INTERIM REPORT OF THE
JOINT LEGISLATIVE
AUDIT AND REVIEW COMMISSION ON

# Review of Virginia's Administrative Process Act

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

# HOUSE DOCUMENT NO. 32

COMMONWEALTH OF VIRGINIA
RICHMOND
1992

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# Preface

The Virginia Administrative Process Act (VAPA) generally governs the regulatory proceedings of State agencies. The act applies to agency actions during the development, promulgation, and application of regulations. It provides for public participation in the regulatory process, as well as certain forms of executive, legislative, and judicial review of regulatory actions.

During the 1991 General Assembly Session, several bills indicated legislative interest in issues concerning VAPA. One of the bills, House Joint Resolution No. 397, is the mandate for this study. HJR 397 requests the Joint Legislative Audit and Review Commission (JLARC) to study whether amendments to VAPA are necessary. Issues raised in the mandate include the efficiency and effectiveness of the act and the meaningfulness of public participation under the act.

This interim report provides an overview of the basic structure, features, and stages of the current VAPA. The historical development of the act is described. A brief summary is provided of remarks received and issues raised at a JLARC public hearing on VAPA held in September 1991. Preliminary study issues are also identified. A final report with findings and recommendations is expected in the summer of 1992.

Philip A. Leone
Director

January 8, 1992

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# I. Overview of Virginia's Administrative Process Act

The current Virginia Administrative Process Act (VAPA) sets forth a four-part basic structure for the administrative process. It provides for certain exemptions from its requirements, and provides for executive, legislative, and judicial review of agency actions. It also mandates certain steps or proceedings that must be followed by agencies in taking administrative actions.

## BASIC STRUCTURE OF THE ADMINISTRATIVE PROCESS

VAPA distinguishes between rules or regulations and case decisions. A rule or regulation is defined as:

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

A case decision is defined as:

> . . . any agency proceeding or determination that, under laws or regulations at the time, a named party . . . [is] (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

An example may help illustrate this distinction. An agency is engaging in rulemaking when it adopts a statement providing for the granting of licenses to all individuals who meet certain criteria specified in the statement. After adoption of the statement as a rule or regulation, an agency is making a case decision when it determines whether or not a particular individual or firm qualifies for such a license, or whether or not a particular individual or firm has committed abuses such that the license should be revoked or suspended or some penalty assessed.

VAPA provides an administrative process with a four-part structure, as it provides for two rulemaking components and two case decision components. The rulemaking components are informational proceedings and evidential hearings. The case decision components are informal fact finding and provisions for "litigated" (contested) issues.

## Rulemaking: Informational Proceedings

Informational proceedings under VAPA involve agency actions to obtain general views, data or arguments on a proposed regulation from the public, either through written submissions or through public hearings. VAPA provisions relative to informational proceedings are contained in §9-6.14:7.1 of the *Code of Virginia*. The focus of the section is that "each agency is to develop guidelines pursuant to the chapter for soliciting public participation in the formation and development of its regulations." The guidelines of the agency must set forth the methods for identifying and notifying interested parties about the proposed regulation, and the specific means of seeking input from interested parties.

An agency must give interested parties an opportunity to submit information to it, orally or in writing. Before promulgating a regulation, an agency also must deliver a copy of the regulation, with a summary and concise statement about the regulation, to the Registrar of Regulations (who is under the direction of the Virginia Code Commission). However, unless required by other law, agencies are not required by VAPA to hold hearings on the proposed regulation. An agency may elect to hold a public hearing even though not required.

## Rulemaking: Use of Evidential Hearings

In some cases, the conduct of the informational proceedings just described may not be sufficient. At its discretion or as required by law, an agency may conduct hearings to receive evidence as provided for in §9-6.14:8. At the hearing, "the agency or one or more of its [designated] subordinates" shall preside and may administer oaths. The proceedings are to be recorded verbatim. The agency may promulgate the regulation only after a finding of fact that sustains the regulation.

## Case Decisions: Informal Fact Finding

The two components just discussed relate to the process for adopting a regulation. VAPA also provides processes for agencies to follow in making case decisions that arise in implementing a regulation after it goes into effect, such as in making decisions about benefits or licenses. Informal fact finding, and litigated issues as discussed in the next section, are two methods provided by VAPA to resolve these cases.

Informal fact finding, set forth in §9-6.14:11, involves agency conferences or consultation to obtain facts necessary to make a case decision and reach consensus, if possible, with the party affected by an agency regulation. VAPA provides certain rights to affected parties: to have reasonable notice of the informal conference or proceeding; to be present or have counsel or other qualified individuals present to present data, arguments, or proof; to have notice of contrary facts in the possession of the agency; to receive a prompt decision; and to be informed in writing of the factual basis for the agency decision.

The agency reaches a decision through this informal fact finding process. If the affected party wishes to further challenge the agency's decision, it may litigate the issue.

## Case Decisions: Litigated Issues

If the affected party challenges the agency decision, then an opportunity is provided to the affected party under §9-6.14:12 to take the case before a hearing officer for the formal taking of evidence. Hearing officers are selected on a rotation basis from a list of attorneys prepared by the Executive Secretary of the Supreme Court. Decisions of the hearing officer are not binding on the agency, however.

# KEY FEATURES OF THE ACT

In addition to the basic structure, there are several features that VAPA contains that should be noted. These features include: exemptions from provisions of the Act (specified in the Act); executive and legislative review of regulations; and judicial review of agency rulemaking and case decisions.

## Exemptions from VAPA Provisions

A listing of exemptions to VAPA is provided in §9-6.14:4.1. The section currently provides for 44 exemptions to all or part of VAPA, with four more exemptions to become effective July 1, 1992). Of the 48 exemptions to be effective by July, 33 are exemptions to the entire Act. There are 17 entities and 16 types of agency actions that are fully exempt. Additionally, there are seven exemptions to the rulemaking provisions of the Act (all of these pertain to types of agency actions), and there are eight exemptions to the case decision provisions (three are entity-specific and five are types of agency action).

Examples of entities exempted include: the General Assembly, the Courts, the Department of Game and Inland Fisheries, the Virginia Housing Development Authority, and State educational institutions. Examples of exempted agency actions include those related to elections, prison inmates, rules for the conduct of lottery games, agency orders or regulations fixing rates or prices, regulations which establish or prescribe internal agency organization or operation, and regulations which an agency finds are necessary due to an emergency situation. In cases of emergency, the agency is to state in writing to the Governor the nature of the emergency. With approval from the Governor, the agency may adopt the emergency regulation, but the effect of such regulations is limited to no more than 12 months.

## Executive and Legislative Review of Regulations

VAPA provides for executive and legislative review of proposed regulations. The Act requires Governors to set forth by executive order the procedures that will be used to review all proposed regulations that are subject to the Act. The Act also requires that these procedures include the following three elements:

(i) review by the Attorney General to ensure statutory authority for the proposed regulations;

(ii) examination by the Governor to determine if the proposed regulations are necessary to protect the public health, safety and welfare; and

(iii) examination by the Governor to determine if the proposed regulations are clearly written and easily understandable.

The Governor is to provide comments to the agency prior to the completion of the public comment period. According to the Act, the agency may adopt the regulation without change despite the Governor's recommendations for change. If substantial changes are made to the regulation, then the Governor may suspend the process for 30 days to require the promulgating agency to seek additional public comment on the changes made. Upon publication of the final regulation in the *Virginia Register of Regulations*, the Governor has the opportunity to forward any objections during a 30-day adoption period.

Legislative review is through the standing committee of each house of the General Assembly that deals with matters related to the content of the proposed regulation. During the promulgation or final adoption period, the standing committees may meet and file an objection to the regulation. Within 21 days from the receipt of the legislative objection, the agency must file a response to the objection with the Registrar, the objecting committee, and the Governor.

## Judicial Review of Agency Rulemaking and Case Decisions

For "any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision," §9-6.14:16 provides a right to judicial review. Although VAPA exempts the "grant or denial of public assistance" from its case decision provisions, VAPA extends the right of judicial review to agency decisions involving the grant or denial of aid to dependent children, Medicaid, food stamps, general relief, auxiliary grants, or state-local hospitalization. However, challenges to agency decisions cannot be made on the issues of the standards of need or the amount of payments that have been established for public assistance programs.

Court actions may be instituted "in any court of competent jurisdiction," and may be appealed to higher courts. In case decision matters, the review is based solely on the record that was established at the informal hearing. The review is conducted to consider whether there is evidence in the agency record to support the case decision.

## STEPS IN THE RULEMAKING PROCESS

Figure 1 shows a graphic from the *Virginia Register* procedure manual illustrating the normal sequence of the administrative process for developing and promulgating a regulation. As shown, to comply with most agency public participation guidelines, the first step is to provide notice that regulatory action is intended. The agency submits a form to the Registrar describing the purpose of the proposed action and identifying a deadline date by which written comments from the public must be received. The deadline date is established based on the agency's public participation guidelines. Based upon the form from the agency, a notice of intended regulatory action is then published in the *Register*.

The agency then submits a proposed regulations package, that includes a notice of comment form. This package provides the information that is necessary to publish the proposed regulation pursuant to §9-6.14:7.1. It includes a summary of the regulation; a statement of basis, purpose, substance, issues and impact of the regulation; and a copy of the proposed regulation. The Department of Planning and Budget and the Governor's Office require that proposed regulations be filed with their offices when the regulations are filed with the Registrar.

The next steps in the process are the closing and publication of the *Register*. Close dates, or deadline dates for the submission of material for publication, occur at two week intervals. Publication dates are 19 days after the close date. A manual of the Registrar of Regulations identifies the *Register* close dates and publication dates for the year.

The proposed regulation is published in the *Register* in accordance with §9-6.14:7.1. The notice of the comment period will appear in each issue of the *Register* until either the public hearing date or a 60-day written comments deadline has elapsed, whichever is later. The requirement for a 60-day period during which comments may be submitted is contained in the *Code of Virginia*.

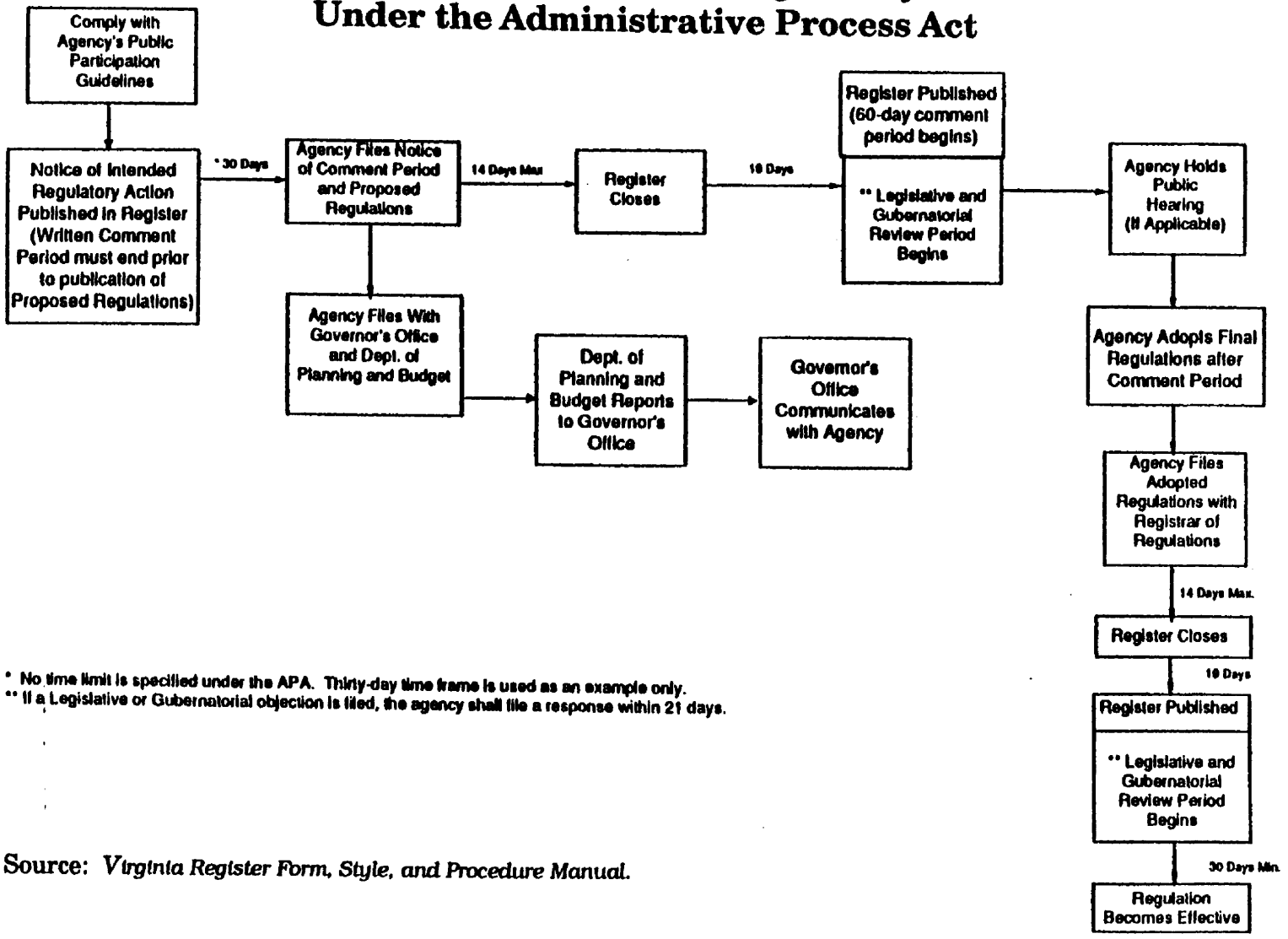
With the publication of the regulation in the *Register*, a period of executive and legislative review begins. The *Code of Virginia* requires that the Governor comment on the proposed regulation prior to the completion of the public comment period. The standing committees of the General Assembly may also file an objection to the proposed regulation during this phase of the process.

If applicable, the agency may hold a public hearing. If the agency adopts a regulatory change, the agency then files the adopted regulation with the Registrar of Regulations before one of the close dates, and the adopted regulation is published in the *Register*.

The *Code of Virginia* requires a minimum 30-day final adoption period that begins with the publication of the final regulation in the *Register*. As discussed previously, under certain circumstances the Governor can suspend the regulatory

Figure 1

## Normal Time Sequence for Regulatory Action Under the Administrative Process Act




* No time limit is specified under the APA. Thirty-day time frame is used as an example only.
** If a Legislative or Gubernatorial objection is filed, the agency shall file a response within 21 days.

Source: *Virginia Register Form, Style, and Procedure Manual.*

process at this point, or the Governor or the Legislature can file an objection. As provided in §9-6.14:9.3, however, regulations may take effect even over executive or legislative objections if the 21-day extension period and/or the Governor's suspension of the process has ended, and the promulgating agency has not withdrawn the regulation.

# II. Overview of VAPA's Historical Development

The Virginia Administrative Process Act (VAPA) was established in 1975 to replace the General Administrative Agencies Act of 1952. The Virginia Code Commission, in its 1975 report to the Governor and the General Assembly recommending the adoption of VAPA, characterized the GAAA as "largely unused and unusable," as well as being inoperable and substantially meaningless.

Since its enactment, VAPA has itself received a number of revisions. Some of these modifications were aimed at increasing notification of those parties potentially affected by regulations, or were designed to consolidate various sub-sections of the Act. Other more substantial and extensive revisions have also occurred.

## ORIGIN OF THE VIRGINIA ADMINISTRATIVE PROCESS ACT

Virginia enacted its first statutes to regulate administrative processes in 1944, but these statutes did not constitute a unified act. The statutes were replaced in 1952 with the General Administrative Agencies Act (GAAA), which was based upon a model state act developed by the Commissioners on Uniform State Laws.

The Virginia Code Commission examined the GAAA in the early 1970s and recommended that it be replaced. The Commission identified three specific problems with the GAAA. First, the GAAA was said to be "riddled with general exceptions of agencies and subjects" which left it little to relate to. Second, the Code Commission considered the GAAA to be "technically defective" because it failed to make distinctions between the processes associated with making regulations and those associated with making case decisions. The Commission speculated that this characteristic may have been what led the General Assembly to include so many exemptions in the GAAA. Third, the GAAA was described as being "overly simplistic in conception," in that it assumed that all administrative powers were the same in kind and method. This was said to be in contrast to "basic laws," which constitutionally or statutorily define whether agencies have authority to regulate and decide cases, as well as the types of procedures they must follow in doing so.

Despite the basic flaws it identified with the GAAA and the model act upon which was based, the Code Commission did not believe that outright repeal of the Act would be feasible. The Commission observed that many laws relating to administrative powers referred to the GAAA and appeared to adopt it by reference. Nor did revision of the GAAA seem to be an acceptable alternative, as the number of amendments required would be so many as to render the revised statutes unrecognizable. Therefore, the Commission offered a new legislative package to the 1975 session of the General Assembly, which it called the Virginia Administrative Process Act.

## Need for VAPA

The Code Commission identified the need for a general administrative process act as doing generally what the Legislature could not do every time it conferred administrative powers:

- to guide agencies,
- to inform the public, and
- to lessen the chances for miscarriage of administrative justice by agencies or by courts reviewing administrative action.

In addition, the proposed VAPA was designed to provide clarity, recognize the needs of the administrative process, aid and expedite administration and inform the public, as well as provide protection to individuals and organizations subject to its control. Therefore, the 1975 legislation attempted to distinguish regulatory processes from processes involved in rendering case-fact decisions. Also, the proposed VAPA made distinctions between regulatory processes which required informational proceedings and those which required evidential proceedings.

## Features of the 1975 VAPA

Consistent with its criticisms of the GAAA's shortcomings, the VAPA recommended by the Code Commission contained distinctions between those processes associated with making administrative regulations and those associated with case decisions. Within the article dealing with regulations, regulatory proceedings were identified as being either "informational" or "evidential" in nature. Agency activities associated with each type of proceeding were identified. Likewise, the article dealing with case decisions differentiated between those processes associated with trial and non-trial fact finding related to decision making. Another article within the 1975 VAPA dealt with court review of agency regulations and case decisions.

# CHANGES IN VAPA SINCE 1975

Since its initial passage in 1975, VAPA has undergone a number of revisions by the General Assembly (Exhibit 1). Several revisions, especially from 1983 through 1986, came in response to recommendations from the Governor's Regulatory Reform Advisory Board. This board had been created in 1982 to advise the Governor of opportunities to improve the regulatory climate in the State.

Several of the revisions since the initial creation of VAPA have been concerned with increasing public notice regarding agency regulations. These revisions have required agency actions both prior to the time when regulations take effect, as well as

Exhibit 1

# Major Changes in the Administrative Process Act: 1975 - 1991

1975 - Virginia Administrative Process Act replaces the General Administrative Agencies Act.

1977 - Agencies required to notify political subdivisions when proposed regulations expected to cost more than $1,000.

- Agencies required to send copies of proposed regulations, plus statement of basis, purpose, and impact to the director of Legislative Services.
- Agencies required to estimate number of people affected and costs of implementation and compliance of adopted regulations.

1981 - Legislative veto enacted.

1984 - Sections repealed requiring notification of political subdivisions and submitting copies of proposed regulations to the director of legislative services.

- Virginia Register of Regulations created; all proposed and final agency regulations required to be filed with registrar of regulations for publication in the Register.
- Agencies with regulatory responsibilities required to solicit public participation when drafting regulations.
- Legislative veto repealed, replaced by system of legislative committee review and comment.
- Governor to adopt procedures for review of all proposed regulations, including review by the Attorney General.
- Governor to mandate procedures for on-going periodic review of existing regulations.

1985 - Definition of regulation revised.

- Public participation required for all proposed regulations, not just substantive changes.
- All exempted agencies and actions consolidated under one subsection.
- Full rule-making and adjudication exemptions granted to the Milk Commission, the Marine Resources Commission, and the Virginia Resources Commission.

1986 - Standardization of procedures for obtaining judicial review of State agency action.

- Systematized hearing officer use, training, and discipline.

## Exhibit 1

**(continued)**

1987 - Addition of the severability clause.

- Virginia Voluntary Formulary Board exempted.
- Habitat management guidelines and general permits issued by the Marine Resources Commission no longer exempted from public comment.

1988 - Standards for inspection of asbestos in hospitals, buildings to be renovated or demolished, child care centers, and condominium conversions exempted.

- Agencies required to annually review references to *Code of Virginia* cited within regulations to ensure accuracy.
- Maximum 12 month limit placed upon emergency regulations adopted without public notice and comment.

1989 - Agencies required to provide registrar of regulations with a summary of proposed regulation and a concise statement of basis, purpose, substance and issues.

- Agencies required to provide advance notice of intent to rely upon public data, documents or information in making case decisions.
- Rules for conduct of specific lottery games exempted.
- Orders condemning or closing shellfish, finfish, or crustacea growing areas exempted.
- Amendments to water quality standards by State Water Control Board required to have formal hearing.
- Standards for inspection of asbestos exempted in 1988 repealed.
- Public assistance case decisions regarding aid to dependent children, Medicaid, food stamps, general relief, auxiliary grants, and state and local hospitalization made subject to judicial review.

1990 - Virginia Medicaid Formulary Committee exempted.

- Medicaid New Drug Review Committee exempted.

1991 - SCHEV guidelines regarding tuition relief, refunds, and reinstatement of certain students exempted.

- Regulatory activities regarding adoption of some federal standards by the Commissioner of VDACS exempted.
- In litigated issues, agencies to give preference to findings by presiding officer explicitly base on the demeanor of witnesses.

Source: *Code of Virginia*; *Virginia Law Review*, 1975, 1977; and *University of Richmond Law Review*, 1984 - 1990.

after regulations are adopted. Other revisions have at times consisted of both increasing and decreasing the specific agencies and agency actions that are exempt from the Act, while still others have addressed the roles of elected State officials regarding agency rule making. Finally, some revisions have had the intent of addressing specific issues regarding how agencies are to fulfill their responsibilities under VAPA.

## Revisions Intended to Increase Public Knowledge

Beginning in 1977, several changes in agency notification of parties affected by proposed regulations were enacted by the General Assembly. Revisions to the Act in that year included a requirement that agencies were to notify any political subdivisions when proposed regulations were expected to cost more than $1,000. This was accomplished by sending copies of the regulations to the affected parties prior to December 1. In addition, such regulations would not take effect until the following February 1, allowing the affected parties time to respond to the proposed regulations. Agencies were also required to send copies of proposed regulations, as well as a statement of their basis, purpose, and impact, to the Director of Legislative Services. Prior to public hearings on proposed regulations, agencies had to make available copies of reporting forms that would be used in administering the regulations.

Another 1977 revision required that after regulations were adopted, agencies were to estimate the number of people affected and the costs associated with implementation and compliance. In addition, it was required that each regulation contain a citation to the enabling section of the *Code of Virginia* and any federal law with which the regulation must conform.

Revisions to VAPA that took place in 1984 were also aimed at increasing agency notification of proposed regulatory action to the public. First, the *Virginia Register of Regulations* was created and placed under the direction of the Virginia Code Commission and the Registrar of Regulations. The *Register* was conceived as a biweekly publication listing the full text and a summary of proposed regulations. Also in 1984, all State agencies with regulatory responsibilities were required to adopt and follow public participation guidelines for the purpose of increasing public input at an earlier stage in the regulatory process. Specifically, agencies were now required to solicit public input during the drafting stage, rather than writing proposed regulations and then releasing them for public comment.

Additional revisions aimed at the public notice features of VAPA occurred in 1985. With regard to the need for public participation, the General Assembly decided to eliminate the distinction between substantive and other regulations. This revision had the effect of requiring agencies to solicit public opinion on all changes in regulations, not just those defined by the agency as substantive.

A final notification-related revision was adopted in 1989. At that time, the General Assembly chose to require agencies to provide the register of regulations with a summary of each proposed regulation and a concise statement of its basis, purpose, and issues.

## Exemptions to VAPA

In 1985 the General Assembly chose to consolidate under one subsection the list of exempted agencies and actions, which until that time had appeared in several places throughout the Act. During that same year, full rule-making and adjudication exemptions were extended to the Milk Commission, the Marine Resources Commission, and the Virginia Resources Authority, each of which had previously been partially exempted from VAPA.

In 1987, changes recommended by the Virginia Voluntary Formulary Board were removed from the jurisdiction of VAPA. Also in that year, some actions by the Marine Resources Commission, specifically habitat management guidelines and general permits, were brought back under the requirements of VAPA.

During the 1989 session of the General Assembly, two new exemptions to VAPA were created, including: (1) rules for the conduct of specific lottery games, and (2) orders condemning or closing growing areas for shellfish, finfish, and crustacea. In addition, formal hearings were required for amendments to State Water Control Board water quality standards, while amendments to asbestos inspections standards, which had been exempted in 1988, were brought back under VAPA. Finally in that year, public assistance decisions became subject to judicial review of agency case decisions for the first time. However, judicial review in these cases was limited to a review of the agency record and the basis of the case decision, and specifically did not include the adequacy of standards of need and payment levels for public assistance programs.

Two exemptions were added to VAPA after the 1990 session of the General Assembly. These included recommendations made by the Virginia Medicaid Formulary Committee as well as those made by the Medicaid New Drug Review Committee.

Finally, during the 1991 session the General Assembly chose to exempt some of the regulatory activities of the State Council on Higher Education in Virginia (SCHEV) as well as the Commissioner of the Department of Agriculture and Consumer Services (VDACS). SCHEV's exemption pertained to its development, issuance, and revision of guidelines regarding tuition relief, refunds, and reinstatement of certain students. Regulatory activities by the Commissioner of VDACS were exempted in two areas. First, federal regulations relating to animal health, contagious diseases, and quarantine may be adopted by the Commissioner and will be effective upon being filed and published by the Registrar of Regulations. Second, the Commissioner may adopt any regulation no less stringent than federal regulations pertaining to meat inspection. Such regulations will be effective upon being filed and published by the Registrar of Regulations. VAPA also exempted revisions to these regulations made by the Board of Agriculture and Consumer Services.

## Roles of Elected State Officials

In 1981, the General Assembly added a legislative veto provision to VAPA. This revision had the effect of investing legislative committees with the authority to postpone

the effective date of new regulations to which they objected until they were considered by the full General Assembly during its next session. If the General Assembly failed to uphold a committee's objection, the regulations would take effect 30 days after the agency filed them with the Registrar of Regulations. However, if by joint resolution the General Assembly upheld the objection of the committee, the regulation was nullified.

The implementation of the legislative veto led to questions regarding its constitutionality. In 1982 the Attorney General issued an opinion indicating that the legislative veto violated State constitutional requirements for separation of powers and lawmaking.

In response to these concerns, the 1984 session of the General Assembly revised VAPA by including a section requiring oversight of all proposed and final regulations by the Governor. Included in this requirement was a mandate that the Attorney General review all proposed regulations to ensure statutory authority of the agency, a determination by the Governor whether the regulations are necessary, and a determination by the Governor whether the regulations are clearly written and easily understandable.

Also in 1984, the General Assembly repealed the legislative veto but specified the authority of legislative committees to review specific regulations within their purview and to make their objections, if any, known to the agency. Finally, another revision required on-going periodic review of all existing regulations by the Governor and the Attorney General to help keep regulatory activities under control and minimize interference with the lives of businesses and Virginia residents.

## Case Decisions and Formal Fact Finding

Revisions to VAPA that occurred during two legislative sessions, 1986 and 1989, had specific bearing on agency case decisions and other actions. First, in 1986 the General Assembly responded to conflict of interest questions regarding the use of hearing officers employed by agencies. Following the recommendations of the Governor's Regulatory Reform Advisory Board, a systematized structure was created for the use, training, and discipline of hearing officers to be administered by the Executive Secretary of the Supreme Court. Also in that year, procedures for standardizing judicial review of State agency actions were put into place, making the basic laws reflective of the procedures identified in VAPA.

In a related area, the 1989 revision dealt with information used by agencies in making case decisions. This revision required agencies to provide advance notice of their intent to use public data, documents or information in making case decisions.

Finally, a 1991 revision affected findings made by presiding officers in formal proceedings. This revision stipulated that when appeals are filed, agencies must give deference to findings that are explicitly based on the demeanor of witnesses or the officer's interpretation of a witness' credibility.

# III. Summary of JLARC Public Hearing on VAPA

For this study, a subcommittee of JLARC was formed consisting of Senators Clive L. DuVal 2d and William A. Truban and Delegates Lewis W. Parker Jr., William Tayloe Murphy Jr., and Jay W. DeBoer. A public hearing on VAPA was held by the subcommittee on September 9, 1991. The main issue areas for the public hearing were those outlined by HJR 397, including:

- the efficiency and effectiveness of the Act;
- business community concerns about the implementation of the Act; and
- the meaningfulness of public participation under the Act.

Eight speakers addressed the subcommittee. Six of the speakers also submitted written materials. The following are summaries of each speaker's remarks and responses to questions from the subcommittee. The summaries are meant to preserve both the tone and content of each speaker's comments. Also included is a summary of written comments from three sources that were received shortly after the public hearing.

## SUMMARY OF COMMENTS PRESENTED AT THE HEARING

### John Johnson - Virginia Farm Bureau

The Farm Bureau believes a measure similar to former President Reagan's Executive Order 12630, requiring all federal regulations to consider and minimize the impact of regulations on the use and value of private property, is appropriate for Virginia's APA. The Bureau supports HB 1969, which failed passage in the 1991 session of the General Assembly, and would have required "a written comparison of the merits of the proposed regulation in protecting the public health, safety and general welfare versus the regulation's general impact on the use and value of private property and the approximate costs to the regulated person."

Mr. Johnson stated that there would have been no great expense incurred by the State if HB 1969 had passed. He based his argument on two points: (1) VAPA already requires State agencies to assess the impact of their regulations, and (2) an assumption that the agencies would know the intended benefit of their regulation. Mr. Johnson urged amendment of VAPA to include the provisions of HB 1969.

Senator DuVal asked Mr. Johnson how he would easily determine the value of a wetland. Mr. Johnson replied that one way would be to figure its replacement cost, and another way would be to assign a value to the wildlife that resides there in terms of the

recreational opportunities of the sportsmen who utilize that marsh and the income that would be generated to the communities through those recreational opportunities. Mr. Johnson said that he did not think it would be impossible to do, but that it had not been tried. Senator DuVal observed that it would not be impossible, but neither would it be very easy, and it would take time.

**Betty Long - Virginia Municipal League (VML)**

The VML has two main areas of concern with VAPA: public participation and periodic review of agency regulations. Regarding public participation, guidelines vary from one agency to another and are not published in one place. This creates a burden on localities dealing with many agencies. Greater uniformity would facilitate involvement in the regulatory process.

One area that lacks uniformity is the Notice of Intended Regulatory Action, which alerts parties to contemplated regulatory action. Each agency decides whether to include a requirement of advance notice in its public participation guidelines. Also, some agencies use only the Virginia Register for such notice, while others develop their own lists of contacts.

An additional concern in this area is the length of time between publication of intent to regulate and proposed regulations themselves. There are no timelines for this phase currently stipulated in VAPA. The timelines can be too short; it is conceivable for the publication of the proposed regulation to appear in the next issue of the *Register* following publication of the intent to regulate.

Strengthening requirements during the early phase of the regulatory process is the important issue for local governments. Meaningful input requires early involvement. The comment period is somewhat perfunctory, as agencies have already decided how they wish to proceed before they are published for comment. Changes thereafter tend to be minor.

Concerning public participation, the VML recommends:

- Require all agencies to publish a notice of intended regulatory action prior to developing proposed regulations.

- Improve the process whereby interested parties are notified of the intended regulatory action. For local governments, include the VML and the Virginia Association of Counties on each agency's mailing list as a minimum requirement.

- Require all agencies to utilize *ad hoc* advisory panels of regulated parties.

- Require proposed regulations to be published no sooner than 90 days after the notice of intent to regulate has been published.

Regarding the second area of concern, the current VAPA does not go far enough to ensure that all regulations receive periodic reviews to determine whether they are achieving their intended purpose. The VML would like to see this aspect strengthened in VAPA.

Senator DuVal asked for clarification regarding whether agencies do or do not publish a notice of intended regulatory action. Ms. Long indicated each agency develops its own public participation guidelines and it is their option whether or not they publish an intent to regulate. Agencies that do publish their intent to regulate publish in the *Virginia Register* and may also publish in a newspaper or develop their own list of interested parties. Each agency does things differently. Senator DuVal also asked for clarification regarding VML's recommendation for a 90-day time period between the notice of intent to regulate and the publication of the proposed regulations. Ms. Long replied that the period up front is most important, and a longer time period would give local governments and others time to respond and improve public participation. She also indicated that if there were more time prior to the actual regulations being proposed, there could perhaps be some shortening of the time period between publishing the proposed regulations and their adoption.

**David Bailey - Environmental Defense Fund**

Mr. Bailey said VAPA is not achieving legislative intent. Agencies and the courts are confused over many of the issues. Some of this occurs in relation to the judicial review sections of VAPA. There is an interrelationship between VAPA and the Supreme Court Rules, but it is not always very clear. In some cases neither VAPA nor the Supreme Court Rules define critical terms, while in other cases one may contain a definition which appears to be at odds with the other. As a result, it is difficult to determine who is covered by VAPA or when it applies.

The question of who is covered deals with definitions. The General Assembly has left the courts to define terms, such as "person affected," "party affected," "party," or "person," which are used but not defined in VAPA. These terms are critical because they determine who gets certain rights and privileges and who has access to certain remedies.

Use of terms is also confusing. For example, the Supreme Court Rules talk about a "party" being a person who appeared at a hearing, but they do not define "hearing" or "party." VAPA defines "hearing" only as a formal hearing. Thus, considering the Rules and the VAPA together, a "person" is only a party who attended a formal hearing. However, the Supreme Court Rules also appear to identify formal hearings as a subset of the circumstances to which the rules apply, thus implying that informal hearings may be covered by the rules. So there appears to be a direct conflict between the two.

The courts have had difficulty applying VAPA, due to two pieces of seemingly contradictory language within VAPA. One is VAPA's purpose statement, which says the act is to supplement the organic statutes. There also is a section dealing with court review, which says VAPA will apply unless language in the statute expressly precludes

VAPA. The courts have had difficulty sorting this out, and most decisions have given a very narrow interpretation to VAPA, relying on the purpose statement rather than other language. The result is that the courts have basically stated that VAPA will supplement only the organic statute, meaning if there is any other language about procedure, standing, or how activities are supposed to go, such language will rule and VAPA will have no application.

This leads to two consequences: (1) the statute may be in part or in whole completely outside of VAPA, yet it may not contain sufficient administrative mechanisms to proceed in an administrative process, and (2) in the court review section, it has led the courts to believe that whatever the language in the organic statute says it will preclude VAPA. The result is that there are very different levels of standing for judicial review or for rules and regulation review.

Due to two recent court decisions, it appears that VAPA is only going to apply to an agency if there is language specifically saying that VAPA applies to the statute. Furthermore, if there is any different language in the organic statute, VAPA is not going to apply. The way this is heading is that VAPA is not going to be applicable, or is only going to be applicable in part, to a large number of administrative agencies. This seems to be counter to the original intent of VAPA.

This has a very negative impact on the public participation requirement of VAPA, especially in the environmental area. Due to the confusion over standing and the likelihood that most people will not have standing, agencies almost never grant formal hearings for fear that they might create standing. The result has been that informal hearings (the public participation meetings) have been turned into the only forum that anyone has before the agency. Consequently, all the attorneys come in, legal briefs are filed, and the proceeding becomes adversarial, with the agency staffs being very defensive and little or no information is exchanged.

Regarding the economic impact of regulations, most State agencies are not staffed to perform that type of analysis, and many of the economic analyses that are seen are very shallow and thin. Secondly, most often the economic information that comes in is from the regulated community, and most often agencies do not have the time or expertise to look behind the information and put together their own independent economic analysis. Finally, requiring agencies to put together that type of analysis, and in many cases to try assigning values to things that are difficult to assign such values to, will have the effect of lengthening the process. Instead, we should concentrate on the many ways in which someone might be able to comply with the statute, and consider which ways are more economic.

## Philip Abraham - Virginia Bar Association, Administrative Law Section

The administrative law section of the VBA is promoting the establishment of a Virginia code of regulations, which would be a permanent compilation of all State regulations. It would be kept current through the periodic issuance of supplements, and between supplements through the *Virginia Register of Regulations*. It would be funded

by paid subscriptions, while start-up costs and any other costs not recovered through subscriptions would be borne by the publisher.

This type of code is currently published in 40 other states and by the federal government. It is needed due to the difficulty in obtaining the current version of regulations on a timely basis. Currently one has to request current versions of regulations directly from agencies, which can be time consuming and frustrating.

The code of regulations would be of significant value to law firms, and to academic, judicial, and municipal libraries. There should be no charge to public libraries to increase the availability of the code to the general public.

Although early attempts to quantify start-up costs were discouraging, the Michie Publishing Company has indicated serious interest and is actively pursuing publishing the code at no start-up cost to the State. Other law publishers have also expressed an interest in publishing the code.

The administrative law section of the VBA asks the subcommittee to consider the following actions:

- Endorsing the need for a comprehensive Virginia code of regulations that would contain all existing State regulations of executive branch agencies, as well as those of the State Corporation Commission.

- Exploring the steps needed to ensure that all State agencies have submitted the full text of their existing regulations to the Registrar of Regulations. Some agencies may not have yet done so. All regulations should be submitted to the Registrar and entered on its data base to facilitate the eventual publisher's work and to ensure that the Virginia code of regulations is comprehensive and meets its full potential.

- Recognize the need to adopt legislation, including additions to the VAPA, the Virginia Register Act, and/or the Virginia Code Commission's enabling legislation. Legislation could be similar to Article 7 of the VAPA, which created the *Virginia Register*, and would facilitate establishment of the official Virginia code of regulations and provide for distribution of copies without charge to public libraries and other appropriate entities.

Delegate DeBoer asked what the initial cost estimates had been for the code. Mr. Abraham replied that one publisher had wanted $1 million, but the price came down dramatically when a number of publishers were solicited. In addition, start-up costs are expected to be less, since most of the regulations are already on the Registrar's database. Delegate DeBoer also asked how many shelf feet the code of regulations would require. Mr. Abraham indicated it might require twice as many shelves as the *Code of Virginia*.

Senator DuVal asked if amendments to the law are necessary concerning the *Virginia Register*, calling for more frequent supplements, for example. Mr. Abraham replied that the *Register* comes out twice a month and contains only the proposed and

final text of regulations. To go back and find a regulation in the *Register* requires searching through seven years of bi-monthly *Register* publications, and very few people can keep them. The real purpose of the *Register* was to give everyone an opportunity to provide comments when a regulation was proposed. The code of regulations would be similar to the *Code of Virginia*, in that it would be published annually and each agency would have a different title containing all it's existing regulations. As changes were made to the regulations, new supplements would be issued. The Virginia *Register* would be used as a cross-reference between supplements to keep current with any additional changes in regulations. Mr. Abraham also stated that many large agencies are in favor of a code of regulations, as they would receive their own title. This would facilitate distribution of their regulations as someone could purchase just one title rather than an entire set.

Delegate DeBoer asked Mr. Abraham to comment on the length of the public comment period for regulations, based upon his prior experience as a member of a governor's staff who reviewed proposed regulations. Mr. Abraham agreed with the VML opinion that the initial stage is the most important stage of the process.

**Judith Singleton - Fairfax County School Board (FCSB)**

The FCSB supports an increased public comment period for regulations of the State Board of Education (SBE). An increase from 60 to at least 90 days would allow local school divisions meaningful participation in the formation and development of educational regulations. The 60-day comment period rarely covers the regulatory process in its entirety.

SBE regulations have significant instructional, operational, and/or fiscal impacts upon local school divisions. Thorough fiscal and administrative analyses of the capacity of local school divisions to comply with regulatory changes are crucial. State agencies do not always possess comprehensive understanding of the effects of proposed regulations on each of the 138 school divisions in the State. The impact of a regulation may only be known through the receipt of meaningful and extensive public comment.

Furnishing meaningful information to the public through the summary, estimated impact, projected costs, and other statements required for publication in the *Virginia Register* is important for ensuring meaningful public participation. When additional or different figures and facts are provided late in the 60-day period, the public is hindered in the preparation of accurate and appropriate comment.

**Patricia Jackson - Lower James River Association (LJRA)**

Public participation under VAPA is extremely important to citizen's groups like the LJRA. The LJRA suggests that the subcommittee consider periodic review of agency public participation guidelines to ensure adequate public notice periods and consistency among agencies. There needs to be some improvement of the notice of intended

regulatory action. If citizens are able to obtain information up front, it is less likely that the public hearing toward the end of the regulatory process will be confrontational. Citizens believe that once a regulation has been drafted, it is almost impossible to get any changes made. More citizen involvement early in the regulatory process will make for more meaningful public participation.

Allowing the public comment period to remain open an additional 10-15 days after the public hearing has occurred would also improve public participation. Some people may not be able to attend hearings when they are scheduled, but may still want to comment on proposed regulations.

Concerning the economic impact of regulations on business, the LJRA feels that current requirements are sufficient. The Jackson bill (HB 1969) is not needed, and the cost of estimating the economic impact would be too high.

Senate Bill 590, passed during the 1991 session, requires the Department of Economic Development to assist the regulated community in submitting applications for all regulatory permits, and to act as an informational resource before regulatory agencies to monitor the status of a permit application and provide information required by the regulatory agency with the goal of expediting the permitting process. The LJRA believes there is a similar need for assistance for private citizens.

## John G. "Chip" Dicks - Virginia Association of Realtors

Mr. Dicks prefaced his remarks by noting that he assisted Delegate Parker with drafting the resolution which resulted in the JLARC study of VAPA.

In the late 1980s the General Assembly began to enact generic legislation, leaving the substantive implementing provisions to administrative regulations. This similarity to federal bureaucracy concerns regulated industries. Substantive law should be made by the General Assembly, not by administrative agencies.

Although the provisions of VAPA appear to adequately protect public participation, in practice nothing could be further from the truth. A public hearing can be held on proposed regulations before any board or commission without any member of the board or commission being present. Why shouldn't VAPA require the presence of a quorum of the board or commission in order for a public hearing to be held?

Standard procedures find the regulated industry appearing before a hearing officer, staff with a tape recorder, and maybe a court reporter. This is the only opportunity for oral testimony. The staff summarizes the comments of the regulated industry and many times completely dominates the process by overshadowing industry comments with staff rebuttals.

At board or commission meetings, the regulated industry must sit without speaking while members debate and discuss proposed regulations. Many times staff

dominate these meetings while the industry has no right to make any comments. There are no checks and balances in the process where an agency goes beyond legislative intent with its rulemaking.

Effective legislative oversight was eliminated after an Attorney General's Opinion in 1982, concerning violation of constitutional provisions relative to separation of powers. We are left with the legislative objection provisions of Section 9-6.14:9.2 and the Governor's review provisions of Section 9-6.14:9.1. Hopefully something constructive will come out of the JLARC study to deal with this problem.

Members of regulated industries have no right to speak before a board when it is deciding to grant or deny a permit. Only the staff gets to speak, summarizing the industry position and overshadowing it with staff comments as to why the permit should be denied or limited.

Every applicant should have an opportunity to speak at a hearing where the applicant's permit request is being determined. All that is required by VAPA is an opportunity to submit data, views, and arguments in an informal proceeding. Accordingly, there is no record of evidence. On appeal, the function of the courts is to decide if the result reached by the agency could be reasonably said on all proofs to be within the legal authority of the agency. Without the right to a formal evidentiary hearing, there is no effective right to appeal.

Delegate DeBoer asked Mr. Dicks if he was advocating that the General Assembly return to micro-management of State agencies and their regulations. Mr. Dicks indicated he was asking for more accountability by the members of boards and commissions and, if necessary, that the General Assembly require these members to attend public hearings.

Senator DuVal asked if Mr. Dicks was asking that at least one member of the board or commission be present at public hearings. Mr. Dicks replied that at least one ought to be present and it might not be a bad idea to require a quorum or a certain number. If members are not present at public hearings they do not get an opportunity to hear testimony and to determine for themselves what is being said, because all they get is a staff summary. And the staff summary in Mr. Dicks' experience basically reinforces what the staff proposed several months ago. There needs to be either an *ad hoc* advisory panel or something where the regulated industry, citizen groups, and everybody can participate up front before the regulations are proposed. If that is included, then the comment period at the end can be shortened. It has become very strategic, as Mr. Bailey suggested, because nobody files their comments until the last day for fear that someone else will pick them up and rebut. The length of the comment period at the end is no longer important. What is important is the comment period at the front end. And if there is going to be a public hearing, then it should be a meaningful hearing and members of the board or commission, or an *ad hoc* advisory panel, should actually show up to hear the public testimony.

Senator DuVal asked if Mr. Dicks thought it was important to have a 30-day notice of intent to regulate prior to the public hearing. Mr. Dicks would like to see an *ad*

*hoc* advisory committee convened, or a notice published saying all interested persons appear at such and such a time, to discuss the promulgation of these regulations before the staff has anything in mind. That way input is received up-front before the staff becomes entrenched in its position. This was done in the fair housing regulatory scheme, and although the industry did not get everything it wanted it did get some considerations in the process. If this were to occur, then the regular timeframe could be kept because the regulated industry, local government, and interested citizens would have input on the front end.

**C. Flippo Hicks - Virginia Association of Counties**

Local governments are finding that regulations from agencies are having as much or more effect upon them than legislation. It is very discouraging when people come down for a public hearing and find that only staff are present, not the board or commission members. It should be made clear to board or commission members that they are expected to attend hearings on regulations. Hearings on a permit may be held by hearing officers, but when a regulation is being adopted that is potentially affecting everybody in Virginia, the commission should be present.

Mr. Hicks has been calling agencies and telling them that he will be happy to talk to them about the concerns of local governments before regulations are drafted. Once the regulation has been cast in stone and only the staff members are conducting the public hearings, the staff are going to report back what they want.

Too many staff are drafting regulations regarding things they have no experience about. The board and commission members are the ones with the experience; they should be the ones conducting the public hearings.

Local governments are also concerned about fiscal impact. They usually do not get the figures until just before the regulation is adopted and do not have time to give them meaningful consideration.

It is most important that regulations be accessible. Mr. Hicks said he has proposed a statewide network that could be accessed by computer. He also indicated he believes most lawyers in practice in Virginia are committing malpractice because they do not know the regulations. Mr. Hicks said that most agency staff do not know the regulations either.

## SUMMARY OF OTHER WRITTEN COMMENTS SUBMITTED

**James R. Borberg - Hampton Roads Sanitation District**

There is no required response to comments submitted during the public hearing process, indicating if the recommendations were implemented or even considered. Meaningful public participation requires that comments be made part of the record and

that each comment receive a written response indicating concurrence or reason for objection. Public hearing processes of special concern to the Sanitation District are those of the State Water Control Board, Department of Health, Department of Air Pollution, and the Department of Waste Management.

## Larry D. Jackson - Department of Social Services

The Registrar of Regulations and her staff are most helpful and accomodating to DSS. They always provide technical assistance and consultation, and are most cooperative in resolving problems.

Three major concerns of DSS address the time frame for the VAPA process, the repetitiveness of information requested, and Article II exclusions from the process. DSS has recommendations for streamlining each area that it thinks would not sacrifice meaningful public participation.

*VAPA Time Frame.* It routinely takes nine to twelve months to progress from a Notice of Intent to finalization of a regulation. This is too long for an agency like DSS that is often responding to critical human needs. DSS rarely receives comments from the Notice of Intent, as it is more meaningful for the public to see the actual regulation. There appears to be ample opportunity for the public to address the Board of Social Services when it considers proposing and finalizing a recommendation, as well as commenting through the VAPA process. Mr. Jackson recommends eliminating the Notice of Intent and the accompanying 30-day comment period and making specific differentiations in types of regulations that could be related to appropriate time frames for comments.

*Repetitiveness of Information.* In promulgating regulations, information provided to the Registrar that summarizes the basis, purpose, and impact tends to be somewhat redundant. Information in the analysis of proposed regulations often repeats the same details. DSS recommends more coordination between the Registrar and VAPA requirements, and the requirements of the Governor's Executive Order specifying information required by DPB and the Governor.

Also, the requirement to republish an entire regulation when there are only changes in one section often requires more time, effort, and paper than is necessary to protect the public's interest. Additional sections of the regulation, or the entire regulation, could be made available upon request. DSS recommends amending the law so that agencies would be allowed to change relevant sections without publication of the entire regulation.

*Article II Exclusions.* DSS has an interdependent relationship with the federal government that places it in the position of being forced to take certain actions to comply with federal requirements. DSS questions whether the provisions for implementing exclusions under Article II are completely necessary. A simplified notification process should be considered where the agency would provide assurance from the Attorney General's office of the applicability of Article II to the regulation, excluding what DSS

considers to be redundant review by the Division of Legislative Services. Mr. Jackson also recommends elimination of the 30-day period following the publication of a regulation under the Article II exclusion. When the agency has no latitude in its action, offering an opportunity for public comment is deceptive.

## Ms. Carol Raper - Virginia Manufacturers Association

VMA believes in strong environmental protection, but this goal should be reached in a cost-effective manner. VMA supported HB 1969, which would have required agencies to publish the projected costs of proposed regulations to the regulated community. Subsequent to the defeat of HB 1969, VMA has met several times with representatives of the Natural Resources Secretariat to consider how the cost/benefit analysis of proposed regulations might be handled more effectively under VAPA.

*Notice of Intended Regulatory Action.* VMA supports an expanded Notice, so all interested parties can comment in a meaningful fashion very early in the promulgation process. VMA would like to see the features of an expanded Notice become part of VAPA to ensure their permanence.

Two features of the expanded Notice would include: (1) information on which to base cost/benefit analyses and (2) how cost/benefit data and other information submitted in response to a Notice will be used. Regarding information on which to base cost/benefit analyses, agencies should be required to provide as complete a statement as possible of the problem which the regulatory action is intended to address, and as complete a description as possible of the potentially available alternatives. Complete descriptions will better enable the public to provide meaningful comments, suggestions, and analyses of the regulatory methods and alternatives. VMA hopes that industry can assist agencies in compiling cost data, but believes that the process would be more effective if the agency, or some other parties, could provide concrete data on the benefits. Although VMA acknowledges that it is often impossible to attach a dollar figure to environmental benefits, it does believe some degree of quantification is both possible and necessary.

Regarding how cost/benefit data and other information will be used, VMA stated that parties would like to be assured that their input would be used in the promulgation process. All comments filed in response to a Notice could be forwarded to the *ad hoc* advisory group working on the proposal and become part of the group's deliberations. Although *ad hoc* groups are not required, VMA believes they are very effective and should be appointed in virtually every regulatory action. In addition, a summary of the Notice comments could be submitted to the agency's board, with the full comments being available to board members upon request.

*Notice of Public Comment and Governor's Executive Order.* The current Executive Order contains certain provisions that VMA strongly favors and would like to see in VAPA:

- statement of purpose;
- estimated impact (number and types of regulated entities or persons, projected cost to regulated entities, and projected cost to the agency);
- explanation of need and potential consequences in the absence of regulation;
- estimate of impact on small businesses or organizations;
- alternative approaches that were considered and agency assurances that the proposed regulation is the least burdensome available alternative; and
- a schedule setting forth when, within two years after promulgation, the agency will evaluate the regulation for effectiveness and continued need.

VMA also favors dissemination of regulatory review packages prepared for the Governor's Office throughout an agency's regional offices when applicable.

*Regulation By Policy.* There are cases when agencies enforce general "policies" against members of the regulated community when these "policies" are not specifically authorized by statute or regulations, and when the "policies" have not been adopted pursuant to VAPA. Such procedure is contrary to law and deprives the public of the right to present to the agency's board the perceived impacts and ramifications of what is, in practical effect, a regulation. VMA favors a provision in VAPA which emphasizes the necessity of agencies adopting rules and policies of general application only through the VAPA rulemaking process, and not by agency staff action alone.

*Code of Virginia Regulations.* VMA favors having a complete, up-to-date and well-organized compilation of Virginia's regulations. The *Virginia Register* does not accomplish this.

# IV. Study Issues

Nine issues have been identified on a preliminary basis for the analysis phase of the JLARC review. These issues have been developed based on the study mandate, the input received through the public hearing, background reading, reviews of the *Virginia Register* and the *Administrative Law Appendix*, attendance at the discussions of the HJR 187 Roundtable on the review of environmental decisions by agencies, and interviews with the Registrar of Regulations and several agencies that implement VAPA provisions.

The following issues have been identified.

*(1) Is there adequate dissemination of information regarding agency regulatory activities under VAPA?*

This issue addresses whether the procedures for informing local governments, the public, business and industry, or others affected by agency regulations are sufficient. The issue includes access to the *Virginia Register of Regulations* and the need for a Virginia code of regulations.

*(2) Does VAPA promote meaningful public participation?*

The study mandate and participants at the JLARC public hearing raise the question of whether VAPA serves to promote meaningful public participation. Potential ideas to explore relative to this issue include: the amendment of VAPA to include a formal provision for the public to petition agencies for rulemaking; ensuring the consistency, appropriateness, and availability of agency public participation guidelines; inclusion of a requirement for notice of intended regulatory action in VAPA itself; a required minimum time frame between notice of regulatory intent and the drafting or publication of a regulation; the required use of *ad hoc* advisory committees prior to drafting of regulations; expansion of the current 60-day comment period; and the required attendance by a quorum of board or commission members when public hearings are held. Tradeoffs must be considered between the impact of such ideas on the meaningfulness of public participation on the one hand and the efficiency of regulatory proceedings on the other.

*(3) Do boards, commissions, and agencies make use of information received from the public when formulating final regulations?*

A major theme at the JLARC public hearing on VAPA is a perception that the public has very little influence upon the substance of regulations once drafted by agencies. This issue has been developed to assess the likelihood of agencies making changes to proposed regulations consistent with public comments received, and to examine the conditions under which agency modification of proposed regulations appears most likely.

*(4) Can the administrative process be made more efficient, without sacrificing quality of input?*

HJR 397 requires that JLARC study the "efficiency and effectiveness of the Administrative Process Act." The concept of efficiency is somewhat difficult to interpret when applied to administrative processes. Agencies can promulgate regulations most efficiently (quickly and at least cost) if public participation is minimal or non-existent; yet public input may bring facts to agency attention that lead to the rejection of ill-advised regulations, perhaps allowing for improved regulatory efficiency. With consideration of this tradeoff, three aspects of administrative process efficiency will be reviewed, to the extent feasible within time and resources: time frames for action, duplication of administrative tasks or excessive paperwork, and opportunities for cost savings.

*(5) Are agencies and other state officials complying with the requirements of VAPA?*

VAPA provides for a fairly complex set of rules to which agencies and other state officials are to adhere when carrying out their responsibilities related to making regulations and deciding cases. The purpose of this issue is to identify whether there are areas in which compliance with VAPA provisions needs to be improved. This issue includes agency compliance with VAPA provisions such as: the projection of costs for the implementation and compliance with regulations; the implementation of public participation guidelines; and publication and time frame requirements.

*(6) Does VAPA provide for appropriate executive and legislative review of agency rule making?*

VAPA provides a specific approach for executive and legislative review of agency rule making. This issue considers the effectiveness of current provisions and whether some alternative approaches should be considered.

*(7) Does VAPA provide appropriate forums for non-judicial review of agency case decisions?*

VAPA provides for three potential forums for review of case decision controversies: informal fact finding, formal hearings, and court review. This issue question was designed to consider the appropriateness of current practices regarding the two forums of review that occur prior to court proceedings. Specifically, the concern is with agency implementation of informal fact finding and formal hearing provisions.

*(8) Do Virginia statutes provide an adequate basis for court review of agency actions?*

There are two components that are planned as part of this issue. The first component relates to whether there is a need for additional definitions to be added to VAPA to clarify the statutory meaning of certain terms. The second component is whether VAPA should be amended to specifically identify those provisions of basic law,

if any, that are intended to limit or preclude VAPA court review provisions. The latter has been a matter of contention, for example, concerning the Water Control Law, which has been held by the courts to preclude standing to all but aggrieved owners (permit seekers).

*(9) Are current exemptions to the act necessary, sufficient, and used appropriately?*

As of July 1, 1992, the number of specified exemptions to VAPA that are in effect will increase from 44 to 48. It may be useful to review certain exemptions for necessity

## Appendix A

# GENERAL ASSEMBLY OF VIRGINIA--1991 SESSION

HOUSE JOINT RESOLUTION NO. 397

*Requesting the Joint Legislative Audit and Review Commission to study whether amendments are necessary to Chapter 1.1:1 of Title 9 of the Code of Virginia, generally known as the Administrative Process Act.*

Agreed to by the House of Delegates, February 22, 1991
Agreed to by the Senate, February 21, 1991

WHEREAS, the Administrative Process Act was adopted by the 1975 Session of the General Assembly following a recommendation by the Virginia Code Commission; and

WHEREAS, the Administrative Process Act was designed to simplify and streamline the regulatory review process, and to ensure meaningful public participation by interested parties in the formation and development of regulations by administrative agencies of the Commonwealth; and

WHEREAS, in the decade of the 1980's, the General Assembly delegated to various administrative agencies of the Commonwealth, through various pieces of legislation, significant and substantive matters which have been the subject of regulations adopted pursuant to the Administrative Process Act; and

WHEREAS, the substantive nature of such regulations could have an economic impact on the business or industry affected by such regulations; and

WHEREAS, the business community throughout the Commonwealth has expressed concern about the implementation of the provisions of the Administrative Process Act by members of boards or commissions and their administrative staffs; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Joint Legislative Audit and Review Commission be requested to study the efficiency and effectiveness of the Administrative Process Act and to make appropriate recommendations for amendments to the Act to ensure meaningful public participation in the regulatory process.

All agencies of the Commonwealth shall provide assistance upon request as the Joint Legislative Audit and Review Commission may deem appropriate.

The Joint Legislative Audit and Review Commission shall submit an interim report to the Governor and the 1992 Session of the General Assembly and shall complete its study in time to submit its findings and recommendations to the 1993 Session of the General Assembly, as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

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