other significant transportation network changes. The preparer should establish the planning horizon in consultation with and subject to the acceptance of VDOT.

6. Background traffic growth. Unless directed by VDOT, geometric growth (or compound growth), based upon historical growth rates, shall generally be used for determining future background traffic levels where extensive traffic-count history is available and capacity constraint is not appropriate. This growth rate replicates "natural growth" and is typical for projecting urban growth.

7. Future conditions. For the purpose of the TIS, future conditions shall include background traffic and additional vehicle trips anticipated to be generated by approved but not yet constructed or improved projects.

8. Level of service calculation. Level of service (LOS) analysis for highways shall utilize the techniques described in the Highway Capacity Manual (see 24VAC30-155-100). Neither the intersection capacity utilization method nor the percentile delay method may be used in the traffic impact calculations of delay and level of service. Preparers shall consult with VDOT on which traffic analysis software package is to be used to conduct the LOS calculations. The results shall be tabulated and displayed graphically, with levels of service provided for each lane group for each peak period. All data used in the calculations must be provided along with the results of the capacity analysis. Any assumptions made that deviate from the programmed defaults must be documented and an explanation provided as to why there was a deviation. Electronic files used for the analysis shall be provided to VDOT as a digital submission (e.g..hcs,.sy6,.inp,.trf files), along with the printed report. If intersections analyzed are in close proximity to each other so that queuing may be a factor, VDOT may require the inclusion of an analysis with a micro simulation model. Unless actual on-ground conditions dictate otherwise, preparers should use the following defaults when utilizing the Highway Capacity Software (HCS) or other approved programs when evaluating roadway components:

a. Terrain – choose the appropriate terrain type. Most of the state will be level or rolling, but some areas may qualify for consideration as mountainous.

b. Twelve-foot wide lanes.

c. No parking or bus activity unless field conditions include such parking or bus activity or unless the locality has provided VDOT with a written statement of intent for the services to be provided.

d. Peak hour factor by approach – calculate from collected traffic counts (requires at least a peak hour count in 15-minute increments).

e. Heavy vehicle factor – calculate from collected traffic (classification) counts or obtain from VDOT count publications.

f. Area type – noncenter of business district.

The TIS shall identify any existing or proposed bicycle and pedestrian accommodation that would be affected by the proposal. For the purposes of this subsection, a bicycle accommodation is defined as on-street bike lanes, paved shoulders of roadways that are not part of the designated traveled way for vehicles, ~~intersection treatments,~~ or exclusive and shared off-street bicycle paths.

For the purposes of this subsection, a pedestrian accommodation is defined as sidewalks, intersection treatments and exclusive or shared off-street trails or paths. If significant potential for bicycle or pedestrian trips exists, the TIS shall include current and future service level analyses at build-out for existing or proposed bicycle and pedestrian accommodations. When the proposal requires or includes improvements or modifications to the roadway, bicycle or pedestrian accommodations, the TIS shall analyze the impacts of such improvements and modifications on bicycle and pedestrian accommodations and service levels, and provide recommendations for mitigation of adverse impacts.

The TIS shall provide analysis for all bus service with routes that have, or will have a station or stop within 2,000 feet of the proposal. The TIS shall evaluate and discuss potential for increased demand for bus use due to the proposal, addressing whether such increases will ~~demand~~ result in longer dwell time at stops or ~~more~~ increase the need for buses on a route. The quality of service analysis for bus service shall be determined in accordance with the Transit Capacity and Quality of Service Manual (see 24VAC30-155-100). The TIS shall provide both route and segment quality of service. The TIS may consider the benefits of dedicated bus lanes for more frequent and rapid service. The TIS shall provide recommendations for mitigation of adverse impacts where adverse impacts are expected to the quality of service to bus service. If an analysis of pedestrian quality or level of service is required for calculation of the bus quality of service, the preparer shall use a methodology approved by VDOT.

9. Trip reduction, and pedestrian and bicycle accommodations. When a proposal meets the criteria listed below, the preparer of the TIS may reduce the number of vehicle trips generated by the proposal in the TIS analysis in accordance with this subsection. Notwithstanding the percentages below, the total number of reductions used by a preparer in accordance with this subsection shall never exceed 500 vehicle trips per peak hour of the generator unless otherwise approved by VDOT. The trip reductions for traffic impact statements prepared for small area plans pursuant to 24VAC30-155-30 C may be based on the non-ITE trip generation methodology approved by VDOT and are not subject to limitations or requirements of this subdivision.

a. Pedestrian accommodations. For the purposes of this subsection, a pedestrian accommodation is defined as a sidewalk, pedestrian path, or multiuse trail. Where a pedestrian service level of A exists, vehicle trips per peak hour of the generator may be reduced by 4.0% for those portions of the development within a 2,000-foot radius of the connections between the proposed development and the adjoining network. Where a pedestrian service level of B exists, vehicle trips per peak hour of the generator may be reduced by 3.0%; where a pedestrian service level of C exists, vehicle trips per peak hour of the generator may be reduced by 1.5% for the portion of the development noted above. These reductions may only be taken if:

(1) Pedestrian facility coverage in a 2,000-foot radius of the connections to the proposed development is on or along at least 80% of the road network;

(2) The connectivity index within the 2,000-foot radius is equal to or higher than 1.4; and

(3) There are at least two of the 10 major land use classifications, as defined in ITE Trip Generation (see 24VAC30-155-100), within the 2,000-foot radius.

b. Bicycle accommodations. For the purposes of this subsection, a bicycle accommodation is defined as a street with a design speed of 25 MPH or less that carries 400 vehicles per day or less, on-street bike lanes, a pedestrian accommodation, paved shoulders of roadways that are not part of the designated traveled way for vehicles and are at least two feet wide, or exclusive and shared off-street bicycle paths. Where a bicycle service level of A exists, vehicle trips per day may be reduced by 3.0%. Where a bicycle service level of B exists, vehicle trips per day may be reduced by 2.0%. Where a bicycle service level of C exists, vehicle trips per day may be reduced by 1.0%. These reductions may only be taken if:

(1) Bicycle accommodations within a 2,000-foot radius of the connections to the proposed development exist on or along at least 80% of the road network;

(2) The connectivity index within the 2,000-foot radius is equal to or higher than 1.4; and

(3) There are at least two of the 10 major land use classifications as defined in ITE Trip Generation (see 24VAC30-155-100), within the 2,000-foot radius.

10. Modal split and trip reduction. All vehicle trip reductions used in the TIS pursuant to this subsection are subject to the approval of VDOT.

a. If a proposal is located within 1/2 mile along roadways, pedestrian or bicycle accommodations of a transit station, excluding bus stops and stations, reasonable vehicle trip reductions of vehicle trips generated by the proposal may be made with approval of VDOT. The preparer shall submit documentation to justify any such vehicle trip reductions used with the TIS. When a proposal is located more than 1/2 mile but less than two miles from a transit stop, excluding bus stops and stations, with parking accommodations transit modal split vehicle trip reductions may be utilized. The analysis of capacity of the parking accommodations shall be included in the TIS when such trip reductions are used.

b. If a proposal is located within 1/4 mile along roadways, pedestrian or bicycle accommodations of a bus stop or station where the segment and route service levels are C or higher, reasonable vehicle trip reductions of vehicle trips generated by the proposal may be made with the approval of VDOT. The preparer shall submit documentation to justify any such vehicle trip reductions used with the TIS.

c. Transit and bus modal split data from similar developments within the geographic scope of the TIS or one mile of the proposal, whichever is greater, shall be collected if the TIS vehicle trip reductions are used pursuant to this subsection and similar developments exist within the geographic scope of the TIS or one mile of the proposal, whichever is greater.

11. Signal warrant analysis. Traffic signal warrant analysis shall be performed in accordance with the procedures set out in the Manual on Uniform Traffic Control Devices (see 24VAC30-155-100) or ITE Manual of Traffic Signal Design as determined by VDOT.

12. Recommended improvements. Recommendations made in the TIS for improvements to transportation facilities shall be in accordance with the geometric standards contained within the Road Design Manual (see 24VAC30-155-100).

24VAC30-155-70. Departmental analysis.

After concluding its review of a proposed comprehensive plan or transportation plan or plan amendment, rezoning, or site or subdivision plan, VDOT shall provide the locality and applicant, if applicable, with a written report detailing its analysis and when appropriate recommending transportation improvements to mitigate any potential adverse impacts on state-controlled highways. VDOT shall provide recommendations for facilitating other modes of transportation including but not limited to transit, bus, bicycle and pedestrian facilities or accommodations where such facilities or accommodations are planned or exist, or where such facilities have a significant potential for use. In addition, VDOT shall provide the locality and the applicant, if applicable, with preliminary recommendations regarding compliance with other VDOT regulations such as the Secondary Street Acceptance Requirements (see 24VAC30-155-100), the Access Management Regulations: Principal Arterials (see 24VAC30-155-100), and the Access Management Regulations: Minor Arterials, Collectors, and Local Streets (see 24VAC30-155-100).

24VAC30-155-80. Fees.

A. Locality initiated proposals. No fee shall be charged for review of any comprehensive plan, comprehensive plan amendment, rezoning proposal, subdivision plat, site plan, or plan of development initiated by a locality or other public agency.

B. Proposals containing a traffic impact statement as described in subdivision C 1 of 24VAC30-155-40. No fee shall be charged for the review of a rezoning submission that properly includes a traffic impact statement submitted under subdivision C 1 of 24VAC30-155-40.

C. Proposals containing supplemental traffic analysis as described in subdivisions C 1, 2, and 5 of 24VAC30-155-50. No fee shall be charged for the review of a subdivision plat, site plan, or plan of development submission that properly includes a supplemental traffic analysis submitted under subdivisions C 1, 2, and 5 of 24VAC30-155-50.

~~C.~~ D. All other proposals. Any package submitted to a locality by an applicant that will be subject to VDOT review pursuant to this chapter shall include any required payment in a form payable directly to VDOT.

1. For initial or second review of all comprehensive plans, comprehensive plan amendments, and transportation plans submitted to VDOT for review, not initiated on behalf of the locality, there shall be a fee of $1,000 charged to the applicant. This fee shall be paid upon submission of a plan to VDOT for review.

2. For initial or second review of rezoning proposals, subdivision plats, site plans, or plans of development accompanied by a traffic impact statement or supplemental traffic analysis, not initiated on behalf of the locality, there shall be a single fee for both reviews determined by the number of adjusted vehicle trips generated per peak hour ~~of the generator~~, as follows:

Low volume road criterion only -	$250
Less than 100 vehicles per peak hour -	$500
100 or more vehicles per peak hour -	$1,000

The fee shall be paid upon submission of a package to VDOT for review.

3. For a third or subsequent submission pursuant to subdivisions 1 or 2 of this subsection, that is requested by VDOT on the basis of the failure of the applicant to

address deficiencies previously identified by VDOT, the applicant shall be required to pay an additional fee as though the third or subsequent submission were an initial submission and requiring the fees identified above. An applicant or locality may appeal to the district administrator a determination by VDOT that a submitted package failed to address deficiencies previously identified by VDOT.

24VAC30-155-90. ~~Implementation.~~ (Repealed.)

~~A. VDOT shall implement this chapter in phases beginning on July 1, 2007, so that it is in full effect by January 1, 2009.~~

~~B. Implementation by VDOT district. For the purposes of this chapter, the nine VDOT construction districts have been divided into three groups.~~

~~1. Group 1 consists of Northern Virginia, Richmond, and Salem Districts. Implementation will begin on July 1, 2007, for this group.~~

~~2. Group 2 consists of Culpeper, Fredericksburg, and Staunton Districts. Implementation will begin on January 1, 2008, for this group.~~

~~3. Group 3 consists of Bristol, Hampton Roads, and Lynchburg Districts. Implementation will begin on July 1, 2008, for this group.~~

~~C. Phasing by submission type and trip generation. Within each group of construction districts, implementation will be phased by the type of submission and the trip generation that each proposal is expected to generate.~~

~~1. Proposal submission that will be required at the start of each group's implementation:~~

~~a. All comprehensive plan and plan amendments submittals described in 24VAC30-155-30.~~

~~b. Rezoning, subdivision plat, site plan, and plan of development proposals as described in 24VAC30-155-40 and 24VAC30-155-50 for sites generating 500 vehicle trips per peak hour or more as described in 24VAC30-155-60.~~

~~2. All remaining proposal submissions subject to this chapter shall be required to be submitted beginning six months after the start of each group's implementation.~~

24VAC30-155-100. Listing of documents incorporated by reference.

Requests for information pertaining to the availability and cost of any of these publications should be directed to the address indicated below the specific document. Requests for documents available from VDOT may be obtained from VDOT's division and representative indicated; however, VDOT documents may be available over the Internet at www.vdot.virginia.gov.

1. Trip Generation (effective November, 2003)

Institute of Transportation Engineers
1099 14th Street NW
Suite 300 West
Washington, DC 20005

2. Trip Generation Handbook – an ITE Proposed Recommended Practice (effective 2004)

Institute of Transportation Engineers
1099 14th Street NW
Suite 300 West
Washington, DC 20005

3. Road Design Manual (effective January 1, 2005)

~~Location and Design Division (VDOT)~~ VDOT
1401 E. Broad Street
Richmond, Virginia 23219

4. Highway Capacity Manual (effective 2000)

Transportation Research Board
500 Fifth Street NW
Washington, DC 20001

5. Manual on Uniform Traffic Control Devices (effective December 22, 2003)

Federal Highway Administration
Superintendent of Documents
U.S. Government Printing Office
P.O. Box 371954
Pittsburgh, Pennsylvania 15250

6. ITE Manual of Traffic Signal Design (effective 1998)

Institute of Transportation Engineers
1099 14th Street NW
Suite 300 West
Washington, DC 20005

7. Transit Capacity and Quality of Service Manual, 2nd Edition (effective 2003)

Transportation Research Board of the National Academies
Keck Center of the National Academies
Transportation Research Board
500 Fifth Street, NW
Washington, DC 20001

8. Secondary Street Acceptance Requirements (24VAC30-92)

Commonwealth Transportation Board
1401 E. Broad Street
Richmond, Virginia 23219

9. Access Management: Principal Arterials (24VAC30-72)

VDOT
1401 E. Broad Street
Richmond, Virginia 23219

10. Access Management: Minor Arterials, Collectors, and Local Streets (24VAC30-73)

VDOT
1401 E. Broad Street
Richmond, Virginia 23219

VA.R. Doc. No. R10-2233; Filed December 2, 2009, 11:45 a.m.

DEPARTMENT OF ENVIRONMENTAL QUALITY

Study to Restore Water Quality in North Fork and South Fork Pound Rivers

Announcement of a public meeting and an effort to restore water quality in North Fork and South Fork Pound Rivers in Wise County, Virginia.

Public meeting location: The meeting will be held at the Pound Town Hall, 8422 North River Road, Pound, Virginia, on Thursday, February 2, 2010, from 6 p.m. to 8 p.m. (in case of inclement weather the snow date will be February 9, 2010, from 6 p.m. to 8 p.m.)

Purpose of notice: To seek public comment and announce a public meeting on a water quality improvement study by the Virginia Department of Environmental Quality, Department of Mines Minerals and Energy (DEQ), and Department of Conservation and Recreation for the North and South Fork Pound River in southwest Virginia. Significant changes were made to the draft document; therefore, a final public meeting is being scheduled for February 2, 2010, at 6 p.m.

Meeting description: Final public meeting on a study to restore water quality.

Description of study: DEQ has been working to identify sources of pollutants affecting the aquatic organisms in the waters of the North and South Fork Pound Rivers. The South Fork Pound River flows along Route 671 and confluences with the North Fork Pound River in the Town of Pound along Bus. 23. The "impaired" stream segments are estimated to total approximately 7.64 miles. The stream is impaired for failing to meet the aquatic life use based on violations of the general standard for aquatic organisms.

During the study, the pollutants impairing the aquatic community were identified and total maximum daily loads (TMDL) were developed for the impaired waters. A TMDL is the total amount of a pollutant a water body can contain and still meet water quality standards. To restore water quality, contamination levels must be reduced to the TMDL amount.

How a decision is made: The development of a TMDL includes public meetings and a public comment period once the study report is drafted. After public comments have been considered and addressed, DEQ will submit the TMDL report to the U.S. Environmental Protection Agency for approval.

How to comment: DEQ accepts written comments by email, fax, or postal mail. Written comments should include the name, address, and telephone number of the person commenting and be received by DEQ during the comment period, February 2, 2010, to March 4, 2010. DEQ also accepts written and oral comments at the public meeting announced in this notice.

To review draft TMDL report: The draft TMDL report on the impaired waters is available after February 1, 2010, from the contact below or on the DEQ website at www.deq.virginia.gov/tmdl.

Contact for additional information: Shelley Williams, Regional TMDL Coordinator, Virginia Department of Environmental Quality, Southwest Regional Office, 355 Deadmore Street, P.O. Box 1688, Abingdon, VA 24212-1688, telephone (276) 676-4845, FAX (276) 676-4899, or email sdwilliams@deq.virginia.gov.

Study to Restore Water Quality in Levisa Fork and Bull Creek

Announcement of a public meeting and an effort to restore water quality in Levisa Fork and Bull Creek in Buchanan County, Virginia.

Public meeting location: The meeting will be held at Riverview Elementary School on U.S. Route 460 west of Grundy, Virginia, on January 14, 2010, from 6 p.m. to 8 p.m. (in case of inclement weather the snow date for the meeting is January 21, 2010, from 6 p.m. to 8 p.m.)

Purpose of notice: To seek public comment and announce a public meeting on two water quality improvement studies by the Virginia Department of Environmental Quality (DEQ), Department of Mines Minerals and Energy, and Department of Conservation and Recreation for the Levisa Fork and Bull Creek in southwest Virginia.

Meeting description: Final public meeting on two studies to restore water quality.

Description of study: DEQ has been working to identify sources of pollutants affecting the aquatic organisms and sources of bacteria and polychlorinated byphenyl (PCB) contamination in the waters of the Levisa Fork including Slate Creek and Bull Creek. The "impaired" stream segments are estimated to be approximately 41 miles of the Levisa Fork and Slate Creek. The stream is impaired for failing to meet the aquatic life use (benthic impairment) based on violations of the general standard for aquatic organisms and failure to meet the recreational use because of fecal coliform bacteria violations. Levisa Fork was also found to have elevated levels of PCBs in fish tissue. The bacteria impairment extends from the mainstem of the Levisa Fork headwaters downstream to the Slate Creek confluence and from the Bull Creek confluence downstream to the Kentucky state line. The bacteria impairment includes Slate Creek from the Upper Rockhouse Branch confluence downstream to the confluence with Levisa Fork. The benthic impairment extends from the mainstem of the Levisa Fork at the confluence with Garden Creek downstream to the confluence of Bull Creek and from the Rocklick Branch confluence downstream to the Kentucky state line. The benthic impairment includes the Slate Creek mainstem from the Upper Rockhouse Branch confluence

downstream to the confluence with Levisa Fork. The PCB impairment begins at the headwaters and continues downstream to the Kentucky state line and includes Garden Creek from the confluence of Right Fork downstream to the confluence with Levisa Fork.

A separate study includes 16.9 miles of Bull Creek from the headwaters to the confluence with Levisa Fork and all tributaries; Belcher Branch, Deel Fork, Burnt Poplar Branch, Big Branch, Starr Branch, Jess Fork, and Convict Hollow. The stream is impaired for failing to meet the aquatic life use based on violations of the general standard for aquatic organisms. The stream is impaired for failing to meet the aquatic life use (benthic impairment) based on violations of the general standard for aquatic organisms.

The pollutants impairing the aquatic community have been identified and total maximum daily loads (TMDL) have been developed for the impaired waters. A TMDL is the total amount of a pollutant a water body can contain and still meet water quality standards. DEQ has also determined the sources of bacteria contamination and developed a TMDL for bacteria. To restore water quality, contamination levels must be reduced to the TMDL amount. The draft documents will be presented at the public meeting.

How a decision is made: The development of a TMDL includes public meetings and a public comment period for the draft study report. After public comments have been considered and addressed, DEQ will submit the TMDL report to the U.S. Environmental Protection Agency for approval.

How to comment: DEQ accepts written comments by email, fax, or postal mail. Written comments should include the name, address, and telephone number of the person commenting and be received by DEQ during the comment period, January 14, 2010, to February 15, 2010. DEQ also accepts written and oral comments at the public meeting announced in this notice.

To review draft TMDL report: The draft TMDL reports on the impaired waters are available after January 13, 2010, from the contact below or on the DEQ website at www.deq.virginia.gov/tmdl.

Contact for additional information: Shelley D. Williams, Regional TMDL Coordinator, Virginia Department of Environmental Quality, Southwest Regional Office, 355 Deadmore Street, P. O. Box 1688, Abingdon, VA 24212-1688, telephone (276) 676-4845, FAX (276) 676-4899, or email sdwilliams@deq.virginia.gov.

Study to Restore Water Quality in the Powell River

Announcement of a public meeting and an effort to restore water quality in the Powell River including the North Fork Powell River, South Fork Powell River, Butcher Fork, Wallen Creek, Bailey's Trace, Ely Creek, Gin Creek, Lick Branch, Puckett Creek, and Stone Creek in Lee County and Wise County, Virginia.

Public meeting location: The meeting will be held at Conference Room 219 in the Virginia Department of Mines, Minerals, and Energy's Buchanan-Smith Building, 3405 Mountain Empire Road, Big Stone Gap, Virginia, January 28, 2010, from 6 p.m. to 8 p.m. (in case of inclement weather the snow date will be February 4, 2010, from 6 p.m. to 8 p.m.)

Purpose of notice: To seek public comment and announce a public meeting on a water quality improvement study by the Virginia Department of Environmental Quality (DEQ), Department of Mines Minerals and Energy, and Department of Conservation and Recreation for Powell River including the North Fork Powell River, South Fork Powell River, Butcher Fork, Wallen Creek, Bailey's Trace, Ely Creek, Gin Creek, Lick Branch, Puckett Creek, and Stone Creek in southwest Virginia.

Meeting description: Final public meeting on a study to restore water quality.

Description of study: DEQ has identified sources of pollutants affecting the aquatic organisms and sources of bacteria contamination in the waters of the Powell River including the North Fork Powell River, South Fork Powell River, Butcher Fork, Wallen Creek, Bailey's Trace, Ely Creek, Gin Creek, Lick Branch, Puckett Creek, and Stone Creek in Lee County and Wise County, Virginia. The stream is impaired for failing to meet the aquatic life use based on violations of the general standard for aquatic organisms and failure to meet the recreational use because of fecal coliform bacteria violations, as well as violation of the E. coli standard.

The draft study identifies the pollutants impairing the aquatic community and total maximum daily loads (TMDL) have been developed for the impaired waters. A TMDL is the total amount of a pollutant a water body can contain and still meet water quality standards. DEQ also determined the sources of bacteria contamination and developed a TMDL for bacteria. To restore water quality, contamination levels must be reduced to the TMDL amount.

How a decision is made: The development of a TMDL includes public meetings and a public comment period for the draft study report. After public comments have been considered and addressed, DEQ will submit the TMDL report to the U.S. Environmental Protection Agency for approval.

How to comment: DEQ accepts written comments by email, fax, or postal mail. Written comments should include the name, address, and telephone number of the person commenting and be received by DEQ during the comment period, January 28, 2010, to March 1, 2010. DEQ also accepts written and oral comments at the public meeting announced in this notice.

To review draft TMDL report: The draft TMDL reports on the impaired waters are available after January 27, 2010, from the contact below or on the DEQ website at www.deq.virginia.gov/tmdl.

Contact for additional information: Shelley D. Williams, Regional TMDL Coordinator, Virginia Department of Environmental Quality, Southwest Regional Office, 355 Deadmore Street, P. O. Box 1688, Abingdon, VA 24212-1688, telephone (276) 676-4845, FAX (276) 676-4899, or email sdwilliams@deq.virginia.gov.

STATE LOTTERY DEPARTMENT

Director's Orders

The following Director's Orders of the State Lottery Department were filed with the Virginia Registrar of Regulations on November 24, 2009. The orders may be viewed at the State Lottery Department, 900 East Main Street, Richmond, Virginia, or at the office of the Registrar of Regulations, 910 Capitol Street, 2nd Floor, Richmond, Virginia.

Final Rules for Game Operation:

Director's Order Number Eighty-Six (09)

Virginia's Instant Game Lottery 1152 "Jumbo Bucks" Final Rules for Game Operation (effective 11/23/09)

STATE WATER CONTROL BOARD

Proposed Consent Special Order

An enforcement action has been proposed for Howard Hughes Medical Institute for alleged violations at the Janelia Farm Research Campus in Loudoun County, Virginia, stemming from a fuel oil spill that occurred at the Janelia Farm Research Campus. The proposed consent order requires corrective action and a civil charge. A description of the proposed action is available at the DEQ office named below or online at www.deq.virginia.gov. Stephanie Bellotti will accept comments by email at stephanie.bellotti@deq.virginia.gov, FAX (703) 583-3821, or postal mail at Virginia Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193, from December 22, 2009, to January 21, 2010.

VIRGINIA CODE COMMISSION

Notice to State Agencies

Mailing Address: Virginia Code Commission, 910 Capitol Street, General Assembly Building, 2nd Floor, Richmond, VA 23219.

Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed

Beginning with Volume 26, Issue 1 of the Virginia Register of Regulations dated September 14, 2009, the Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed will no longer be published in the Virginia Register of Regulations. The cumulative table may be accessed on the Virginia Register Online webpage at http://register.dls.virginia.gov/cumultab.htm.

Filing Material for Publication in the Virginia Register of Regulations

Agencies are required to use the Regulation Information System (RIS) when filing regulations for publication in the Virginia Register of Regulations. The Office of the Virginia Register of Regulations implemented a web-based application called RIS for filing regulations and related items for publication in the Virginia Register. The Registrar's office has worked closely with the Department of Planning and Budget (DPB) to coordinate the system with the Virginia Regulatory Town Hall. RIS and Town Hall complement and enhance one another by sharing pertinent regulatory information.

The Office of the Virginia Register is working toward the eventual elimination of the requirement that agencies file print copies of regulatory packages. Until that time, agencies may file petitions for rulemaking, notices of intended regulatory actions and general notices in electronic form only; however, until further notice, agencies must continue to file print copies of proposed, final, fast-track and emergency regulatory packages.