REPORT OF THE
JOINT LEGISLATIVE AUDIT
AND REVIEW COMMISSION

# Review of Virginia's Administrative Process Act

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA


# HOUSE DOCUMENT NO. 51

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# Preface

House Joint Resolution 397 of the 1991 Session directed JLARC to review the Virginia Administrative Process Act (VAPA). VAPA is the act which generally governs the regulatory proceedings of State agencies. It provides for public participation in the regulatory process, as well as certain forms of executive, legislative, and judicial review of regulatory actions.

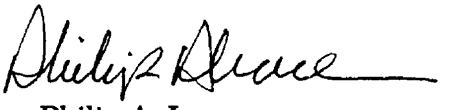
Issues raised in the study mandate included the efficiency and effectiveness of the Act and the meaningfulness of public participation under the Act. An interim JLARC report on VAPA was published in January 1992. This final report contains the staff findings and recommendations from a review of VAPA.

The JLARC review indicates that the effectiveness of VAPA is limited because it frequently does not apply to regulatory activity, and because there are executive branch compliance problems. Also, State agencies could do a better job of explaining the basis, purpose, substance, and issues of their regulations, and frequently do not provide estimates of regulatory impact as statutorily required.

This report recommends a curtailing of the use of certain VAPA exemptions, and encourages executive branch compliance with VAPA requirements. It also contains a number of recommendations to promote meaningful public participation in the rulemaking process and to promote fairness in the case decision process.

Throughout the review, a subcommittee of JLARC met to receive public input and consider the policy implications of JLARC staff work. A subcommittee report and two draft bills endorsed by the subcommittee are provided in Appendix E. The first bill is an omnibus bill that incorporates several revisions to VAPA. The second bill provides for a suspension of regulations by joint executive and legislative action.

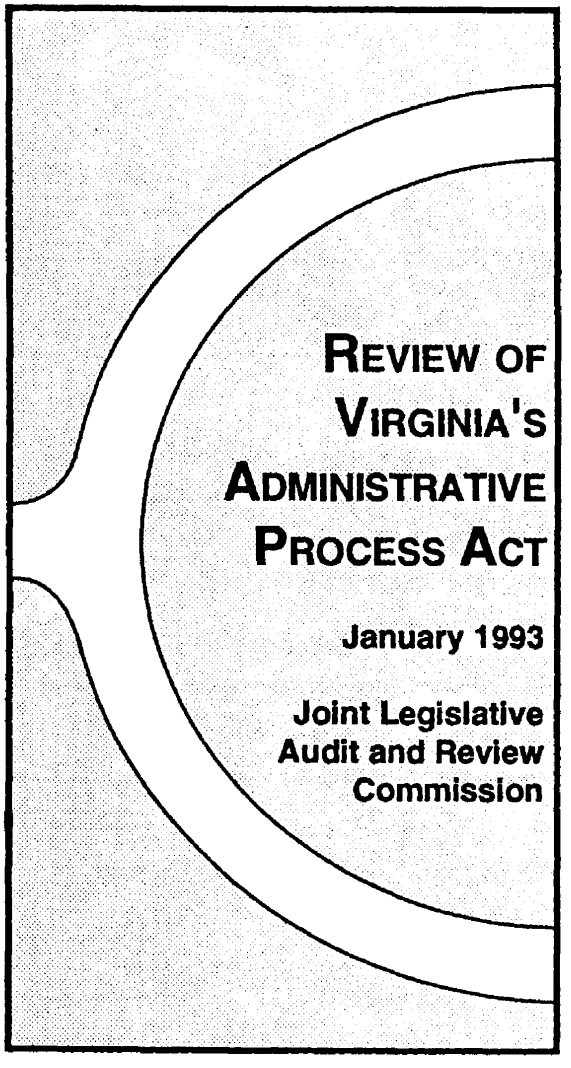
On behalf of JLARC staff, I would like to express our appreciation for the cooperation and assistance provided by the Registrar of Regulations, State agency regulatory coordinators, and the respondents to the JLARC staff surveys of Virginia associations, local governments, and administrative law attorneys.



Philip A. Leone
Director

January 15, 1993

# JLARC Report Summary




Administrative process acts are developed to deal with the practical need of delegating certain law-making authority to administrative agency expertise, while structuring the exercise of that authority. The required structure or process is to serve as a substitute for detailed substantive guidance from the legislature, allow for public input into agency decisions, and thereby help legitimize the resulting regulation.

The Virginia Administrative Process Act (VAPA) is the act which generally governs the regulatory proceedings of State agencies. The Act applies to agency rulemaking and case decision processes. Rulemaking is the process by which an agency develops, receives input on, and promulgates a regulation. Case decisions occur when a regulation is applied to individual cases, such as the granting or revoking of a license or permit. VAPA provides for public participation in the regulatory process, as well as certain forms of executive, legislative, and judicial review of agency actions.

JLARC staff were directed by House Joint Resolution 397 of the 1991 Session to study whether amendments to VAPA are necessary. Specific issues raised in the study mandate include the efficiency and effectiveness of the Act, and the meaningfulness of public participation in the regulatory process.

There are two major findings of this report. First, VAPA does not appear to place an undue burden on agencies, and could be strengthened to meet certain objectives. Second, there have been compliance problems in meeting existing requirements that appear to be due to a lack of knowledge, priority, or effort rather than to any unreasonableness of the requirements.

VAPA provides a great deal of agency discretion over regulatory matters, including the conduct of the process to promulgate the regulations. A reason for a degree of caution in restricting agency discretion is that some restrictions could impair administrative efficiency. However, there are areas in which too much agency discretion or compliance problems can negatively impact the achievement of other important goals, such as overall effectiveness, public participation, and fairness.

This report summary highlights some of the key ways in which agencies currently

exercise high levels of discretion that appear to be problematic. The General Assembly may be interested in modifying the current level of discretion to achieve various objectives.

### Executive Order Published Only Recently

Agencies have a greater degree of discretion if they are not compelled to comply with existing VAPA requirements. The Governor is required by VAPA to have an executive order for the review of regulations. An executive order was published on November 30, 1992 — three years into the administration. Some agencies indicate that they were following the terms of the previous administration's executive order.

The lack of an executive order may contribute to confusion and a lack of compliance in meeting VAPA requirements among agencies. For example, timeframe and publication requirements of VAPA are not always met. Also, agencies seldom provide estimates of the impact of their regulations as required by VAPA (see figure below). There is no question that for many proposed regulations, it is difficult to provide an accurate estimate. However, in many cases, it does not appear that agencies are making a good faith effort to provide the required information.

***Recommendation.*** *The administration should review its work processes for the review of regulations, to ensure uniform compliance with the Administrative Process Act. Consideration should be given to designating one staff person in the Governor's office, the administrative secretariat, or the Department of Planning and Budget to oversee agency compliance with the Administrative Process Act.*

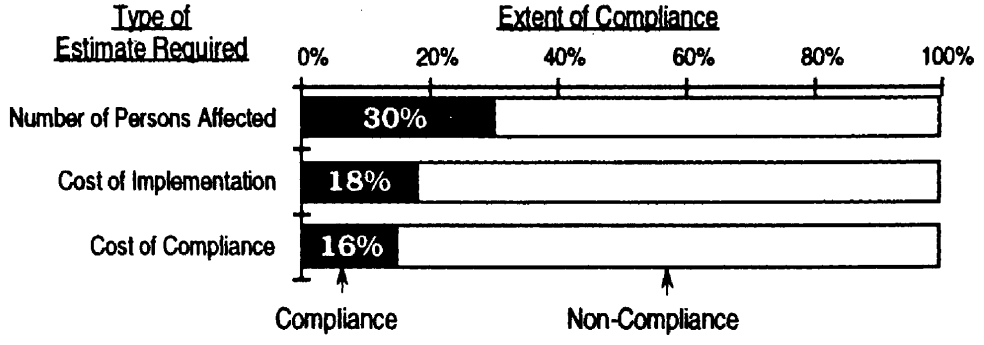
***Recommendation.*** *Agencies should submit proposed regulation submission packages that include the estimated impact "with respect to the number of persons affected and the projected cost for the implementation and compliance thereof," as required by VAPA.*

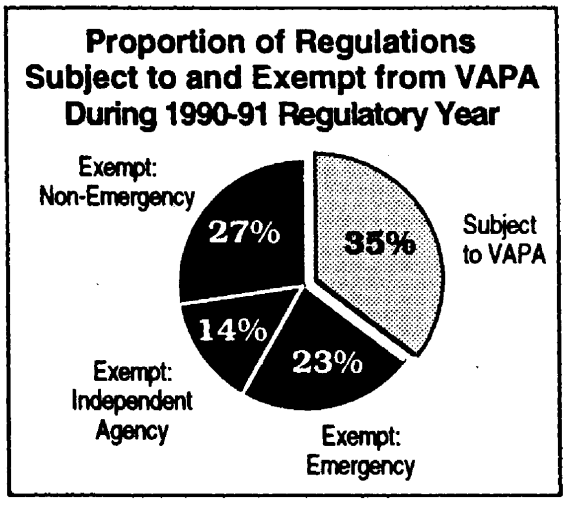
### VAPA Frequently Does Not Apply

VAPA's ability to dictate the process to be used to promulgate regulations is reduced by the use of exemptions to its provisions. There are instances where exemptions are justified. However, JLARC analysis of 1990-91 data indicates that VAPA applied to only a minority of regulations (see figure, top of next page).

Areas of concern with regard to VAPA exemptions include total agency exemptions and the high usage of emergency regulations. The granting of total agency exemptions is discouraged by APA literature because blanket exemptions can be overly broad, and this appears to be the case with some of Virginia's total exemp-

**Compliance with VAPA Requirements that Agencies Estimate Regulatory Impact**






tions. Emergency regulations in Virginia are overused. In 1990-91, the ratio of VAPA regulations to emergency regulations was only 1.6 to 1.

***Recommendation.*** *The General Assembly may wish to consider eliminating or further restricting the use of total agency exemptions, and limiting the use of the emergency regulation process to situations with imminent danger to public health or safety.*

## VAPA Requirements Are Limited

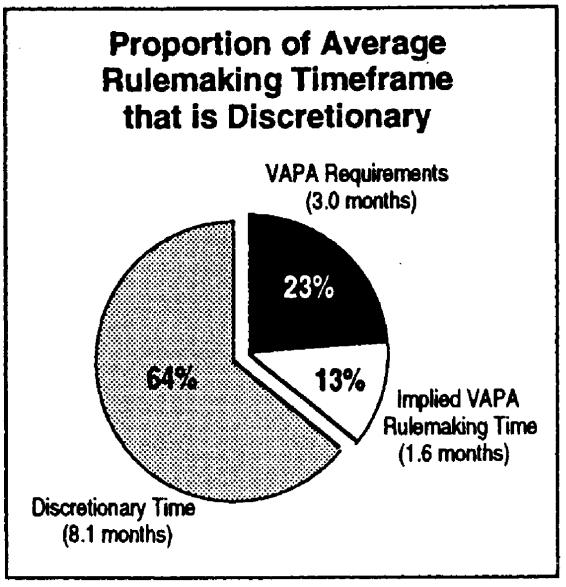
Although regulations take an average of about 12.7 months to develop and promulgate, the key procedural requirements of VAPA are fairly limited in scope and appear reasonable. For example, as shown in the figure at right, VAPA requirements govern about one-third of average rulemaking time; almost two-thirds of average rulemaking time is accounted for by other factors, such as the time required by the agency to develop the regulation. Some of the burden associated with VAPA may be due to paperwork and other concerns surrounding the transmittal of documents that are part of the process, and lead times for publication. Efficiency goals for rulemaking might be promoted if some of the paperwork and publication lead times could be reduced, but this is a technical matter and not a flaw in VAPA itself. Efficiency goals could be promoted within VAPA, by clarifying VAPA provisions on regulation development and the need for public hearings.

There are areas in which VAPA and current agency public participation guidelines may not require enough to adequately promote public participation or achieve other goals. This report suggests a number of areas in which the General Assembly may wish to amend VAPA to address these limitations.

***Recommendation.*** *To promote administrative efficiency, the General Assembly may wish to amend VAPA to allow agencies to begin drafting regulations early in the process, and to clarify that oral proceedings are not always required.*

***Recommendation.*** *To promote public participation, the General Assembly may wish to amend VAPA to: provide for petitioning for rulemaking, provide for petitioning for an initial public hearing and for a second hearing on substantive changes, require a minimum 30-day comment period prior to the filing of the proposed regulation, and require agencies to provide comments on participation to the public.*

***Recommendation.*** *The General Assembly, in consultation with the executive branch, may wish to consider whether the*



*potential value of agency public participation guidelines justifies an effort to seek to systematically improve them, or if they should be eliminated. If a decision is made to improve them, then minimum standards for their organization and subject matters should be developed and published in the* Register Manual.

## Elected Officials Cannot Stop a Regulation Except by Statute

Under VAPA, a regulation may become effective in Virginia despite legislative and Governor objections. A provision in VAPA for a legislative committee suspension of a regulation until the General Assembly could consider a veto resolution was eliminated subsequent to a 1982 Virginia Attorney General opinion and the 1983 decision of the U.S. Supreme Court in the *Chadha* case on the constitutionality of the federal legislative veto.

*Chadha* is influential but not controlling at the state level. The likelihood that a form of a "veto" by elected officials could survive a constitutional challenge depends on the specific terms of that veto provision and the interpretation of the state courts. It appears that the form of expanded review most likely to survive a constitutional challenge would enable a standing legislative committee, with the Governor's concurrence, to suspend the regulation's effective date until the next session. Then the regulation would become effective unless a bill were passed by the General Assembly and signed by the Governor to stop it. There are a number of states that provide for a suspension of the effect of regulations until the legislature can meet. However, it is not certain how Virginia courts would rule on the constitutionality of such a provision if challenged.

***Recommendation.*** *The General Assembly may wish to consider whether it wants to amend VAPA to provide a mechanism for legislative and executive suspension of the effective date of regulations.*

## Agencies Have Substantial Power in Case Decisions

Case decisions are made to implement regulations on a case-by-case basis. For example, case decisions may involve granting, revoking, or defining the terms of permits and licenses held by businesses, professionals, or others. VAPA contains some procedural requirements for the conduct of case decisions.

Agencies or boards have considerable authority in case decision matters. For example, in disciplinary matters, it is often the agency/board staff that do the investigatory work. The agency/board decides, in consultation with the Attorney General's office, whether to instigate a case decision proceeding. The agency/board may in many instances conduct the hearing and render the final decision. In other instances, an agency may, pursuant to VAPA, employ an independent hearing officer to conduct the hearing and make a recommendation. However, the agency/board may disregard the hearing officer's recommendation.

Because case decisions can affect the reputations and livelihoods of individuals or businesses, it is important that every reasonable effort is made by agencies and boards to define the process and the rules to be followed, and to be consistent, fair, objective, and timely in their application. The evidence available suggests that agencies and boards generally attempt to exercise their case decision authority responsibly. However, there are some problem areas and instances when the process or agency implementation does not appear to do a good job of achieving fairness and efficiency goals.

***Recommendation.*** *The General Assembly may wish to amend VAPA to address certain case decision issues, including requiring agenices to provide consistent access to informal hearings, establishing continuance policies, providing an opportunity for parties to comment when all deci-*

*sion-makers were not present at prior hearings, adopting rules providing the basis for making case decisions to the extent practicable, considering alternatives to the current hearing officer system, and promoting timely decisions.*

### Judicial Review Affords Priority to Finality of Agency Decisions

The terms and implementation of judicial review in Virginia places a high priority on the finality and stability of agency decisions. A survey of administrative law attorneys found that 86 percent agreed with a statement that "judicial review as implemented in Virginia provides a high degree of stability and finality to the fact-findings of administrative agencies." Consistent with common administrative law practice, VAPA places the burden of proof upon those complaining of agency action. Also, with regard to findings of fact, the test is not of the ultimate accuracy or correctness of the agency, but rather with whether there is "substantial evidence in the agency record" upon which the agency could have reasonably reached its conclusion.

There are, however, a number of more controversial ways in which judicial review is restrictive or deferential to agencies. With regard to environmental matters, basic agency laws supersede VAPA and limit standing (access to court review) to owners of potential discharge sites. This has led to some controversy, as it appears that there is a lack of recourse when it is believed that permits have been granted unlawfully and the permittee is creating or is about to create environmental damage.

Also, the courts have declined to intervene when it has been alleged that agencies have sought to apply unpromulgated regulations, or are about to deprive individuals of due process rights in a case decision proceeding. And unlike the Commonwealth's general policy in litigation in favor or discovery, discovery is not provided for in case decision proceedings or in judicial review of case decisions. Perhaps as a net consequence of these restrictions, 53 percent of administrative law attorneys indicated disagreement with the statement that "judicial review as implemented in Virginia provides a high degree of protection to the public from potentially arbitrary or capricious agency case decisions."

While the tendency of the system towards stability and finality of agency decisions seems clear, the desirability of the current approach is primarily a policy or value judgement. This report provides recommendations suggesting policy options the General Assembly may wish to consider if it wishes to increase judicial review from its currently restrictive levels. One issue that it appears the General Assembly must address during the 1993 Session is the potential impact of federal Clean Air Act requirements on Virginia's standing provisions in the basic law of the Air Board.

***Recommendation.*** *The General Assembly may wish to consider options to expand access to judicial review, particularly in the environmental area. An item of particular priority for consideration is the potential impact of the federal Clean Air Act on Virginia standing requirements for judicial review.*

***Recommendation.*** *The General Assembly may wish to amend VAPA to provide for judicial review of persons claiming the unlawfulness of unpromulgated or defacto agency rules. The General Assembly may also wish to consider amending VAPA to authorize courts to enjoin administrative hearings if there are reasonably supported claims of due process concerns, and to provide for discovery during the case decision process or in judicial review of VAPA appeals.*

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# I. Introduction

The federal government and all state governments in the United States have administrative process acts. An administrative process act is the law that structures the making and implementation of regulations by government agencies. Regulations are rules of general application that are made by governmental boards or agencies, have the force of law, and affect the rights or conduct of people.

At the federal level of government, an administrative process act was enacted in 1946. North Dakota was the first state to enact an APA, in 1941. Since then, each state has adopted statutes governing the process used by its administrative agencies.

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 of 1952. This Act was subsequently replaced by the Virginia Administrative Process Act in 1975.

Administrative process requirements have significance for a number of reasons. Perhaps first and foremost, process can affect substance. The process used can affect what facts or arguments are brought to the regulating agency's attention, and affect the regulatory outcome. The process requirements help determine the balance that is struck between the opportunities, rights, and responsibilities of regulators, the regulated, and the public.

In addition, the process can affect the "legitimacy" of regulatory decision-making. Public confidence and willingness to observe regulations may be increased if the public has a sense that all interested parties were meaningfully consulted in the development of a regulation, and that the regulation is implemented consistently.

The Virginia Administrative Process Act is the act which generally governs the regulatory proceedings of State agencies in the Commonwealth. The Act applies to agency actions during the development, promulgation, and application of regulations, and provides for public participation in the regulatory process.

## VIRGINIA'S ADMINISTRATIVE PROCESS ACT

The current Virginia Administrative Process Act (VAPA) consists of sections 9-6.14:1 to 9-6.14:25 of the *Code of Virginia*. It sets forth a four-part basic structure for the administrative process. The Act 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 qualifies for such a license, or whether or not a particular individual 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. VAPA provisions relative to informational proceedings are contained in §9-6.14:7.1 of the *Code of Virginia*. An agency must give interested parties an opportunity to provide input on a proposed regulation, orally or in writing. The proposed regulation must be published at least 60 days prior to the last date for oral and written submittals from the public. 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 rare cases, the conduct of the informational rulemaking proceeding just described may not be deemed sufficient. At its discretion or as required by law, an agency may conduct evidential hearings to receive evidence as provided for in VAPA by §9-6.14:8 of the *Code of Virginia*. 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 granting or revoking licenses or permits. 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 of the *Code of Virginia*, involves an effort to reach consent on an informal basis between the agency and a 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 the contrary facts that are 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 a matter is not resolved at the informal fact finding stage, then a formal hearing may be held. Under §9-6.14:12 of the *Code of Virginia*, litigated issues are taken before a hearing officer for the formal taking of evidence. (For some agencies with boards, informal and formal hearings may be conducted by members of the board). Hearing officers are selected on a rotating basis from a list of attorneys prepared by the Executive Secretary of the Supreme Court. Recommendations 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 of VAPA that should be noted. These features include: exemptions from provisions of the Act (specified in the Act); public participation guidelines (PPGs); 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 of the *Code of Virginia*. The section currently provides for 48 exemptions to all or part of VAPA. Some of these exemptions exempt entities; others exempt specific types of regulatory 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 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.

***Public Participation Guidelines (PPGs).*** Section 9-6.14:7.1 of the *Code of Virginia* requires that agencies develop and use public participation guidelines. These guidelines are promulgated as regulations. They are intended to provide agency procedures for the solicitation of input from the public throughout rulemaking, including methods for the identification and notification of interested parties.

***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 from its proposed to final form, 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 official State document on regulatory activity, also referred to as the *Register*), 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 of the *Code of Virginia*

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 on the evidential record of the agency. 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 Form, Style and Procedure Manual,* (a handbook developed by the Virginia Code Commission and the Registrar of Regulations, hereafter referred to as the *Register Manual,* which guides agencies through the process), 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 a 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 (NOIRA) is then published in the *Register.*

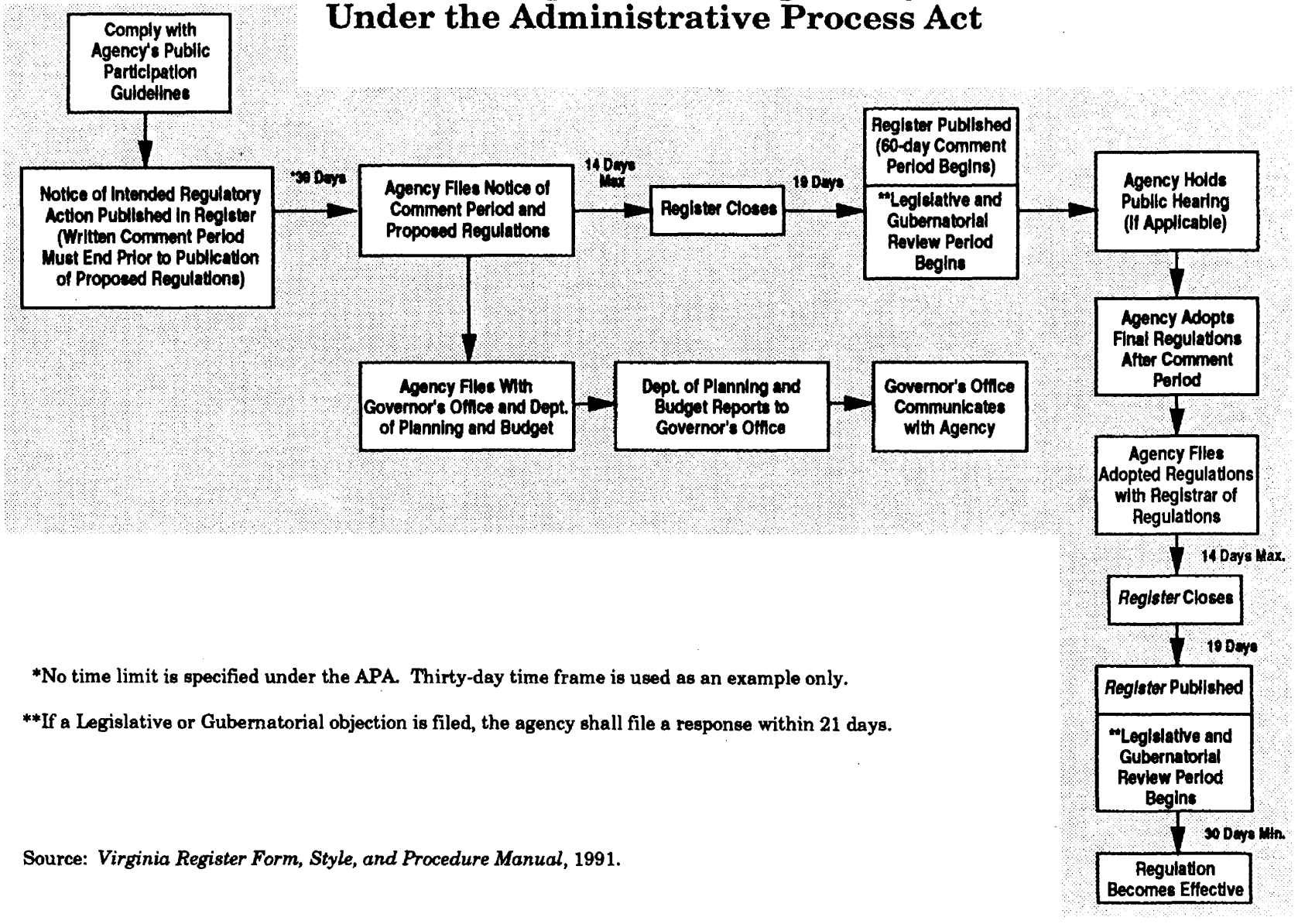
Once the agency has developed a proposed regulation, it then submits a proposed regulations package, that includes a notice of comment form. This package provides the information that is necessary to publish the proposed regulation pursuant to §9-6.14:7.1 of the *Code of Virginia.* It includes a summary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

The next steps in the process are the closing and publication of the *Register,* which is issued every two weeks. 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. The *Register* and the *Register Manual* identify 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 of the *Code of Virginia,* and the public comment period begins. The agency may hold a public hearing. A notice of comment will appear in each issue of the *Register* until either the public hearing date or a 60-day minimum comment period 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.*

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*, 1991.

With the publication of the regulation in the *Register*, a period of executive and legislative review also 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 the agency adopts the proposed regulation, the agency then files the adopted regulation with the Registrar 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 process at this point, or the Governor or the legislature can file an objection. As provided in §9-6.14:9.3 of the *Code of Virginia*, 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.

## VIRGINIA'S REGULATORY AGENCIES

Virginia has many agencies that are empowered to promulgate regulations. A few of these agencies are located outside of the executive branch, as independent agencies. These agencies include the State Corporation Commission (SCC), the Department of Worker's Compensation (the Industrial Commission), the State Lottery Department, and the Virginia State Bar. The SCC, for example, promulgates numerous regulations. However, most of the regulatory activity of the independent agencies has been exempted from VAPA. The focus of this discussion will be on regulatory agencies in the executive branch of government.

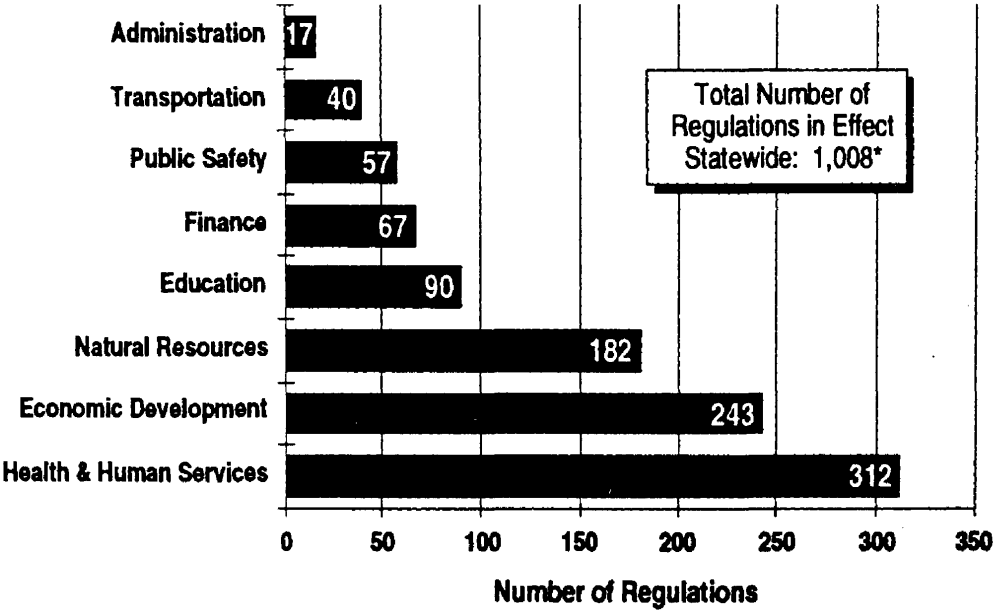
Figure 2 identifies the number of regulations on file with the Registrar, based on the 1990-91 *Administrative Law Appendix* (a document which lists agency regulations). The regulations were inventoried by secretarial area within the executive branch. In terms of quantity of regulations, three of the eight secretariats account for the bulk of the regulations (73 percent). These secretariats are the Health and Human Services Secretariat, with the largest number of regulations, followed by the Economic Development and Natural Resources secretariats.

With regard to regulatory agencies, there are 75 executive branch agencies with public participation guidelines on file with the Registrar. Public participation guidelines are required of agencies which promulgate regulations and are not fully exempt from VAPA processes.

Table 1 provides data on the 12 executive branch agencies with the greatest number of regulations in effect and on file with the Registrar. These 12 agencies account for 702 of the 1,008 executive branch regulations on file, or about 70 percent.

**Figure 2**

## Number of Regulations in Effect and Filed with the Registrar (By Cabinet Secretary Area)




*Excludes the regulations of independent agencies, such as the State Corporation Commission, the Industrial Commission, the State Lottery Department, and the Virginia State Bar.

Source: JLARC staff analysis of the 1990-91 *Administrative Law Appendix* for regulations with discretely identified VR (*Virginia Register*) numbers.

Thus, while there are many agencies with at least one regulation, only a few agencies have the bulk of regulations. Data on the number of regulations identifies some of the major regulatory actors. It should be kept in mind, however, that the number of regulations does not necessarily indicate extent of regulatory activity or impact. To some degree, the number of regulations is influenced by agency decisions on whether to have many regulations each with few components, or a few large regulations with many components. For example, the Air Pollution Control Board had only three listed regulations, but one of these regulations is a major regulation with many components. Because of its scope, portions of this regulation are frequently revised through the VAPA rulemaking process.

Table 1

## Executive Branch Agencies with the Most Regulations in Effect and Filed with the Virginia Registrar

| Agency | Number of Regulations |
|---|---|
| Department of Medical Assistance Services | 84 |
| Department of Social Services | 83 |
| Department of Labor and Industry | 76 |
| Marine Resources Commission* | 71 |
| Department of Taxation | 63 |
| Department of Agriculture and Consumer Services | 60 |
| Department of Health | 59 |
| State Board of Education | 54 |
| State Water Control Board | 44 |
| Department of Commerce | 39 |
| Department of Game and Inland Fisheries ** | 37 |
| Department of Health Professions | 32 |

*Partially exempted from VAPA rulemaking provisions under §9-6.14:4.1.

**Fully exempted from VAPA rulemaking provisions under §9-6.14:4.1 of the *Code of Virginia*.

Source: JLARC staff analysis of the 1990-91 *Administrative Law Appendix*.

## JLARC REVIEW

The mandate for this study is House Joint Resolution 397 from the 1991 General Assembly Session (Appendix A). The mandate requests JLARC to study whether amendments are necessary to the Virginia Administrative Process Act. Specific issues raised in the study mandate include the efficiency and effectiveness of the Act, and the meaningfulness of public participation in the regulatory process.

A subcommittee of JLARC was formed to receive public input and to consider the policy implications of JLARC staff work. The JLARC subcommittee held a public hearing and six subcommittee meetings prior to the publication of this staff report.

### Study Approach

An important starting assumption was that the study should focus on VAPA processes for adopting and implementing regulations. The study is a process study — not a study of the adequacy, quality, or impacts of existing regulations.

Comments at the JLARC subcommittee public hearing, the study mandate, and JLARC staff background research were used to define principal issues for the study. The following issues were developed and enumerated in an interim report of this study issued in January 1992.

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

(2) Does VAPA promote meaningful public participation?

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

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

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

(6) Does VAPA provide for appropriate executive and legislative review of agency rulemaking?

(7) Does VAPA provide appropriate conditions for the resolution of cases through the case decision process?

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

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

A combination of qualitative and quantitative methods were used to address the study issues. The quality of an administrative process, or what would constitute an improvement to it, can in part be examined by considering the perceptions and experiences of those who have been involved with the process. Accordingly, surveys were sent to local governments, associations, and administrative law attorneys; and interviews were conducted with State agency personnel.

In addition, however, an objective for the study was to examine the process and perceptions with systematic data collection and analysis activities. There have been few empirically-driven studies of administrative processes. For this study, substantial data were collected on two key elements that play a major role in rulemaking: process timeframes and public participation.

In many cases, VAPA policy issues relate to perceived tradeoffs between administrative efficiency (accomplishing rulemaking with some speed) and public input (allowing opportunities for public participation in rulemaking). Claims are made, for

example, that the rulemaking process takes too long, or that public comments are ignored by agencies once proposed regulations have been published. This report provides data that indicate how long the rulemaking process takes at each of the various stages, so problem areas can be specifically identified. This report also provides data, based on a sample of regulations, on the amount of public comment received and the extent of agency changes consistent with public comment.

**Research Activities**

Numerous research activities were completed in JLARC's review of the efficiency and effectiveness of VAPA. These activities included conducting a public meeting on the VAPA process, structured interviews, document reviews, mail surveys, and content and data analyses.

***Public Meeting***. A public meeting was held by the JLARC subcommittee on the Virginia Administrative Process Act on September 9, 1991. The main issue areas for the public hearing were those outlined in the JLARC study mandate. Eight speakers addressed the subcommittee. Six of the speakers also submitted written materials. In addition, written comments were received from three additional sources shortly after the public hearing was held.

***Structured Interviews***. Structured interviews were held with numerous individuals concerning the VAPA process. Staff of the Attorney General's Office (OAG) were interviewed concerning the role of OAG as legal counsel to agencies regarding the Act, the statutory responsibilities of the OAG within the Act, and a number of opinion questions on the operation of the VAPA process. The Registrar was interviewed numerous times throughout the study, focusing on the Registrar's role in the VAPA process, interactions with regulatory agencies, and the availability of information.

Interviews were also conducted with staff of State agencies on the VAPA process. Staff of four agencies were interviewed broadly about the VAPA regulatory process, while staff of 12 agenices were interviewed concerning specific rulemaking actions which the agencies finalized during the 1990-91 regulatory year. In addition, the Executive Secretary of the Supreme Court was interviewed concerning the use of hearing officers in VAPA case decision proceedings.

***Document Reviews***. A wide variety of documents were used in this study. The *Code of Virginia* was used extensively. The *Register* was also frequently used. Copies of the *Register* were examined for information regarding both past and present rulemaking and case decision activities. JLARC staff also examined the *Register Manual* issued by the Code Commission. The 1983 and 1985 reports of the Governor's Regulatory Reform Advisory Board were studied, as well as selected State agency documents, legal publications, and court opinions.

The 1981 Uniform Law Commissioners' Model State Administrative Procedure Act (MSAPA) was reviewed, as was *State Administrative Rulemaking*, by Arthur Earl

Bonfield, a professor of law at the University of Iowa. Bonfield's work discusses the rationale of various provisions in the 1981 MSAPA, and compares it to the federal APA, the 1961 MSAPA, and state APAs.

***Mail Surveys***. There were two mail surveys completed for this study. The first survey dealt with the VAPA rulemaking process and was sent to all 136 Virginia local governments and to 426 Virginia business, professional, trade, and civic associations. The survey had two sections. The first section asked about respondent experiences and views with regard to certain aspects of the State regulatory process, while the second section asked for respondent views on the *Register*. A total of 216 associations (51 percent) and 87 localities (64 percent) responded to the survey.

The second survey dealt with VAPA case decision and judicial review provisions. The survey was mailed to 198 members of the Virginia State Bar or Virginia Bar Association administrative law sections. A total of 97 attorneys responded to the survey (49 percent). Of these attorneys, 37 reported experience with VAPA case decision or judicial review issues and were included in the analysis. The other respondents were predominately involved in administrative law practice at the federal level or before agencies excluded from VAPA, such as the State Corporation Commission.

***Content and Data Analyses***. There were four main content and data analyses completed by JLARC staff: an analysis of rulemaking timeframes; a comparison of State agency public participation guidelines (PPGs); an examination of the meaningfulness of public participation; and an analysis of agency statements on the basis, purpose, substance, issues, and impact of their regulations.

The timeframe analysis involved using the *Register* to determine how long it took each regulation proposed or finalized during the 1990-91 regulatory year to complete the rulemaking process. All 217 regulations were tracked using the *Register* to identify the date when each of the nine steps in the rulemaking process occurred. The data were verified with each agency involved. The amount of time between each step was then calculated and totalled for each regulation. This procedure allowed the calculation of both the average amount of time between each step in the rulemaking process and the overall average rulemaking timeframe. The *Register* was also used in a similar manner to determine the average emergency regulation timeframe for the 1990-91 regulatory year.

For the analysis of State agency PPGs, JLARC staff reviewed the content of 75 PPGs to assess their level of specificity and consistency. Each PPG was examined for its provisions across ten different factors to determine if each factor was: (1) affirmatively addressed or required; (2) inconclusively addressed or optional; or (3) negatively addressed or not addressed. JLARC staff developed a graphic summarizing the results of this analysis, and developed a measure to quantify the relative degree of consistency across all agencies and by secretariat.

To assess the meaningfulness of public participation, JLARC staff collected and analyzed the rulemaking history of 33 regulations that were finalized during the 1990-91 regulatory year. The specific objective of the analysis was to assess the scope of public

comment during rulemaking, the scope of substantive change to proposed regulations, and the relationships between process factors, public comment, and substantive change.

JLARC staff collected data on process factors, such as whether advisory groups were used, and transcripts or copies of oral and written comments. The remarks of the 130 commenters on the proposed regulations were analyzed, in terms of requests for change or endorsements by regulatory section (there were 718 sections). The content of the proposed regulations were compared by section to the content of the final regulations, and substantive changes by section were identified. A comparison by section of commenter input and substantive changes made provided quantified data that could be used to assess the impact (meaningfulness) of public participation.

JLARC staff also analyzed the content of 217 statements by agencies of the basis, purpose, substance, issues, and impact of their regulations. These statements were published in the *Register* in proposed or final form during the 1990-91 regulatory year.

This analysis had two objectives. The first objective was to examine the content of the statements of basis, purpose, substance, and issues to determine if they provide useful information to the public in a consistent manner. The statements that failed to meet the criteria for usefulness were identified, and calculated as a percentage of all statements.

The second objective was to assess overall agency compliance with VAPA requirements regarding the reporting of the estimated impact of regulations. VAPA requires that agency statements address the number of persons affected and the projected costs of both implementation and compliance of all promulgated regulations. Statements that failed to provide this information were identified, and also calculated as a percentage of all statements.

## Report Organization

This report examines the efficiency and effectiveness of the Virginia Administrative Process Act. Chapter I has provided an introduction to VAPA, an overview of Virginia's executive branch regulatory agencies, and a discussion of the JLARC study mandate and approach.

The next three chapters of the report examine VAPA rulemaking issues. Chapter II addresses rulemaking process issues, or issues surrounding the specific provisions (or lack of specific provisions) in the Act. Chapter III addresses implementation issues, such as compliance with VAPA requirements, and Chapter IV addresses public participation issues.

The final two chapters relate to activity that generally occurs after adoption of regulations. Chapter V discusses case decision issues, or agency decision-making in applying regulations. Chapter VI discusses issues pertaining to judicial review of rulemaking and case decisions.

# II. Rulemaking: Process Issues

VAPA provides a set of procedures that are intended to generally regulate the rulemaking activity of administrative agencies. Several questions surrounding these procedures were identified for this study:

(1) When and to what extent are regulations subject to VAPA rulemaking procedures?

(2) When VAPA does apply, does it comprehensively regulate rulemaking procedures, or does it leave significant procedural choices to agency discretion?

(3) Are current rulemaking procedures adequate to provide clarity, consistency, and openness to public participation?

(4) Should VAPA rulemaking procedures be strengthened?

(5) Does VAPA provide an adequate procedure for the review of regulations by elected officials?

The study analysis indicates that during the 1990-91 regulatory year, only 35 percent of regulations were subject to VAPA process requirements. Further, when VAPA does apply, it leaves significant process choices to individual agency discretion. Generally, its requirements do not appear to impose an undue burden upon regulatory agencies. In fact, VAPA currently leaves broad flexibility and discretion to agencies, possibly to the detriment of achieving greater understanding by agency personnel and the regulated public of the ground rules and expectations for promulgating regulations and for public participation.

Many process choices, such as petitioning for rulemaking, the use of advisory groups, the timeframe for notifying the public of the intent to regulate, or whether or not to hold hearings, are addressed, if at all, in agency public participation guidelines (PPGs). An assessment of agency PPGs indicates that they are frequently vague, inconsistent statewide and within secretarial areas, and do not uniformly encourage public participation.

Not only does VAPA provide substantial discretion to regulatory agencies over process choices, it also provides limited powers of review of agency regulatory actions by elected officials. During the early 1980s, VAPA provided for a legislative veto of regulations by joint resolution. This was eliminated due to concern with its constitutionality following a United States Supreme Court ruling on the constitutionality of the congressional veto. Under the current VAPA, neither the Governor nor the General Assembly can prevent an agency regulation from being promulgated. They can file an

objection, which requires an agency response and may postpone the publication of the regulation by 21 days. The General Assembly can enact a law in the following legislative session, with the Governor's signature, to negate the regulation. However, in the interim the regulation will have had the effect of law.

## RULEMAKING ACTIONS SUBJECT TO VAPA ARE IN A MINORITY

VAPA sets forth procedures on what State agencies must do, and what they cannot do, in promulgating regulations. However, the Act also provides for certain exemptions from its provisions.

In assessing VAPA, it is important to consider the amount of rulemaking activity to which VAPA applies, and the amount of activity which is exempt. One of the criticisms of the previous administrative process act in Virginia (the General Administrative Agencies Act) was that it was "so riddled with general exceptions of agencies and subjects that there is very little left for it to relate to." This concern was stated in the 1975 report by the Virginia Code Commission that originated VAPA.

### Proportion of Regulations Subject to VAPA Rulemaking Provisions

JLARC staff reviewed the status attached to the 417 final regulations that were published in the *Virginia Register of Regulations* during the 1990-91 regulatory year. Of these regulations, 148 (35 percent) were subject to VAPA, and 269 regulations (65 percent) were exempt.

Table 2 shows the results of this assessment in additional detail. The table provides: (1) the combined result across all eight secretarial areas of Virginia government, (2) sub-totals for the three most active rulemaking secretariats as well as the "other" five secretariats, and (3) the results for Virginia's independent agencies. Virginia has three independent agencies, the SCC, the Department of Workers' Compensation, and the State Lottery Department, which are not organized into any secretariat. Of these three agencies, the SCC is exempt, and VAPA also exempts rules for the conduct of specific lottery games from its provisions.

Because all 60 of the regulations of the independent agencies were exempt, within the secretarial areas the proportion of regulations subject to VAPA is higher than the overall average. That is, 41 percent of the regulations in the secretarial areas were subject to VAPA, compared to the overall average of 35 percent. This still means that within the secretarial areas, exemptions are frequent, or about six of every ten regulations finalized during 1990-91.

The "other" secretariats (Administration, Education, Finance, Public Safety, and Transportation) collectively had the highest proportion of regulations subject to VAPA, with 72 percent. The Economic Development Secretariat also had more than half of its regulations, 57 percent, subject to VAPA.

Table 2

## Applicability of VAPA Rulemaking Requirements

| | Number of Regulations | Percent VAPA | Percent Exempt |
|---|---|---|---|
| **All Secretarial Areas** | **357** | **41** | **59** |
| • *Economic Development* | *98* | *57* | *43* |
| • *Health and Human Resources* | *155* | *32* | *68* |
| • *Natural Resources* | *68* | *24* | *76* |
| - *Non-exempt agencies* | *28* | *57* | *43* |
| - *Exempt agencies* | *40* | *0* | *100* |
| • *"Other" Secretariats** | *36* | *72* | *28* |
| **Independent Agencies** | **60** | **0** | **100** |
| **Total** | **417** | **35** | **65** |

*The "other" secretariats are Administration, Education, Finance, Public Safety, and Transportation.

Source: JLARC analysis of Volume 7 of the *Virginia Register of Regulations*. Volume 7 covers rulemaking actions from October 1990 to September 1991.

In the Health and Human Resources Secretariat, only 32 percent of the regulations were subject to VAPA. Many of the exempted regulations in this secretariat were classified as emergency situations.

In the Natural Resources Secretariat, there are two agencies that have exemptions from VAPA rulemaking requirements. Game and Inland Fisheries is fully exempt, and the Marine Resources Commission has a partial exemption. In 1990-91, these two agencies issued 40 regulations, none of which were subject to VAPA. For the non-exempt agencies in the Natural Resources Secretariat, a majority (57 percent) of the regulations were subject to VAPA. Since many regulations were promulgated by the exempt agencies, however, an overall average of only 24 percent of the regulations in the Secretariat were subject to VAPA.

### Types of Exclusions from VAPA Rulemaking Provisions

VAPA exclusion criteria are enumerated in §9-6.14:6 of the *Code of Virginia*. Of VAPA's currently effective 48 exclusion criteria, 41 apply to VAPA rulemaking provisions.

Twenty of the 41 rulemaking exclusion criteria originated with the initial enactment of VAPA in 1975. Over the next nine years, only three more rulemaking exclusion criteria were added. Then in 1985, seven rulemaking exclusion criteria were added to VAPA. From 1986 to 1991, 11 more rulemaking exclusion criteria were enacted (four of those enacted in 1991 were not effective until July 1, 1992).

JLARC staff considered whether the rapid expansion in the number of exclusion criteria from 1985 to the present accounts for the high proportion of regulations that are currently exempt from VAPA. Relatedly, the question of which exclusion criteria are cited the most frequently as the basis for exclusion from VAPA rulemaking provisions was examined.

Table 3 shows the rulemaking exclusion criteria cited by agencies during the 1990-91 regulatory year in excluding their regulations from the VAPA process. Only 15 of the 41 rulemaking criteria were cited. The ten most frequent exclusion criteria accounted for 97 percent of the total exclusions.

The data also indicate that the exclusions enacted prior to 1985, or before the major expansion in the number of exclusions, account for the vast majority of exclusions. Of the 276 cites to exclusion criteria, 225 cites (82 percent) were to criteria that were part of the original 1975 VAPA. Exclusion criteria enacted between 1976 and 1984 accounted for 17 percent; 1985 exclusions accounted for one percent; and none of the exclusions enacted since 1985 were cited. Thus, the recent expansion in exclusions did not account for the high proportion of VAPA regulations that were exempt. However, it should also be noted that the four exclusions enacted in 1991 were not effective during the 1990-91 regulatory year, and the frequency of their use is not yet known.

One of the exclusions that appears to be misused is the emergency regulation exclusion. This accounted for almost 35 percent of all exclusions. The misuse of this exemption is discussed in more detail as an implementation issue in the next chapter of this report. Another type of exemption that is of some concern is the total agency exemption, which accounted for approximately 18 percent of the exclusions. While an assessment of these exemptions does not indicate that this is a major problem as currently exercised, such exemptions should be cautiously granted, and periodically subjected to skeptical review.

**Assessment of Agency Exemptions**

One type of exclusion that APA literature generally advises against is the total agency exemption. The reason that this practice is discouraged is that a blanket exemption can be overly broad, and may be used to reduce or eliminate public participation.

The 1981 Model State APA (MSAPA) therefore provides no exemptions to entities that would be commonly understood to be executive branch administrative agencies. (It does suggest exclusions for the legislature, the courts, the governor, and

Table 3

## Exclusions Cited by Agencies for Exempting Rulemaking Activity from the VAPA Process, 1990-91 (Parentheses indicates year exclusion first enacted)

| | Exemption | Number of Times Used |
|---|---|---|
| 1. | Emergency regulation (1975) | 96 |
| 2. | Courts, any agency with constitutional powers of a court of record (1975) | 59 |
| 3. | Needed to meet federal law requirements (1975) | 32 |
| 4. | Department of Game and Inland Fisheries (1977) | 23 |
| 5. | The Marine Resources Commission (1984) | 17 |
| 6. | Needed to conform with Virginia statute change (1975) | 14 |
| 7. | Regulation change is only style, form, or technical correction (1975) | 10 |
| 8. | Virginia Housing Development Authority (1979) | 8 |
| 9. | Agency orders fixing prices or rates (1975) | 5 |
| 10. | Grants of State or federal funds or property (1975) | 4 |
| 11. | Internal agency matter (1975) | 3 |
| 12. | Milk Commission (1985) | 2 |
| 13. | Virginia Resources Authority (1985) | 1 |
| 14. | Regulation addresses inmates or parolees (1975) | 1 |
| 15. | Regulation addresses custody of persons in mental or other State institutions (1975) | 1 |

*There were 276 exemptions cited in excluding 269 regulations from VAPA. Exemptions cited exceed the number of regulations because for six of the regulations, more than one exemption was cited.

Source: JLARC analysis of Volume 7 of the *Virginia Register of Regulations* (October 1990 to September 1991) and the *Acts of Assembly*, 1975 to 1991.

political subdivisions of states). *State Administrative Rulemaking* provides information on agency exemptions in 38 states. Ten of the 38 states are reported to have no agency exemptions. The average of the states was four exemptions, and the maximum was 22 exemptions. The number of agency exemptions appears to have little relationship to state size. For example, Texas is reported to have one total agency exemption, Virginia five, and North Dakota 22.

Virginia's five total agency exemptions under VAPA are:

- the Department of Game and Inland Fisheries
- the Virginia Housing Development Authority
- the Milk Commission
- the Virginia Resources Authority
- the Council on Information Management.

In addition, most of the regulatory activity of the Marine Resources Commission (MRC) is exempt from VAPA. In 1990-91, MRC promulgated 17 regulations and all were excluded from VAPA under its partial agency exemption.

As part of this study, JLARC staff requested information from the five fully exempt agencies and from MRC on the exemptions. Each agency was asked to provide examples of the types of regulations for which exemptions from VAPA public comment are necessary, reasons why the exemption is necessary, and whether there are any regulations of the agency that could be reasonably subject to public comment.

***Game and Inland Fisheries.*** Although exempt from VAPA rulemaking provisions, the department identified the fact that in its basic law, §29.1-501 of the *Code of Virginia*, there are public participation requirements. The agency must publish the full text or summary of any proposed regulation between 15 and 30 days before it may be acted upon, and at the time and place that the matter is taken up by the agency, "any interested citizen shall be heard."

The department cited that "little time is available between the critical deadlines" for actions such as responding to federal frameworks for migratory bird seasons and bag limits, or setting regulations for big game hunting seasons. It stated that "a public comment period longer than those generally provided would mean that regulations would not be responsive to the dynamics of the wildlife populations being managed through the regulatory process."

The department indicated that in addition to wildlife, it also regulates recreational boating, and these regulations "are not as time sensitive as the wildlife regulations." On the other hand, the department indicated that it had never received a complaint about the public comment period provided for its regulations pursuant to agency basic law.

***Virginia Housing Development Authority (VHDA).*** VHDA indicated that although it is exempt from VAPA rulemaking provisions, its basic law provides for public participation. Section 36-55.30:3 requires that VHDA publish its regulations between 15 and 30 days before acting upon them, and at the time and place of a hearing on the regulation, "any person wishing to comment shall be heard and any written comments shall be considered." The primary reason for its exemption from VAPA, the agency states, is that "in many respects [VHDA] operates as a public financial institution and must be able to respond promptly to changes in the lending and housing industries and in federal requirements relating to the tax exemption of its bonds and to the operation of its

programs." It believes that its basic law provisions provide "an appropriate compromise" between the public's needs and the agency's need to respond promptly.

***The Milk Commission.*** The commission stated that its purpose is to ensure that the citizens of Virginia have a constant supply of pure milk at reasonable prices. It has a supply allotment system to ensure "an adequate return to producers through a pricing formula." The commission indicated that timely reaction to changes in price data is "paramount to the maintenance of an orderly marketing structure." Further, it stated that it does obtain public comment on its regulations: "even in an emergency situation, the Commission makes regulatory changes only after a 14-day public notice and a public hearing", and otherwise has a 30-day review procedure.

The commission's justification for a fast timeframe was based on its role in regulating the supply and price for milk. The response indicated, however, that the agency also regulates fair trade practices, accounting methods, and licensing procedures. Its justification for not subjecting these regulatory actions to a public comment period is not very compelling. It stated that "to try to differentiate certain regulations could put the Commission in a judgemental position as to whether the regulation should follow the complete administrative process procedure." All agencies currently subject to VAPA must exercise such judgement in determining whether to seek any subject matter exemptions or emergency exemptions from VAPA.

***Virginia Resources Authority (VRA).*** The VRA describes itself as a political subdivision of the Commonwealth created in 1984 to provide infrastructure financing for local governments. As a bond bank, it provides lower borrowing costs. No local government is required to secure financing through VRA. VRA indicates that its exemption is based in large part on the fact that it "does not regulate private conduct." Its regulations, VRA states, do not lend themselves to the regulatory process due to the volatility of credit and financial markets.

***Council on Information Management.*** The purpose of the council is to promote coordinated planning, acquisition, development and use of information technology serving State agencies and higher education. The council does not believe that there is any need for a public comment period on its regulations "because the Council has no authority to regulate parties outside state government."

***Marine Resources Commission (MRC).*** MRC has a partial exemption for its regulations governing marine fisheries. Its marina siting and wetlands guidelines are covered by VAPA. MRC indicates that pursuant to its basic law, it provides a 15-day rulemaking procedure on its exempt regulations that includes a public hearing. It states that a shorter time frame is needed for its regulations because "conditions change quickly on the status and condition of fisheries stocks, levels of harvesting effort; weather; etc."

***General Assembly Reassessment of Exemptions Needed.*** Requests for total agency exemptions should be carefully scrutinized, and periodically reviewed once granted. They can be overly broad and limit public participation. The JLARC staff review of existing agency exemptions suggests some potential areas in which the scope of agency

exemptions could be reduced. For example, consideration could be given to limiting the exemption of Game and Inland Fisheries to wildlife regulations, while recreational boating regulations could be subject to VAPA. The Milk Commission's agency exemption may not be necessary, as the commission's concern with the need to make timely pricing adjustments already appears to be addressed through the VAPA subject matter exemption which excludes "agency orders or regulations fixing rates or prices."

***Recommendation (1).*** **The General Assembly may wish to periodically review agency exemptions, and consider whether it is feasible to replace, eliminate, or qualify such exemptions.**

## SIGNIFICANT PROCESS CHOICES ARE LEFT TO AGENCY DISCRETION

Regulatory agencies are provided with discretionary rulemaking authority over many matters that affect the well-being of the public. Some observers of regulatory processes are troubled by the fact that detailed law-making authority is delegated to agencies that are not directly accountable to the public. Other observers note that it is impractical for elected legislatures to craft every detail of the law. Thus, administrative process acts are developed to deal with the practical need of delegating certain law-making authority to agencies, while structuring the exercise of that authority. It is hoped that the required structure or process will serve as a substitute for detailed substantive guidance from the legislature, will allow for public input into agency decisions, and will thereby help legitimize the resulting regulation.

When it applies, VAPA sets forth rules or procedures for the rulemaking process. It addresses what agencies must do, and what they cannot do, in promulgating regulations. However, there are also a number of important areas in which VAPA, either explicitly or implicitly by omission, leaves choices about the process to the discretion of agencies.

Exhibit 1 summarizes key VAPA requirements that must be followed for VAPA regulations. It should be noted that in the rare instances of an objection by the Governor or the General Assembly or a suspension of the process by the Governor, VAPA places some additional requirements on the agency.

There are seven items that appear to form the essence of VAPA requirements on agency rulemaking. Agency basic law or guidelines may place some additional requirements on the agency outside of VAPA. However, the VAPA items do not appear to impose an undue burden on agencies. The items address basic elements of providing opportunities for public input, notifying the public of these opportunities, requiring the agency to explain its regulation, and allowing a period of time from the adoption to the effective date of the regulation to enable the public to become informed of the new law.

Concerns are sometimes raised about the timeframe that it takes to promulgate regulations. However, JLARC staff examined VAPA requirements and 1990-91 rule-

Exhibit 1

## Comparison of Key VAPA Requirements and Agency Process Choices for the Typical Regulation

| VAPA Phase | VAPA Requirement | Agency Choice |
|---|---|---|
| Initiation and Development of the Proposed Regulation | 1. Use PPGs that set out methods for identifying and notifying interested parties and specific means for seeking input | 1. Whether to accept, and how to respond to, rulemaking petitions from the public.<br>2. Whether to have a formal NOIRA phase.<br>3. How to obtain public input into the development of the proposed regulation, including whether or not to use advisory groups.<br>4. Length of time allowed for public input into the development of the proposed regulation. |
| Publication and Input on the Proposed Regulation | 2. Prepare statement of basis, purpose, substance issues, and impact of the regulation.<br>3. Publish the proposed regulation and notice of opportunity for comment in the *Register*.<br>4. Publish notice in Richmond newspaper.<br>5. Allow at least 60 days from publication for public comment. | 5. Whether to publish a notice of opportunity for comment in newspapers other than the Richmond newspaper.<br>6. Whether and how to hold a public hearing during the notice and comment phase, including when, where, who is present in an official capacity, and whether a transcript or recording is made.<br>7. Whether to allow additional time for public comment beyond the 60 days. |
| Adoption of the Final Regulation | 6. Forward copy of regulation to Registrar for publication, explaining substantial changes and summarizing public input and agency response.<br>7. Wait for 30-day adoption period to expire before regulation can become effective. | 8. Whether to respond directly to the individual public comments received.<br>9. Whether to provide additional time beyond the 30 days before the regulation is effective. |

Source: JLARC staff analysis of VAPA.

making timeframes in detail (see Appendix B), and found that VAPA does not generally impede rulemaking progress. There are only two explicit VAPA timeframe requirements. The first is a 60-day public comment period on the proposed regulation. The second is a 30-day adoption period from publication of the final regulation. These requirements account for 90 days, or only 23 percent of the total time period that it takes the average regulation to complete the process (387 days). While the various steps of VAPA also have implicit timeframe consequences, the timeframe required to complete all rulemaking steps is at most 36 percent of average rulemaking time. This percentage is based on the timeframe taken by the agency that progressed through the VAPA process the fastest, meeting all VAPA requirements in 140 days.

Exhibit 1 indicates that there are many process issues which VAPA leaves explicitly or implicitly to agency choice. Nine significant areas are shown in the exhibit, including petitioning, use of advisory groups, advertising, and holding hearings. Agency choice provides flexibility. On the other hand, the lack of definition through VAPA can also lead to agency uncertainty as to how to proceed, public confusion about how to participate, and public skepticism as to whether agencies with less open procedures are interested in public participation.

## AGENCY PUBLIC PARTICIPATION GUIDELINES ARE INADEQUATE

Although there are many areas in which VAPA leaves process choices to agencies, this does not necessarily mean that these decisions are left to be made by the agencies on an ad hoc basis. The *Code of Virginia* requires agencies to adopt public participation guidelines (PPGs) that are to address the agency's procedures for obtaining public input.

However, JLARC staff reviewed 75 PPGs, or all PPGs on file with the Registrar, and found that in many instances existing guidelines are vague on key issues, are unnecessarily divided on certain public participation matters, and relatedly, are inconsistent statewide and within secretarial areas. The result is confusion and a lack of certainty for the public and agency personnel as to the ground rules for public participation.

### Background of PPGs

The 1983 report of the Governor's Regulatory Reform Advisory Board recommended that "State agencies should be required by statute to develop, adopt and follow 'public participation guidelines'." The purpose of these guidelines, the report indicated, was to have a process for notifying the public and receiving input in place for each agency before regulations are proposed under VAPA.

In 1984, VAPA was amended to require PPGs. The *Code of Virginia* in §9-6.14:7.1 states that:

> Public participation guidelines for soliciting the input of interested parties in the formation and development of its regulations shall be developed, adopted and utilized by each agency....

PPGs have provided agencies with an opportunity to specify how their rulemaking process will work, in those areas that VAPA has left to agency discretion.

Since the inception of the PPG concept, almost all regulatory entities have developed PPGs as required. Documents from the Registrar of Regulations indicate that the Department of State Police and the Council on Human Rights are exceptions, as both have regulations but no currently effective PPGs. The State Police have acted to address this problem, publishing a proposed PPG in the October 19, 1992 *Register*.

**PPGs Are Vague and Divided on Public Participation Matters**

JLARC analyzed the provisions of each of the 75 PPGs across ten factors. The ten factors that were analyzed are:

1. whether the guideline contains a statement of the policy or purpose of the guideline
2. whether the guideline contains a petitioning for rulemaking provision
3. whether the guideline contains requirements upon a petitioner, beyond self-identification and a statement of the proposed change
4. whether the guideline requires an agency response to petitioners
5. whether the guideline defines the use of any lists external to the agency in identifying interested parties
6. whether the time frame for a Notice of Intended Regulatory Action (NOIRA) is addressed in the PPG
7. whether a minimum time frame from the NOIRA to publication of the proposed regulation is quantified in days
8. whether the use of any advisory board is required
9. whether at least one public hearing is required, explicitly or implicitly
10. whether or not the issue of conducting a periodic review of agency regulations is addressed

The 75 PPGs were analyzed for each of these factors, to assess whether each factor was: (1) affirmatively addressed or required, (2) inconclusively addressed or optional, or (3) negatively addressed or not addressed.

From this analysis, JLARC staff drew several conclusions. First, PPGs are vague. This is especially illustrated in how agencies address the issues of the use of advisory panels during NOIRA, and the conduct of public hearings during the notice and comment period.

Second, PPGs do not uniformly encourage public participation. This is clear from several of the factors analyzed, but the focus of the discussion in this section will be on petitioning for rulemaking and timeframes for NOIRA comment. And relatedly, it is clear from the analysis that there is substantial inconsistency in PPGs, both statewide and by secretariat. While this finding is not surprising at the statewide level (PPGs provide agency flexibility, and VAPA does not specify their content except at a very broad level), it can be a concern if there is needless variation, especially within the same secretarial area. Inconsistency can create confusion for public participants.

***PPGs Are Vague.*** If PPGs are to be useful, they need to establish procedures, or at least criteria for making procedural decisions. Otherwise, they provide no new information to supplement VAPA, and allow agency personnel to make *ad hoc* decisions as to the process to be used. An analysis of PPGs indicates that in many instances their usefulness is suspect. Many guidelines are written vaguely on key points.

For example, VAPA raises the possibility but does not resolve the issue of the use of: (1) advisory panels and (2) public hearings. Agencies have an opportunity through their PPGs to clarify their approach to these procedural issues. A review of PPGs shows, however, that few guidelines provide any guidance as to the likelihood that the agency will use panels or hold hearings.

With regard to advisory panels, VAPA indicates that:

> whenever appropriate, [PPGs] may provide for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering interest in working with the agency.

VAPA thus establishes that an agency "may," or has the authority to, use advisory panels. It would appear to be left to PPGs to define whether the agency (1) will generally create advisory panels, with perhaps some specified exceptions, or (2) will generally not create advisory panels, perhaps with some specified exceptions.

An analysis of the 75 PPGs indicates, however, that 68 guidelines (91 percent) do not provide the public with guidance on whether advisory committees will be formed. Of those 68 guidelines, seven do not address the subject of advisory panels at all; the other 61 guidelines indicate that the agency "may" at its discretion use advisory boards. An example of the content of these guidelines follows:

> The agency may appoint advisory committees as it deems necessary to provide for adequate citizen participation in the formation, promulgation, adoption, and review of regulations.

These guidelines do not provide any more information to the public than is already contained in VAPA, and do not forthrightly address the issue.

Another example of PPG vagueness is the issue of the conduct of public hearings. VAPA has historically enabled agencies to elect to provide public hearings on proposed regulations. The conduct of public hearings is an issue, therefore, that agency public participation guidelines could address.

However, 52 of the 75 guidelines (69 percent) did not state either an explicit or implicit position on the conduct of public hearings. For example:

> *The PPGs of the Department of Commerce and its boards in the Economic Development Secretariat, and the Department of Health Professions and its boards in the Health and Human Resources Secretariat, each address VAPA requirements for a periodic review of existing regulations.*
>
> *These PPGs have sections titled "informational proceedings or public hearings for existing rules." The sections indicate that an informational proceeding "may take the form of a public hearing", but provide no actual guidance or criteria on whether public hearings will be held or are likely. The PPGs contained no statements on whether public hearings would be held on new regulations.*

The majority of PPGs fail to clarify for the public: (1) the circumstances under which public hearings will be held, (2) who will be present from the board at the hearings, if held, (3) where hearings will be held (region(s) of the State), and (4) any rules for participation at the hearings, such as length of time per speaker or distribution of written copies.

***Procedures Do Not Uniformly Encourage Public Participation.*** VAPA requires two major opportunities for public participation: (1) an opportunity for input into the formation of the regulation, and (2) the notice and comment period. For the notice and comment period, a 60-day minimum timeframe is specified.

Beyond these requirements, the opportunity for public participation is largely left to agency guidelines and agency implementation. As a consequence, there is substantial variety in the extent to which public participation is encouraged.

For example, one way to involve the public in the total regulatory process is to provide for a formal, recognized opportunity for members of the public to call for the initiation of a regulation or a change to an existing regulation. A method to accomplish this is to adopt a formal provision for members of the public to petition agencies to request the initiation of rulemaking.

There is considerable variation in how PPGs address petitioning for rulemaking. As of March 1992, 42 of the 75 guidelines (56 percent) contained provisions for petitioning; 33 guidelines (44 percent) did not address the issue. The Natural Resources

Secretariat, which in March had four guidelines with petitioning provisions and four without, is planning to bring greater uniformity to their guidelines. Their proposed PPG revision did not initially include petitioning, but the secretariat indicates that in response to public input, they now plan to include it.

There is also substantial variation between PPGs as to the timeframes that are afforded for public comment during the NOIRA process. The *Register Manual* provides a clear statement of the idealized purpose of the NOIRA:

> The purpose of this notice is to alert interested individuals or groups of the purpose of the regulatory action and allow them to provide input by submitting written comments to the agency.

The NOIRA provides an opportunity for the public to participate in the formulation of the regulation. VAPA is unclear as to whether the NOIRA must occur prior to any drafting of the regulation. It is clear, however, that to be meaningful, the NOIRA must give interested parties a sufficient amount of time to develop and provide comments to the agency before the agency has completed its work on the proposed regulation.

With regard to NOIRA timeframes, 19 of the 75 PPGs (25 percent) do not address the issue. Fourteen guidelines (19 percent) require that the NOIRA be published prior to the development of the regulation. Thirty-two guidelines (43 percent) require publication of the NOIRA at least 30 days before publication of the proposed regulation. Ten guidelines (13 percent) require either a minimum comment period or that the NOIRA occur prior to a meeting or hearing.

The guidelines do not ensure that the regulation will be held by the agency in draft form until the NOIRA comment period is closed, which is essential if the purpose of the NOIRA is to be achieved. The largest group of guidelines, for example, require that the NOIRA be published at least 30 days prior to publication of the proposed regulation. Based on the two-week cycle of the *Register* and lead times for the submission of material, a regulation filed just nine days after publication of the NOIRA could appear in the *Register* after the required 30-day time period. Thus, a 30-day requirement from the one publication to the other does little to ensure an adequate NOIRA comment period.

***PPGs Are Inconsistent Statewide and by Secretariat.*** The issue of PPG consistency was first raised to JLARC staff by the Natural Resources Secretariat in October of 1991. In January of 1992, the Deputy Secretary sent a memo to the Attorney General's Office, indicating the Secretariat's intent to "develop guidelines that would be uniformly used across the Secretariat, thereby allowing for greater understanding and less confusion on the part of the members of the public who interact with more than one Natural Resources Agency."

The JLARC PPG analysis indicates substantial inconsistency in guidelines statewide and within secretarial areas (Appendix C). The analysis was conducted in the Spring of 1992, before publication of new proposed PPGs by the Natural Resources Secretariat. The content analysis for the Natural Resources Secretariat was done for the

PPGs at that time. A content analysis was also done for an October 1992 version of a uniform PPG provided by the Natural Resources Secretariat, and the result is included in Appendix C for comparison purposes.

JLARC staff also performed a quantitative assessment of PPG consistency across the ten factors analyzed. At the time of the analysis, the secretarial areas with the highest levels of consistency in PPGs were the Finance, Transportation, Public Safety, and Administration Secretariats respectively. However, these secretariats do not have many PPGs, and do not perform much rulemaking.

The PPGs of the Natural Resources, Economic Development, and Education Secretariats were lower in consistency. The least consistent PPGs were for Health and Human Resources.

## RULEMAKING PROVISIONS SHOULD BE STRENGTHENED

VAPA and agency PPGs leave a considerable number of significant issues unaddressed or unclearly defined. There are opportunities available to address areas of ambiguity and strengthen the process without hampering the efficiency and effectiveness of administrative agencies.

### Petitioning for Rulemaking

The argument for petitioning for rulemaking is that it provides an opportunity for the public to communicate its wishes and needs for regulatory change, and have these needs considered by the regulatory agency. Petitioning may improve regulations by directing agency attention to new facts, changed circumstances, or problems. The 1981 Model State APA and the federal APA both provide for petitioning.

VAPA currently recognizes a right to petition certain regulations. It explicitly addresses petitioning for some of the regulations adopted without the use of VAPA due to VAPA exclusions. For these regulations, the promulgating agency is required to state that it will "receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision." VAPA does not address the issue of petitioning in other circumstances. As of the spring of 1992, just over half of agency PPGs recognized petitioning. The remainder did not address the subject.

Formally recognizing a petitioning opportunity should not hamper agencies in the performance of their duties. The degree of consideration that a petition receives and the decision of whether or not to initiate the rulemaking would be under the agency's control, perhaps only subject to court review for agency arbitrariness. The agency is not compelled to initiate rulemaking. It is only required to give the petition consideration, and if it rejects it, to provide a stated reason for the rejection.

***Recommendation (2).*** **The General Assembly may wish to amend VAPA to allow for petitioning for a new regulation or for the amendment of an existing regulation, and require that the agency must "receive, consider and respond" to such petitions.**

***Recommendation (3).*** **The General Assembly may wish to provide in VAPA that agency failures to consider and respond to petitions for rulemaking are subject to judicial review.**

### Requiring a Notice of Intended Regulatory Action

The argument for requiring NOIRAs in VAPA is that: (1) NOIRAs alert all readers of the *Register* as well as others that an agency intends to consider a regulatory issue, and allows them to provide input, (2) NOIRAs have become the primary method of most agencies to solicit public input into the development of regulations, (3) the long-term status of NOIRAs if left to PPGs is unclear, however, as NOIRAs are not popular with all agencies.

Some agencies have criticized NOIRAs as delaying proposed regulations and producing limited comment. However, the JLARC staff analysis of rulemaking timeframes indicates that for the average regulation, the NOIRA comment period is completed in 1.3 months, but the proposed regulation is not published until 6.3 months have passed. The fact that agencies on average spend an additional 5.0 months preparing their proposed regulations does not support the notion that the NOIRA comment period is a key delaying factor.

The JLARC staff analysis on public participation issues indicates that, as some agencies claim, public comment on NOIRAs is spotty. About 30 percent of the sample of regulations drew written comment from the public, with an average of five comments per NOIRA commented upon. However, this criticism neglects the NOIRA role as a notification device as well as the symbolic value of the opportunity. Also, if agencies are clearly allowed to work on regulation drafts during the NOIRA phase, as recommended in this report, agencies can provide draft options on regulations to interested parties if they would like, enabling the public to provide more focused input and thereby potentially increasing interest in participation and the value of participation.

***Recommendation (4).*** **The General Assembly may wish to consider amending VAPA to require a Notice of Intended Regulatory Action. The General Assembly may also wish to establish a minimum 30-day comment period, which is the current median timeframe.**

### Use of Advisory Committees

Some State agencies cite the use of advisory committees as a method they employ to help gain input into the development of a proposed regulation. JLARC's review

of agency PPGs indicates that while most discuss advisory committees, few indicate the conditions under which advisory groups will be formed or consulted.

JLARC staff analysis of a sample of regulations found that for 30 percent, advisory groups were used. This percentage, while obviously constituting a minority of the regulations, may not be inappropriate, since most regulatory changes are modest and non-controversial.

However, what is needed is clearer guidance in VAPA or in agency PPGs as to the conditions under which agencies intend to form or consult with advisory committees. There are only a few PPGs that currently attempt to do this. An example from the minority of guidelines which forthrightly address the subject follows:

> Whenever the Commissioner or the Board proposes to develop or modify a regulation, they will create an advisory panel to assist in this development or modification. Advisory panels will be established on an ad hoc basis except where the rule-making process is so frequent as to make a standing committee more efficient. The use of an advisory panel will be waived when (i) there is no response to the notice of intent, [or] (ii) the Office of the Attorney General determines that regulations are promulgated pursuant to state or federal law or federal regulation and that no agency discretion is involved.

This guideline is among the most-fully developed of current PPGs on the subject of using advisory panels. The key point is that the guideline states a general principle as to whether the panels will or will not be created, and then cites specific exceptions, as applicable, to the general principle (in this case, lack of public interest during the NOIRA or lack of agency discretion). It also provides some particular information as to how the exceptions will be determined.

However, under most PPGs, public participants interested in being part of an advisory committee for a regulation will not find any clear policies articulated on the subject. They therefore have to rely in each case on ad hoc agency discretion.

***Recommendation (5).*** **Agency public participation guidelines should be amended to clearly address the conditions under which agencies intend to make use of advisory committees in developing regulations.**

### Clarify that Oral Proceedings Are Not Always Required

There has been long-standing confusion as to whether VAPA requires that agencies conduct a public hearing during the notice and comment phase. A few agency PPGs reflect this confusion, stating that public hearings will always be held pursuant to VAPA requirements:

The department will hold formal public hearings on all proposed regulations as required by the Administrative Process Act.

Amendments to §9-6.14:7.1 of VAPA in 1991 have made the statutory language even more unclear as to whether a public hearing is required. The amendment eliminated prior VAPA language linking the comment period to "the case of regulations for which the basic law requires a hearing, or for which the agency elects to hold a hearing." As a result, there is no longer any substantive statement on the subject of hearings in the section. However, in a later part of the section, there is a descriptive statement that makes reference to a "notice of hearing required above."

From examining the evolution of the VAPA language, it appears that the intent has been to require a hearing when agency basic law requires it or when the agency elects to hold one. However, some agencies may be holding public hearings under the belief that public hearings are required. Excluding the Department of Medical Assistance Services, State agencies held public hearings on 82 percent of regulations subject to VAPA during 1990-91. DMAS had 43 regulations during 1990-91 and held no public hearings. With DMAS included in the data, public hearings were held on about 66 percent of all VAPA regulations.

Public hearings may be an essential part of the process in certain situations, such as controversial, high-impact regulations. The problem with holding hearings on all or most regulations is that it is inefficient. Agency staff who have questioned the efficiency of hearings have indicated that for hearings on most regulations, the number of speakers is low. Also, they state that public hearing comments often consist of the reading of the written comments that are submitted to the agency in writing anyway.

Many regulations are non-controversial and the public may express no interest in them. JLARC staff analysis of public participation through a sample of 33 regulations found that at 11 of the 21 public hearings held, there were no speakers. Also, during the study JLARC staff attended two public hearings on regulations at which no one from the public was present. In both cases, the agencies had received no advance indication from any member of the public as to an interest in speaking. In the one case, agency staff were present at the hearing. In the other case, a Board member, agency staff, and a court reporter to transcribe remarks were present.

***Recommendation (6).*** **The General Assembly may wish to amend VAPA to clarify that public hearings are not always required. This clarification can be achieved by specifying the conditions under which a public hearing must be held.**

### Provide for Oral Proceedings upon Request

One of the conditions under which the General Assembly may wish to require public hearings is when there is substantial public demand for one. This would mean that

the public could not be denied the opportunity to participate in a hearing on a controversial regulation.

The majority of agency PPGs (68 percent) do not state an explicit or implicit position on public hearings. Agencies have discretion under VAPA to deny an opportunity for a public hearing, even if there is public interest in one.

A JLARC survey of local governments and associations indicated strong support for the notion that "public hearings should always be held if requested." Most respondents indicated a view that public hearings can be an important part of the rulemaking process for controversial regulations. Reasons cited for support of public hearings included: the values of openness, access, and opportunity for public scrutiny; the provision of a forum for dialogue, the exchange of ideas, and direct inquiry between boards and citizens; the ability of the setting to allow for greater impact and understanding of the tone and intensity of viewpoints; the ability to learn of the viewpoints of others; the publicity that may be generated on controversial issues; the belief that written comments are rarely acknowledged by agencies, and may be ignored; and the idea that hearings may bring focus to the point that regulations affect people.

The 1981 Model State APA requires an oral proceeding if formally requested within a suggested timeframe of 20 days of the published notice of a proposed rule adoption. The request can be made by those responsible under the Act for reviewing administrative rules, or by a single political subdivision (local government), a single agency, or by a suggested threshold of 25 persons. The purpose of a minimum threshold is to attempt to ensure that public hearings are only required when there is genuine interest.

***Recommendation (7).*** **The General Assembly may wish to consider amending VAPA to require that public hearings be held if a minimum threshold of interest in a public hearing is met. The threshold should be specified in VAPA.**

### Provide for Petitioning when Final Regulation Is Different than Proposed

JLARC analysis of a sample of regulations indicates that agencies do make changes to proposed regulations. Many of these changes were consistent with public comment received. This is generally a positive finding, in the sense that it suggests that public participation can be meaningful, even after an agency has published its proposed regulation.

However, there are some potential negative consequences for public confidence in agencies that can stem from agency changes to proposed regulations. For example, in some cases an agency may make a "surprise" change at one groups' suggestion that did not receive a full discussion during the comment period. This is a situation that local governments complain occurred with regard to a requirement that solid waste disposal

sites use double liners. Local governments state that this change, which apparently stemmed from comment by one or more environmental groups, has had major cost implications, with no opportunity to comment on the idea.

Another situation is when an agency adopts a drastically altered regulation after a controversial public comment period, without an opportunity for an additional formal comment period upon the altered version of the regulation. Exhibit 2 provides an example of this type of circumstance.

It does not appear that VAPA provides an effective safeguard from major "surprise" changes made without additional opportunity for public comment. The Governor may suspend the regulatory process to require additional public comment if changes are substantial. However, important changes may appear small and not be brought to the Governor's attention. Further, VAPA states that an "additional public comment period shall not be required if the Governor determines that the substantial changes were made in response to public comment."

Thus, the Governor's decision discussed in Exhibit 2 was not inconsistent with VAPA, as the changes made were arguably in response to the substantial comments received from physicians/physician groups during the public comment period. However, the action meant that major changes were made to the substance of the regulation without the opportunity for formal public comment on those changes.

It appears that a mechanism is needed that does not discourage agencies from changing proposed regulations as needed, but provides the public with an additional opportunity to be heard in situations where major changes are made from what was submitted for comment.

One idea would be to allow the public to petition for an additional 30 day comment period if the public thinks that a change with a significant impact has occurred. To provide the petition with greater weight than the general petitioning opportunity discussed earlier, in this case the agency could only deny the petition if it finds that the difference between the proposed and final regulation are minor or inconsequential in impact. Otherwise, an additional 30 day comment period must be made available pursuant to the petition.

This approach would provide the public with an opportunity to be heard on major changes. The risk is that agencies might be more reluctant to take public participation into account and make changes, because they do not want the process extended for 30 days.

***Recommendation (8).*** **The General Assembly may wish to amend VAPA to allow the public to petition for a second comment period, limited to issues of change from proposed to final regulations.**

Exhibit 2

## Example of Lack of Public Recourse when Final Regulation Significantly Differs from Proposed

A proposed regulation of the Board of Medicine would have expanded the scope of practice for licensed optometrists who elect to meet the standards for expanded practice. The regulation reflected substantial preparatory work over the course of one year by an ad hoc committee which consisted of several members of the Board of Medicine.

The executive committee of the Board of Medicine approved the ad hoc committee's proposed regulation in September of 1989. During the public comment period which followed, an extraordinary amount of comment was received. There were 99 persons providing comment, with those opposing some provisions of the regulation, mainly physicians and physician groups, outnumbering those favoring it by approximately two to one.

The ad hoc committee reviewed the comments and made several changes to the regulation and recommended it be approved by the full Board of Medicine. The Board of Medicine met in March 1990, and adopted the amended version of the regulation.

The amendments to the proposed regulation included: elimination of the opportunity to treat two of eight diseases and the use of ten of 26 therapeutic pharmaceutical agents; limiting the time that an optometrist can treat a patient for a disease before mandatory referral to an ophthalmologist when a patient fails to appropriately respond to treatment, and prohibiting treatment for the listed diseases of anyone five years of age or younger. The final regulation was published in the June 4, 1990 *Register* and was to become effective on July 5, 1990.

Upon examination of the adopted regulations, staff of the Department of Health Professions noted that the "regulations differ substantively from earlier proposed regulations". The member of the Board of Health Professions assigned to review Board of Medicine regulations stated that there "can be no question that the final regulations as adopted...are considerably more restrictive than those previously presented for public comment". The reviewer recommended that the Board of Medicine defer the regulations for "further study, reconsideration, and public input." The executive committee of the Board of Health Professions passed a motion to request that the Governor delay the effective date of the regulation. According to staff of the Department of Health Professions, the Governor received "thousands of pieces of mail" on the issue. The Governor did not suspend the process for additional comment, and approved the final regulation on July 3, 1990. The Governor did request that the regulation be reviewed by the Board of Medicine within one year.

Source: JLARC analysis of VR 465-09-01, Board of Medicine, Effective Date: July 5, 1990 and interviews with Department of Health Professions staff.

## EXPANDED REVIEW POWERS FOR ELECTED OFFICIALS COULD BE CONSIDERED

Federal and state agencies are provided with discretionary power over many administrative matters that affect the well-being of the public. An issue that is frequently raised in the regulatory field is whether there are adequate checks or safeguards to the exercise of discretionary power by non-elected agency officials. The concern is the protection of the public from arbitrary or unreasonable exercises of agency power. Agencies may act arbitrarily for a number of reasons, including error, bias, arrogance, self-interest, fear of reprisal, or corruption.

Arguments are sometimes put forth at the federal and state levels that legislative bodies have delegated too many decisions to administrative agencies. However, solutions that involve greater legislative retention of decision-making can overwhelm legislative resources and expertise. Therefore, efforts to protect the public from agency arbitrariness are frequently directed at ensuring that there are procedures agencies must follow in reaching their decisions, and in ensuring that agencies and their regulatory actions are subject to various forms of control or review.

VAPA specifies a number of procedures that administrative agencies must follow in rulemaking or in making case decisions. Many of these procedures are designed to ensure public participation and input to agency decisions. Ultimately, however, while the *Code of Virginia* requires that agencies seek public input, an agency can choose to ignore public input at its discretion.

Therefore, it is important to consider what powers of review are provided by statute to elected officials. Exhibit 3 shows the review powers that are provided by VAPA to the Governor, the Attorney General, and the General Assembly. The focus of this section will be on the review of regulations by the Governor and the General Assembly.

### Gubernatorial Review Powers

VAPA provides that the Governor may recommend amendments or modifications to an agency regulation, or suspend a regulation for additional public comment. The Governor may also file an objection to a proposed regulation during the final 30-day adoption period.

The Executive Assistant to the Governor has written that since taking the office, the current Governor "has been dismayed by the quantity and substance of regulations submitted for his comment." However, a review of the *Register* indicates that it is rare for a gubernatorial objection to be filed, or for the Governor to express concerns about regulations in his regulatory comments. From January 1990 to October 1992, the Governor filed five objections. Previous governors also filed few objections.

**Exhibit 3**

## Review of Agency Rulemaking under VAPA

| Institution | Review Power |
|---|---|
| Governor | • §9-6.14:9.1 provides for review to determine if proposed regulations are clear, and necessary to protect the public.<br>• The Governor may recommend amendments or modifications.<br>• The Governor may suspend the regulatory process for 30 days if substantial changes have been made to the original regulatory proposal.<br>• The Governor may file an objection during the 30-day adoption period.<br>• An agency may "adopt the regulation without changes despite the Governor's recommendations for change."<br>• §9-6.14:25 provides that the Governor shall mandate an executive procedure for the periodic review of regulations. |
| Attorney General | • §9-6.14:9.1 provides for review by Attorney General to ensure statutory authority. The Act does not address what happens if the agency and the Attorney General are in disagreement as to statutory authority. |
| General Assembly | • §9-6.14:9.2 provides for legislative review by the appropriate standing committee of each house.<br>• Standing committee may file an objection, which requires a response by the promulgating agency within 21 days, and which extends the adoption period by 21 days.<br>• The agency may still promulgate the regulation after the 21 day extension period. |

Source: JLARC review of the *Code of Virginia*, 1992.

Under VAPA, in those cases in which the Governor objects to a proposed regulation, the promulgating agency does not have to withdraw the regulation. The regulation may take effect over the Governor's objection. This occurred in a recent instance in which a gubernatorial objection was filed.

A gubernatorial objection was published in the *Register* in January, 1991. The Governor's objection was to two regulations of the Virginia Safety and Health Codes Board of the Department of Labor and Industry. For the one regulation, the Governor cited that an approximate five percent difference in effectiveness in preventing injuries between tagout and lockout procedures did not provide the necessary evidence or adequately justify the need for more stringent regulations. On the second regulation, the

Governor questioned the need for more stringent construction sanitation standards. At the Board's meeting on January 8, 1991 the Board took no action to withdraw the regulations. The regulations became effective on January 9, 1991.

According to *State Administrative Rulemaking*, some states provide for a gubernatorial veto of regulations. In Virginia, this issue was discussed by the 1983 Report of the Governor's Regulatory Reform Advisory Board. The nature of the arguments in support and against such a veto have probably changed little since then. The Advisory Board noted:

> Advocates feel that only such a proposal would give an elected official full control over state bureaucrats and agency boards; they promote this idea as essential to protecting the public from overzealous regulators.
>
> Others...argue that this places one individual (the Governor) in a position where he can thwart the will of boards and commissions that have served the Commonwealth well in meeting their regulatory responsibilities. They feel it would expose the Governor to undue pressure and perhaps lead to unwise interference in the regulatory process. They believe the review procedures...are sufficient.

The Advisory Board decided not to recommend the executive veto because of a division of opinion on the Board and because they thought that the recommendation could undermine the success of their other recommendations.

### Legislative Review Powers

The original VAPA of 1975 did not address the question of legislative review. In 1981, language was added to VAPA to provide for a legislative veto of regulations. This language was placed in §9-6.14:9, pertaining to the adoption of regulations.

Under the 1981 provision, the Registrar was to forward materials on the regulation in final form "to each member of the committee of each house of the General Assembly to which the Registrar believed matters relating to the content of the regulations are most properly referrable," and to the House Appropriations and Senate Finance Committees. Any committee receiving the materials could, within 90 days of the mailing by the Registrar, "meet and with a majority of the members of said committee being present, direct upon simple majority vote that the effective date of the regulation or any part thereof be deferred."

The committee then was required to "prepare an appropriate joint resolution expressing the sense of the General Assembly that all or any part of the regulation should be modified or not take effect." Approval of the resolution by the General Assembly would "permanently defer the effect of the regulation in the form adopted."

At the federal level, the congressional veto had been called into constitutional question prior to Virginia's enactment in 1981 of a legislative veto in §9-6.14:9. In 1980, a three-judge panel of the United States Court of Appeals for the Ninth Circuit ruled unanimously against a congressional veto in the case of the *Immigration and Naturalization Service v. Chadha.*

In February 1982, the Attorney General of Virginia was asked for an opinion on the legislative veto provision of §9-6.14:9. Citing the Court of Appeals decision in *Chadha*, as well as other cases and arguments, the Attorney General's opinion was that §9-6.14:9 "as written violates" the Virginia Constitution.

In June 1983, the United States Supreme Court ruled the federal congressional veto (increasingly used by Congress since its initial application in 1932) unconstitutional in the *Chadha* case. During the 1984 Virginia legislative session, the General Assembly repealed its legislative veto provision, apparently due to concern as to its constitutionality.

***Chadha Case Has Influenced State Court Cases But Did Not Settle the Constitutionality of State Legislative Vetoes.*** The *Chadha* case addressed the constitutionality of the congressional veto under the U.S. Constitution. It was not directly applicable to legislative vetoes by state legislatures. The constitutionality of legislative vetoes by state legislatures depends on court decisions applying the provisions of the State Constitution to the particular legislative veto method employed.

On the other hand, the Supreme Court's decision obviously has had and will have an influence when similar separation of powers issues are being argued. An August 1990 paper by the National Conference of State Legislators (NCSL) states that *Chadha* appears to have an influence on many but not all of the State court cases. The paper indicates that the premise of *Chadha*, as well as the decisions of many state courts, is that the "legislative veto of rules constitutes an amendment to statutory authority", and to be constitutional, "must be accomplished through passage by both houses with presentment to the executive." Of ten court cases during the 1980s, in only one case did the court rule in favor of the legislative veto.

A review of state statutes indicates that almost a decade after *Chadha*, 14 states provided for a legislative veto of regulations through concurrent resolutions, joint resolutions, or resolutions. Five other states provide for legislative suspension of the effect of regulations until the General Assembly can consider statutory action. According to the NCSL paper, four states have legislative veto authority written into their state constitutions: Connecticut, Iowa, Michigan, and South Dakota. Connecticut is an interesting case, as it was one of the states with a court ruling against the legislative veto during the 1980s. In response, the voters of Connecticut granted the legislature veto authority through an amendment to the state constitution.

***Assessment of Legislative Veto Issue in Virginia.*** The primary legal document on the subject of the legislative veto in Virginia is the 1982 Attorney General opinion. That opinion can be divided into two main arguments. First, the opinion

concluded that the courts might well consider the legislative veto an "impermissible intrusion into the arena of authority exercised by the executive branch of government." This argument is rooted in Article III §1 of the Virginia Constitution, pertaining to division of powers between the branches. Second, the opinion argued that the legislative veto was inconsistent with Article IV §11 of the Virginia Constitution, which specifies that "no law shall be enacted except by bill."

The Attorney General recognized that no Virginia case had been found "that concerns any type of legislative oversight, such as is established in §9-6.14:9." The opinion also recognized that "the Supreme Court of Virginia has indicated that Article III §1 is not to be strictly construed." However, the opinion cited three factors that are used in assessing the issue: (1) the danger of abuse, (2) necessity, and (3) propriety.

In addressing the "danger" question, the Attorney General opinion distorted the effect of §9-6.14:9. The opinion stated:

> By applying the procedure in §9-6.14:9, a simple majority of a quorum of a committee of the General Assembly may modify or nullify valid regulations, and, without public knowledge, thereby change existing rights, privileges, and obligations created by such regulations.

This statement was not accurate. First, §9-6.14:9 only authorized committees of the General Assembly to defer "the effective date of the regulation or any part thereof." It did not provide authority to committees to modify or nullify the regulation. Committees were authorized to prepare a joint resolution for the General Assembly's consideration to modify the regulation or prevent it from taking effect. If the resolution was not acted upon or approved by the full General Assembly, then the regulation would take effect. If the full General Assembly did act to modify or nullify the regulation, there would be public knowledge of that action.

Second, no substantive regulation was to be effective until the provisions of §9-6.14:9 had been completed. Specifically, the section stated:

> A. No regulation except an emergency regulation shall be operative in less than thirty days after such adoption and the filing thereof in accordance with the Virginia Register Act, provided that in the case of any substantive regulation, such filing shall be deferred pending action in subsection D [the subsection addressing committee review].
>
> D.(2) If no committee acts to defer a regulation within the ninety-day period...it shall take effect as specified in subsection A.
>
> D.(3) No substantive regulation except an emergency regulation shall be effective unless the provisions of this subsection D are followed. The requirements of this subsection shall apply only to substantive regulations.

Thus, it was misleading to state that the effect of the committee action would be to "change existing rights, privileges, and obligations created by such regulations." The "rights, privileges, and obligations" referred to were not yet official, effective, available, or enforceable. They existed on paper, but not in fact. Under the law, proposed regulations did not become effective until the committee review process was completed.

In addressing the "necessity" and "propriety" questions, the opinion stated the conclusion that "the General Assembly may enact legislation...but it may not appropriately enforce the legislation." An alternative perspective on this, however, is that General Assembly consideration of the substantive content of a regulation is not a question of "enforcing" legislation. If the General Assembly vetoes the agency's regulatory language, it is addressing the terms of the law, not enforcing the law.

The opinion further states that the "absence" of a reference to legislative review of regulations in Article III "indicates that the General Assembly was not intended to have the overview authority conferred by §9-6.14:9." On the other hand, the argument should be contrasted with Article IV, Section 14, which states:

> The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject.

The second major argument of the Attorney General opinion was:

> The General Assembly cannot by statute confer upon agencies the power and responsibility to promulgate regulations, and then defer, modify or nullify those regulations by resolution.

The constitutional basis for this argument was considered to be Article IV §11 of the Constitution of Virginia, which specifies that "no law shall be enacted except by bill."

This argument is similar in vein and foreshadows the majority opinion of the U.S. Supreme Court in the *Chadha* case. The U.S. Supreme Court majority opinion cited the federal constitution provision that "every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes law, be presented to the President of the United States...." The court's majority opinion was that Congress was using the legislative veto to make policy decisions that it could not make except through "bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."

The counter-argument to the Virginia Attorney General's opinion is that there is no assertion by the Attorney General that it is improper for the General Assembly to delegate law-making authority to agencies, or for agencies to promulgate regulations with the force of law. The Attorney General opinion does not object constitutionally to the use of regulations rather than bills to establish the law on a subject. But the opinion

does object to the General Assembly attempting to prevent the promulgation of new law by agency regulation.

This counterargument was made in the dissenting opinion of Justice White in the *Chadha* case:

> If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative powers may issue regulations having the force of law without bicameral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test.... Under the Court's analysis, the Executive Branch and the independent agencies may make rules with the effect of law when Congress, in whom the Framers confided the legislative power, Art. I, S1, may not exercise a veto which precludes such rules from having operative force.

Another constitutional concern raised in the Virginia Attorney General's opinion was based on an interpretation of subsection E of colon 9. This subsection stated that once the General Assembly passes a resolution nullifying certain regulations, "no rule or regulation [having] substantially the same object shall thereafter be adopted unless and until the General Assembly repeals the resolution by a recorded vote."

The Attorney General interpreted subsection E to mean that the statutory authority of the agency to regulate the subject matter would therefore be affected by the resolution. The opinion stated that it was well settled that a statute cannot be amended by resolution. As a consequence, the opinion stated that there are "grave doubts that §9-6.14:9 could survive a constitutional challenge."

Theoretically, the legislative veto under §9-6.14:9 could be exercised to serve two purposes. One purpose, as noted by the Attorney General opinion, would be to stop all regulatory activity on a subject matter to which the General Assembly had provided statutory authority to the agency to regulate. Subsection E could potentially serve this purpose, and therefore raise a constitutional concern.

However, the other potential purpose is to provide the General Assembly with the power to stop particular regulatory provisions that address details not specified in statute. Colon 9 could have been amended to serve this purpose. For example, the statute could require the General Assembly in its resolution to identify the particular provisions of the regulation that are unsatisfactory. The agency could seek to redraft and republish regulations that would address the General Assembly's objections. The agency's general authority to regulate the subject matter would remain.

In conclusion, the *Chadha* decision has influenced, but does not directly address and has not settled the constitutionality of the legislative veto at the state level. The primary arguments used in the Virginia Attorney General opinion are not unassailable. Legislatures in nineteen other states can veto or suspend a regulation, presumably within the bounds of their state constitutions. However, if the General Assembly wishes to increase its oversight through the use of a legislative veto, it must consider that the action is subject to court challenge and the courts might not sustain the veto provision.

It appears that a form of expanded legislative review that would have the greatest chance to withstand constitutional challenge would enable a standing legislative committee, with gubernatorial concurrence, to suspend the regulation's effective date until the next session. Then the regulation would become effective unless a bill is passed by the General Assembly and signed by the Governor to stop it. The involvement of the Governor in the suspension and the use of a statute to decide the fate of the regulation may avoid some of the separation of powers and presentment concerns. There are 17 states that provide for a suspension of regulations until the legislature can meet, at least in some situations, including: Alabama, Alaska, Connecticut, Idaho, Illinois, Iowa, Michigan, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, and Wisconsin.

***Recommendation (9).*** **The General Assembly may wish to consider whether it wants to amend VAPA to provide a mechanism for legislative and executive suspension of the effective date of regulations.**

# III. Rulemaking: Implementation Issues

In order for VAPA requirements to be effective, they must be implemented effectively by government officials and regulatory agencies. An analysis of the implementation of VAPA requirements indicates several problem areas. An executive order on the periodic review of regulations, as is required by VAPA, was only published recently, and the review of many regulations has not been timely.

There are also some executive agency compliance problems. VAPA timeframe requirements are not always met. Further, VAPA requires agencies to publish in the *Register* the "estimated impact" of their regulations "with respect to the number of persons affected and the projected costs for the implementation and compliance thereof." An analysis of all 217 regulations published in final form during 1990-91 indicated that only 30 percent provided an estimate of persons affected, only 18 percent provided an estimate of the cost of implementation, and only 16 percent provided an estimate of the cost of compliance.

In addition, there is concern that some exemptions to VAPA, particularly the emergency regulation provision, are being misused. In an "emergency situation", VAPA allows for a regulation to become effective without public participation. As a safeguard from abuse, such regulations are to be effective for only one year. Analysis indicates that there has been growth in the use of the emergency process, that the process does not appear to be limited to emergency situations, and that agencies are in some cases extending the effective period of emergency regulations beyond one year.

Finally, agency implementation of the VAPA requirement to state the basis, purpose, substance, and issues of each proposed regulation has been weak. In part, this appears to be due to a lack of definitions or instructions for fulfilling this requirement.

## EXECUTIVE ORDER PUBLISHED ONLY RECENTLY

Section 9-6.14:9.1 of VAPA requires the Governor to "adopt procedures by executive order for the review of all proposed regulations." The executive order of the previous administration was "in full force and effect until June 30, 1990." The Registrar stated, in issuing the 1991 edition of the Code Commission's *Register Manual* to the agencies of State government:

> Governor's Executive Orders 5(86) and 26(86) expired June 30, 1990, therefore, all references to these executive orders have been removed from the Style Manual.... Appendix D is being reserved for any executive orders relating to the regulatory process that may be issued in the future.

The Governor's office did not publish an executive order until November 30, 1992 (Appendix D).

VAPA also requires in §9-6.14:25 that "[e]ach Governor shall mandate through executive order a procedure for periodic review...of regulations." Again, no executive order was published to address this requirement until the November 30 executive order. Agencies indicated to JLARC staff that they generally followed the provisions of the executive order of the previous administration on these matters.

In addition to the lack of a timely executive order on the regulatory process, the Governor has been late in commenting on proposed regulations and in transmitting those comments. Section 9-6.14:9.1 of VAPA requires the Governor to comment on proposed regulations and transmit those comments prior to completion of the public comment period. Almost half of the proposed regulations during the 1990-91 regulatory year to which this requirement applied (88 of 180) were signed one or more days late. On average, the Governor signed his comments 11 days after the end of the comment period. Fourteen of the comments (about eight percent) were over two months late.

In one case, the Governor's staff called the Registrar's office on November 20, 1990, to state that the Governor was objecting to two regulations that were to become effective at midnight. The regulations had been published in proposed form in May 1990 and in final form on October 22, 1990. The Governor had not filed any previous comments on the regulations. Although the Registrar requested a written objection, and VAPA requires that "the Governor's objection shall be published in the *Register,*" nothing appeared in the *Register* until January 28, 1991, when a January 3, 1991 letter to the Board from the Governor's Executive Assistant was published.

The Governor's policy office is responsible for carrying out the review of proposed regulations for the Governor's action. The office has many duties related to the legislative session, special projects assigned by the Governor, and other matters, which at times impose extraordinary workload demands. Compounding the problem, according to the Executive Assistant for Policy, is the fact that agencies frequently submit regulations late for the Governor's review. This causes a problem because the volume and complexity of regulations require additional time for review. Only three full-time staff are assigned to the policy office.

***Recommendation (10).*** **Each new Governor should comply with §9-6.14:9.1 and §9-6.14:25 of the *Code of Virginia* by issuing an executive order on the review of proposed regulations and a procedure for the periodic review of regulations.**

***Recommendation (11).*** **The administration should review its work processes for promulgating and reviewing regulations to ensure uniform compliance with VAPA. Consideration should be given to designating one staff person in the Governor's office, or the administrative secretariat, or the Department of Planning and Budget to oversee agency compliance with VAPA.**

## TIMEFRAME AND PUBLICATION REQUIREMENTS ARE NOT ALWAYS MET

Section 9-6.14:7.1 of VAPA requires that a "general notice of opportunity for oral or written submittals" be published in the *Register*. The "Revisors' Note" to this section of the *Code of Virginia* explains that this requirement means that interested parties are to be allowed to present their views orally, in writing, or both at their option. The opportunity for "oral submittals" does not mean public hearings, which are currently held at the agency's option (unless agency basic law requires it). VAPA requires that the publication of the notice of opportunity for oral or written submittals "shall be made at least sixty days in advance of the last date prescribed in the notice for such submittals."

An analysis of 217 VAPA regulations from the 1990-91 regulatory year indicated that for nine regulations, the notice in the *Register* did not provide at least 60 days before the comments were due. For two of these regulations, a Board of Medicine regulation and a Department of Social Services regulation, the difference could be attributed to the agency counting the day of the regulation's publication towards the 60 days, as the difference between the due date and the publication date was 59 days.

Six of the regulations were part of a package of the Alcoholic Beverage Control (ABC) Board. The ABC Board published these regulations on August 26, 1991. The notice said that written comments could be submitted until October 16, 1991. This provided only 51 days for written submittals. The fact that a public hearing on the regulation was subsequently held on October 30, 1991 has no bearing on the need under VAPA to provide at least sixty days for oral or written submittals.

In the last case, only 33 days were allotted for written submittals after publication of the proposed regulation. A regulation of the Department of Education on proprietary schools was published on March 26, 1990. The notice said that written comments could be submitted until April 28, 1990. Again, the fact that a public hearing was subsequently held on May 24, 1990 has no bearing on the VAPA requirement to provide at least 60 days for oral or written submittals.

Another timeframe and publication issue relates to a problem already noted, the fact that the Governor's comments have been late and have not fallen within the notice and comment period. The problem has been compounded by the fact that some of the comments have not been signed prior to agency adoption and publication of the final regulation. Sixteen of the 190 final regulations examined were adopted and published before the Governor's comments were signed. Nine of these regulations were published an average of 45 days before the Governor's comments were signed. The Governor has yet to sign his comments concerning six of the regulations.

The agencies that took final action on these 16 regulations before the Governor signed his comments appear to have violated section 9-6.14:9.1 of the *Code of Virginia*. This section of the *Code* states that "upon receipt of the Governor's comments on the proposed regulation" the agency may adopt the proposed regulation, and forward the

regulation to the Registrar for publication. Realizing this problem, the Code Commission amended the *Register Manual* in October 1991 by specifying that final regulations will not be published until the Governor's comments on the proposed version of the regulation are received by the promulgating agency and the Registrar's office.

***Recommendation (12).*** **Pursuant to §9-6.14:7.1, agencies should not submit notices of opportunity for public comment, nor should the Registrar of Regulations accept and publish such notices, that do not provide at least 60 days for written submittals.**

***Recommendation (13).*** **The Registrar of Regulations should help ensure compliance with the *Virginia Register Form, Style, and Procedure Manual* issued by the Code Commission, by contacting the Governor's office when no Governor comment has been filed with a final regulation, and encouraging compliance with the *Register Manual*.**

## AGENCIES DO NOT PUBLISH ESTIMATES OF THE IMPACT OF THEIR REGULATIONS

Since 1977, VAPA has required agencies to develop separate, concise statements on the estimated impact of their regulations, with respect to the number of persons affected and the projected costs for the implementation and compliance with the regulations. In 1989, VAPA was amended to require that this statement be published in the *Register*. VAPA requirements on the publication of impact statements can be found in §9-6.14:7.1(C).

A JLARC survey of Virginia associations and local governments on the subject of the VAPA rulemaking process indicated that one of the greatest areas of concern was the adequacy of information about the costs of regulations. Seventy-eight percent of association respondents and 93 percent of local government respondents indicated that agencies do not develop adequate information about the costs of their regulations (Table 4).

To address the issue further, JLARC staff reviewed agency statements of impact as published in the *Register*. The purpose of the review was to examine agency compliance with the VAPA requirement to provide "the estimated impact" of regulations, "with respect to the number of persons affected and the projected costs for the implementation and compliance thereof." The review was conducted for all 217 regulations that were proposed in the 1990-91 regulatory year.

The review consisted of four components. First, the agency statement for each regulation was reviewed to determine if the subject of "impact" was discussed in any way. If the statement discussed any of the following matters, it was considered to have addressed the subject of impact: Who are the regulated entities who will bear the burden or will benefit by the new or amended regulatory language? How will they be impacted? How much will the costs or cost reductions be?

Table 4

## Virginia Association and Local Government Views on Adequacy of Agency Information on Costs of Regulations

*Statement: "State agencies develop adequate information about the costs of their regulations."*

| Response | Associations (Percent) | Local Governments (Percent) |
|---|---|---|
| Strongly Agree | 2 | 3 |
| Agree | 20 | 4 |
| Disagree | 53 | 38 |
| Strongly Disagree | 25 | 55 |

Source: JLARC analysis of survey data from associations and local governments, spring 1992. For this question, 163 associations and 78 local governments responded with an opinion.

Second, each agency statement was reviewed to examine whether it provided an estimate of the "number of persons affected." The statement was considered to have provided an estimate if it provided a quantified single estimate, or a range, as to the number of regulated entities or persons who would bear the burden or would benefit by the new or amended regulatory language.

Third, each agency statement was reviewed to assess whether an estimate of the "cost of implementation" was provided. Cost of implementation was defined as a dollar estimate, or dollar range, of the cost or cost reduction to the State agency or agencies implementing the new language.

Finally, each agency statement was reviewed for whether a "cost of compliance" was provided. Cost of compliance was defined as a dollar estimate, or dollar range, of the cost or cost reduction to the regulated entities who will bear the burden or benefit from the new or amended regulatory language.

It should be emphasized that the analysis was designed as a general check of agency compliance with *Code of Virginia* requirements that estimates of persons affected, costs of implementation, and costs of compliance be provided. The quality of any estimates found were not systematically assessed, although some statements were noted in which a particularly good or poor job appeared to have been done.

For the purposes of the analysis, if an agency stated that the regulation would have no cost (of implementation, or compliance), that statement was accepted as compliance with the *Code*, because zero cost was asserted. However, if the regulation was

stated to have "minimal" or "no material" cost, then the statement was not accepted because some cost was recognized but there was no quantified estimate provided. Also, the *Code* was interpreted to require an estimate of the total effect of the new language of the regulation. Therefore, if an estimate was provided of the impact of certain pieces of the new regulatory requirements but not others, then it was not considered to be in compliance with the *Code.*

JLARC staff found that 18 of the 217 statements (8 percent) did not discuss impact at all. This included 14 regulatory amendments of the Alcoholic Beverage Control Board, and one regulation each of the Department of Agriculture, Air Pollution Control, Labor and Industry, and Waste Management.

Further, only 66 of the 217 statements (30 percent) provided an estimate of the number of persons affected. Only 39 of the statements (18 percent) provided an estimate of the costs of compliance. And only 34 of the statements (16 percent) provided an estimate of the costs of implementation.

In many cases, the specific components of "impact" were ignored. In other cases, they were discussed but no estimates were provided. For example:

> The estimated impact of the regulation is undetermined. The number of yard waste composting facilities that will request a permit by rule status is unknown.... The overall economic impact may be substantial or minimal.
>
> Impact: The regulations will impact all licensed professional counselors." [The number of licensed counselors was not provided, nor was an estimated cost.]
>
> Projected costs to regulated entities: The proposed amendments will impact all currently licensed practitioners and new applicants applying for licensure who have elected to practice in Virginia. [The substance of the agency's discussion did not address the agency's topical heading of "projected costs."]

The problem of a lack of quantified estimates was found in all of the secretarial areas with substantial regulatory activity. Table 5 shows the percentage of regulatory statements that provide estimates for the specific components of "impact," by secretarial area.

There is no question that for many proposed regulations, it is difficult to provide an estimate for the number of persons affected, the cost of implementation, or the cost of compliance — especially an estimate with a degree of precision. However, what the *Code of Virginia* appears to require at a minimum is a good faith effort to identify the "estimated impact." A review of the statements indicates that in many cases, there is little or no effort made.

Table 5

## Percentage of Proposed Regulation Submission Statements Containing Overall Estimates of Impact

| Secretariat | Number of Persons Affected (Percent) | Cost of Implementation (Percent) | Cost of Compliance (Percent) |
|---|---|---|---|
| Administration (N=1) | 0 | 0 | 0 |
| Economic Development (N=64) | 44 | 14 | 19 |
| Education (N=9) | 22 | 11 | 78 |
| Finance (N=8) | 13 | 0 | 13 |
| Health and Human Resources (N=61) | 39 | 38 | 13 |
| Natural Resources (N=24) | 38 | 8 | 13 |
| Public Safety (N=46) | 0 | 2 | 0 |
| Transportation (N=4) | 50 | 75 | 75 |
| Average, All Regulation Statements | 30 | 18 | 16 |

Source: JLARC staff analysis of proposed regulation submission statements printed in the *Virginia Register of Regulations* during the 1990-91 regulatory year.

Agencies should have some general idea of the probable impact of their regulations upon people and upon the economy. Otherwise, there is good reason to question the legitimacy of undertaking the regulatory action. Ideally, the agency can produce a single best estimate, based on empirical data that it has collected. However, in the less than ideal situation, the *Code* language does not preclude the provision of the estimate as a range, from an estimated low to high impact. Nor does it preclude the use of agency experience and expertise to make an educated estimate in the absence of comprehensive empirical data. However, most agency regulatory statements do not provide any quantified estimate.

It seems appropriate to continue to require agencies to estimate the impact of the regulations, for several reasons. Published cost estimates from the agency show the regulated public that the agency has at least given some concrete thought to the cost impact of its regulation. It provides an initial cost estimate, however crude, that can be discussed and possibly refined during the public comment process. If regulated parties think the cost estimate is substantially understated, they have an opportunity to make their case that it is understated. Conceivably, an agency could decide that the perceived benefits of the regulation do not justify the cost shown by a refined cost estimate. Therefore, the appropriate course of action is to insist upon agency compliance with the existing *Code* provision.

***Recommendation (14).*** **Agencies should not submit, nor should the Registrar of Regulations accept for publication, any proposed regulation**

**submission package that does not provide "the estimated impact of that regulation with respect to the number of persons affected and the projected cost for the implementation and compliance thereof", as required by §9-6.14:7.1 of the *Code of Virginia*. Agencies should make a good faith effort to estimate the impact of proposed regulations.**

## SOME VAPA EXEMPTIONS APPEAR TO BE MISUSED

During the JLARC review, several issues were identified pertaining to the use of exemptions. The most frequently encountered issue pertained to the use of the exemption for emergency situations. The use of the emergency exemption has been growing, particularly as implemented by the Department of Medical Assistance Services (DMAS). Its use is not limited to situations in which public health or safety is immediately endangered. Further, agencies sometimes extend the effect of their emergency regulations, undermining the *Code of Virginia* requirement limiting the effect of emergency regulations to twelve months.

Two other instances of problems with the implementation of exemptions were noted. One is a case in which an agency appears to have unjustifiably cited an exemption from VAPA public comment requirements. Another is a complaint from the public that copies of an exempt regulation were not made available to the public prior to or during a meeting at which the agency's board promulgated the regulation.

### Use of Emergency Regulations Has Increased

As previously indicated in Chapter II of this report, emergency regulations were the most frequent type of exemption from VAPA rulemaking provisions during 1990-91. Of the 276 exemptions cited that year, 96 (more than one-third) were emergency regulations. There were 148 VAPA regulations in 1990-91; thus, the ratio of VAPA regulations to emergency regulations that year was just 1.6 to one.

The 96 emergency regulations promulgated during 1990-91 represented a tripling of the 32 emergency regulations promulgated in 1987-88. Most of this growth was in the regulations of DMAS (see Table 6). In 1987-88, DMAS promulgated just six emergency regulations. In 1990-91, DMAS promulgated 56 emergency regulations, or almost 60 percent of all emergency regulations promulgated in State government.

DMAS had an average of two emergency regulations for every one regulation subject to VAPA in 1990-91. By contrast, excluding the independent agencies and DMAS, all other State agencies had a combined average in 1990-91 of three regulations subject to VAPA for every one emergency regulation.

DMAS has indicated that it needs to make rapid changes to many of its regulations due to the effective dates of federal requirements. The *Code of Virginia* provides an exemption from VAPA rulemaking when "necessary to meet the require-

Table 6

## Number of Emergency Regulations Filed by DMAS and Other Agencies, 1987-1991

| | DMAS | Other Agencies | Total |
|---|---|---|---|
| 1987-88 | 6 | 26 | 32 |
| 1988-89 | 18 | 37 | 55 |
| 1989-90 | 37 | 24 | 61 |
| 1990-91 | 56 | 40 | 96 |

Source: JLARC staff analysis of the *Virginia Register of Regulations*.

ments of federal law or regulations provided such regulations do not differ materially from those required by federal law or regulation." However, under the exemption, the Registrar must agree in writing that there is no material difference, and notice of the regulation and the Registrar's determination must be published in the *Register* at least 30 days prior to the effective date of the regulation. By using the emergency regulation approach, DMAS needs only the prior approval of the Governor and there is no 30-day adoption period.

DMAS's proposal to address its heavy usage of the emergency process is to "streamline" the federal law requirement exemption so that it can be exercised as rapidly as an emergency regulation. DMAS proposes that the Director should be able to certify to the Governor and the Registrar that no agency discretion is to be exercised in amending the plan, and then should be able to adopt, suspend, or rescind plan provisions effective immediately upon filing with the Registrar. DMAS has indicated that this change would "reduce the frequency of use of the emergency regulatory process."

Based on a review of DMAS justifications for its emergency regulations published in the *Register* during 1990-91, it appears that 22 were justified by DMAS on the basis of federal law requirements, and it is not clear how many of these regulations involved the exercise of no agency discretion. Even the use of an alternative process for all of these federally-driven regulations would have left DMAS with 34 emergency regulations, or almost half of all emergency regulations in State government. The reasons cited by DMAS for the remaining emergency regulations were varied, and in some cases did not appear to constitute an emergency situation. Some emergency regulations were used to supercede existing emergency regulations, due to the department's failure to commence timely VAPA rulemaking proceedings.

### Use of Emergency Exemption Not Limited to Emergency Situations

In §9-6.14:4.1, VAPA states that emergency regulations are "regulations which an agency finds are necessitated by an emergency situation." The prior approval of the Governor is required for adoption.

VAPA does not define an "emergency situation." As it is being implemented, emergency situations are not restricted to situations with a potential impact on public health or safety, or situations in which there is a pressing time deadline imposed by State or federal law.

Under current implementation, an emergency regulation is any regulation that the executive branch decides is needed more quickly than it thinks the VAPA process permits. Rationales that have been cited by agencies have included: to establish fees, to implement cost management initiatives, to meet the agency's planned effective date, and to address the agency's objectives.

The emergency process enables the agency to act without public participation procedures or General Assembly review. There are serious questions as to the legitimacy of an agency using this process other than in extremely time-sensitive situations that are beyond agency control. The purpose of emergency regulations is not simply to allow agencies to exercise bureaucratic discretion quickly and with minimal checks.

Further, excessive use of emergency regulations is a concern because emergency regulations are exempt from the 30-day adoption period. They can become effective upon filing with the Registrar. In 1990-91, emergency regulations were effective an average of 20 days before publication. This can mean that the public does not have a fair opportunity to know the regulation's content before it is applied. The loss of this opportunity may exceed the loss of the ability to participate in the process.

***Recommendation (15).*** **The General Assembly may wish to consider amending VAPA to restrict the use of emergency regulations to situations involving an imminent threat to public health or safety, or a deadline under law that could not be met using VAPA.**

***Recommendation (16).*** **The General Assembly, to the extent that it does not similarly restrict the use of emergency regulations, may wish to amend VAPA to require that emergency regulations are exempt from the 30-day adoption period only in situations involving an imminent threat to public health or safety, or a deadline under law that cannot be met otherwise.**

### Some Emergency Regulations are Effective More than One Year

Section 9-6.14:4.1 of VAPA states that emergency regulations "shall be limited to no more than twelve months in duration." Again, an argument in favor of the current law's limit on the timeframe of an emergency regulation is the truncated promulgation process of an emergency regulation. The process does not provide for public comment or legislative review.

However, analysis indicates that some regulations remain in emergency status for more than one year, due to agency practices of reissuing or revising emergency regulations. An analysis of emergency regulations from October 1990 to June 1992 indicates that 14 were reissuances and were in effect for more than one year. Exhibit 4

Exhibit 4

## Examples of Emergency Regulations Effective Beyond the One-Year VAPA Limit

| Regulation Number | Regulatory Agency Explanation of Action |
|---|---|
| • VR 615-45-1 | "The purpose of this request to take emergency action is to continue the existing emergency regulation...." |
| • VR 480-05-22.1 | "...the Department must reissue the emergency regulation to continue its gas and oil regulatory program until the permanent regulation can be promulgated." |
| • VR 460-03-3.1120 | "The extensive period of time required to 'shake down' the original emergency regulation by gathering comments and proposed changes from CSBs in the field and HCFA has left insufficient time to complete the APA Process." |

Source: Agency statements published in the *Virginia Register of Regulations*, 1990-91.

provides some examples of emergency regulations that were reissued and were thus in effect for more than one year.

None of the 14 reissued emergency regulations were followed up by a proposed regulation within a half-year timeframe — which would be helpful to meet the one year timeframe for a final regulation. This indicates that a requirement may be needed that the interim steps necessary to promulgate a VAPA regulation be accomplished by agencies within a set period of time, so that agencies are less likely to neglect the process.

***Recommendation (17).*** **The Governor should ensure that agencies comply with §9-6.14:4.1 of the *Code of Virginia*, and not provide approval to emergency regulations that would reissue or extend an emergency regulation concerning the same subject area beyond the one year limit.**

***Recommendation (18).*** **The General Assembly may wish to require that within 60 and 180 days after the effective date of an emergency regulation, an agency wishing to continue regulating the subject covered by the emergency regulation must publish a NOIRA and a proposed regulation.**

### Basic Law Participation Requirements Are Sometimes Ignored

The scope of review for this study did not include a detailed examination of the fact situations and the statutory authority for the exemptions cited by agencies. However, a notice printed in the *Register* drew attention to one regulation in this regard.

The *Register* notice stated that the regulation was "being revised pursuant to §3.1-188.23 of the *Code of Virginia*." This statement did not identify the authority for an exemption.

The regulation was not published in proposed form, and there was no public notice and comment period. It was being published in final form with a cite to the agency's basic law. The statute cited, however, required that before adoption, the Board "after due public notice, [shall] hold a public hearing in accordance with the Administrative Process Act [9-6.14:1 *et seq.*]." Thus, it appears that the regulation should have been subject to VAPA notice and comment provisions.

### Copies of Exempt Regulations Should Be Available Prior to Promulgation

A respondent to the JLARC survey on VAPA provided the following statement of concern about the promulgation of a regulation:

> The meeting was convened, a staff member read the proposed new regulations, the chair asked for a motion and voted the adoption without prior distribution of the text or any opportunity for public review or comment....
>
> Members of my association were in telephone contact twice with staff people in preceding days...but were never able to have a complete discussion or to know the text of the proposal until it was read immediately prior to the voting by the board. In response to my complaint to a staff member, I was told that the Administrative Process Act allowed such actions and that it had been complied with. Regardless of anyone's intent, the good or bad effect or whether compliance was achieved, an injustice was committed.

JLARC review of the situation indicates that VAPA had been complied with, because the regulation was exempt from VAPA. The agency had cited an exemption to VAPA on the basis that the regulation was necessary to conform to Virginia statutes, with no exercise of agency discretion.

However, the agency's unwillingness or inability to furnish the regulation in advance of adoption proceedings undermines public confidence. For regulations that are to be adopted by board or commission action, it seems reasonable for the agency to make copies of the exempted regulation available for public inspection upon public request in advance of the meeting. This is the only way that the public would have an opportunity to raise an issue with the agency as to the appropriateness of the claimed exemption.

***Recommendation (19).*** **The General Assembly may wish to consider amending VAPA to require that for exempt regulations to be adopted by action of a board or commission, agencies should furnish copies of their exempted regulations to members of the public requesting such copies at least two days in advance of the board or commission meeting.**

## DEFINITIONS ARE NEEDED OF "BASIS, PURPOSE, SUBSTANCE AND ISSUES"

Section 9-6.14:7.1 of the *Code of Virginia* requires agencies to submit concise statements about their proposed regulations to the Registrar that cover the following: "the basis, purpose, substance, issues, and the estimated impact." With the exception of "estimated impact", (which is defined as the number of persons affected and the costs of implementation and compliance), these terms are not defined by VAPA.

Also, §9-6.14:22 of VAPA requires that agencies "present their proposed regulations in a standardized format developed by the Code Commission." However, the *Register Manual* contains no definitions, instructions, or forms to help standardize the information provided by agencies to meet this requirement. The manual just states that "two copies of a statement as to the basis, purpose, substance, issues and impact of the regulation shall be submitted on a separate sheet of paper." The manual does not emphasize that each of these elements is specified in the *Code of Virginia* and must be addressed.

JLARC staff reviewed the 217 statements published in the *Register* during the 1990-91 regulatory year. The purpose of the review was to examine the content and usefulness of these statements, as prepared without standardized definitions and formats.

The review showed that many agencies are using the five elements (basis, purpose, substance, issues and estimated impact) as headings to structure their statements, but this is not always the case. Specifically, many agencies interpreted "basis" as the statutory authority of the agency to act, and 214 of the 217 statements (99 percent) had a heading of either "basis" or "statutory authority." There were 181 statements that had a "purpose" heading (83 percent), 112 statements that had a "substance" heading (52 percent), 117 statements that had an "issues" heading (54 percent), and 168 statements (77 percent) had an "impact" heading. Consistent use of these headings would be helpful to promote completeness on the part of the agency, to facilitate the Registrar's review for compliance with what is required, and to help the public readily locate the information they are interested in.

The content that agencies provide pertaining to the four undefined elements is inconsistent, and indicates that agencies define the elements differently. These problems suggest that the *Register Manual* should provide definitions of these terms, and examples of statements that appropriately implement those definitions. The definitions should be designed to educate the public and meet its need for concise information about the regulatory action, which is the purpose of requiring the statement.

Exhibit 5 addresses each of the four undefined elements. For each element, it describes the nature of the problem that was found in agency statements, provides an example of the problem, suggests a definition that could be used, and provides an example of an agency statement that illustrates how the element could be addressed appropriately.

Exhibit 5

## Problems and Suggested Definitions for Statements of Basis, Purpose, Substance and Issues

- "Basis" — Many agencies provide only the *Code* section number as authority for a new or amended regulation with no explanation.

  - Inappropriate "basis" example — "This regulation is issued under the authority granted by section 42.1-52 of the *Code of Virginia.*"

  - Suggested "basis" definition — Cite the statutory authority for promulgating the regulation, including an identification of the section number and a brief statement relating the content of the statutory authority to the specific regulatory action planned.

  - Appropriate "basis" example — "Section 9-158(C) states 'the council, where appropriate, shall provide for modification consistent with the purposes of this chapter, of reporting requirements to reflect correctly these differences among health care institutions and to avoid otherwise unduly burdensome costs in meeting the requirements of the uniform system of financial reporting'." [The regulation dealt with an agency survey of annual charges by health care institutions.]

- "Purpose" — Many agencies do not explain the need for the new or amended regulation.

  - Inappropriate "purpose" example — "The [Board] has not revised the local minimum expenditure requirement for public libraries since 1977."

  - Suggested "purpose" definition — From the standpoint of the public's health, safety, or welfare, explain the rationale or justification for the new or amended regulation.

  - Appropriate "purpose" example — "The purpose of the standards is to require the owner to limit source emissions of noncriteria pollutants to a level that will not produce ambient air concentrations that may cause, or contribute to, the endangerment of human health.... The proposed regulation amendments are being made in response to problems discovered during the implementation of these rules."

- "Substance" — Many agencies fail to identify and explain key provisions of the new or amended regulation.

  - Inappropriate "substance" example — "This regulation is an update and revision of VR 230-40-009, issued by the Board of Corrections in 1983."

**Exhibit 5**
**(continued)**

- Suggested "substance" definition — Identify and explain the key provisions of the new or amended regulation that make changes to the current status of the law.

- Appropriate "substance" example — "The amendments to section 4 allow the [Board] to increase the required collateral of any and all savings institutions above 100% of the public deposits held. The amendment in section 7 states that pledge securities which are difficult to value or subject to rapid decline in value may be valued at less than their market value for purposes of securing public deposits...."

• "Issues" — Many agencies fail to identify the advantages and disadvantages of the regulatory action in question.

- Inappropriate "issues" example — "There are no issues contained in the proposed regulation." [The regulation was a new PPG; several pages of this report describe the issues surrounding PPGs.]

- Suggested "issues" definition — Identify the primary advantage(s) and disadvantage(s) for the public, and as applicable for the agency, of implementing the new or amended regulation.

- Appropriate "issues" statement — "The Board sees 40 hours of CPE as a reasonable requirement which will assist the profession in remaining current with changes in tax laws and accounting procedures.... The [Board] clearly sees that CPE requirements will cost the licensees in terms of fees for courses, transportation, and time away from the office."

Source: JLARC staff analysis of agency statements of basis, purpose, substance and issues, as published in Volume 7 of the *Virginia Register of Regulations*, 1990-91.

***Recommendation (20).*** **The Code Commission may wish to provide definitions or instructions in the *Virginia Register Form, Style, and Procedure Manual* to guide agencies in providing information on the basis, purpose, substance, and issues of proposed regulations. The definitions should be designed to meet the public's need for concise information about the regulatory action.**

# IV. Rulemaking: Public Participation Issues

Public participation in the rulemaking process is one of the cornerstones of VAPA. VAPA requires that agencies seek public input concerning all regulations subject to the Act. This input is sought primarily to provide the public with the opportunity to bring facts or arguments to the promulgating agency's attention and possibly affect the regulatory outcome. Public participation can also impact the perceived "legitimacy" of the rulemaking process. Public confidence and willingness to observe regulations may be enhanced if the public perceives that all interested parties are allowed meaningful participation in the rulemaking process.

Public participation can be promoted by increasing public knowledge of the regulatory process. JLARC survey results indicate that a significant minority of local governments and associations are unaware of the existence of the *Register*, which is an important source of information on regulatory activities. Greater emphasis on publicizing the *Register* is needed. In addition, a code of regulations containing all current regulations of State agencies would be useful for the public and State agencies. The Code Commission is currently seeking to establish a code of regulations.

Public participation can also be promoted by appropriate agency responsiveness to public comment received. An analysis of the impact of public participation indicates a mixed picture. On the one hand, substantive changes to proposed regulations by State agencies are not unusual. Agencies do make substantive changes to proposed regulations in sections for which commenters request change, and sometimes the changes are consistent with the public comment received. On the other hand, the number of changes made is far outnumbered by the number of requested changes that are not made.

There is currently a difference of opinion among public participants in VAPA processes on the meaningfulness of public participation. Local governments and civic associations have little confidence that State agencies will make substantive change to proposed regulations based upon their comment, while business, professional, and trade associations have greater confidence.

Public confidence in the meaningfulness of participation could be increased by sending State agency responses to public comment to those who commented. State agencies are already required to prepare such a response, but the response is not published and is not distributed, and many commenters appear to be unaware that responses are produced. Also, agencies should be allowed to begin drafting proposed regulations before the filing of a NOIRA, a practice which would enhance public participation, but they should be prohibited from filing proposed regulations prior to the close of the NOIRA comment period, a practice which undermines public confidence.

## PUBLIC KNOWLEDGE OF REGULATIONS COULD BE EXPANDED

The public's awareness of the *Register* should be increased to facilitate greater public participation in the rulemaking process. The *Register* is the official source book concerning regulations in Virginia. Its main purpose is to satisfy the need for public availability of information respecting the regulatory activity of State agencies. The *Register* is published once every two weeks by the Code Commission and includes the complete text of proposed and final regulations, regulatory comments by the Governor, notices of all intended regulatory actions and public hearings, and the basis, purpose, substance, issues, impact, and summary statements for each proposed regulation. The regulatory information contained in the *Register* cannot easily be obtained in a timely manner from any other source. Knowledge of and access to the *Register* is critical for those who have a stake in the regulatory activities of State agencies.

A 1992 survey of Virginia local governments and associations indicated that a significant minority of these groups were unaware of the existence of the *Register*. A total of 20 percent of the local governments and 30 percent of the associations responding indicated that they had never heard of the *Register*. JLARC staff also received numerous inquiries from the localities and associations surveyed about the *Register* regarding: the type of regulatory information contained, the frequency of publication, who publishes the *Register*, and general subscription information. In addition, a review of the *Register* mailing list for those subscribers classified as "local governments" reveals that only 25 of a possible 136 cities and counties in Virginia (18 percent) have at least one identifiable subscription to the *Register*.

In addition to the *Register*, a code of regulations containing all current regulations of State agencies would be a useful source of information for the public. State agencies could also benefit from having all their current regulations consolidated in one place since JLARC staff have found that agencies are occasionally confused as to what version of a regulation is currently in effect.

Consideration of an administrative code was recommended in 1982 by the JLARC report *Occupational and Professional Regulatory Boards in Virginia*. The current Model State Administrative Process Act (MSAPA) also suggests publication of an administrative code, indicating that it should include all effective rules (with specified exceptions) of each agency and have loose leaf supplements published at least every three months. Commenters on MSAPA have suggested that administrative codes help ensure that regulations are in fact accessible to the public, and that agencies do not establish "secret law."

***Recommendation (21).*** **The Code Commission may wish to request that the Registrar provide an active marketing role for the *Virginia Register of Regulations*. This role could include periodic distribution of an informational pamphlet, user surveys, references to subscription information in newspaper notices, and speaking engagements with associations to provide information on the regulatory process and the use of the *Register*.**

***Recommendation (22).*** **The Code Commission should continue its efforts to establish a Virginia code of regulations.**

## PUBLIC PARTICIPATION IS SOMETIMES MEANINGFUL

VAPA requires that agencies seek public input concerning all regulations subject to the Act. Questions have been raised as to whether that input has impact, or is meaningful. In order for public participation to be meaningful, State agencies must carefully consider public comment and change the content of proposed regulations if public comment produces sound reasons for change.

Based on the sample data analyzed for this study, substantive change in proposed regulations is not unusual. Approximately half of the regulations examined by JLARC staff had at least one section of a regulation change substantively between publication of the proposed and final regulations. State agencies do make substantive changes to proposed regulations that are consistent with public comment received. The public commenter "success" rate, based on at least one change being made in a section consistent with the commenter's position, was 24 percent. The number of changes made by agencies, however, are far outnumbered by the number of requested changes that are not made. The public commenter "failure" rate, based on at least one change being denied in the section commented upon, was 84 percent. The impact of the substantive changes made to proposed regulations in response to public comment varies.

### Substantive Change to Proposed Regulations is Not Unusual

It is not unusual for a proposed regulation to be changed substantively by the time it is published in final form. Of the 33 regulations examined by JLARC staff, 46 percent of the regulations had at least one section that was substantively changed after the proposed regulation was published. The average regulation had substantive change occur in ten percent of its sections.

### Changes Are Made to Regulations Consistent with Public Comment

State agencies do make substantive changes to proposed regulations that are consistent with public comment received. The number of suggested commenter changes that are actually made by agencies, however, is far outnumbered by the number of requested changes that are not made. JLARC staff analyzed the relationship between the information received during the public comment period, and changes observed in the content of proposed and final regulations printed in the *Register*. This analysis was conducted using 33 regulations that were finalized during the 1990-91 regulatory year.

Public commenters can generally provide two types of comment regarding a section of a regulation. Commenters can endorse a section indicating their support for

at least one of its provisions, or they can request substantive change to at least one of the provisions in a section. These two types of comments are not mutually exclusive, as a commenter can endorse a section of a regulation while also requesting that a change be made.

A total of 131 public commenters made 316 sectional comments concerning the regulations examined by JLARC staff. Most public comments were found to seek change rather than provide endorsements. There were 98 sectional endorsements, compared to 225 substantive change requests. (The two categories do not sum to 316 due to rare cases in which a commenter both provided an endorsement and called for a change to the same section).

For the regulations examined, State agencies made a total of 54 substantive section changes to proposed regulations that were consistent with public comment requesting change. This is a "success" rate of 24 percent (54/225). State agencies denied 188 commenter requests for sectional change. This is a failure rate of 84 percent (188/225). Thus, the sample suggests that the likelihood of agency rejection of requests for change exceeds the likelihood that change will be made. However, change consistent with public comment does occur.

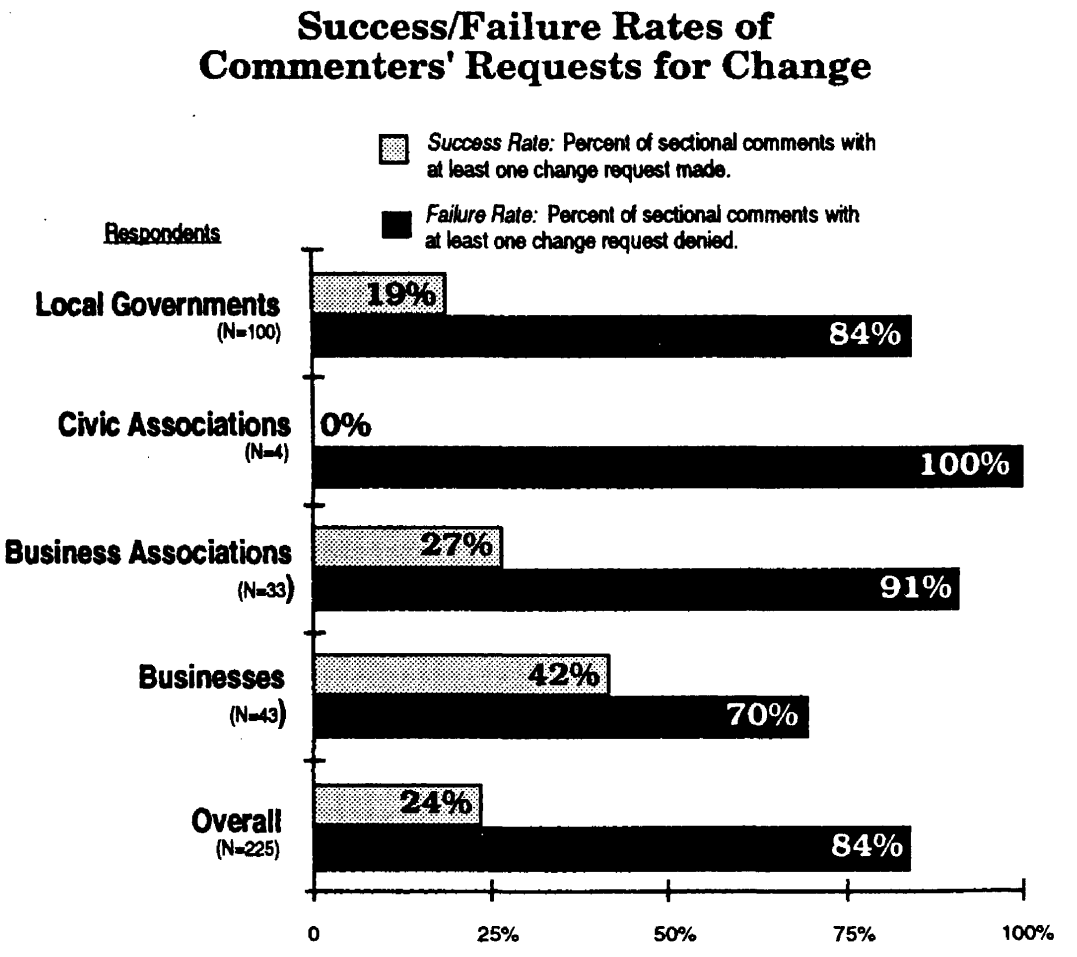
Examination of "success" and "failure" rates by type of commenter indicates that different classifications of public commenters have varying levels of success in requesting substantive change to proposed regulations (Figure 3). For the regulations examined, the most "successful" type of public commenter was individual businesses, with 42 percent of their substantive change requests being consistent with changes made by agencies. Business associations also had an above average commenter change request "success" rate (24 percent). The two types of public commenter classifications with below average success rates were local governments (19 percent) and civic associations (0 percent). It should be noted, however, that the success rate for civic associations is based on only four change requests.

## Impact of Substantive Change Made in Response to Public Comment Varies

The impact of the substantive changes made to proposed regulations in response to public comment varied among the regulations. Some of the changes appeared to have significant impacts while others, although substantive, appeared to be minor. The majority of the substantive changes appeared to be between these two extremes. An example of two relatively minor substantive changes in the same regulation are as follows:

> *In VR 647-01-02 (Policy and Procedure Manual) of the Commission on the Virginia Alcohol Safety Action Program, two relatively minor substantive changes were implemented at the request of public commenters. The first change made was to require that each policy board of the local alcohol safety action programs (ASAP) adopt Robert's Rules of Order as operational guidelines for actions not specifically*

Figure 3




Notes: Forty-five commenter change requests were in other categories. Success and failure rates do not sum to 100 percent because a commenter could have at least one sectional comment change request made and at least one denied in the same section.

Source: JLARC staff analysis of public comment, and substantive change from proposed to final regulation form, for a sample of 33 regulations during the 1990-91 regulatory year. The analysis was done at the section level.

*defined in the board's guidelines. The second change was to move the due date for each ASAP's annual report of activities and financial data from 60 to 90 days after the end of the fiscal year. The reason for the change was that many of the audits could not be completed within the allotted timeframe and were being submitted late.*

In comparison, the Stormwater Management Regulations of the Department of Conservation and Recreation provide an example in which at least two significant changes were made to the regulation in response to public comment (Exhibit 6).

Exhibit 6

## Substantive Changes Made in Response to Public Comment on VR 215-02-00

Section 2.2.K. stated that "where deemed necessary by the locality, the applicant shall submit an analysis of the impacts of stormwater flows downstream in the watershed. Over detention of the design storms may be required to prevent flooding or stream erosion downstream." Several commenters complained about the language. One stated that the "opportunity for abuse of this regulation, at the municipal level, is unprecedented. Without any guidelines as to what criteria might be 'deemed necessary' this is a wide open opportunity for local jurisdictions to require needless, expensive and unnecessary analysis of downstream impact...it should be the responsibility of the [government entity] to provide for their failure to properly control downstream conditions."

The Department changed the regulation stating that it "agrees this requirement as written could be abused. The intent of this requirement was not to require a person to correct an existing flooding problem but to avoid exacerbating an existing flooding problem."

A second change involved section 3.6.5 which stated that "no transfer, assignment or sale of the rights granted by virtue of an approved [stormwater management] plan shall be made without the prior written approval of the locality." Several commenters complained about the language. One stated that typically "permit approvals and maintenance agreements 'run with the land' and are transferred from property owner to property owner without review by the County. This statement would seem to imply that property could not be bought or sold without approval of the County if the property owner wishes to retain the previously approved permits."

The Department agreed with the commenters that the section needed to be clarified and changed the regulation, replacing "without the prior approval of the locality" with "unless a written notice of transfer is filed with the locality and the transferee certifies agreement to comply with all the obligations and conditions of the approved plan."

Source: JLARC analysis of VR 215-02-00, Department of Conservation and Recreation, Effective Date: December 5, 1990.

## PUBLIC CONFIDENCE THAT COMMENTS ARE CONSIDERED COULD BE HIGHER

Opinions on the meaningfulness of public participation vary among the public. Some believe that it is very difficult for the public to actually influence the substance of regulations promulgated by State agencies. Local governments and civic associations in particular have little confidence that State agencies will make substantive change to proposed regulations based upon their comment. These groups strongly believe that agencies will not give serious consideration to their comments.

The *Code of Virginia* and the *Register Manual* issued by the Code Commission require that State agencies summarize and respond to the oral and written comments presented during the Notice of Comment period. This summary is filed with the Registrar as part of an agency's final regulation package. The Registrar should ensure agency compliance by making sure that the summary does include an agency response to all public comment.

The contents of the summary are neither published nor distributed to those who commented upon the regulation in question. Many public commenters appear to be unaware that these summaries are produced. Distribution of this summary to those who commented upon a regulation would increase public confidence concerning the meaningfulness of their comments. It would ensure the public that their comments were received and considered by the agency. It would also provide commenters with the agency's reaction to their comments and what, if any, action was taken in response to them by the agency.

An additional benefit of distributing the summary would be that it would allow commenters to correct errors or misunderstandings regarding their comments by agencies. A requirement that the summary be provided to commenters five days before an agency could file their final regulation package with the Registrar would ensure that agency interpretations of the public comment is accurate while not extending the timeframe it takes most regulations to complete the rulemaking process.

There are instances when agency actions have undermined public confidence in the meaningfulness of public participation. Several agencies have filed their proposed regulation packages with the Registrar before the close of the regulation's NOIRA comment period. This type of action is prohibited by the *Register Manual* although the language in the *Register Manual* could be made clearer on this issue. The Registrar should not accept proposed regulation submission packages for filing before the NOIRA comment period has expired.

### Some Question Meaningfulness of Public Comment

There is considerable difference of opinion concerning whether State agencies will seriously consider and make changes to proposed regulations based upon public

comment. A JLARC survey of Virginia associations and local governments on the subject of the VAPA rulemaking process indicated that 72 percent of local governments had little confidence that State agencies would make substantive change to proposed regulations if public comment produced sound reasons for change (Table 7). The majority of Virginia associations (55 percent), however, indicated that they had confidence that State agencies would make changes to their proposed regulations for sound reasons.

**Table 7**

## Virginia Association and Local Government Confidence Levels Concerning Impact of Public Comment on Proposed Regulations

*Statement: "I have confidence that State regulatory agencies will change the content of their proposed regulations if the public comment period produces sound reasons for change."*

| Response | Associations (Percent) | Local Governments (Percent) |
|---|---|---|
| Strongly Agree | 3 | 1 |
| Agree | 52 | 27 |
| Disagree | 33 | 61 |
| Strongly Disagree | 12 | 11 |

Source: JLARC analysis of survey data from associations and local governments, Spring 1992. For this question, 156 associations and 74 local governments responded with an opinion.

Further examination of the Virginia association survey results also reveals a difference of opinion concerning agency willingness to change proposed regulations among the different types of associations surveyed. In general, civic associations have much less confidence in the impact of public comment than the other types of associations (Table 8). A total of 69 percent of civic associations had little confidence that State agencies would make substantive change to a proposed regulation for sound reasons. This contrasts with the 59 percent of business, professional, and trade associations who have confidence that State agencies will make changes to proposed regulations based upon public comment.

Local governments are also more pessimistic than associations on the question of whether State agencies carefully consider the public comment they receive concerning proposed regulations. The majority of local governments surveyed (67 percent) reported that they have little confidence that State agencies give careful consideration to their comments (Table 9). In contrast, 54 percent of Virginia associations believe State agencies carefully consider their comments.

Table 8

## Differences in Virginia Association Confidence Levels Concerning Impact of Public Comment on Proposed Regulations

*Statement*: *"I have confidence that State regulatory agencies will change the content of their proposed regulations if the public comment period produces sound reasons for change."*

| Response | Civic Associations (Percent) | Business, Trade, and Professional (Percent) |
|---|---|---|
| Strongly Agree | 0 | 3 |
| Agree | 31 | 56 |
| Disagree | 42 | 32 |
| Strongly Disagree | 27 | 9 |

Source: JLARC analysis of survey data from associations, Spring 1992. For this question, 26 civic associations and 130 business, professional, and trade associations responded with an opinion.

Table 9

## Virginia Association and Local Government Confidence Levels Concerning the Consideration of Public Comment by Agencies

*Statement*: *"When we provide oral or written comments, I have confidence that the State regulatory agency will give the comments careful consideration."*

| Response | Associations (Percent) | Local Governments (Percent) |
|---|---|---|
| Strongly Agree | 4 | 0 |
| Agree | 50 | 33 |
| Disagree | 28 | 53 |
| Strongly Disagree | 18 | 14 |

Source: JLARC analysis of survey data from associations and local governments, Spring 1992. For this question, 156 associations and 70 local governments responded with an opinion.

Further examination of the association surveys again reveals that civic associations have much less confidence in State agency use of public comment (Table 10). A total of 63 percent of civic associations feel that agencies will not give their comments serious consideration, with the majority of those civic groups indicating dissatisfaction classifying their feelings as strong. In contrast, business, professional, and trade associations have a much greater level of confidence, with the majority (58 percent) of these types of associations reporting that they believe their comments get serious consideration.

**Table 10**

## Differences in Virginia Association Confidence Levels Concerning Consideration of Public Comments by Agencies

*Statement*: *"When we provide oral or written comments, I have confidence that the State regulatory agency will give the comments careful consideration."*

| Response | Civic Associations (Percent) | Business, Trade, and Professional (Percent) |
|---|---|---|
| Strongly Agree | 4 | 5 |
| Agree | 33 | 53 |
| Disagree | 15 | 30 |
| Strongly Disagree | 48 | 12 |

Source: JLARC analysis of survey data from associations, Spring 1992. For this question, 27 civic associations and 129 business, professional, and trade associations responded with an opinion.

***Some Commenters Frustrated by a Lack of Response from Agencies.*** Many of the association and local government survey respondents as well as participants in the September 1991 JLARC public meeting on VAPA indicated a sense of frustration that most agencies do not provide any type of response to written comments or even acknowledge their receipt. Respondents said that "written comments are rarely acknowledged" and "agencies are generally unresponsive to the general public and citizens groups". Commenters have indicated that after they have gone through the time and expense of preparing written comments, they are not sure that the comments are read.

The following are examples of typical responses JLARC received from the public concerning this issue:

> We were told the Board could not respond to our association's comments provided during the public comment period. We were told that our comments would be included in the next revision of the regulations,

> but there has repeatedly been no evidence of this. We have received no agency response specific to our recommendations.
>
> * * *
>
> Two relatively recent proposed regulatory efforts are examples of instances when the State agencies involved have appeared to dismiss, without sufficient explanation, concerns and comments raised by this locality during the administrative review process. The locality's comments...appeared to have been disregarded.
>
> * * *
>
> The public comment provision of the Act is very important to us; however, when comments are submitted during the Public Hearing process there is no required response indicating if the recommendations were implemented or even considered. We believe that a meaningful public participation process requires that comments submitted during the Public Hearing process be made a part of the record and that each comment receive a written response indicating concurrence or reason for rejection.

This problem contributes to the weakening of public confidence in the public participation process and has brought into question the usefulness of providing public comment.

***Comment Summaries Are Prepared by State Agencies.*** Public comment summaries are currently prepared by agencies for all regulations subject to VAPA. Section 9-6.14:9D of the *Code of Virginia* states that "[i]mmediately upon the adoption by any agency of any regulation in final form, a copy of...the agency's summary description of the nature of the oral and written data, views, or arguments presented during the public proceedings and the agency's comments thereon shall be transmitted to the Registrar". The *Register Manual* issued by the Code Commission requires that agencies file "a summary of the oral and written comments presented during the notice of comment period and the agency's response to the comments." The *Register Manual* requires that this document must "be submitted to the Registrar's office when submitting final regulations to be published in the *Virginia Register*."

A review of the 33 regulations from the 1990-91 regulatory year examined by JLARC staff revealed that agencies do routinely file public comment summaries with the Registrar in their final regulation submission packages. For regulations that receive no public comment, this summary consists of a statement indicating no public comment was received. For regulations that received public comment, the content of this summary can vary tremendously. Many of the filings examined included an accurate and detailed summation of the comments received and a description of both the action the agency took regarding the comments and the rationale for that action. There were two instances, however, in which the agency summaries were just restatements of the public comment it received without an agency response addressing the merits of the comments.

***Recommendation (23).*** **The Registrar of Regulations should ensure compliance with the *Code of Virginia* and the *Virginia Register Form, Style and Procedure Manual* issued by the Code Commission by ensuring that no final regulation is published before a Summary of Public Comment and Agency Response, which includes an agency response to the public comment, is filed with the Registrar's Office.**

***Public Access to Agency Comment Summaries Is Limited.*** While agency public comment summaries are generally completed by State agencies, public access to the summaries is limited. State agencies are only required to file these summaries with the Registrar's office and maintain a copy for their records. They are not required to individually respond to all persons submitting public comment. In addition, when an agency files a commenter summary with the Registrar's office, the summary is made a part of the permanent record and is available for public inspection. The summaries are not, however, published in the *Register* along with the final regulation.

The majority of persons commenting on agency responsiveness to public comment are apparently unaware that these summaries must be produced by State agencies. The fact that these summaries exist is not publicized by agencies or the Registrar. For the most part, public commenters would have to read the *Code of Virginia* or the *Register Manual* to know that these summaries are required of agencies.

***Increased Information and Access to Agency Comment Summaries Would Improve Public Confidence.*** Public confidence in the meaningfulness of public participation could be increased if the public were better informed about the existence of the agency summaries and if access to the summaries were increased. Information concerning the availability of these summaries could be increased by having the Registrar publish along with the final regulation a note that a public comment summary has been prepared and is available for viewing at the Registrar's office or from the agency. Publication of this information in this manner would inform any member of the public interested enough in a regulatory action to read the final regulation about the existence and availability of the summary.

Access to the agency summaries by public commenters on a regulation could be increased by requiring agencies to send each public commenter a copy of the summary. This would ensure that any member of the public who took the time and effort to comment on a regulation would know that their comments were received by the agency, whether or not the agency acted favorably upon their comments, and the agency's rationale for acting in the manner it did.

Providing the summary to commenters would not be unduly burdensome to agencies since they are already required to produce this information for their final regulation submission package. Agencies would incur some additional costs due to copying the summary and the associated mailing costs. These costs, however, would be tempered by the fact that the average regulation has only a handful of public commenters and many regulations receive no public comment.

An additional benefit of providing the summaries to commenters would be that it would allow them to verify the accuracy of an agency's interpretation of their comments. JLARC staff, in a review of regulations finalized during the 1990-91 regulatory year, found at least two instances in which an agency, in its public comment summary, may have either misunderstood or misrepresented a public comment. The result was that the agency failed to address pertinent issues raised by the commenter.

A requirement that agencies release their comment summaries at least five days before filing their final regulation packages with the Registrar would allow commenters a brief examination period to ensure that an agency understood and accurately represented their comments. It would also allow any corrections or misunderstanding to be addressed before the final regulation is filed for publication.

This five-day waiting period would not extend the total regulation timeframe for the majority of regulations. The average amount of time that elapses between when a regulation's comment period expires and the filing of the final regulation package is two months and ranges from between one day to 10.3 months. If this requirement was in place during the 1990-91 regulatory year, only three regulatory actions involving a total of eight regulations would have been affected (5 percent of all regulations finalized that year). Implementation of the waiting period would have delayed these three regulatory actions an average of only two days.

***Recommendation (24).*** **The Registrar of Regulations should publish with every final regulation subject to VAPA that appears in the *Virginia Register of Regulations* a statement indicating that a Summary of Public Comment and Agency Response can be obtained from the promulgating agency or viewed at the Registrar's office. An agency contact person with telephone number and any related charges for copies should be detailed.**

***Recommendation (25).*** **The Code Commission may wish to consider amending the *Virginia Register Form, Style and Procedure Manual* to require that agencies release their Summary of Public Comment and Agency Response to all public commenters at least five days before filing their final regulation submission package with the Registrar of Regulations.**

## Early Drafting Promotes Participation and Efficiency

Explicitly allowing agencies to begin drafting proposed regulations before the close of the NOIRA comment period could both increase public participation and allow for more focused public input in the early stages of rulemaking process. Currently, there is confusion among agencies as to whether it is appropriate to begin drafting a regulation before and during the NOIRA phase. This confusion sometimes results in agencies being unwilling to share drafts of proposed regulations with the public. In most cases, the only information available to the public through the NOIRA comment period is a brief summary of the pending regulatory action totalling a handful of sentences. By allowing early drafting of proposed regulations, agencies may be more willing to open the drafting

process to the public which, in turn, would allow for more focused public input earlier in the process.

Allowing earlier drafting of regulations may also increase administrative efficiency. The JLARC staff timeframe analysis indicates that on average about half of total rulemaking time, or 6.3 of the 12.7 months, is spent on the development of proposed regulations. Specifically, 1.3 months is spent on the NOIRA comment period, and 5 months is spent after the close of NOIRA but prior to publication of the proposed regulation. Allowing drafting to begin before or during the NOIRA comment period may reduce the time it takes agencies to publish a proposed regulation after the NOIRA comment period, thereby decreasing the overall rulemaking timeframe.

***Recommendation (26).*** **The General Assembly may wish to consider amending VAPA to explicitly allow agencies to begin the process of drafting proposed regulations prior to or during the NOIRA comment period.**

### Filings Prior to End of Comment Period Can Undermine Confidence

A review of the regulations finalized during the 1990-91 regulatory year revealed that 11 proposed regulations were filed with the Registrar's office by ten agencies prior to the close of the NOIRA comment period. These 11 regulations accounted for 6 percent of all regulations finalized that year and were filed an average of 1.2 months before the end of the comment period. Nine of these regulations were actually published in the *Register* before the end of their NOIRA comment period.

By filing a proposed regulation before the end of the NOIRA comment period, an agency defeats the purpose of the NOIRA which is to alert interested persons or groups to an impending regulatory action and allow them to provide input before the action is finalized as a proposed regulation. The action by these ten agencies provides the public prima facie evidence that these agencies place little value on public participation at this stage in the process. This is especially damaging to public confidence in the meaningfulness of public participation since many local government and association survey respondents as well as public commenters at the JLARC public meeting on VAPA have stated that the ability to provide comments before the regulation has been drafted in proposed form is crucial.

While it appears to be the intent of the *Register Manual* to prohibit agencies from filing a proposed regulation with the Registrar prior to the completion of the NOIRA comment period, the language of the section is not as clear as it could be on the matter. Specifically, the *Register Manual* states:

> The Notice of Intended Regulatory Action shall be completed when an agency's public participation guidelines require that notice be given to the public.... The written comment period is established by the agency pursuant to its public participation guidelines and must end prior to the publication of the proposed regulation.... After considering the

comments received as a result of the Notice of Intended Regulatory Action, the following documents shall be submitted to the Registrar's office [the proposed regulation submission package].

The language conflict arises because the filing of a proposed regulation is a unique action which occurs before the publication of the proposed regulation. The *Register Manual* currently requires that the NOIRA comment period end before publication of the proposed regulation. This language would seem to allow filing of the proposed regulation before the end of the comment period as long as the publication date for the proposed regulation was subsequent to the end of the comment period. However, the *Register Manual* goes on to require that all comments received during the NOIRA comment period be considered before the proposed regulation submission package can be filed with the Registrar. The language in this section should be clarified and made consistent by requiring that the written comment period must end prior to the filing of the proposed regulation with the Registrar.

***Recommendation (27).*** **The Code Commission may wish to consider amending the *Virginia Register Form, Style and Procedure Manual* to clarify the requirement that the Notice of Intended Regulatory Action written comment period must end prior to the filing of a proposed regulation with the Registrar of Regulation's office.**

***Recommendation (28).*** **The Registrar of Regulations should ensure compliance with the *Virginia Register Form, Style and Procedure Manual* issued by the Virginia Code Commission by ensuring that no proposed regulations are filed with the Registrar's office prior to the completion of the Notice of Intended Regulatory Action written comment period.**

# V. Case Decision Issues

In addition to rulemaking, VAPA also addresses the making of case decisions. Case decisions are made to implement regulations on a case-by-case basis. For example, case decisions may involve granting, revoking, or defining the terms of permits and licenses held by businesses, professionals, or others.

Case decision proceedings are conducted by State boards or commissions, State agency hearing officers, or hearing officers selected from a rotating list maintained by the Executive Secretary of the Supreme Court. Although the process may be conducted and a recommendation made by a hearing officer independent of the regulating State agency, the agency has the final decision. The agency may disregard the recommendation of the independent hearing officer. The final agency decision may be appealed under VAPA to court review, however.

It is useful to contrast case decisions with rulemaking to understand the essentially different nature of the proceedings. Rulemaking is a part of the regulatory process that by design is intended to promote public participation. Agencies are provided authority to make law within the terms of statute. To promote accountability, a quasi-legislative, political environment is created through the rulemaking process, in which the public has the opportunity to provide input and argue their interests before the agencies creating law.

The case decision process is fundamentally an adjudicatory process, in which the rights and privileges of individuals are determined within the structure of promulgated law. The key factor in this process should be the fair and accurate application of the law. The pull and pressure of public opinion or politics should generally be removed from the process. This is not to say, however, that case decision proceedings make no allowance for public input. The affected parties to potentially receive or be denied a right or benefit, or to be sanctioned under law, must have the opportunity to present their case. Also, other members of the public may possess facts or evidence that bear on the fair and accurate application of the law.

Through case decisions, agencies and boards have substantial authority to make decisions affecting the rights and privileges of individuals. The decisions also may affect the degree of protection afforded to the public from violators of regulations. Agency authority needs to be exercised responsibly. The decisions can affect the reputations and livelihoods of individuals or businesses, as well as the safety of the public. Further, the courts in Virginia appear to be reluctant to intrude into these processes and outcomes.

Therefore, it is important under this system that every reasonable effort be made by agencies to define the process and the rules to be followed, and to be consistent, fair, objective, and timely in their application. The evidence available suggests that agencies and boards generally attempt to exercise their case decision authority respon-

sibly. However, there are some problem areas and instances where the process or agency implementation does not appear to do a good job of achieving fairness and efficiency goals.

## INFORMAL PROCEEDINGS ARE NOT CONSISTENTLY AVAILABLE

VAPA distinguishes between an informal fact finding process and a litigated issue (formal hearing) process. At the informal fact finding stage, the process is described in VAPA as a "conference-consultation". At the litigated issue stage, the process is described in VAPA as the "formal taking of evidence."

Case decisions do not necessarily progress from an informal fact finding process to a formal hearing process. First, in many instances the agency and the affected parties will come to an agreement during an informal fact finding process and there will be no need for a formal hearing. Second, in some instances agencies are skipping the informal fact finding stage and initiating proceedings at the formal hearing stage. Third, in some cases such as environmental permit situations, the agency may settle the matter during informal negotiation with the permittee and refuse to grant requests for a formal hearing by other parties.

The practice by some agencies of skipping informal fact finding, and initiating formal hearings instead, has been a long-standing case decision issue. There has been disagreement as to whether the practice is consistent with VAPA and whether it is reasonable and appropriate.

It appears that VAPA does not prohibit the practice. The APA committee of the Attorney General's Office indicates that its advice to agencies has consistently been that both informal proceedings and formal hearings are not required. The section of VAPA that provides for informal fact finding does so "save to the extent that case decisions are made as provided by 9-6.14:12," which is the section on formal hearings. This would appear to indicate that an informal fact finding proceeding does not have to be held if the agency proceeds to meet the provisions of the section on formal hearings.

The interpretation that informal proceedings are not required would appear to be reinforced by the provisions of the section on formal hearings. The formal hearing section states that an agency may hold a formal hearing "in any case to the extent that informal procedures under §9-6.14:11 have not been had or have failed to dispose of a case by consent." If informal fact finding was mandatory, then there would be no instances in which "informal procedures...have not been had."

However, the question of whether the practice is currently lawful under VAPA is different than the question of whether it is the best policy. The policy argument basically involves differing views of how the goals of administrative efficiency, public interest, and due process would best be served.

Specifically, an argument for the current policy is that it allows agencies to decide if efficiency and the public interest are better served by skipping the informal

proceeding. For example, the agency may be pursuing a matter in which it seems unlikely that the matter could be resolved by consent under any circumstances.

On the other hand, there are also arguments for amending VAPA to reduce the discretion of agencies to skip directly to the formal hearing stage. Under this view, agencies should offer the opportunity for informal fact finding (although both parties could by consent skip them). Otherwise, parties are denied access to the type of proceeding which generally provides a less adversarial, less pressurized setting for addressing the problem than a formal hearing. They are also denied access to an opportunity to avoid the expense of preparation for a formal hearing. The possibility of inconsistencies in offering or not offering such proceedings raises the concern of whether individuals are being extended equal treatment.

When the agency and the affected party or parties agree that their interests would be served by moving directly to formal hearings, then it should be possible to skip directly to a formal hearing. However, an agency's simple desire to expedite the process does not appear to be an adequate basis for this practice. The choice of proceedings should not be left entirely to agency discretion. To do so means that some parties do not have the same process opportunities prior to decisions that may affect their reputations or livelihood. Current VAPA provisions appear to extend a degree of discretion that could be abused.

***Recommendation (29).*** **The General Assembly may wish to consider amending VAPA to require the use of informal proceedings except in specified circumstances, such as when parties waive the informal opportunity.**

## AGENCIES NEED SOUND CONTINUANCE POLICIES

Survey results from administrative law attorneys indicate that generally, agencies provide adequate time for affected parties to prepare for case decision proceedings. Survey respondents indicated that this is not always the case, however. In addition, it appears that most if not all State regulatory agencies lack policies on the granting of continuances.

For example, in a recent case discussed in a Virginia law journal, the Board of Medicine provided a one-month minimum notice period in a complex, high-publicity case. Materials were made available to the individual 11 days before the scheduled hearing that affected the individual's preparation needs for the proceeding. When a continuance was requested, the Board denied the request without a statement of reasons.

Prior to this case, the umbrella board/agency for health professions had recommended that the health profession boards "develop explicit policies" on matters such as continuances. The report said that "these policies should not subvert the letter or spirit of due process requirements."

In the Board of Medicine action, the Board did not extend a continuance beyond the one-month minimum. It had no formal policy on continuances. To promote fairness and consistency in continuance decisions, it appears that agencies should have continuance policies to help make these decisions.

***Recommendation (30).*** **Agencies and boards that conduct case decision proceedings should develop and use guidelines addressing the granting of continuances when the need for additional time to prepare can be reasonably established or documented.**

## OPPORTUNITIES TO COMMENT MAY BE UNREASONABLY RESTRICTED

Input was provided at JLARC APA subcommittee meetings and by a survey respondent that some boards or agencies render case decisions after hearing a summary of the arguments from staff. This is done after the VAPA proceeding has been conducted, and the board is meeting to render a decision. In this situation, according to the input received, a board may deny counsel for the affected parties the opportunity to speak.

The effect of this process can be to leave affected parties with a sense that agency staff have had an unrebutted opportunity to potentially bias the decision. This is especially a concern in cases for which most of the Board members were not present at the VAPA proceeding. For example, the procedural rules of the State Water Control Board (SWCB) only require one board member to be present ("hearings may be held before less than the full Board, but shall be conducted by at least one Board member designated by the chairman").

The following are quotes from material received during the study pertaining to SWCB case decisions. The first is from an attorney who represented business interests. The second is from an attorney who represented environmental interests.

> As a member of a regulated industry applying for a permit — before the SWCB for example — I have no right to speak before the Board when it is deciding whether to grant or deny my permit application[.] No right to speak — only the staff gets to speak summarizing my position and then overshadowing with staff comments as to why my application should be denied or limited! And this is 'meaningful public participation' according to the APA?
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> * * *
>
> The staff of the SWCB usually make two presentations. The first, presented by an administrative person, summarizes the comments made at the [informal] hearing. More than one lawyer representing clients has suffered heart palpitations listening to the 'summary' of his legal argument presented by someone who has no idea what the issues

are. The second presentation is the staff recommendation, usually given by a technical person. Most agencies have no set procedure to decide whether comments will be taken at this stage. The SWCB takes the position that the record is closed, thus no comment can be taken. But this position is often broken and comment allowed; one never knows whether you will be able to comment or not.

VAPA could be amended to require that when prior case decision proceedings are to be used as the basis for decision, affected parties should be provided an opportunity to respond to any staff summaries of such proceedings. This could be done by requiring that the staff summaries be available to affected parties in advance of the meeting and that the parties have the opportunity to comment at the meeting. The agency should be provided authority to limit such comments to areas in which the affected party believes that the staff summary is an inaccurate or inadequate reflection of the previously held proceeding.

***Recommendation (31).*** **The General Assembly may wish to amend VAPA to allow affected parties whose comments are being summarized the opportunity to respond, directly before the board, to staff summaries of informal or formal proceedings that are presented to the board prior to their rendering a case decision.**

## HEARING OFFICER SYSTEM HAS SOME PROBLEMS

Pursuant to VAPA, the Executive Secretary of the Supreme Court maintains a list of qualified attorneys to be used as hearing officers in VAPA case decision proceedings. Under the terms of VAPA, hearing officers from the list shall preside over formal hearings, with some exceptions. The exceptions include hearings for which all or a quorum of board members are present, and several named State entities whose proceedings are exempt from the requirement. Also, hearing officers from the list may be used in informal proceedings, if both parties agree at the outset that this is what they want.

VAPA specifies some requirements that attorneys must meet to be placed on the list. Those requirements include: active membership in good standing in the Virginia State Bar, an active practice of law for at least five years, and completion of a course of training that is approved by the Executive Secretary of the Supreme Court. In addition, the Supreme Court's rules of administration for the hearing officer system require "prior experience with administrative hearings or knowledge of administrative law."

The role of the hearing officer can vary, depending on what the agency requests. In some cases, the hearing officer is present to preside over the hearing only. In other cases, the hearing officer is responsible for making a recommendation. However, hearing officer recommendations are not binding on agencies, who may override the recommendation if they believe it is in error.

There are potential benefits to the use of hearing officers that are not part of the agency or board. One potential benefit is independence. The hearing officers are not members of the agency or board whose regulations are being enforced or implemented in the case decision.

A second related benefit is objectivity. Hearing officers are selected on a rotating basis by the Executive Secretary of the Supreme Court. Under this procedure, agencies or boards do not have the opportunity to select hearing officers that they expect would be most sympathetic to their position. The hearing officer selected is more likely to be dispassionate about the issues involved than the agency, board, or commission. Administrative law attorneys responding to the JLARC survey indicated concerns about agency, board, or commission objectivity. In the most extreme case cited, an associate commissioner was stated to have turned their chair away from an applicant's counsel at several informal hearings, in an apparent attempt to express complete disdain for the arguments advanced.

A third potential benefit is expertise in legal procedures. Boards, commissions, or agency staff who otherwise might conduct the proceedings would not necessarily be trained and experienced attorneys.

However, there are some factors that mitigate against the benefits. First, the Executive Secretary of the Supreme Court's role has largely been limited to maintenance of the list. There are ways in which the current operation of the system still presents major appearance problems as to the independence and objectivity of the system.

Specifically, the Office of the Executive Secretary provides the agency with the name of the hearing officer. However, at this point, it is the agency that sets up the contract with the hearing officer. The agency contacts the hearing officer. It is not known the extent to which the agencies and hearing officers avoid discussing the particulars of the case at this point. The Office of the Executive Secretary has suggested hourly compensation guidelines, but the agency may decide to pay more or less. Also, it is the agency which decides if any limits are to be placed in the contract, such as a maximum number of chargeable hours.

The hearing officer is thus contracted and paid by the agency to do a job. At a conscious or subconscious level, this could cause the hearing officer to believe that in a sense the agency is "owed" something. Further, hearing officers are evaluated by subsequent surveys of the agencies who had the contract with the hearing officers. Counsel for those appearing before agencies are not included in the evaluation process. Thus, hearing officers who wish to have good evaluations have an incentive to please agencies.

Also, the benefit of legal and procedural expertise is diminished by the size of the list. It is argued that while attorneys on the hearing list may not have substantive expertise in the subject matter of the hearing they are selected for, they bring a general knowledge of the law and due process that is valuable in the fair conduct of the hearings. This argument would be more compelling if the attorneys on the list routinely conducted

case decision hearings. However, there are currently 114 hearing officers on the list. According to the Executive Secretary of the Supreme Court, an average hearing officer may only have two or three cases a year. This means that there is limited opportunity for the hearing officers to become familiar and comfortable with the role they are expected to perform.

There are a number of options that might be considered to address these concerns. One option is to make adjustments to the current hearing officer system. For example, the size of the list could be reduced by attrition to a specified limit, so that those on the list would handle more cases. Any vacancies that then occur below the specified level could be filled from a "waiting list", based on the date of requests received to be on the list. Also, the Executive Secretary of the Supreme Court could be given more authority over compensation matters. The Executive Secretary would consult with the agency as to the expected time commitment and difficulty of the case. The Executive Secretary and the agency would agree upon a reasonable compensation amount or range, and it would be the responsibility of the Executive Secretary to contact the hearing officer and discuss the terms of payment. Finally, the Office of the Executive Secretary could include counsel of those appearing before agencies in the evaluation process of hearing officers.

Alternatively, the hearing officer list and approach could be replaced by the use of a small number of judges. One option to do this would be to use a subgroup of the substitute judges that currently serve district courts. If the substitute judges are not used to capacity, they might be interested in handling administrative cases. Another option would be to create an administrative law judge (ALJ) system on a small, experimental basis. The system could be expanded on a controlled basis if a need is demonstrated.

The General Assembly has considered the use of ALJs in the past, and may wish to again. ALJs are full-time, independent administrative hearing officers that may have a degree of subject matter specialization. An August 1989 survey prepared for a joint subcommittee of the General Assembly found that 12 states, including the bordering states of North Carolina and Tennessee, have such systems. The survey found that the reported number of positions and budgets for ALJs at that time were eight and 11 and $1.8 million and $580,000 in North Carolina and Tennessee respectively.

It was beyond the scope of this study of VAPA issues to fully assess ALJ systems. Concerns about the use of ALJs include the expense and the creation of positions. (Previous consideration in Virginia was for the creation of about five positions). On the other hand, any estimation of the net cost for the system must include the savings from a reduction in the use of hearing officers from the Supreme Court list. While there have been complaints as to the adequacy of the Supreme Court's payment guidelines ($54 per hour for time spent in actual hearings, $36 per hour for time outside of hearings), it is anticipated that the costs are not insignificant. Some agencies have failed to place any contractual limits on the number of hours charged. The Executive Secretary of the Supreme Court has indicated that a bill was submitted to one agency for $18,000 for one case decision.

***Recommendation (32).*** **The General Assembly may wish to consider whether it wants to make any changes to the current hearing officer system, such as: implementing adjustments to the current system, using substitute judges of the district courts, or implementing an ALJ system on a small, experimental basis.**

## DECISIONS RELY TOO OFTEN ON UNPROMULGATED RULES

Agencies can make law through a series of ad hoc case decisions, or by regulation. APA literature suggests that it is generally preferrable, where practical, to have lawmaking by rule.

There are several reasons why lawmaking by rule or regulation is considered preferrable. Regulations are subject to public comment and external review. They have terms that are published and known, and have universal application. Finally, they are clearly presumed to have the force of law.

By contrast, the use of *ad hoc* case decisions to define the law, even and sometimes especially when guided by internal agency policies or memos, seems less desirable on each point. Ad hoc decisions may be, or appear to be: based on narrow input and representative of the agency's interest; secretive and unknown to the public; selectively employed; and questionable in terms of their force.

The consensus of opinion among respondents to the JLARC survey of administrative law attorneys was strong that decisions at the informal fact finding stage are often based on unpromulgated policies or memos. Of those with experience at the informal fact finding stage before agency hearing officers or boards and commissions, and with an opinion on the question, only six of 19 (32 percent) agreed with the statement that "decisions are based on promulgated law rather than unpromulgated policies or memos," while 13 (68 percent) disagreed. Opinion was divided among those with experience in informal proceedings conducted by hearing officers from the Supreme Court list, as four of eight agreed with the statement.

On the other hand, at the formal hearing stage, the respondents were less likely to identify this as a concern. Eight of ten respondents with experience before hearing officers from the Supreme Court list indicated general agreement with the statement that "decisions are based on promulgated law." The degree of agreement was less among those with experience before boards or commissions, where nine of 14 agreed with the statement (64 percent).

The survey data are suggestive that a problem exists, especially at the informal stage. The data can also be considered in conjunction with the facts of some recent court cases where agency reliance on unpromulgated rules has been contested.

In 1988, the Board of Medicine sought to convene an informal proceeding to inquire into the performance of a needle electrode examination (EMG) as part of an

electromyographic test by a physical therapist. Electromyographic tests had been performed by physical therapists upon referral by physicians since the 1950s, or before the licensing of physical therapists in Virginia. In 1983, a physician organization, the Virginia Neurological Society, stated a position that EMG testing was the practice of medicine and should be performed by physicians. The Board of Medicine, receiving the society's resolution, formed a committee. The committee submitted material that was relied upon by the Attorney General in 1984 and 1985 opinions stating that a portion of the EMG test was the practice of medicine, and should only be performed by physicians.

After the physical therapist received notification of the Board's plans for an informal proceeding, the Virginia Physical Therapist Association petitioned the Board of Medicine to promulgate a regulation under VAPA before prohibiting physical therapists from performing the test. The Board denied the request.

Through its actions, the Board indicated an intent to apply an unpromulgated rule in a case decision proceeding. The Court of Appeals panel, in its 1991 opinion in *Virginia Board of Medicine v. Virginia Physical Therapy Association*, indicated that "the parties agree that the Board did not formally adopt a rule in this case." The Court identified Board activity, however, that it believed made it clear that the "Board had adopted a position or a de facto rule that the performance of EMGs constituted the practice of medicine and thus these tests could not lawfully be performed by physical therapists."

The intent to conduct disciplinary proceedings based on alleged activity which an agency is unwilling to formally regulate seems to abuse administrative discretion and seems contrary to the spirit of VAPA. It is not surprising that such agency actions would be challenged in court. Such actions give the appearance that agencies can make the law without regard to procedural requirements.

In the case of the *Environmental Defense Fund v. Virginia State Water Control Board* (1991), a case decision that applied an unpromulgated staff memorandum was challenged. Staff of the Water Control Board had issued an internal memorandum to all regional directors which provided for the issuance of flow-tiered VPDES (Virginia Pollutant Discharge Elimination System) permits. This memorandum was implemented in amending a permit that was challenged in court.

It is not possible for agencies to anticipate every detail in every situation that may arise and promulgate regulatory language to address those details. It is inevitable upon occasion that case decisions will need to be made where the specific details of the situation are not addressed by the regulation. However, this was not the situation presented in the two court cases cited. It seems clear that in these situations, case decisions were sought or rendered when neither a lack of agency awareness of the issue nor the minuteness of the issue would appear to justify the lack of a rule.

There are three conditions that should be addressed to minimize this problem. One condition, the fact that the language of VAPA does not address the issue, leads to the recommendation for this section of the report. It would be helpful if VAPA contained language, even though difficult to enforce except by voluntary agency compliance, that

explicitly states the objective of lawmaking by rule. Such exhortatory language is contained in the 1981 Model State Administrative Process Act.

A second condition is the need for agencies to be aware of the problem. Agencies need to recognize that in implementing policy or law that affects the rights and privileges of people, to do so without issuing a regulation can be detrimental to public confidence in the agency and in State government generally. It also subjects the agency to a strong possibility of court challenge.

The third condition is the need to amend VAPA to clearly allow judicial review when agencies seek or make a VAPA case decision in the absence of supporting regulation provisions. This condition will be addressed in more detail in Chapter VI.

***Recommendation (33).*** **The General Assembly may wish to amend VAPA to include a policy statement that agencies, as soon as feasible and to the extent practicable, are to adopt rules indicating the standards to be applied in case decisions.**

## DECISIONS ARE NOT ALWAYS TIMELY

Respondents to the JLARC survey of administrative law attorneys indicated some concern about the timeliness of the case decision process, especially the recommendations of hearing officers at the informal fact finding stage. The respondents commented that in some instances, the case decision process has been unreasonably slow. Examples of comments from respondents include:

> It has now been almost a year from the last informal proceeding and we have no word of a decision. From what I've heard from other attorneys, that is common.
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> * * *
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> I have had informal appeals pending for months beyond agency deadline dates, even in situations where agencies are bound by statute to act within a set time frame. Such delays hurt the regulated parties.... I have a case now that involves 3 simple issues that has been pending for almost a year since the informal conference. I have other cases that have continued for 10 months before a 'tentative' informal decision and another 6-8 months before a 'final' informal decision due to agency staffing priorities.

Respondents attributed delays by agencies or boards to a number of different reasons. Where the proceedings involve the issue of reimbursement from the State, it is alleged that decisions are delayed to avoid making payment until as late as possible. Where the proceedings have involved a permit that has citizen opposition, it is alleged

that the board is hesitant to render a controversial decision, and may impose additional permit conditions "in direct proportion to the level of citizen opposition."

The Executive Secretary of the Supreme Court has stated that the office receives occasional complaints about the timeliness of hearing officer recommendations, from both agencies and other parties. The Executive Secretary indicates that excessive delay may be due to the press of other business upon the attorney, or in other cases, a degree of detailed work effort that may go beyond the need of the case. There is nothing that anyone can do, however, to compel that a recommendation be made. The Executive Secretary can institute proceedings to remove the hearing officer from the list, or the agency can withhold payment, but this does not address the lack of a recommendation for the hearing that was already held. Further, the Executive Secretary indicated that since being on the list does not lead to a lot of business, the possibility of removal from the list is not a very strong incentive to action.

There are some steps that can be taken to promote more timely decisions generally. When the decision-maker is the agency or board itself, VAPA could be amended to set maximum timeframes for the rendering of those case decisions, with some specific adverse consequences to the agency or board for timeframe violations.

When a hearing officer from the Supreme Court list is used, VAPA could provide specifically that untimely recommendations are a grounds for permanent removal. The Executive Secretary does have authority under VAPA for maintaining the list, and the Office's rules do provide for removal from the list. However, there is no specific language addressing untimely recommendations or what is meant by an untimely recommendation and linking it to removal. Further, while complaints of untimely recommendations appear to be periodic, actual removals are rare. While specific removal provisions would not address the timeliness problem for the hearing already held, it would ensure that those who have failed to meet their responsibility are not assigned any more cases.

***Recommendation (34).*** **The General Assembly may wish to consider amending VAPA to require that when agency personnel or boards are responsible for rendering case decisions, those decisions must be rendered within a set time period after informal or formal proceedings, or else: (1) the affected party's position prevails, or (2) the administrative remedy is considered exhausted for the purpose of seeking court review.**

***Recommendation (35).*** **The General Assembly may wish to consider amending VAPA to provide the Executive Secretary of the Supreme Court with authority to remove hearing officers from the list, and to provide that compensation may be reduced in any case in which recommendations are not made within a reasonable time period after informal or formal proceedings.**

# VI. Judicial Review Issues

Article 4 of VAPA provides for judicial review of administrative agency rule-making and case decision actions. Some limitations are placed upon the types of actions that are subject to review, the persons or parties who have standing to seek judicial review, and the issues that the courts can consider upon review. Nonetheless, VAPA generally provides the prospect that a person who experiences harm from an allegedly unlawful agency action can appeal the action to the courts and seek a remedy from the unlawful action.

The role of the courts in reviewing administrative matters has been a long-standing source of debate and contention. On the one hand is the desire to protect people from potentially unlawful or arbitrary and capricious agency actions. It is sometimes argued that the courts have the necessary degree of independence, objectivity, and sense of fairness and justice to perform this role. On the other hand is the desire to provide some stability and finality to agency decisions, to avoid overwhelming the courts with matters of a highly technical nature that are outside of their expertise, and to reduce the general trend to litigating more and more matters.

Considered from most any perspective, judicial review in Virginia affords a high priority to the finality and stability of agency decisions. Consistent with frequent administrative law practice, the burden of proof is upon those complaining of agency action. Also, with regard to agency findings of fact, the test is not of the ultimate accuracy or correctness of the agency, but rather whether there is "substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did." The revisor's note to the judicial review section of VAPA states that this standard is "designed to give great stability and finality to the fact-findings of an administrative agency."

In addition, however, there are a number of more controversial ways in which judicial review is restrictive or deferential to agencies. Basic agency laws supersede VAPA, and the basic laws of the Air and Water Boards have been interpreted by the courts to limit standing (access to court review) to owners of potential discharge sites seeking permits. This has led to some controversy, as it appears that there is a lack of recourse when it is believed that unlawfully granted permits are creating, or are about to create, environmental damage.

Also, the courts have declined to intervene when it has been alleged that agencies have sought to apply unpromulgated regulations, or are about to deprive individuals of due process rights in a case decision proceeding. Unlike the Commonwealth's general policy in litigation in favor of discovery (obtaining evidence through methods such as depositions, interrogatories, the production of documents, or entering land or property for inspection), Virginia Supreme Court rules exclude VAPA appeals from discovery provisions.

As part of this study, JLARC staff surveyed administrative law attorneys and asked questions about judicial review. Of those with an opinion, 86 percent (24 of 28) agreed with the statement that "judicial review as implemented in Virginia provides a high degree of stability and finality to the fact-findings of administrative agencies." However, only 47 percent (14 of 30) agreed with the statement that "judicial review as implemented in Virginia provides a high degree of protection to the public from potentially arbitrary or capricious agency case decisions." The majority disagreed with this statement.

While the tendency of the system toward stability and finality of agency decision seems clear, the desirability of that approach is primarily a policy or value judgement. Arguments have been made that increasing access to review could be economically damaging and unfair. For example, it can be argued that a business, issued a permit within the requirements of existing law, could be unfairly delayed and economically harmed while those opposed to the permit pursue far-fetched bases to challenge the permit.

On the other hand, denying access to judicial review can mean a lack of recourse for inequities and injuries resulting from unlawful agency actions. For example, the granting of an unlawful permit to a pollution discharger may affect the health and property values of individuals nearby. Or an individual denied access to due process in case decision hearings, resulting in their professional license being revoked, would be left treated unfairly and economically damaged.

Therefore, this chapter has two purposes. The first purpose is to identify several issues related to judicial review of administrative matters, and describe the current requirements of VAPA and related rules and law on those issues. The second purpose is to provide some policy options that the General Assembly may wish to consider if it wants to increase judicial review from its currently restrictive levels.

## ACCESS TO COURT REVIEW COULD BE INCREASED

VAPA provides a right to review, in §9-6.14:16, to "any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision." However, VAPA has also been interpreted by Virginia courts to provide deference to agency basic law when that law addresses the subject of judicial review.

For example, the basic law of the Air Pollution Control Board states in §10.1-1318 that "any owner aggrieved by a final decision of the Board...is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act." The basic law of the State Water Control Board contains the same provision in §62.1-44.29. "Owner" as used in the basic law has been interpreted to refer to "an entity exercising control over a potential discharge site." Virginia courts have held that these basic laws are controlling over the provisions of VAPA. Therefore, only owners of potential

discharge sites have had a right to judicial review of the lawfulness of permit case decisions by the State Air and Water Boards. Consequently, there is no judicial remedy of a permit decision (unless it is not in the owner's favor) that is unlawful or contrary to the regulatory framework.

Based on concerns about this situation, House Joint Resolution 187 was introduced and passed by the 1991 Session of the General Assembly. The resolution created a committee (roundtable) to "review the current administrative and judicial review processes." The purpose of the review was to determine "whether the citizens of the Commonwealth are provided with adequate remedies for the protection of environmental interests."

No consensus was reached by the roundtable on how to best address the issue of standing. Some business advocates indicated that a change in standing in the basic law from "owner" to "person" might be acceptable, but indicated that might be the maximum change acceptable. Some environmental advocates indicated that a change from "owner" to "person" was not sufficient from their perspective. Some participants felt a comprehensive review of the regulatory process and who can participate was needed.

House Bill No. 450 was offered during 1992 Session to change the Air and Water Laws from "owner" aggrieved to "person" aggrieved. This bill was continued to the 1993 Session.

Since the 1992 Session, additional events have occurred that may affect whether and how the General Assembly addresses the standing issue during the 1993 Session. Specifically, the federal Environmental Protection Agency (EPA) promulgated regulations in July of 1992 to implement the federal Clean Air Act. The Act and the regulations contain certain requirements that states must meet to continue to operate their air pollution control permitting programs. Among these requirements is that there must be an opportunity for judicial review of the final permit action of air pollution control agencies.

Under the EPA regulation, this opportunity is to be extended to the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law. Clearly this would require an extension of judicial review beyond just the "owner" in the Virginia law. The Natural Resources Secretariat is concerned that without a change to its standing law during the 1993 Session, the Air Pollution Control Board may lose control of its permit administration authority.

There are a number of options that are available if the General Assembly wishes to address standing issues. These options include: clarifying VAPA policy on when its provisions are preempted by basic law; changing standing in the basic laws from "owner" to "person" aggrieved; defining the concept of aggrieved to include imminent as opposed to actual injury; defining the concept of aggrieved to include non-economic injuries; and providing standing to persons who participate in VAPA proceedings consistent with the federal Clean Air Act and the associated EPA regulation.

**Clarify VAPA Policy on When Basic Laws Define Access to Review**

The general "policy" section of VAPA (§9-6.14:3, hereafter referred to as "colon 3") states that the purpose of VAPA is to:

> supplement present and future basic laws conferring authority on agencies either to make regulations or decide cases as well as to standardize court review thereof save as laws hereafter enacted may otherwise expressly provide. [emphasis added]

The clause "save as laws hereafter enacted may otherwise expressly provide" indicates that the General Assembly may expressly provide in agency basic law certain authority or requirements that are different from and supersede VAPA. This approach recognizes that in agency basic law, matters can be dealt with in more detail and can be more tailored to an individual agency than in VAPA, and there may be some special circumstances in which procedures are needed that are different from VAPA.

However, the policy section of VAPA was described in the original 1975 VAPA, and is currently described in the revisor's note in the *Code of Virginia*, as a "thumbnail summarization of the general import of the chapter and hence subject to the more specific provisions which follow, particularly Articles 2, 3, and 4." Therefore, it is useful to examine the judicial review article, or Article 4, for its provisions on when statutes outside of VAPA preclude VAPA's provisions for court review.

In the judicial review article of VAPA (§9-6.14:15, hereafter referred to as colon 15), it is stated that the article's provisions:

> [do] not apply to any agency action which (i) is placed beyond the control of the courts by constitutional or statutory provisions expressly precluding court review. [emphasis added]

There is a difference in this statement and the statement that is provided in the purpose section of VAPA. In the purpose section, deference to basic law is provided as basic law "expressly provide[s]." In the more specific provision of Article 4, the judicial review provisions of VAPA do not apply when the agency action is placed beyond the control of courts by statutes "expressly precluding" court review.

This does not appear to be a semantic difference without a distinction. For example, the basic laws of the Air and Water Boards appear to expressly provide access to judicial review for a particular group, but do not appear to expressly preclude judicial review in general or to any other groups.

Specifically, the Air and Water laws state that "any owner aggrieved by a final decision of the Board...is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act." Thus, the statute "expressly provides" judicial review for owners aggrieved, and, based on the policy statement of VAPA, would supersede any VAPA statement to the contrary.

But what is the relationship between the language of the VAPA article on judicial review, and the language of the Air and Water Laws? First, the VAPA judicial review article excludes from its provisions an agency action "placed beyond the control of courts" by statute. But the basic laws of the Air and Water Boards do not place the permit decisions of the boards beyond the control of courts. The laws expressly provide that owners aggrieved may seek judicial review.

Second, the VAPA judicial review article excludes those actions for which there are statutory provisions "expressly precluding" court review. As the term "express" is commonly understood, and as it is defined in Black's Law Dictionary, it means "clear, definite, explicit...declared in terms, set forth in words, directly and distinctly stated." Nowhere in the Air and Water Laws is judicial review expressly precluded in general or to any groups.

The preceding discussion, however, is in contrast to the holdings of two recent Court of Appeals panels. In a May 1991 decision of a Court of Appeals panel in the *Environmental Defense Fund v. Virginia State Water Control Board*, the panel relied upon the purpose section of VAPA (colon 3) in limiting standing based on the Water Law. The panel stated that contrary to the trial court's view, basic law does not have to "specifically exclude the APA appeal." Thus, the panel apparently did not give weight to the revisor's note, which has dated from the original 1975 VAPA, that the purpose section is a "thumbnail summarization" subject to the more specific provisions in VAPA that follow.

In October of 1991, a Court of Appeals panel in the *Town of Fries v. State Water Control Board* also held that the Water Law precludes judicial review to anyone but an owner. However, this panel did not reference the purpose section of VAPA that was relied on by the previous panel. This panel relied upon the exclusion section of the VAPA judicial review article. It stated that the Water Law:

> provides solely to an "owner" aggrieved the right of court review. It provides no similar right to any other person. The express provision of a right of appeal for an "owner aggrieved" implies [emphasis added] that there is no such right for any other person.

The reasoning of this statement by the Court of Appeals panel needs to be considered in more detail. There is no question that the Water Law "expressly provides" judicial review to owners aggrieved. But the colon 15 exclusion test that this panel applied is whether the statutory law "expressly precludes" court review. The panel held that the express provision of a right to owners implies that court review for others is precluded.

To say that the colon 15 exclusion can be reached based on what is implied is not consistent with the common understanding of what the term "expressly" means. As *Black's Law Dictionary* elaborates, in defining the term "express," it means "made known distinctly and explicitly, and not left to inference...the word is usually contrasted with implied."

In summary, it appears that the language of VAPA should be clarified as to when basic law precludes its provisions on judicial review. The Court of Appeals panel in the May 1991 decision relied on colon 3, and indicated that it thought that the trial court may have erred by relying on colon 15 instead of colon 3 of VAPA in reaching its decision. Then, on the same issue, a Court of Appeals panel in October of 1991 relied upon colon 15 (thus using a different basis than the previous Court of Appeals panel), but reached the opposite conclusion of the previous trial court that was thought to have relied on colon 15.

As a matter of policy, access to judicial review could be considered a fundamental check against unlawful agency actions. Therefore, it may be desirable to provide clearly and consistently in VAPA that agency basic law can only restrict judicial review of VAPA agency actions where that intent is explicitly stated in the basic law, and cannot do so by implication.

***Recommendation (36).*** **The General Assembly may wish to amend VAPA to clarify when basic law precludes its provisions on judicial review. To ensure that VAPA judicial review provisions are only excluded when the General Assembly's intent to do so has been expressly stated, the General Assembly may wish to amend VAPA to provide for a basic law exclusion from its judicial review provisions only when the basic law states that it supercedes VAPA.**

### Change Standing in Basic Law from "Owner" to "Person" Aggrieved

Another option to address standing concerns would be to change the Air and Water Laws rather than to amend VAPA. The Air and Water Laws could be amended to provide standing on permit issues to individuals or groups other than owners of potential discharge sites. For example, House Bill No. 450 of the 1992 Session proposed to do this by changing the language in both statutes from "owner" to "person" aggrieved.

Some members of the HJR 187 Legal Standing Roundtable who were business advocates indicated that they might not oppose a change from "owner" to "person" aggrieved, as long as it was clear that the change did not constitute legislative endorsement of federal standing rules or of use interests. (Standing for "use interests" would open up access to judicial review to persons whose interest in using natural resources, such as hiking or fishing, might be adversely affected but might not be economically injured by permitted discharges).

On the other hand, some members of the roundtable who were environmental advocates were not satisfied with this change. Their concern was due to what they consider to be the restrictive interpretation of "aggrieved" in Virginia — for example, the very point that economic injury, but not use interests, might be interpreted to constitute aggrievement.

The General Assembly may wish to consider changing the Air and Water Laws from "owner" to "person" aggrieved. Replacement of the term owner by person would provide standing to persons experiencing injury other than just those exercising control over discharge sites.

***Recommendation (37).*** **The General Assembly may wish to consider changing §10.1-1318 and §62.1-44.29 of the *Code of Virginia* to provide standing to persons aggrieved.**

## Define Aggrieved to Include Imminent Injury

In 1986, the Virginia Supreme Court stated in its decision in the case of *Virginia Beach Beautification Commission v. Board of Zoning Appeals of the City of Virginia Beach* that the term "aggrieved" has a settled meaning in Virginia. A party aggrieved must show "an immediate, pecuniary and substantial interest."

However, implementation of these concepts is subjective and open to interpretation. For example, the term "immediate" has two connotations with regard to time. One connotation is instant, present, current. A second connotation is near to the present, approaching, pending.

The language of the *Virginia Beach Beautification* decision is not clear enough to determine which connotation was intended. The decision said that it is not sufficient for a petitioner to redress "some anticipated public injury when the only wrong" suffered is in common with other persons. The fact that the word "anticipated" was included might suggest that pending injury would not be sufficient. However, the statement could also be interpreted to focus on the need for substantial individualized injury as opposed to "public" injury. In a more recent case on an environmental permit matter (the *Town of Fries v. State Water Control Board*, decided in October 1991), the Court of Appeals cited *Virginia Beach Beautification* in stating that appellants challenging "an anticipated public injury" do not have standing.

An opinion that appears to suggest how the courts would approach this area of ambiguity is *Citizens for Clean Air v. State Air Pollution Control Board* (December 1991). In this case, the Court of Appeals panel indicated that an association of real property owners would have met the aggrievement test. They would have been aggrieved because they were "faced with the prospect of a decline in property value as a direct result of the operation of the proposed rendering plant." This statement by the court, by referring to a "prospect" of a decline, indicates that the court would have provided standing for imminent or anticipated injury. However, the court did not provide standing because these individuals were not "owners" under the definition of the Air Law.

It may seem undesirable and inefficient to the General Assembly to require that people actually experience harm from an allegedly unlawful case decision before they may seek judicial review. VAPA could be amended so that the concept of "aggrieved" in VAPA would clearly be stated to include "imminent" injury, and would no longer be subject to court interpretations of the concept of "immediate" injury.

***Recommendation (38).*** **The General Assembly may wish to define "aggrieved" in VAPA, and where used in basic law, to include the possibility of imminent injury.**

### Define Aggrieved to Include Non-Economic Injury

As indicated, the *Virginia Beach Beautification* test for aggrievement includes "pecuniary" interest. Pecuniary interest is "a direct interest related to money" (*Black's Law Dictionary*). This test for aggrievement would appear to preclude many forms of interest or injury that can only be indirectly linked to money.

A member of the HJR 187 Legal Standing Roundtable provided illustrations of interests that might therefore be excluded. These illustrations included:

- "parents of children who attend a school immediately downwind" from a toxic polluter
- a "municipality which takes its drinking water immediately downstream" from a river contaminated by discharges
- an "asthmatic who suffers health effects" from air pollution
- "recreational users (hikers, campers, fishermen)" of a park near the discharge facility.

In each of these cases, it appears that the interest involved could be expressed in pecuniary terms, and might meet standing on a pecuniary basis. For example, while there is a health interest or risk involved in the municipal drinking water illustration, it also seems likely that the municipality would want to take steps to either purify the water from the discharge or seek an alternative source — in either event, at potentially substantial pecuniary cost to the municipality.

Nonetheless, if the General Assembly is interested in ensuring that judicial review is available for agency permit decisions that may unlawfully threaten health or use interests, it may wish to amend the *Code of Virginia* to do so.

***Recommendation (39).*** **The General Assembly may wish to consider whether it wants to provide standing to persons with a substantial, but not necessarily economic, injury.**

### Standing for Persons Who Participate in Proceedings

Another standing option is to provide standing to challenge agency actions to persons who participate in the public comment process, regardless of whether concretely injured. This appears to be the standing approach currently required by the Clean Air

Act and the EPA regulation for the permit processes of state air pollution control agencies.

This standing requirement would be a major change from existing administrative standing law in Virginia. It would represent a change in standing in the Air Law, from restricting standing to potential discharge site owners only, to opening standing to any person participating in the public comment process.

There are a few points that may need to be addressed before the impact of the federal requirement is clear, however. One issue is what limits can the agency place upon the public opportunity to comment. If the agency can limit the opportunity to comment in the permit process to just owners, then it appears that no practical change from the status quo would occur.

Another potential issue could be the constitutionality of the requirement. It is possible that the Clean Air Act or the regulation could be challenged in court. The most likely basis for such a challenge would be the "concrete injury" requirement reiterated by the U.S. Supreme Court in a June 1992 decision in *Manuel Lujan v. Defenders of Wildlife*. In this case, the majority opinion stated:

> The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular statutorily prescribed procedure) can be converted into an individual right by a statute that...permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue...it is clear that in suits against the government, at least, the concrete injury requirement must remain.

It could be argued that requiring access to judicial review for public commenters without regard to injury is unconstitutional.

At this time, the Virginia Secretary of Natural Resources and staff of the Attorney General's office are seeking legal and policy interpretations from the EPA. It is hoped that a response will be available before the 1993 Session. In all likelihood, it appears that the 1993 General Assembly will need to assume the constitutionality of the federal law, and decide during the 1993 Session what it intends to do with the Virginia Air Law.

***Recommendation (40).*** **If the standing provisions of the Clean Air Act and the EPA regulation are lawful, and it is therefore necessary to provide such standing to enable Virginia to continue operating its own air pollution permitting program, then the General Assembly may wish to amend the Virginia Air Law to meet the standing provisions of the Clean Air Act. The General Assembly may need to consider what, if any, limitations it may lawfully desire to place upon the persons who may participate in the public comment process on air pollution permits. The General Assembly could also consider amending the Virginia Water Law for consistency.**

## COURTS COULD REVIEW AGENCY USE OF UNPROMULGATED REGULATIONS

Chapter V on case decisions indicated that agencies should not rely upon unpromulgated rules as the basis for case decisions. The chapter recommended that, to the extent practicable, agencies should promulgate rules for standards that they intend to use in making case decisions. The intent of this recommendation was to address the problem at the agency level, insofar as possible.

However, there is no guarantee that agencies will not at times make unreasonable use of unpromulgated rules in case decisions. It seems desirable to provide a potential remedy to persons who might be harmed by agency application of a rule that the agency never lawfully promulgated.

Currently, Virginia courts will not intervene in these situations, based on a narrow interpretation of the scope of VAPA. VAPA provides for judicial review of the unlawfulness of any rule or case decision. VAPA also defines a rule as a statement that is "promulgated by an agency." In the *Virginia Board of Medicine v. Virginia Physical Therapy Association* (December, 1991), a Court of Appeals panel indicated that since the rule the Board of Medicine was applying had not been promulgated:

> the alleged unlawful rule fails to meet the definition of a rule, and, therefore, a rule technically does not exist for purposes of [judicial review].

This result seems less than satisfying — apparently even to the Court of Appeals panel that rendered it. The point of VAPA is that there are certain procedures that agencies should follow in making policies that affect people's rights and privileges. Under the logic of the result in this case, a policy which an agency appropriately seeks to promulgate but promulgates improperly can be declared invalid by the courts, but the same policy applied but never promulgated cannot be reviewed by the courts.

The Court of Appeals panel described its concern with the situation as follows:

> ....here, as a result of the Board's notification to a medical insurer of its position or de facto rule on the performance of EMGs by physical therapists, physical therapists could be denied reimbursement for services rendered and would be without any means to challenge the Board's position if the Board does not choose to enforce directly its position or de facto rule. Whether by design or oversight, Virginia law contains a gap that prevents direct appeals of 'de facto' rules by affected parties. That, however, is a matter for the General Assembly to address, if it so desires.

Judicial review could be linked to the recommendation made previously in this report pertaining to the problem of unpromulgated rules. The recommendation required

agencies to promulgate rules for standards they intend to apply affecting the grant or denial of rights and privileges. Judicial review could be provided when persons claim that they are aggrieved by an agency's failure to promulgate such rules.

***Recommendation (41).*** **The General Assembly may wish to amend VAPA to provide for judicial review for persons claiming the unlawfulness of unpromulgated or defacto agency rules.**

## COURTS COULD REVIEW DUE PROCESS CONCERNS PRIOR TO CONCLUSION OF CASE DECISIONS

"Due process of law" is a constitutional guarantee of the Bill of Rights of the U.S. Constitution (Article V) and the Virginia Constitution (Article I, Section 11). Due process requires that no person is "deprived of life, liberty, or property without due process of law."

This requirement has been extended to situations in which government bodies "act so as to injure an individual." This can occur, for example, when agencies act to revoke or deny a license or permit or impose disciplinary sanctions.

While it appears that Virginia agencies are generally aware of and respectful of due process issues, it also appears that problems do occur. For example, as previously cited in this report, the Board of Medicine denied a continuance in a 1991 matter beyond a one-month notice period in a complex, high-publicity case.

The circuit court granted a petition from the person affected in this case, and the Court of Appeals affirmed the circuit court's injunction. However, the Virginia Supreme Court dissolved the injunction of the circuit court, finding:

> the denial of a motion for continuance is not a case decision within the meaning of [VAPA], and hence, that the said circuit court was without jurisdiction to enter the injunction.

A case decision would be the agency determination as to whether or not a violation occurred and a sanction should be imposed.

On the one hand, it can be argued that early judicial intervention may be premature or unnecessary and delay the process. On the other hand, if the courts do not intervene when there is a reasonably supported claim of a due process violation, then a party to an administrative proceeding may have to endure a due process violation until such time as the process is complete and a judicial appeal is heard. In the meantime, substantial and groundless reputation damage may occur, as the lack of a fair proceeding may increase the probability of an incorrect, damaging conclusion by the agency. Further, the person may suffer the loss of the ability to earn a living until such time as the process is complete and judicial review can take place.

***Recommendation (42).*** **The General Assembly may wish to amend VAPA to authorize circuit courts to enjoin administrative hearing processes if there appears to be a reasonably supported claim of due process violations.**

## DISCOVERY COULD BE ALLOWED IN CASE DECISIONS OR IN JUDICIAL REVIEW

"Discovery" would provide an opportunity for those affected by agency decisions to have access to the evidence that forms the foundation of agency decisions. The discovery process may include elements such as the transmittal of files, interrogatories (written questions about the case submitted by one party to the other party or witness), or depositions (one party asks the other party or a witness questions to be answered orally under oath and transcribed, but done outside of the courtroom).

Discovery could be permitted during the case decision process, or in appeals for judicial review. However, in Virginia administrative law, it is currently not provided for in either forum. Within the case decision article of VAPA, §9-6.14:13 states that "nothing in this section shall be taken to authorize discovery proceedings". Supreme Court rules also do not provide for discovery in appeals pursuant to VAPA.

A key argument for discovery is that it provides an opportunity for the affected party to know the basis for an agency's action, thus preventing major surprises and allowing issues to be meaningfully joined. To serve this purpose, it would seem that discovery would be most useful the earlier it is provided — for example, in the case decision process itself. Otherwise, people appearing before agencies may be at an unfair disadvantage from the beginning, and the case decision proceeding may be like a "trial by ambush." Further, it may be impossible for counsel to people appearing before agencies to give sound advice on consent decrees offered by the agency. Counsel may have little information on the strength or credibility of the agency's case or witnesses.

Arguments for discovery at the judicial review stage include that it is the general policy of the Commonwealth in litigation to allow discovery in the judicial forum, and its use can be safeguarded through the court's direction from abuse.

Arguments against discovery include that it can be time and resource-consuming, and it can be subject to abuse (for example, the provision of voluminous quantities of documents on one side to counter perceived fishing expeditions by the other side). Also, at the judicial review stage, it is argued that discovery could mean a trial de novo on some issues at least, and could reduce deference to agency findings of fact. This is of concern if the court's role is supposed to be to defer to the agency's record and findings of fact, and predominately address the question of whether there are errors of law.

***Recommendation (43).*** **The General Assembly may wish to consider whether it wants to amend VAPA to allow for discovery during the case decision process or in judicial review of VAPA appeals.**

# Appendixes

## Appendix A

# Study Mandate

## 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.

## Appendix B

# Analysis of Timeframes for Non-Emergency and Emergency Regulations

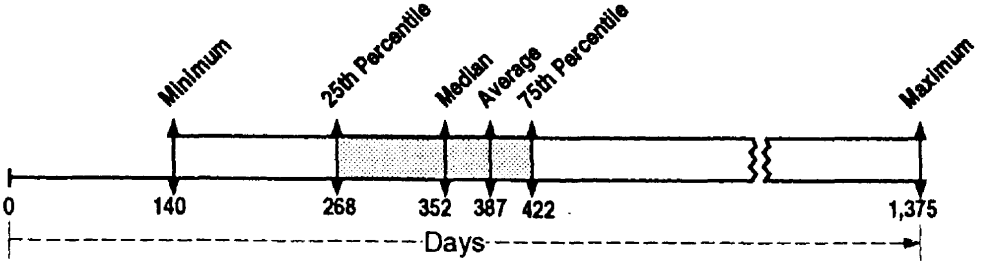
As part of this study, JLARC staff analyzed the typical time and the range in time that it takes agencies to complete the nine formalized steps of rulemaking, and the time that it takes to promulgate emergency regulations. This appendix provides the results of that analysis.

### Timeframes for Non-emergency Regulations

For regulations proposed or finalized during the 1990-91 regulatory year, it took the average regulation 387 days or 12.7 months to complete the nine steps of the rulemaking process (Figure 1). Twenty-five percent of the regulations completed the process in 268 days (8.8 months) or less, while 25 percent took 422 days (13.9 months) or more. The shortest amount of time it took a regulation to complete the process was 140 days (4.6 months), while the longest amount of time was 1,375 days (45.2 months).

**Figure 1**

**VAPA Rulemaking Timeframe: From NOIRA Publication to the Regulation's Effective Date**




Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

The nine formal steps in rulemaking, in typical order of occurrence based on current implementation, include: publication of a notice of intended regulatory action (NOIRA); a NOIRA comment deadline; publication of the proposed regulation; a public hearing (if any); a proposed regulation comment deadline; issuance of comments on the proposed regulation by the Governor; publication of the Governor's comments; publication of the final regulation; and the effective date of the final regulation.

***Publication of the NOIRA.*** Publication of the NOIRA is the action that begins the rulemaking process in most cases. To publish a NOIRA, an agency typically 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 concerning the notice. The purpose of the NOIRA is to alert interested individuals or groups of the purpose of the regulatory action and allow them to provide input by submitting written comments to the agency proposing the regulatory action. A NOIRA appears in the "Notices of Intended Regulatory Action" section of the *Register*.

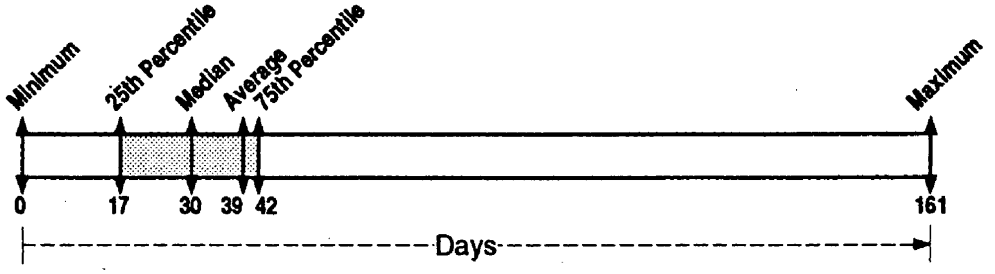
VAPA does not require the publication of a NOIRA. (The omnibus bill in Appendix E would make the NOIRA a VAPA requirement). However, most agency public participation guidelines provide for a NOIRA. During the 1990-91 regulatory year, 201 of the 217 VAPA regulations (93 percent) included NOIRAs.

***NOIRA Comment Deadline.*** The NOIRA comment deadline is the date specified in the NOIRA as being the last day the issuing agency will receive written comments from the public concerning its NOIRA. The amount of time an agency provides the public to comment on the NOIRA is at the discretion of each agency. The Registrar requires that the comment deadline must end prior to the publication of the proposed regulation.

During the 1990-91 regulatory year, the NOIRA comment period averaged 39 days and ranged from two regulations requiring comments by the close of business on the day their NOIRA's were published in the *Register*, to one regulation allowing in excess of five months for public comment (Figure 2). Half of the comment periods provided were between 17 and 42 days in length. The average of 39 days is 30 percent greater than the median, demonstrating the impact of several regulations with unusually long comment periods.

**Figure 2**

**Length of NOIRA Comment Period**




Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

***Publication of Proposed Regulation.*** The next step in the process after the NOIRA phase is the publication of a proposed regulation. In order to publish a regulation, an agency works on completing a proposed regulation submission package which is filed

with the Registrar. This package provides the information that is necessary to publish the proposed regulation pursuant to section 9-6.14:7.1 of the *Code of Virginia*. The package includes a summary of the regulation; a statement of basis, purpose, substance, issues and impact of the regulation; a copy of the proposed regulation; and a notice of comment form. The Governor's Office and the Department of Planning and Budget (DPB) also require that a copy of the proposed regulation be filed with their offices when it is filed with the Registrar.

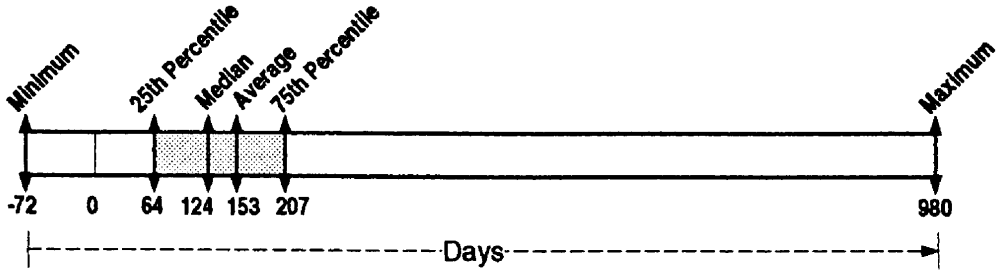
Once the Registrar receives all the required documents concerning a proposed regulation, the actual regulation and its summary will be published in the "Proposed Regulation" section of the *Register*. In addition, the notice of comment will appear in each issue of the *Register* in the "Calendar of Events" section until either the public hearing date or a 60 day written comment period has elapsed, whichever is later. The statement of basis, purpose, substance, issues and impact of the regulation will also appear with the notice of comment the first time such notice is published in the *Register*. There is no VAPA requirement concerning the amount of time that must elapse between the end of the NOIRA comment period and the publication of the proposed regulation.

The average amount of time that elapsed between the end of the NOIRA comment period and the publication of a proposed regulation during the 1990-91 regulatory year was 153 days or 5.0 months (Figure 3). Half of the proposed regulations, however, were published within four months of the end of the NOIRA comment period. Seventeen of the 201 regulations examined had at least one year elapse between the end of the NOIRA comment period and when the proposed regulation was published, with the longest time period being approximately 32 months.

In contrast, nine of the regulations were published in the *Register* before the end of their NOIRA comment period, with one regulation being published 72 days before the

**Figure 3**

**Time Between the NOIRA Comment Period Deadline And Publication of the Proposed Regulation**




Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

end of the comment period. This action defeats the purpose of having a NOIRA comment period.

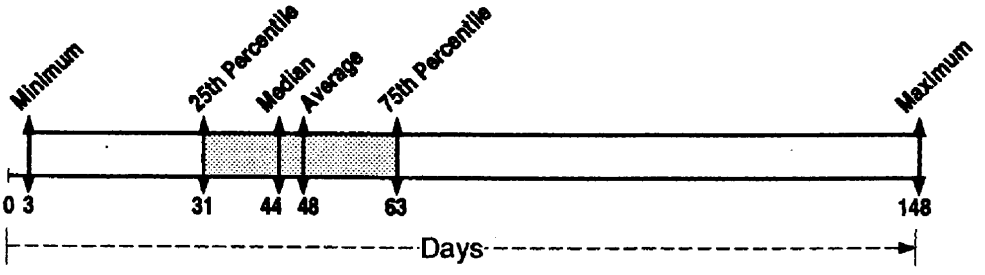
***Public Hearing Date.*** There are two types of public hearings that can be held by an agency concerning a proposed regulation. The first is an informational proceeding. This type of hearing affords interested persons the opportunity to submit data, views, and arguments orally to the agency proposing the regulation. The second type of hearing is an evidential hearing. This type of hearing may be limited to the consideration of factual issues directly relevant to the legal validity of the proposed regulation. In effect, this type of hearing collects evidence as distinguished from general views, data, or argument which is collected in an informational proceeding.

VAPA does not require that a public hearing be held. Whether or not a hearing will be held and whether the hearing will be informational or evidential is left to agency discretion except where the basic law under which an agency is proposing to act expressly requires that a certain type of hearing be held.

The average number of days between when the proposed regulation is published and when the first public hearing is held is 48 days (Figure 4). Half of the public hearings that were held during the 1990-91 regulatory year occurred between one and two months from the publication of the proposed regulation. Only five regulations had public hearings occurring 80 days or more after the publication of the proposed regulation.

**Figure 4**

**Time Between Publication of the Proposed Regulation And the First Public Hearing (If Held)**




Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

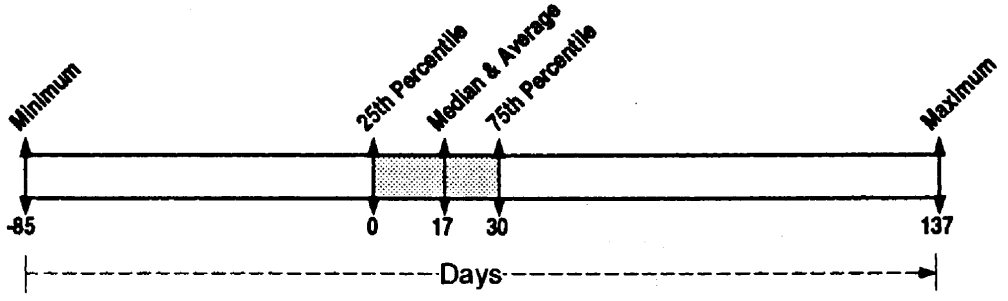
***Proposed Regulation Comment Deadline.*** The proposed regulation comment deadline is the date specified in the notice of comment as being the last day the issuing agency will receive comments from the public concerning its proposed regulation. Section 9-6.14:7.1 of the *Code of Virginia* requires that an agency, when formulating any regulations, afford interested persons an opportunity to submit data, views, and argu-

ments, either orally or in writing, to the agency or its specially designated subordinates. To serve this purpose, the *Code of Virginia* also requires that a comment period must be established and remain open for a minimum of 60 days from the publication of the proposed regulation in the *Register*. Previous to a 1991 amendment to VAPA, an agency was only required to provide the 60 day comment period if the agency held a public hearing. The 1991 amendment expanded this requirement to all VAPA regulations, whether or not a public hearing is held.

The amount of time between a public hearing and when the proposed regulation comment period ends averages 17 days (Figure 5). Approximately two-thirds of all comment periods examined closed within one month after the date of the first public hearing. Eleven percent of the comment periods ended the same day the public hearing concerning the proposal was held, while 15 percent of the comment periods ended before the first public hearing with the latest occurring 85 days after the close of the comment period.

**Figure 5**

**Time Between the Public Hearing and the Proposed Regulation Comment Deadline**



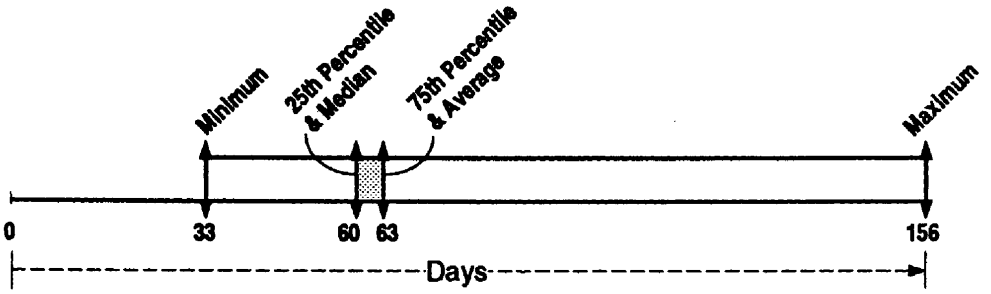

Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

The average length of a proposed regulation comment period is 63 days (Figure 6). Approximately 84 percent of all regulations during the 1990-91 regulatory year had a comment period of 60 to 65 days. Five regulations had comment periods of four months or longer, while nine regulations had comment periods of less than 60 days. Chapter III of this report addresses the concern that these nine regulations were out of compliance with the provisions of VAPA.

***Governor Comments Signed.*** Section 9-6.14:9.1 of the *Code of Virginia* requires that the Governor adopt procedures by executive order for the review of all proposed regulations governed by VAPA. The procedures are to include: a review by the Attorney General to ensure statutory authority for the proposed regulation; an examina-

**Figure 6**

## Length of a Proposed Regulation Comment Period




Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

tion by the Governor to determine if the proposed regulation is necessary to protect public health, safety, and welfare; and an examination by the Governor to determine if the proposed regulation is clearly written and easily understandable.

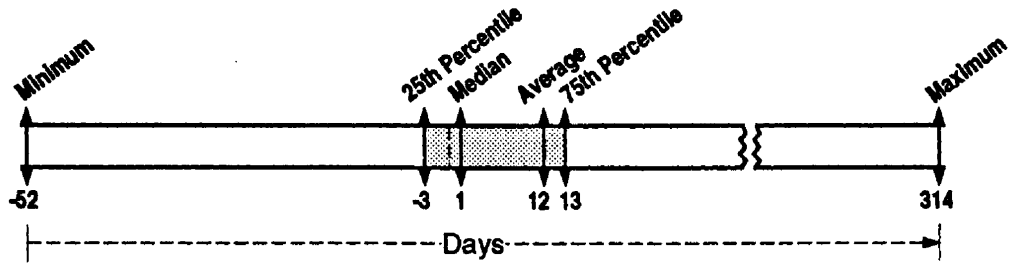
The Governor's review of a proposed regulation begins upon the publication of that proposed regulation in the *Register*. Since a 1991 amendment to Section 9-6.14:7.1 of the *Code of Virginia*, the Governor is required to comment on all proposed regulations and transmit those comments to the Registrar and the promulgating agency prior to the completion of the public comment period of each regulation. Prior to this amendment, this submission requirement was only imposed upon the Governor if a public hearing was held to discuss the proposed regulation. The Governor, in his comments, may recommend amendments or modifications to any regulation which would bring that regulation into conformity with statutory authority, State or federal laws and regulations, and judicial decisions.

Upon receipt of the Governor's comments on the proposed regulation, an agency may do one of the following: adopt the regulation if the Governor has no objection; modify and adopt the proposed regulation after considering and incorporating the Governor's objections or suggestions; or adopt the regulation without changes despite the Governor's recommendation for changes.

During the 1990-91 regulatory year, the Governor's comments concerning proposed regulations were signed an average of 12 days after the close of comment period (Figure 7). Approximately half of the comments issued by the Governor were signed at least one day after the comment period ended, while the earliest comment issued was signed 52 days before the close of the comment period. Chapter III of this report addresses the concern that the signature of comments after the close of the proposed regulation comment deadline does not comply with VAPA requirements.

Figure 7

## Time Between the Proposed Regulation Comment Deadline And When the Governor's Comments are Signed




Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

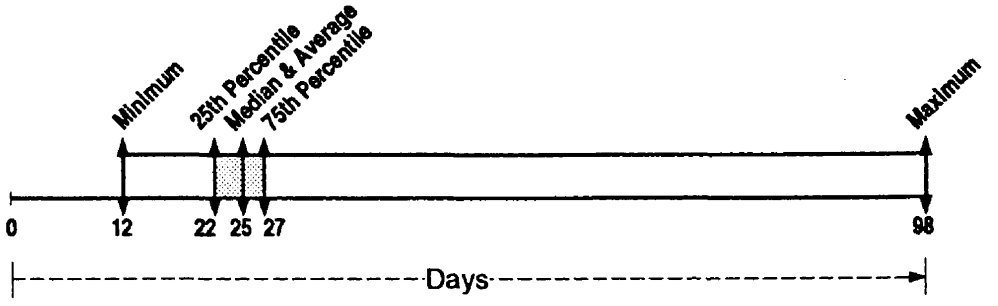
***Governor's Comments on Proposed Regulation Published in the Register.*** When the Governor transmits his comments on a proposed regulation to the Registrar, the Registrar publishes the comments in the next issue of the *Register* in the "Governor" section. Since the *Register* is published every two weeks, publication of the Governor's comments is not immediate and can vary from the date the Governor signed the comments by several weeks even if the Registrar receives the comments on the day the Governor signs them. Obviously, any delay by the Governor's office in transmitting the comments to the Registrar will delay publication further. VAPA does not specify any timeframe within which the comments must be published.

The Governor's comments on a proposed regulation appear in the *Register* an average of 25 days after the Governor signs them (Figure 8). Approximately 90 percent of the comments examined were published within one month of signature. The shortest amount of time the Governor's comments were published in the *Register* was 12 days after they were signed.

***Publication of the Final Regulation.*** An agency may take action on a proposed regulation once the written comment period has ended and the agency has received the Governor's written comments on the proposed regulation. When final action on the proposed regulation is taken, the agency must complete and submit a final regulation submission package to the Registrar. This package provides the Registrar with the necessary information to publish the final regulation and maintain a permanent record of the regulatory action pursuant to sections 9-6.14:9 and 9-6.14:9.1 of the *Code of Virginia*. According to the *Register Manual*, the Registrar will not publish the final regulation in the *Register* until the agency and the Registrar's office have received the Governor's comments on the proposed regulation from the Governor's Office.

Figure 8

## Time Between When the Governor's Comments Are Signed and When the Comments are Published




Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

The final regulation submission package includes: an explanation of substantial changes made after the regulation was published as a proposed regulation; a summary of the oral and written comments presented during the notice of comment period and the agency's response to these comments; a summary of the regulation; an updated statement of basis, purpose, substance, issues, and impact; and a complete copy of the final regulation. The Governor's Office and DPB also require that the final regulation be filed with their offices at the same time that it is filed with the Registrar.

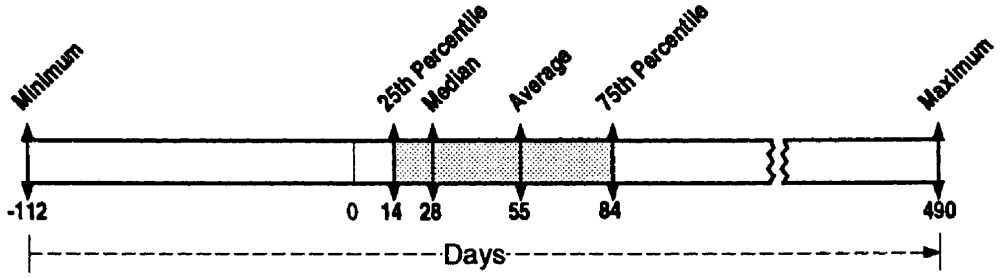
Publication of a final regulation in the "Final Regulations" section of the *Register* occurs on average 55 days after the Governor's comments on the proposed regulation are published (Figure 9). Seventy-five percent of all final regulations examined were published within 84 days of the publication of the Governor's comments. However, 16 regulations took six months or longer to be published. A total of 13 final regulations were published prior to publication of the Governor's comments with the earliest regulation being published 112 days before the Governor's comments.

An examination of the timeframe between when the Governor's comments are signed and when the final regulation is published for the 1990-91 regulatory year shows that some regulations were published in final form in the *Register* before the Governor's comments concerning the regulation were signed. Concerns about the appropriateness of such publication are discussed in Chapter III.

***Final Regulation Effective Date.*** Section 9-6.14:9.3 specifies that a 30-day final adoption period for a final regulation commences upon the publication of the final regulation in the *Register*. During this time, the Governor is directed to review the regulation. If the Governor objects to all or any portion of the regulation, the Governor must forward his objection to the Registrar and the promulgating agency prior to the conclusion of the adoption period. The Governor is deemed to have acquiesced concerning

Figure 9

## Time Between When the Governor's Comments Are Published and Publication of the Final Regulation




Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

a final regulation if no objection is made during the adoption period. The Governor's objection, if any, is published in the *Register* in the "Governor" section.

A regulation will become effective at the conclusion of the adoption period or at a later date specified by the promulgating agency unless one of three events occur. The first is if a legislative objection is filed. A legislative objection delays the effective date of a regulation 21 days from the date the promulgating agency chose for it to become effective. The second event is a suspension of the regulatory process by the Governor. The Governor can suspend the regulatory process for 30 days and require an agency to solicit additional public comment if the Governor finds that the changes the agency made to the proposed regulation are substantial. The third event that can occur is a withdrawal of the regulation by the promulgating agency. An agency can withdraw a regulation at any time before the regulation becomes effective.

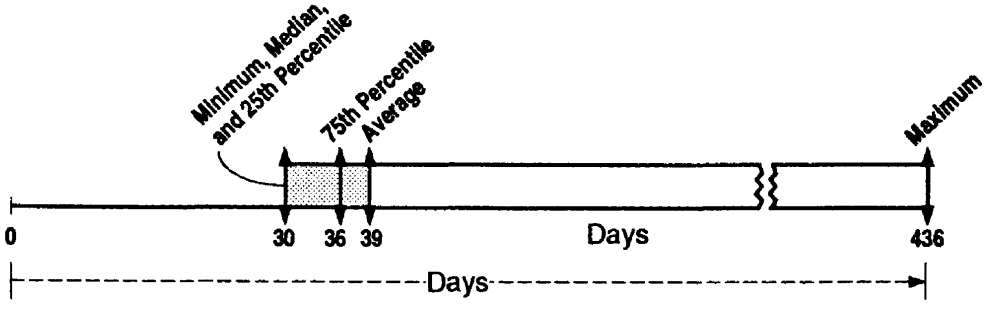
During the 1990-91 regulatory year, on average a regulation became effective 39 days after publication in the *Register* (Figure 10). This average, however, was inflated by two extreme outliers. These two regulations had effective dates that were 190 and 436 days after publication of the final regulation. If these two outliers are removed from the database, the average falls to 36 days. This number provides a more realistic perspective of the data, given the fact that over 75 percent of the regulations became effective between 30 and 36 days after publication of the final regulation.

### Timeframes for Emergency Regulations

There are no VAPA timeframe requirements for regulations classified as emergency regulations. Although VAPA requires that certain events occur in specific

Figure 10

## Time Between the Publication of the Final Regulation and the Regulation Effective Date




Source: JLARC analysis of the regulations proposed or finalized during the 1990-91 regulatory year as published in the *Virginia Register* and verified by State agencies.

order before an emergency regulation can become effective, no rulemaking timeframe requirements are imposed. As the name of this type of rulemaking implies, the emergency regulation process is designed to allow accelerated regulatory implementation to meet an urgent regulatory need.

There are six steps in the promulgation process for emergency regulations: agency recommendation; secretarial concurrence; Governor approval; filing with Registrar; regulation effective date; and regulation publication date. The process begins when an agency formally recommends that an emergency regulation be implemented. The Registrar requires that the emergency regulation be written following the guidelines of form and style specified in the *Register Manual*. The regulation must be approved and signed by the agency head or his authorized representative.

The next step in the process is for the agency to submit the emergency regulation to the appropriate secretarial office for approval by the Secretary. Although this step is not required by the *Code of Virginia*, it is specified in the *Register Manual* as part of the emergency regulation adoption process. Approximately 90 percent of all emergency regulations finalized during the 1990-91 regulatory year received secretarial approval that was noted in the *Register*.

After secretarial concurrence, an emergency regulation is forwarded to the Governor for his approval and signature. Upon Gubernatorial approval, the agency must file the regulation with the Registrar. The effective date of the regulation can be the date it is filed with the Registrar or a later date specified by the agency. The final step in the promulgation process is the publication of the emergency regulation in the *Register*.

The majority of emergency regulations are promulgated at great speed. Based upon a review of the emergency regulations finalized during the 1990-91 regulatory year,

the median emergency regulation was effective 17 days after agency recommendation, and the average of all emergency regulations was 27 days (Table 1). Publication of the emergency regulation almost always occurs after the regulation becomes effective, or a median of 41 and an average of 47 days after agency recommendation.

**Table 1**

## Timeframe Analysis of the Steps in the VAPA Emergency Regulation Promulgation Process

| | Cumulative Number of Days from Initial Agency Recommendation to Step Completion | |
|---|---|---|
| Regulatory Step | Median | Average |
| Secretarial Concurrence | 4 | 6 |
| Governor Action | 11 | 18 |
| Filing with Registrar | 14 | 22 |
| Effective Date | 17 | 27 |
| Publication in the *Register* | 41 | 47 |

Source: JLARC staff analysis of the emergency regulations finalized during the 1990-91 regulatory year as published in the *Register*.

The fastest emergency regulation became effective one day after agency recommendation. One regulation, however, took a total of 153 days from agency recommendation to become effective. This amount of time is 13 days longer than it took the fastest regular regulation to make it through the full VAPA rulemaking process.

Of the 96 emergency regulations finalized during the 1990-91 regulatory year, 56 (60 percent) were promulgated by the Department of Medical Assistance Services (DMAS). Since the emergency regulations of this agency account for such a large percentage of the total number of regulations filed, an examination was made to determine if the timeframe for this agency's regulations differed from the timeframe for all other emergency regulations. This examination indicated that on average, DMAS's emergency regulations took only 20 days to become effective, while the regulations of all other agencies took an average of 34 days.

# Appendix C: Public Participation Guidelines

| Key:<br>● Yes/Required<br>☮ Maybe/Optional<br>○ No/Not Addressed | 1. Statement of Policy or Purpose | 2. Petitioning for Rulemaking | 3. Requirements on Petitioner | 4. Agency Response to Petition | 5. Notification from Specific, "Independent" List | 6. NOIRA Timeframe Identified | 7. Minimum Days, NOIRA to Notice of Comment | 8. Use of Advisory Committee | 9. Public Hearing | 10. Periodic Review of Regulations |
|---|---|---|---|---|---|---|---|---|---|---|
| **ADMINISTRATION** | | | | | | | | | | |
| General Services | ● | ○ | ○ | ○ | ○ | ○ | ○ | ☮ | ☮ | ○ |
| Commission on Local Government | ● | ○ | ○ | ○ | ○ | ● | ○ | ○ | ● | ○ |
| **ECONOMIC DEVELOPMENT** | | | | | | | | | | |
| Agriculture | ● | ● | ○ | ☮ | ● | ● | ○ | ○ | ● | ○ |
| Mines | ● | ● | ● | ☮ | ○ | ● | ○ | ● | ● | ○ |
| Housing | ○ | ○ | ○ | ○ | ○ | ● | ○ | ☮ | ● | ☮ |
| Minority Business | ● | ● | ● | ● | ● | ○ | ○ | ☮ | ☮ | ● |
| Forestry | ● | ● | ● | ● | ○ | ○ | ○ | ☮ | ☮ | ● |
| Racing | ● | ● | ○ | ☮ | ● | ● | ○ | ☮ | ☮ | ○ |
| Labor and Industry | ● | ● | ○ | ☮ | ○ | ○ | ○ | ☮ | ☮ | ○ |
| Commerce | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ○ | ○ |
| - Accountancy | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ○ | ○ |
| - Architects | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ○ | ○ |
| - Real Estate Appraiser | ● | ● | ○ | ● | ○ | ● | ● | ☮ | ○ | ○ |
| - Soil Scientists | ○ | ● | ○ | ● | ○ | ● | ● | ○ | ● | ○ |
| - Waterworks | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ● | ○ |
| - Athletic | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| - Auctioneers | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| - Barbers | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| - Contractors | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| - Cosmetology | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| - Geology | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| - Hearing Aid | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| - Opticians | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| - Branch Pilots | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| - Real Estate Board | ○ | ● | ○ | ● | ○ | ● | ● | ☮ | ☮ | ● |
| **EDUCATION** | | | | | | | | | | |
| Department of Education | ● | ○ | ○ | ○ | ○ | ○ | ○ | ● | ☮ | ○ |
| Education Assistance | ● | ○ | ○ | ○ | ○ | ○ | ○ | ☮ | ● | ○ |
| SCHEV | ● | ○ | ○ | ○ | ☮ | ● | ○ | ○ | ● | ○ |
| Library Board | ● | ○ | ○ | ○ | ○ | ● | ● | ☮ | ☮ | ○ |

Source: JLARC analysis of public participation guidelines, March 1992.

# Appendix C: Public Participation Guidelines (continued)

| Key:<br>● Yes/Required<br>✇ Maybe/Optional<br>○ No/Not Addressed | 1. Statement of Policy or Purpose | 2. Petitioning for Rulemaking | 3. Requirements on Petitioner | 4. Agency Response to Petition | 5. Notification from Specific, "Independent" List | 6. NOIRA Timeframe Identified | 7. Minimum Days, NOIRA to Notice of Comment | 8. Use of Advisory Committee | 9. Public Hearing | 10. Periodic Review of Regulations |
|---|---|---|---|---|---|---|---|---|---|---|
| **FINANCE** | | | | | | | | | | |
| Taxation | ● | ○ | ○ | ○ | ● | ● | ○ | ✇ | ✇ | ○ |
| Treasury | ● | ○ | ○ | ○ | ● | ● | ○ | ✇ | ✇ | ○ |
| | | | | | | | | | | |
| **HEALTH AND HUMAN RESOURCES** | | | | | | | | | | |
| Disabled | ● | ○ | ○ | ○ | ○ | ● | ○ | ✇ | ✇ | ○ |
| Aging | ● | ○ | ○ | ○ | ○ | ● | ○ | ● | ● | ○ |
| Health Planning | ● | ● | ○ | ○ | ○ | ○ | ○ | ✇ | ✇ | ○ |
| DMAS | ● | ○ | ○ | ○ | ○ | ○ | ○ | ● | ✇ | ○ |
| Deaf and Hard of Hearing | ● | ○ | ○ | ○ | ○ | ○ | ○ | ✇ | ○ | ○ |
| Child Day Care | ● | ○ | ○ | ○ | ○ | ○ | ○ | ✇ | ○ | ○ |
| Employment Training | ● | ○ | ○ | ○ | ● | ● | ○ | ✇ | ● | ○ |
| Health | ● | ○ | ○ | ○ | ○ | ● | ● | ● | ✇ | ○ |
| Cost Review | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| DMHMRSAS | ● | ○ | ○ | ○ | ● | ○ | ○ | ✇ | ● | ○ |
| Rehabilitative Services | ● | ○ | ○ | ○ | ○ | ○ | ○ | ✇ | ✇ | ○ |
| Social Services | ● | ○ | ○ | ○ | ○ | ○ | ○ | ✇ | ○ | ○ |
| Visually Handicapped | ● | ○ | ○ | ○ | ○ | ● | ○ | ✇ | ● | ○ |
| Health Professions | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Audiology | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Dentistry | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Funeral Directors | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Medicine | ○ | ● | ○ | ● | ○ | ○ | ○ | ○ | ✇ | ● |
| - Nursing | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Nursing Home Administrators | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Optometry | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Pharmacy | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Professional Counselors | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Psychology | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ○ | ● |
| - Social Work | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |
| - Veterinary Medicine | ○ | ● | ○ | ● | ○ | ● | ● | ✇ | ✇ | ● |

Source: JLARC analysis of public participation guidelines, March 1992.

# Appendix C: Public Participation Guidelines (continued)

| Key:<br>● Yes/Required<br>✇ Maybe/Optional<br>○ No/Not Addressed | 1. Statement of Policy or Purpose | 2. Petitioning for Rulemaking | 3. Requirements on Petitioner | 4. Agency Response to Petition | 5. Notification from Specific, "Independent" List | 6. NOIRA Timeframe Identified | 7. Minimum Days, NOIRA to Notice of Comment | 8. Use of Advisory Committee | 9. Public Hearing | 10. Periodic Review of Regulations |
|---|---|---|---|---|---|---|---|---|---|---|
| **NATURAL RESOURCES - 3/92** | | | | | | | | | | |
| Environment | ● | ○ | ○ | ○ | ○ | ● | ○ | ✇ | ✇ | ○ |
| Air Pollution | ● | ○ | ○ | ○ | ○ | ● | ○ | ✇ | ● | ○ |
| Waste Management | ● | ● | ● | ● | ○ | ● | ○ | ✇ | ● | ○ |
| Chesapeake Bay | ● | ● | ● | ● | ○ | ○ | ○ | ● | ✇ | ○ |
| Conservation | ● | ● | ● | ○ | ○ | ● | ○ | ✇ | ● | ● |
| Marine Resources | ● | ○ | ○ | ○ | ○ | ○ | ○ | ● | ✇ | ○ |
| Soil and Water | ● | ● | ● | ○ | ○ | ● | ○ | ✇ | ● | ○ |
| Water Control | ● | ○ | ○ | ○ | ○ | ● | ○ | ✇ | ● | ○ |
| | | | | | | | | | | |
| NATURAL RESOURCES (Proposed *) | ● | ● | ● | ● | ○ | ● | ○ | ● | ● | ● |
| | | | | | | | | | | |
| **PUBLIC SAFETY** | | | | | | | | | | |
| Alcoholic Beverage Control | ○ | ● | ● | ○ | ○ | ○ | ○ | ✇ | ✇ | ○ |
| Youth Family Services | ● | ○ | ○ | ○ | ○ | ○ | ○ | ✇ | ✇ | ○ |
| Corrections | ● | ○ | ○ | ○ | ○ | ○ | ○ | ✇ | ✇ | ○ |
| Emergency Services | ● | ○ | ○ | ○ | ● | ● | ○ | ✇ | ✇ | ○ |
| Fire Programs | ● | ○ | ○ | ○ | ● | ● | ○ | ✇ | ● | ○ |
| Criminal Justice Services | ● | ○ | ○ | ○ | ● | ● | ○ | ✇ | ● | ○ |
| | | | | | | | | | | |
| **TRANSPORTATION** | | | | | | | | | | |
| Alcohol Safety | ● | ● | ○ | ○ | ● | ● | ○ | ○ | ● | ○ |
| Aviation | ● | ○ | ○ | ○ | ○ | ● | ○ | ○ | ● | ○ |
| Motor Vehicles | ● | ○ | ○ | ○ | ● | ● | ○ | ✇ | ● | ○ |
| Department of Transportation | ● | ○ | ○ | ○ | ○ | ● | ● | ✇ | ● | ○ |

*Proposal of the Natural Resources Secretariat for a uniform public participation guideline for the agencies of the Secretariat, October 1992.

Source: JLARC analysis of public participation guidelines, March 1992.

## Appendix D

# Agency Responses

As part of an extensive data validation process, the Governor's Office, each cabinet secretary, the Code Commission and the Registrar of Regulations, and the Attorney General's Office were given an opportunity to comment on an exposure draft of the report. This appendix contains the response by the Governor's Office, the Secretary of Finance, the Secretary of Natural Resources, the Code Commission and the Registrar, and the Attorney General's Office.

Page references in the agency response relate to an earlier exposure draft and may not correspond to page numbers in this version of the report.

OCT 2 2 19..

# COMMONWEALTH of VIRGINIA

Walter A. McFarlane
Executive Assistant
Chief Counsel and Director of Policy

*Office of the Governor*
*Richmond 23219*

(804) 786-2211
TDD (804) 371-8015

October 22, 1992

Mr. Philip A. Leone
Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building
Capitol Square
Richmond, Virginia 23219

Dear Mr. Leone:

I am in receipt of the exposure draft of your report, Review of Virginia's Administrative Process Act. Thank you for affording this office an opportunity to respond to the findings and recommendations of your staff and for your taking the time to personally discuss the matter with me.

As I stated during our discussion this morning, this office was not a part of the process by which the findings were made. Our input was not sought. During our discussion it became evident that there was a very valid reason why that occurred. You were concerned that if you did contact us directly, it might appear that you were in some way intruding into the functions of the Executive branch. I understand completely your reluctance and believe it is admirable that you have given deference to the separation of functions that exist between the Executive and Legislative branches. In the future, however, please recognize that I personally find no difficulty with you calling me at any time to discuss any matter which you believe merits attention. I will never consider such an approach as meddling.

I believe that even at this late date, and in spite of the extremely limited turnaround time we have for review, we can offer

comments that will be of some assistance. Because of the lack of sufficient time, however, the foregoing comments focus upon section three of the report: "Implementation Issues."

Let me emphatically state that regulatory review is a Gubernatorial priority. The conclusions reached by your staff, of course, were incumbered because of the fact that they had not discussed the matter with us. Had we been contacted regarding the same, we would have shared with you our review process and the exceptional amount of time that is and must be expended on regulation review. This office reviews even "housekeeping" measures with a particularity that would reassure all involved in the process of our determination to see that the public interest is always served.

We share the concern your staff raises regarding making timely comments on proposed regulations. It is important for you to understand, however, that there have been many times that the Governor's Office has only received the regulations for review at the very last moment or even after the time for comment has passed. Thorough agency review and comments from other sources sometimes delay the receipt of these requests to the Governor. We are taking steps in an attempt to assure that the agencies and other responsible parties send the requests to the Governor with sufficient time to assure that this office does not continue to be placed under unconscionable time deadlines. Any problems which can be attributable solely to this office, however, are to my knowledge, for the most part past occurrences because of the steps that we took last year to adjust staffing responsibilities for regulatory review. Since these adjustments, I believe there has been a perceptible improvement in the timeliness of the process. In fact, I am aware of few if any problems in the last eight or so months that can be directly attributed to this office. Be assured that this improvement will continue because this office is committed to making sure that it continues.

As a practical matter, as you are aware, with the increase in federal mandates, the requirement for the creation of regulations to meet federal demands has increased. This in turn has required a significant adjustment to the review process for this office. Many of the required regulations have been very technical, lengthy and difficult to fully comprehend. Thus, the review of these regulations has required an exceptional amount of time. The time constraints of the review process have placed a significant burden on this office and will continue to do so.

As to the Executive Order, please find attached hereto a copy of a revised Order that has been implemented by the Governor. Upon realizing that the original Order had not been published, we undertook a search in an attempt to discover the problem. The drafting, review by the Department of Planning and Budget and the Attorney General, and the implementing process all had been completed, a number had been officially assigned to the Order [23 (90)], and the Order had been signed by the Governor; however,

apparently, the Order was never officially published in 1990. Accordingly, as you will note, the original Order was slightly revised to reflect this history.

In summary, the concerns raised in the implementation section of this report have been addressed by this office. If we had had an opportunity to discuss the issues with you and given you our input before this draft was published, I trust that the conclusions reached would have been different.

I also wish that we had more time to more thoroughly review the concepts of the entire document. I did pass on to you orally some of the concerns that I have about the proliferation of regulations and the need to find some way to prevent Virginia from becoming a regulation oriented government like the federal government. As you are aware, while the Governor can comment on regulations, he cannot veto them. Perhaps through the cooperative efforts of the Legislative and Executive branches, we can come to a conclusion that will assure that only those regulations that are absolutely essential to good government are implemented.

Once again, I appreciate the opportunity to offer our comments and with kindest regards, I am

Sincerely,

Walter A. McFarlane

# COMMONWEALTH of VIRGINIA

Paul W. Timmreck
Secretary of Finance

*Office of the Governor*
*Richmond 23219*

(804) 786-1148
TDD (804) 786-7765

October 22, 1992

MEMORANDUM

TO: Philip A. Leone

FROM: Paul W. Timmreck PT/egs

SUBJECT: Review of Virginia's Administrative Process Act

I write to provide you comments on the exposure draft of the report on the Review of the Administrative Process Act. Because the Tax Department is the largest issuer of regulations, I asked that they provide me their comments on your findings.

In general, the report does not seem to recognize the difference between those regulations which merely interpret the law (as is the case at TAX) and those regulations which are quasi-legislative or quasi-judicial in nature. Although some of the recommendations are quite valid when dealing with the above, others do not seem applicable or practicable for regulations which merely interpret the law so as to educate the public.

Of a more specific nature, two of the recommendations are worthy of elaboration. They are:

Recommendation 15 (Page 91): This recommendation would require the Registrar to reject regulations when agencies do not document implementation costs. Although it appears to be targeted toward regulations that impose mandates on local government, it is very broad in application (i.e., it fails to recognize the difference between interpretative and quasi-legislative regulations).

From TAX's experience, it is sometimes possible to estimate the number of taxpayers impacted by a regulation; however, it is impossible in virtually any case to estimate compliance costs for those taxpayers. For regulations that are merely interpretative of the law, compliance costs ordinarily can be assumed to be minimal; to the extent they are not, checks and balances exist to ensure that interest groups' concerns are heard. Where the affected group is very large, e.g., all individual taxpayers, there is no practical method to assess the impact of a regulation. This is particularly true when regulations are developed to implement legislation.

Recommendation 23 (Page 109): This recommendation urges the Code Commission to continue its efforts to establish a code of regulations. The impact of such a code on the regulated public, as well as agencies, must be measured--TAX would expect the costs to be significant.

To the extent that a formal code is developed and marketed by a publisher (such as Michie), costs to disseminate regulations to taxpayers may increase. For example, TAX currently provides copies of its regulations free of charge; a process whereby regulations can only be obtained from a publisher would have a definite effect on voluntary taxpayer compliance.

Thank you for the opportunity to comment on the report. If you have any questions, please do not hesitate to let me know.

PWT/6597/ljg
c: Finance Agencies

# COMMONWEALTH of VIRGINIA

Elizabeth H. Haskell
Secretary of Natural Resources

*Office of the Governor*
*Richmond 23219*

(804) 786-0044
TDD (804) 786-7765

October 21, 1992

Mr. Philip A. Leone
Director
Joint Legislative Audit and Review Commission
Suite 1100
General Assembly Building, Capitol Square
Richmond, Virginia 23219

Dear Phil:

Thank you for the opportunity to review the exposure draft of the JLARC's Review of Virginia's Administrative Process Act.

On behalf of the Secretariat of Natural Resources, I offer the following comments:

1. On the chart on page 52, there is a listing for hazardous waste and for waste management. Both of these areas come under the Department of Waste Management which uses a single set of Public Participation Guidelines. There should be only one listing for the Department.

2. Also on the chart on page 52, there is a listing for Natural Resources agencies proposed public participation guidelines. Based on public comments received during the NOPC period, the agencies have revised the proposal. A copy of the proposal to be considered by various approving authorities is attached. We would suggest that the revised proposal be used in the report. This would change the listing to solid black circles in columns 1-4, 6, and 8-10.

3. Recommendation #19 could cause problems with the 180 day requirement. We do not foresee any problem with requiring that a NOIRA be published within 60 days after the effective date of an emergency regulation. However, requiring publication of a proposal within 180 days could be difficult to comply with, especially when attempting to implement federal programs.

4. Recommendation #34 is another area where problems could arise. Agencies should give timely decisions on case decisions; however, care should be exercised in setting a specific time frame. We also need to be very careful about automatically letting the affected party's position prevail: this may result in "automatic" decisions which are contrary to the public interest.

5. In recommendation #40 we agree that the standing issue, as it relates to Virginia's air law, needs to be addressed in order to ensure that Virginia will be able to continue to comply with the Clean Air Act and administer the federal program.

I have no comments on the remainder of the report at this time. Should the Commission offer legislation to implement any of the recommendations in the report, we would appreciate the opportunity to comment further at that time.

Sincerely,

Bernie

Bernard J. Caton
Deputy Secretary

BJC/tas

Attachment

COMMONWEALTH of VIRGINIA

JOAN W. SMITH
REGISTRAR OF REGULATIONS

VIRGINIA CODE COMMISSION
General Assembly Building

910 CAPITOL STREET
RICHMOND, VIRGINIA 23219
(804) 786-3591

October 20, 1992

Philip A. Leone, Director
Joint Legislative Audit and Review Commission
General Assembly Building, Suite 1100
Capitol Square
Richmond, VA 23219

Dear Phil:

Thank you for giving me the opportunity to comment on the exposure draft of your report, Review of Virginia's Administrative Process Act. The report is informative and brings to light some of the issues that we have been unable to effectively deal with because we lack the authority and the number of staff needed. There are several comments that I would like to make on the report.

CHAPTER II. RULEMAKING: PROCESS ISSUES.

- Page 27, Proportion of Regulations Subject to VAPA Rulemaking Provisions.

  Reference is made that the three independent agencies in Virginia are exempt from the Administrative Process Act (APA). In our view, the State Lottery Department is not exempt from the APA. The exemption for the State Lottery Department found in subdivision B 15 of § 9-6.14:4.1 of the Code of Virginia is to exempt "Any rules for the conduct of specific lottery games..." The department's regulations concerning administration, on-line games, and instant games are not exempt from the APA; however, each time the department announces a new lottery game, such as "Full Throttle" or "Magic Number," the rules for the specific game are exempt from the APA.

- Page 57, Clarify that Oral Proceedings are Not Always Required.

  In paragraph 2, the report specifies that the purpose of an amendment to § 9-6.14:7.1 of the APA in 1991 was that all regulations falling under the APA, not just regulations for which a public hearing is held, should have a 60-day comment period. It is our understanding that this amendment requires the Registrar of Regulations to publish in the

newspaper the 60-day notice of comment period for all regulations, except those exempted by § 9-6.14:4.1. Prior to the passage of this legislation, notice was only published in the newspaper when an agency held a public hearing on the proposed regulation. The 60-day comment period was already required under the APA prior to the 1991 amendment.

CHAPTER III. RULEMAKING: IMPLEMENTATION ISSUES.

- Page 84, Timeframe and Publication Requirements are Not Always Met.

  The report states that the Registrar of Regulations did not comply with the Virginia Register Form, Style and Procedure Manual by publishing final regulations prior to receiving comments from the Governor on the proposed regulations. During the 1990-91 regulatory year (October 8, 1990 through September 30, 1991) that was used for the JLARC study, the Style Manual in effect at the time gave no information concerning the publication of final regulations when Governor's comments had not been received. As a result of numerous final regulations being filed prior to the Governor's comments being made, the Virginia Code Commission was advised of the problem and staff was instructed not to publish any final regulations unless the Governor's comments had been received. The Style Manual was amended, effective October 1991, to specify that a final regulation would not be published until the Governor's comments on the proposed regulation had been received by the agency and the Registrar's office.

Please don't hesitate to contact me if you have any questions. I have enjoyed working with Bob Rotz on this study and hope that, as a result, we can ensure that the regulatory process is used more effectively.

Sincerely,

Joan W. Smith
Registrar of Regulations

Mary Sue Terry
Attorney General

Stephen D. Rosenthal
Chief Deputy Attorney General

Deborah Love-Bryant
Chief-of-Staff

# COMMONWEALTH of VIRGINIA

## *Office of the Attorney General*

October 26, 1992

K. Marshall Cook
Deputy Attorney General
Finance & Transportation Division

R. Claire Guthrie
Deputy Attorney General
Human & Natural Resources Division

Gail Starling Marshall
Deputy Attorney General
Judicial Affairs Division

Milton K. Brown, Jr.
Deputy Attorney General
Public Safety & Economic Development Division

Mary Yancey Spencer
Deputy Attorney General - Administration

**HAND DELIVER**

Mr. Philip A. Leone, Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building
Richmond, Virginia 23219

Dear Mr. Leone:

This will follow up your recent letter to the Attorney General enclosing the exposure draft of the JLARC Report on the Administrative Process Act.

The Attorney General has again asked our Administrative Process Act Committee to review the Report and provide comments. As you will recall, we did that with respect to the June Interim Report when I appeared before the Subcommittee in July.

We have therefore prepared and I enclose herewith comments on the new portions of the Report -- those dealing with case decisions and with judicial review. I hope these are helpful.

One issue not addressed in the report is conflicts (similar to those related to standing) that exist between VAPA procedures and those set forth in certain basic laws (particularly environmental statutes). For the most part, the procedural sections left in these basic laws are "vestigial", left over from pre-APA days and should be repealed. See e.g., §§ 62.1-44.26 through 62.1-44.29.

We would be happy to discuss these comments further with JLARC or with the Subcommittee, as you wish. We suggest that many affected agencies of the Commonwealth might need to have input into this process also. Hopefully the Report will be circulated in time for them to participate.



Supreme Court Building • 101 North Eighth Street • Richmond, Virginia 23219 • 804 - 786-2071 • 804 - 371-8946 (V/TDD)

Thank you for the opportunity to be of assistance.

Sincerely,

Roger L. Chaffe
Senior Assistant Attorney General

cc: The Honorable Mary Sue Terry
Stephen D. Rosenthal, Chief
Deputy Attorney General
R. Claire Guthrie, Deputy Attorney General
APA Committee

## COMMENTS ON JLARC EXPOSURE DRAFT OF "REVIEW OF VIRGINIA'S ADMINISTRATIVE PROCESS ACT"

The Committee has submitted comments previously on the Interim Draft dealing with the regulatory process. These comments will focus on the new portions of the Report, those dealing with Case Decisions and Judicial Review.

Recommendation 29, page 149:

This suggestion would reverse the present provisions of the APA (§§ 9-6.14:11 and 12) to the effect that both an informal proceeding and a formal hearing are not needed.[1] While, as pointed out, this is a policy judgment, the results of such a change would almost certainly include delays and greater need for agency resources to conduct these proceedings. Moreover, some agencies already have the authority to suspend licenses or take similar action on a summary basis upon a finding of imminent danger to public health or safety (e.g. §§ 54.1-2708, 54.1-2920, 54.1-3009, 54.1-3317 and 54.1-3808 of the Code). It is not clear how and whether this recommendation is intended to be consistent with these existing statutes. Moreover, danger to the environment might well be included in this proposal.

Recommendation 30, page 151:

The requirement to have agency guidelines for continuances is a good one and consistent with advice given to many agencies by this Office. Reference to a particular case (page 150) is clearly motivated by an article in a recent Virginia Bar Journal. It must be remembered that this article was written after the fact by an attorney who lost a particular case and is seeking to reverse the result. That case was reviewed by two appellate courts and decided against his client. Thus, the insinuation that the Board of Medicine acted improperly should be seen as the position of a disappointed advocate not as a finding of fact.[2]

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[1]In this Recommendation and elsewhere in the Report, the term "informal hearing" is used. This is incorrect, since "hearing" is a defined term in the APA. In § 9-6.14:4(E), the terms is clearly used to mean only a formal hearing (in the case decision context) conducted under § 9-6.14:12 and it is distinguished from informal proceedings conducted under § 9-6.14:11.

[2]The suggestion is made (at 150) that the agency acted unfairly or arbitrarily. This is unfair and unsubstantiated by the record. In fact, the agency's refusal to grant a continuance was based in part on the refusal of the respondent - at the direction of counsel - to be interviewed or to meet with the agency's

In fact, counsel, including the author of the cited article may and do use continuance requests for purposes of delay more than to expedite the process and achieve the ends of justice.

Recommendation 31, page 153:

If the term "affected parties" in this recommendation refers only to the party whose rights are actually before the agency, there is little problem with this. If some broader meaning is intended, this provision could confer standing on a variety of persons to intervene in individual cases, thereby complicating and potentially protracting each one. The decision who has standing is an important policy issue for the legislature to resolve after careful and knowing consideration. The key is to define clearly what is intended.

Recommendation 32, page 158:

In addition to possible review of hearing officer training and qualifications, it would be helpful to the administrative law system to require that such persons have some competence and/or experience in handling administrative litigation. Much time is often spent by counsel educating hearing officers regarding the unique nature of such litigation.

Recommendation 33, page 162:

This suggestion would reverse the recent Court of Appeals decision in the VPTA case. See also Recommendation 141 on page 185. The very difficulty recognized by the court in that case carries over into these recommendations. It is difficult for an agency to promulgate a rule on every conceivable aspect of the subject within its jurisdiction. It is equally difficult for a court to review a "de facto" regulation, which is not a regulation at all. Nonetheless, as with the courts, there must be some room for an agency's interpretation of its governing statutes and rules in the course of making a case decision. Administrative law is not "civil law" where everything must be written in advance. Agency decision-makers should be expected to develop a body of case law through their decisions that interpret and apply agency rules. Certainly, federal administrative law has long recognized the validity of such interpretive rule-making in case decisions. Of course, such interpretations must be reasonable and not arbitrary. It should be noted that the Virginia Supreme Court has just

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investigator, the failure to establish good cause, and the stated purpose of the respondent to employ additional counsel in addition to competent lawyers already working on the case.

accepted an appeal in the VPTA case, so the issue discussed in this suggestion remains in litigation.

Recommendation 35, page 165:

The suggestion to allow removal without pay of hearing officers who fail to render reports is particularly appropriate.[3] In fact, it has been suggested that the Supreme Court should be given specific authority to discipline such attorneys. The wasted time and resources, as well as the impact on the administrative law system, requires strict and enforceable rules. Hearing officers volunteer and are compensated to serve an important role in the case decision process. Failure to do it in an effective and timely way damages the whole process.

Recommendations 38, 39, and 40, pages 180-183:

The Report presents several different policy issues relating to standing to sue in the environmental area. The General Assembly should choose among them only after knowing and careful consideration of all of the options. As indicated, this Office is working with the Secretary of Natural Resources to clarify the federal government's position on standing under the Federal Clean Air Act.

Recommendation 42, page 186:

This Recommendation would reverse the Richter decision. What it may mean in practice is unnecessary, early judicial intervention into the administrative process, along with delays at the behest of the affected party. Despite the recent article referred to (in No. 130) above, the federal courts have moved towards a policy of greater abstention from such intervention. See, for example, Phillips v. Board of Medicine, 749 F.Supp. 715 (E.D. Va. 1990), a copy of which is attached. The reasoning is that the administrative process should be allowed to run its course before courts step in. Written guidelines for granting of continuances are, as indicated above, a useful idea. But, a proper balance must be struck particularly when delay in the proceeding may result in a person who is dangerous to the public being able to continue to practice a profession. "Reasonably supported claim of due process violations" is a very broad and indefinite term which will itself provide grounds for major litigation within existing administrative litigation. Such litigation would demand major resources for

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[3]Once again, hearing officers selected from the Supreme Court list do not make "decisions." They recommend findings and conclusions and make reports to the agency decision-maker to meet the specific needs of the latter.

agencies and their counsel.

Recommendation 43, page 188:

This Recommendation, was rejected two years ago by the Supreme Court's Committee on Rules.[4]

Discovery at the agency level will turn every administrative case into major litigation. Current resources of the agencies and of the Attorney General's Office may be inadequate to assume the additional work that would result. The traditional purpose and intent of the APA has been to provide a simpler less adversarial alternative to avoid the complication and expense of discovery in administrative litigation. One of the stated reasons for this recommendation is to prevent or reduce "surprise" or "trial by ambush." It is respectfully suggested that the sources of these suggestions (pages 187-188) are purely anecdotal and rarely, if at all, reflective of real administrative practice before Virginia agencies at present.[5] Moreover, this issue was addressed by a 1989 statutory amendment which added § 9-6.14:11(B), requiring agencies to provide advance notice to all parties of documents on which they will rely in making case decisions.

Discovery at the appellate level turns the whole APA on its ear. The concept of judicial review on the record and deference to the agency in its area of expertise would be eliminated. Since a new record could be created, the court would have before it a record different from that before the agency. Thus, de novo trials would become routine as persons appearing before an agency sought to re-litigate issues they had previously lost and the whole purpose of review on a record made by the agency would be rendered superfluous. If discovery is to be allowed in the course of judicial review of agency decisions, then repeal of present Article 4 with the right to file an action in equity challenging a case decision would be the simplest solution.

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[4]Attempts were made to amend Part 2A of the Rules of the Supreme Court to allow discovery. The Committee heard a variety of arguments and rejected the idea.

[5]It should be remembered that the APA at present requires detailed notices to parties under both § 9-6.14:11 and § 9-6.14:12. It also provides for conferences to resolve procedural issues and already allows limited discovery, as well as the issuance of subpoenas. Another subject which should be considered is the availability of documentation from an agency under the Freedom of Information Act, a technique used frequently by many attorneys as a substitute for discovery in administrative cases.

**Appendix E**

# Report of the JLARC APA Subcommittee, and the Omnibus and Regulation Suspension Bills

## Summary of JLARC APA Subcommittee Actions

The JLARC APA Subcommittee met on October 27, November 9, and December 14, 1992 to consider the recommendations of the JLARC staff report. The subcommittee assessed which recommendations it would like to incorporate into a bill, either in modified or unmodified form, and which recommendations it was not interested in pursuing at this time.

The subcommittee requested that two bills be prepared to implement changes to the Administrative Process Act. The first bill is an omnibus bill to incorporate those recommendations for change to the Act that the subcommittee expressed interest in, except for one. The second bill is designed to address the other recommendation, for a legislative and executive suspension of a regulation.

In addition to requesting the preparation of two bills, the subcommittee considered some other actions related to the Administration Process Act that are not addressable through revisions to the Act. For example, the subcommittee endorsed House Bill 450 from the 1992 Session, as a first step in addressing the environmental standing issue.

### The Omnibus Bill

The omnibus bill contains amendments to several sections. These amendments are designed to achieve the following goals: increase opportunities for meaningful public participation; provide additional information to the public about regulatory activity; clarify existing provisions; and shorten timeframes for certain regulatory activity.

*Increasing Opportunities for Meaningful Public Participation.* Amendments in the bill are designed to increase opportunities for participation in both the rulemaking and case decision processes. For rulemaking, key amendments to further participation are contained in § 9-6.14:7.1. These amendments would: provide in the Act for public petitioning for rulemaking (many agencies do so in their public participation guidelines); establish the Notice of Intended Regulatory Action (NOIRA) in the Act, with a minimum thirty day public comment period and a requirement that the proposed regulation may not be filed until the public comment period on the NOIRA is closed; enable the public to submit requests during the NOIRA phase for a public hearing on the proposed regulation, and to compel such a hearing with at least twenty-five persons making this request; require agencies to develop general policy statements in their public participation guidelines on the use of advisory panels; and enable the public (at least twenty-five persons) to require an additional

comment period on a regulation, if changes with a substantial impact are made to a regulation between its proposed and final form. Also, amendments to § 9-6.14:4.1 would increase public participation by modifying certain exemptions to the Act to provide for greater use of APA public participation procedures, and requiring periodic future reviews of APA exemptions and exclusions.

For case decisions, an amendment in the bill would consistently provide named parties in case decision matters with an opportunity for an informal fact finding proceeding, unless both the agency and the named party agree to waive that opportunity. Another amendment provides that when boards or commissions meet to render a case decision and information from a prior proceeding is being considered, then persons who participated in the prior proceedings shall be provided an opportunity to respond at the board or commission meeting to any summaries of the prior proceeding that may be prepared for the board or commission.

*Providing Additional Information to the Public.* One of the concerns expressed by members of the public who have participated in administrative proceedings is that they do not know what the agency's response is to the input they have provided. However, agencies are already required by the Act to prepare responses to public input. To increase public awareness and access to these responses, an amendment to the Act would require agencies to send copies of their responses to all public commenters. Another amendment would require agencies to make exempt regulations accessible to the public prior to board adoption of those regulations.

*Clarifying Existing Provisions.* Several amendments in the omnibus bill either clarify or provide greater specificity to existing provisions. For example, the Governor's executive order is required to be adopted and published within a specific timeframe. The concepts of "emergency situation" and the "basis, purpose, substance, issues, and impact" of regulations are specifically defined. The Act is clarified to more clearly indicate that public hearings during the notice and comment phase are only required under specified circumstances. Also, there is a housecleaning amendment at the beginning of the Act, to eliminate a seventeen-year-old grandfather clause for proceedings commenced under the General Administrative Agencies Act.

*Shortening Timeframes for Certain Regulatory Activity.* About forty percent of total rulemaking time is spent, on average, between when NOIRA comments are due and the publication of the proposed regulation. Some agency public participation guidelines currently require that agencies draft regulations only after the NOIRA comment period has ended, and current language in the Act appears to indicate that drafting may only begin after public input has been received. Amendments to the Act in the omnibus bill would permit agencies to

begin drafting at any time, and this could speed agency progress in the development of the proposed regulation. However, the amendments do require that agencies not submit their proposed regulations until the NOIRA comment period is closed.

For case decisions, amendments in the omnibus bill would compel agencies, boards or commissions to make case decisions within ninety days of holding the case decision proceeding, or within sixty days of receiving a recommendation from a hearing officer on the Supreme Court list, if notified by the named party to the case decision to do so. If the agency, board, or commission fails to render a decision within the required timeframe, then the decision is deemed to be in favor of the named party. A hearing officer on the Supreme Court list who is empowered to make a recommendation on a case decision matter would also be compelled to make that recommendation within ninety days of holding the case decision proceeding, if notified by the named party to the case decision to do so. If the hearing officer fails to provide a recommendation within the required timeframe, then the hearing officer shall be removed from the hearing officer list and reported to the Virginia State Bar for possible disciplinary action, unless good cause is shown for the delay.

**The Executive and Legislative Suspension Bill**

The executive and legislative suspension bill allows the Governor and the General Assembly to suspend the effective date of a regulation until the end of the next regular legislative session. This would provide Virginia's elected officials with the ability to delay a regulation, if necessary, until there is an opportunity to consider a bill to nullify all or a portion of the regulation. The details of how the proposed suspension would work are summarized in an attached graphic, and in the suspension bill.

**Other Subcommittee Actions**

The subcommittee endorsed House Bill 450 from the 1992 Session, which called for changing standing in the Air and Water Laws from "owner aggrieved" to "person aggrieved". This was identified as a first step toward addressing the environmental standing issue. It was recognized that the requirements of the federal Clean Air Act could have further impact on what Virginia ultimately does in the matter of environmental standing.

The subcommittee expressed concern with executive branch noncompliance with the APA. The Governor should not provide approval to emergency regulations that would reissue or extend an emergency regulation concerning the same subject area beyond the one year limit provided in the Act. In addition, the Governor should ensure that executive branch agencies make a

good faith effort to provide the estimated impact of their regulations as required by the Act. Finally, the subcommittee was concerned by the fact that there have been instances of State agencies violating the APA requirement that public comment periods for proposed regulations remain open for at least 60 days. These violations can negatively impacted the efficiency and effectiveness of the Act and damage public confidence in the rulemaking process.

The subcommittee endorsed the concept of the legislation being drafted for the Virginia Code Commission to require that all State agency regulations be officially filed with the Registrar's office. The effect of this action by the Code Commission would be to remove the force of law from any "regulation" which has not been filed with the Registrar by a certain date. The subcommittee encouraged the Code Commission to expand the scope of the legislation to specifically remove the force of law from all State agency policies and guidelines that have not been properly promulgated as regulations. This action would eliminate the uncertainty over whether these policies and guidelines have the force of law in case decision proceedings. The subcommittee also requested that the Code Commission more actively promote the *Register*.

The subcommittee encouraged the Registrar's office to provide more supervision over the rulemaking activities of State agencies to ensure their compliance with the APA. The Registrar should notify legislative members if the Governor fails to issue an executive order in compliance with the requirements of the Act. The Registrar's office should not accept proposed regulations from agencies until the completion of the NOIRA comment period. The Registrar should also not accept notices of opportunity for public comment which do not allow at least 60 days for public comment. The Registrar should contact the Governor's office when no Governor's comment has been filed with a final regulation. Finally, the Registrar should not publish final regulations before ensuring that the agency has filed a Summary of Public Comment and Agency Response which includes an agency response to the public comment.

Administrative Process Act Subcommittee

Delegate Lewis W. Parker, Jr., Chairman

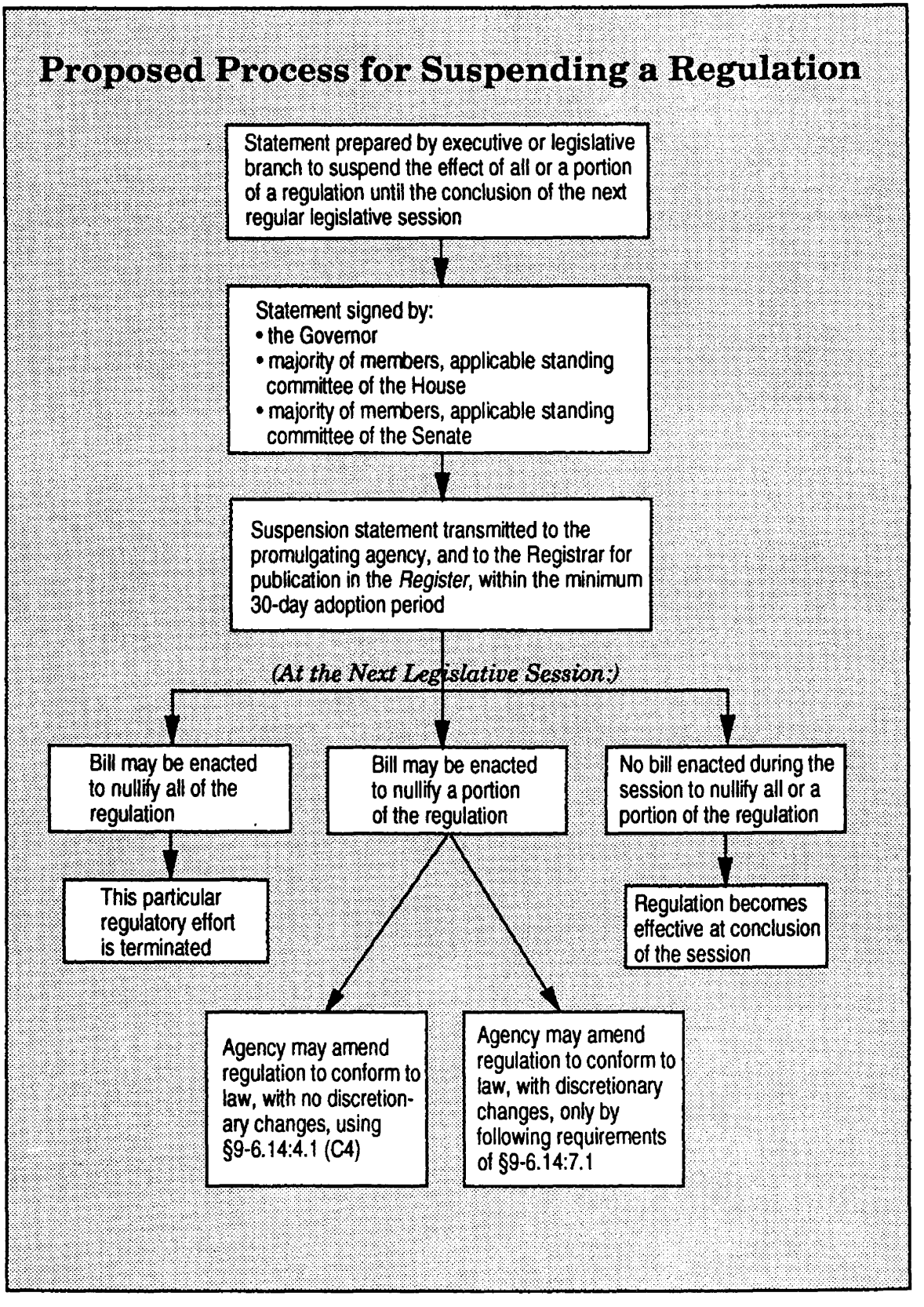
Delegate Jay W. DeBoer

Senator Joseph V. Gartlan, Jr.

Delegate William Tayloe Murphy, Jr.

Senator Robert E. Russell, Sr.

# Proposed Process for Suspending a Regulation



SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact §§ 9-6.14:2, 9-6.14:4.1, 9-6.14:7.1, 9-6.14:9, 9-6.14:9.1, 9-6.14:9.3, 9-6.14:11, 9-6.14:12, and 9-6.14:14.1 of the Code of Virginia, relating to the Administrative Process Act.

Be it enacted by the General Assembly of Virginia:

1. That §§ 9-6.14:2, 9-6.14:4.1, 9-6.14:7.1, 9-6.14:9, 9-6.14:9.1, 9-6.14:9.3, 9-6.14:11, 9-6.14:12, and 9-6.14:14.1 of the Code of Virginia are amended and reenacted as follows:

§ 9-6.14:2. Effect of repeal of the General Administrative Agencies Act and enactment of this chapter.--A. The repeal of Chapter 1.1 (§ 9-6.1 et seq.) of this title, which is entitled the General Administrative Agencies Act but which will be hereinafter referred to as Chapter 1.1, ~~shall not affect any proceedings that may have been commenced under the provisions of Chapter 1.1 prior to the effective date of this chapter including those proceedings prerequisite to the adoption of a regulation, and those proceedings, and any appeals therefrom, for determination of the validity of a regulation and for determination of whether or not a regulation has been violated.-- Provided, however, that any regulation adopted pursuant to the provisions of Chapter 1.1 but subsequent to the effective date of this chapter shall be subject to all the provisions of this chapter except those relating to the proceedings prerequisite to the adoption of a regulation. Provided further, that the repeal of Chapter 1.1~~ shall in

no way affect the validity of any regulation that has been adopted and promulgated under Chapter 1.1 prior to the effective date of this chapter.

B. Whenever any reference is made in this Code to the General Administrative Agencies Act, the applicable provisions of this chapter are substituted therefor.

§ 9-6.14:4.1. Exemptions and exclusions.--A. Although required to comply with § 9-6.18 of the Virginia Register Act (§ 9-6.15 et seq.), the following agencies are exempted from the provisions of this chapter, except to the extent that they are specifically made subject to §§ 9-6.14:14.1, 9-6.14:21 and 9-6.14:22:

1. The General Assembly.

2. Courts, any agency of the Supreme Court, and any agency which by the Constitution is expressly granted any of the powers of a court of record.

3. The Department of Game and Inland Fisheries <u>in promulgating regulations regarding the management of wildlife</u> .

4. The Virginia Housing Development Authority.

5. Municipal corporations, counties, and all local, regional or multijurisdictional authorities created under this Code, including those with federal authorities, except for those created under Chapter 27 (§ 15.1-1228 et seq.) of Title 15.1.

6. Educational institutions operated by the Commonwealth provided that, with respect to § 9-6.14:22, such educational institutions shall be exempt from the publication requirements only with respect to regulations which pertain to (i) their academic affairs; (ii) the selection, tenure, promotion and disciplining of faculty and employees; (iii) the selection of students; and (iv) rules of conduct

and disciplining of students.

7. ~~The Milk Commission.~~

8. The Virginia Resources Authority.

9. Agencies expressly exempted by any other provision of this Code.

10. The Virginia Voluntary Formulary Board in formulating recommendations regarding amendments to the Formulary pursuant to § 32.1-81.

11. The Council on Information Management.

12. The Department of General Services in promulgating standards for the inspection of buildings for asbestos pursuant to § 2.1-526.14.

13. [Repealed.]

14. [Repealed.]

15. The State Council of Higher Education for Virginia, in developing, issuing, and revising guidelines pursuant to § 23-9.6:2.

16. The Commissioner of the Department of Agriculture and Consumer Services in adopting regulations pursuant to subsection B of § 3.1-726.

17. The Commissioner of Agriculture and Consumer Services and the Board of Agriculture and Consumer Services in promulgating regulations pursuant to subsection A of § 3.1-884.21:1.

18. The Board of Medicine when specifying therapeutic pharmaceutical agents for the treatment of certain conditions of the human eye and its adnexa by certified optometrists pursuant to § 54.1-2957.2.

19. The Board of Medicine, in consultation with the Board of Pharmacy, when promulgating amendments to the Physician's Assistant Formulary established pursuant to § 54.1-2952.1.

20. The Boards of Medicine and Nursing in promulgating amendments to the Nurse Practitioner Formulary established pursuant to § 54.1-2957.01.

21. The Virginia War Memorial Foundation.

B. Agency action relating to the following subjects is exempted from the provisions of this chapter:

1. Money or damage claims against the Commonwealth or agencies thereof.

2. The award or denial of state contracts, as well as decisions regarding compliance therewith.

3. The location, design, specifications or construction of public buildings or other facilities.

4. Grants of state or federal funds or property.

5. The chartering of corporations.

6. Customary military, naval or police functions.

7. The selection, tenure, dismissal, direction or control of any officer or employee of an agency of the Commonwealth.

8. The conduct of elections or eligibility to vote.

9. Inmates of prisons or other such facilities or parolees therefrom.

10. The custody of persons in, or sought to be placed in, mental, penal or other state institutions as well as the treatment, supervision, or discharge of such persons.

11. Traffic signs, markers or control devices.

12. Instructions for application or renewal of a license, certificate, or registration required by law.

13. Content of, or rules for the conduct of, any examination required by law.

14. The administration of a pool or pools authorized by Article 7.1 (§ 2.1-234.9:1 et seq.) of Chapter 14 of Title 2.1.

15. Any rules for the conduct of specific lottery games, so long as such rules are not inconsistent with duly adopted regulations of the State Lottery Board, and provided that such regulations are published and posted.

16. Orders condemning or closing any shellfish, finfish, or crustacea growing area and the shellfish, finfish or crustacea located thereon pursuant to Chapter ~~7~~-8 (§ ~~28.1-175~~-28.2-800 et seq.) of Title ~~28.1~~-28.2 .

C. The following agency actions otherwise subject to this chapter and § 9-6.18 of the Virginia Register Act are excluded from the operation of Article 2 (§ 9-6.14:7.1 et seq.) of this chapter:

1. Agency orders or regulations fixing rates or prices.

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

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

4. Regulations which:

(a) Are necessary to conform to changes in Virginia statutory law where no agency discretion is involved;

(b) Are required by order of any state or federal court of competent jurisdiction where no agency discretion is involved; or

(c) 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, and the Registrar has so determined in writing; notice of the proposed adoption of these regulations and the Registrar's above determination shall be published in the Virginia Register not less than thirty days prior to the effective date thereof.

5. Regulations which an agency finds are necessitated by an emergency situation. For the purposes of this subdivision, "emergency situation" means (i) a situation involving an imminent threat to public health or safety or (ii) a situation in which Virginia statutory law or federal law requires that a regulation must be effective in 210 days or less from passage of the law and the regulation is not exempt under the provisions of subdivision C4 of this section. In such cases, the agency shall state in writing the nature of the emergency and of the necessity for such action and may adopt such regulations with the prior approval of the Governor. Such regulations shall be limited to no more than twelve months in duration. If the agency wishes to continue regulating the subject matter governed by the emergency regulation beyond the twelve-month limitation, a regulation to replace the emergency regulation must be promulgated in accordance with Article 2 (§ 9-6.14:7.1 et seq.) of this chapter. The Notice of Intended Regulatory Action to promulgate a replacement regulation shall be published within sixty days of the effective date of the emergency regulation, and the proposed replacement regulation shall be published within 180 days after the effective date of the emergency regulation.

6. [Repealed.]

7. Preliminary program permit fees of the Department of Air

Pollution Control assessed pursuant to subsection C of § 10.1-1322.2.

Whenever regulations are adopted under this subsection C, the agency shall state as part thereof that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision. The effective date of regulations adopted under this subsection shall be in accordance with the provisions of § 9-6.14:9.3, except in the case of emergency regulations, which shall become effective as provided in § 9-6.14:9 A.

D. The following agency actions otherwise subject to this chapter are excluded from the operation of Article 3 (§ 9-6.14:11 et seq.) of this chapter:

1. The assessment of taxes or penalties under the tax laws.

2. The award or denial of claims for workers' compensation.

3. The grant or denial of public assistance.

4. Temporary injunctive or summary orders authorized by law.

5. The determination of claims for unemployment compensation or special unemployment.

6. The award or denial of individual student loans by the Virginia Education Loan Authority.

7. The determination of applications for guaranty of individual student loans or the determination of default claims by the State Education Assistance Authority.

E. The Marine Resources Commission, otherwise subject to this chapter and § 9-6.18 of the Virginia Register Act, is excluded from the operation of subsection C of this section and of Article 2 (§ 9-6.14:7.1 et seq.) of this chapter; however, the authorization for any general permit or guidelines for activity undertaken pursuant to Title 62.1 by the Marine Resources Commission shall be in accordance

with the provisions of this chapter.

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

G. The Joint Legislative Audit and Review Commission shall conduct a review periodically of exemptions and exclusions authorized by this section. The purpose of this review shall be to assess whether there are any exemptions or exclusions which should be discontinued or modified.

§ 9-6.14:7.1. Public participation; informational proceedings; effect of noncompliance.-- A. Any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation. The agency receiving the petition shall receive, consider, and respond to the petition within 180 days. Agency decisions to initiate or not initiate rulemaking in response to petitions are not subject to judicial review.

B. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, an agency shall provide the Registrar of Regulations with a Notice of Intended Regulatory Action which describes the subject matter and intent of the planned regulation. At least thirty days shall be provided for public comment after publication of the Notice of Intended Regulatory Action. An agency shall not file proposed regulations with the Registrar until the public comment period on the Notice of Intended Regulatory Action has closed.

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

~~A.~~--D. Public participation guidelines for soliciting the input of interested parties in the formation and development of its regulations shall be developed, adopted and utilized by each agency pursuant to the provisions of this chapter. ~~Such guidelines shall not only be utilized prior to the formation and drafting of the proposed regulation, but shall also be utilized during the entire formation, promulgation and final adoption process of a regulation.~~--The guidelines shall set out any methods for the identification and notification of interested parties, and any specific means of seeking input from interested persons or groups ~~and, whenever appropriate, may provide~~ which the agency intends to use in addition to the Notice of Intended Regulatory Action. The guidelines shall set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering interest in working with the agency. Such policy shall address the circumstances

in which the agency considers such panels or consultation appropriate and intends to make use of such panels or consultation.

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

C.--F. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be published in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 9-6.14:22 and such notice shall be published in a newspaper of general circulation published at the state capital and, in addition, as the agency may determine, it may be similarly published in newspapers in localities particularly affected, as well as publicized through press releases and such other media as will best serve the purpose and subject involved. The Register and newspaper publication shall be made at least sixty days in advance of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts, summaries or notations of oral presentations, as well as any agency action thereon, shall be matters of public record in the custody of the agency.

The Registrar shall develop the format for the proper advertisement of proposed regulations in newspapers. The Registrar

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

G. Before promulgating any regulation under consideration, the agency shall deliver a copy of that regulation to the Registrar together with a summary of the regulation and a separate and concise statement of ~~the basis, purpose, substance, issues and the estimated impact of that regulation with respect to the number of persons affected and the projected costs for the implementation and compliance thereof.~~ (i) the basis of the regulation, defined as the statutory authority for promulgating the regulation, including an identification of the section number and a brief statement relating the content of the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as the rationale or justification for the new provisions of the regulation, from the standpoint of the public's health, safety or welfare; (iii) the substance of the regulation, defined as the identification and explanation of the key provisions of the regulation that make changes to the current status of the law; (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public, and as applicable for the agency or the State, of implementing the new regulatory provisions; and (v) the estimated impact, defined as the projected number of persons affected, and the projected costs, expressed as a dollar figure or range, for the implementation and compliance thereof. The estimated impact shall represent the agency's best estimate for the purposes of public review and comment, but the accuracy of the estimate shall in no way affect the validity of the regulation. Staff

as designated by the Code Commission shall review proposed regulation submission packages to ensure the requirements of this subsection are met prior to publication of the proposed regulation in the Register . The summary and the statement of the basis, purpose, substance, issues and estimated impact shall be published in the Virginia Register of Regulations, together with the notice of ~~hearing required above~~ opportunity for oral or written submittals on the proposed regulation. However, only the summary shall be printed in the newspapers unless the agency requests publication of the statement of basis, purpose, substance, issues and estimated impact.

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

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

J. If one or more changes with substantial impact are made to a proposed regulation from the time that it is published as a proposed

regulation to the time it is published as a final regulation, any person may petition the agency within thirty days from the publication of the final regulation to request an opportunity for oral and written submittals on the changes to the regulation. If the agency receives requests from at least twenty-five persons for an opportunity to submit oral and written comments on the changes to the regulation, the agency shall suspend the regulatory process for thirty days to solicit additional public comment, unless the agency determines that the changes made are minor or inconsequential in their impact. Agency denial of petitions for a comment period on changes to the regulation shall be subject to judicial review.

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

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

§ 9-6.14:9. Adoption; effective date; filing; emergency regulations; duties of Registrar of Regulations.--A. The purpose of the regulatory procedures is to provide a regulatory plan which is predictable, based on measurable and anticipated outcomes, and is inclined toward conflict resolution.

B. Subject to the provisions of §§ 9-6.14:9.1 and 9-6.14:9.2, all regulations, including those as to which agencies pursuant to § 9-6.14:4.1 may elect to dispense with the public procedures provided by §§ 9-6.14:7.1 and 9-6.14:8, may be formally and finally adopted by the signed order of the agency so stating. No regulation except an emergency regulation shall be effective until the expiration of the applicable period as provided in § 9-6.14:9.3. In the case of an

emergency regulation filed in accordance with subdivision C 5 of § 9-6.14:4.1, the regulation shall become operative upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. The originals of all regulations shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies. They, or facsimiles thereof, shall be made available by the agency for public inspection or copying. Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as may be required by other laws.

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

C. Prior to the publication for hearing of a proposed regulation, copies of the regulation and copies of the summary and statement as to the basis, purpose, substance, issues and impact of the regulation and the agency's comments thereon as required by [ 9-6.14:7.1 shall be transmitted to the Registrar of Regulations, who shall retain these documents.

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

E. Immediately upon the adoption by any agency of any regulation in final form, a copy of (i) the regulation, (ii) a then current summary and statement as to the basis, purpose, substance, issues, and impact of the regulation, and (iii) the agency's summary description of the nature of the oral and written data, views, or arguments

presented during the public proceedings and the agency's comments thereon shall be transmitted to the Registrar of Regulations, who shall retain these documents as permanent records and make them available for public inspection. A draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation .

§ 9-6.14:9.1. Executive review of proposed and final regulations; changes with substantial impact.--A. The Governor shall adopt and publish procedures by executive order for review of all proposed regulations governed by this chapter by June 30 of the year in which the Governor takes office . The procedures shall include (i) review by the Attorney General to ensure statutory authority for the proposed regulations; (ii) examination by the Governor to determine if the proposed regulations are necessary to protect the public health, safety and welfare; and (iii) examination by the Governor to determine if the proposed regulations are clearly written and easily understandable. The procedures may also include review of the proposed regulation by the appropriate Cabinet Secretary.

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

Upon receipt of the Governor's comments on the proposed

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

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

C. If the Governor finds that one or more changes with substantial impact have been made to the proposed regulation ~~are substantial~~, he may suspend the regulatory process for thirty days to require the promulgating agency to solicit additional public comment on the ~~substantial~~ changes. ~~An additional public comment period shall not be required if the Governor determines that the substantial changes were made in response to public comment.~~

D. A thirty-day final adoption period for regulations shall commence upon the publication of the final regulation in the Register. The Governor shall review the final regulation during this thirty-day final adoption period and if he objects to any portion or all of a regulation he shall forward his objections to the Registrar and agency prior to the conclusion of the thirty-day final adoption period. The Governor shall be deemed to have acquiesced in a promulgated regulation if he fails to object to it during the thirty-day final adoption period. The Governor's objection shall be published in the

Register.

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

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

§ 9-6.14:9.3. Effective date of regulation.--A regulation adopted in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) and the Virginia Register Act (§ 9-6.15 et seq.), shall become effective at the conclusion of the thirty-day final adoption period provided for in subsection D of § 9-6.14:9.1, or any other later date specified by the promulgating agency, unless:

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

2. The Governor has exercised his authority in accordance with § 9-6.14:9.1 to suspend the regulatory process for solicitation of additional public comment ~~on substantial changes to the proposed regulation~~, in which event the regulation, unless withdrawn by the promulgating agency, shall become effective on a date specified by the promulgating agency which shall be after the period for which the Governor has suspended the regulatory process.

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

§ 9-6.14:11. Informal fact finding.--A. ~~Save to the extent that case decisions are made as provided by § 9-6.14:12, agencies~~ Agencies shall ~~, unless the parties consent,~~ ascertain the fact basis for their

decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such conference-consultation procedures include rights of parties to the case (i) to have reasonable notice thereof, (ii) to appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer as provided by subsection A of § 9-6.14:14.1, for the informal presentation of factual data, argument, or proof in connection with any case, (iii) to have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision, (iv) to receive a prompt decision of any application for a license, benefit, or renewal thereof, and (v) to be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.

B. Agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information. This requirement shall not apply to an agency's reliance on case law and administrative precedent.

C. In cases where a board or commission meets to render an informal fact-finding decision and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall be provided an opportunity to respond at the board or commission meeting to any summaries of the prior proceeding prepared by or for the board or commission.

D. In any informal fact-finding proceeding in which a hearing officer, as described in § 9-6.14:4.1, is not used or is not empowered

to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within sixty days from the date of the informal fact-finding proceeding. If the agency does not render a decision within sixty days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt of the notice, the decision is deemed to be in favor of the named party. An agency shall provide notification to the named party of its decision within five days of the decision.

E. In any informal fact finding proceeding in which a hearing officer, as described in § 9-6.14:4.1, is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within thirty days from the date that the agency receives the hearing officer's recommendation. If the agency does not render a decision within thirty days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt of the notice, the decision is deemed to be in favor of the named party. An agency shall provide notification to the named party of its decision within five days of the decision.

§ 9-6.14:12. Litigated issues.--A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 9-6.14:11 have not been had or have failed to dispose of a case by consent.

B. Parties to such formal proceedings shall be given reasonable

notice of (i) the time, place, and nature thereof, (ii) the basic law or laws under which the agency contemplates its possible exercise of authority, and (iii) the matters of fact and law asserted or questioned by the agency. Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 9-6.14:11.

C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at such proceedings are empowered to (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee an accurate verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection E of § 9-6.14:14.1, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by such presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its

own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefor. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make such recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be, make recommendations or decisions, the agency shall receive and act on exceptions thereto.

E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

F. In cases where a board or commission meets to render a decision on a litigated issue and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall be provided an opportunity to respond at the board or commission meeting to any summaries of the prior proceeding prepared by or for the board or commission.

G. In any formal proceeding in which a hearing officer, as described in § 9-6.14:4.1, is not used or is not empowered by the agency to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within sixty days from the date of the formal proceeding. If the agency does not render a decision within sixty days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt of the notice, then the decision is deemed to be in favor of the named party. An agency shall provide notification to the named party of its decision within five days of the decision.

H. In any formal proceeding in which a hearing officer, as described in § 9-6.14:4.1, is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within thirty days from the date that the agency receives the hearing officer's recommendation. If the agency does not render a decision within thirty days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt of the notice, the decision is deemed to be in favor of the named party. An agency shall provide notification to the named party of its decision within five days of the decision.

§ 9-6.14:14.1. Hearing officers.--A. In all hearings conducted in accordance with § 9-6.14:12, the hearing shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court and maintained in the Office of the Executive Secretary of the Supreme Court. Parties to proceedings conducted pursuant to § 9-6.14:11 may agree at the outset of the

proceeding to have a hearing officer preside at the proceeding, such agreement to be revoked only by mutual consent. The Executive Secretary shall have the power to promulgate rules necessary for the administration of the hearing officer system.

All hearing officers shall meet the following minimum standards:

1. Active membership in good standing in the Virginia State Bar;

2. Active practice of law for at least five years; and

3. Completion of a course of training approved by the Executive Secretary of the Supreme Court. In order to comply with the demonstrated requirements of the agency requesting a hearing officer, the Executive Secretary may require additional training before a hearing officer will be assigned to a proceeding before that agency.

These requirements must be met prior to being included on the list of hearing officers. All attorneys on the list as of July 1, 1986, shall satisfy these requirements by January 1, 1987, to remain on the list.

B. On request from the head of an agency, the Executive Secretary will name a hearing officer from the list, selected on a rotation system administered by the Executive Secretary. Lists reflecting geographic preference and specialized training or knowledge shall be maintained by the Executive Secretary if an agency demonstrates the need.

C. A hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or consideration, or when required by the applicable rules governing the practice of law in the Commonwealth. Any party may request the disqualification of a hearing officer by filing an affidavit, prior to the taking of evidence at a hearing, stating with

particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification.

The issue shall be determined not less than ten days prior to the hearing by the Executive Secretary of the Supreme Court.

D. Any hearing officer empowered by the agency to provide a recommendation or conclusion in a case decision matter shall render that recommendation or conclusion within sixty days from the date of the case decision proceeding. If the hearing officer does not render a decision within sixty days, then the named party to the case decision may provide written notice to the hearing officer and the Executive Secretary of the Supreme Court that a decision is due. If no decision is made within thirty days from receipt by the hearing officer of the notice, then the Executive Secretary of the Supreme Court shall remove the hearing officer from the hearing officer list and report the hearing officer to the Virginia State Bar for possible disciplinary action, unless good cause is shown for the delay.

~~D.~~--E. The Executive Secretary shall ~~have the authority to~~ remove hearing officers from the list, upon a showing of cause after notice in writing and a hearing. When there is a failure by a hearing officer to render a decision as required by subsection D, the burden shall be on the hearing officer to show good cause for the delay. Decisions to remove a hearing officer may be reviewed by a request to the Executive Secretary for reconsideration, followed by judicial review in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.).

~~E.~~--F. This section shall not apply to hearings conducted by (i) any commission or board where all of the members, or a quorum, are

present; (ii) the Alcoholic Beverage Control Board, the Virginia Workers' Compensation Commission, the State Corporation Commission, the Virginia Employment Commission, the State Education Assistance Authority, ~~and~~-or the Department of Motor Vehicles under §§ 46.2-368, 46.2-389 through 46.2-416, 46.2-506, 46.2-705 through 46.2-710, 46.2-1501, 46.2-1514, 46.2-1542, 46.2-1543, 46.2-1563, 46.2-1572, 46.2-1573, 46.2-1576, 46.2-1601, 46.2-1704 through 46.2-1706, ~~and~~-or 58.1-2409; or (iii) any panel of a health regulatory board convened pursuant to § 54.1-2400. All employees hired after July 1, 1986, pursuant to §§ 65.2-201 and 65.2-203 (formerly §§ 65.1-11 and 65.1-12 ) by the Virginia Workers' Compensation Commission to conduct hearings pursuant to its basic laws shall meet the minimum qualifications set forth in subsection A of this section. Agency employees who are not licensed to practice law in this Commonwealth, and are presiding as hearing officers in proceedings pursuant to (ii) above shall participate in periodic training courses.

~~F.~~--G. Notwithstanding the exemptions of subsection A of § 9-6.14:4.1, this article shall apply to hearing officers conducting hearings of the kind described in § 9-6.14:12 for the Department of Game and Inland Fisheries, the Virginia Housing Development Authority, the Milk Commission and the Virginia Resources Authority pursuant to their basic laws.

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SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact §§ 9-6.14:9.1, 9-6.14:9.2 and 9-6.14:9.3 of the Code of Virginia, relating to the Administrative Process Act; suspension of regulations.

Be it enacted by the General Assembly of Virginia:

1. That §§ 9-6.14:9.1, 9-6.14:9.2 and 9-6.14:9.3 of the Code of Virginia are amended and reenacted as follows:

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

The Governor's review of proposed regulation shall begin upon the publication of that proposed regulation in the Register. The Governor shall transmit his comments on that proposed regulation to the Registrar and the agency prior to the completion of the public comment period provided for in § 9-6.14:7.1. The Governor may recommend

amendments or modifications to any regulation which would bring that regulation into conformity with statutory authority or state or federal laws, regulations or judicial decisions.

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

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

C. If the Governor finds that changes made to the proposed regulation are substantial, he may require the agency to provide an additional ~~suspend the regulatory process for~~ thirty days ~~to require the promulgating agency~~ to solicit additional public comment on the substantial changes. An Additional public comment period shall not be required if the Governor determines that the substantial changes were made in response to public comment.

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

with subsection B of § 9-6.14:9.2, or both .

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

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

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

§ 9-6.14:9.2. Legislative review of proposed and final regulations; suspension with Governor's concurrence.-- A. After the legislative members have received copies of the Register pursuant to § 9-6.14:24, the standing committee of each house of the General Assembly to which matters relating to the content of the regulation are most properly referable may meet and, during the promulgation or final adoption process, file with the Registrar and the promulgating agency an objection to a proposed or final adopted regulation. The Registrar shall publish any such objection received by him as soon as practicable in the Register. Within twenty-one days after the receipt by the promulgating agency of a legislative objection, that agency shall file a response with the Registrar, the objecting legislative committee and the Governor. If a legislative objection is filed within the final adoption period, subdivision 1 of § 9-6.14:9.3 shall govern.

B. In addition, or as an alternative to, the provisions of subsection A, the standing committee of both houses of the General Assembly to which matters relating to the content are most properly referable may suspend the effective date of any portion or all of a final regulation with the Governor's concurrence. The Governor and the applicable standing committee of each house may direct, through a statement signed by a majority of the members of the standing committee of each house and by the Governor, that the effective date of a portion or all of the final regulation is suspended and shall not take effect until the end of the next regular legislative session. This statement shall be transmitted to the promulgating agency and the Registrar within the thirty-day adoption period, and shall be published in the Register. If a bill is passed at the next regular legislative session to nullify a portion but not all of the regulation, then the promulgating agency (i) may promulgate the regulation under the provision of subdivision C4 of § 9-6.14:4.1 of this Act, if it makes no changes to the regulation other than those required by statutory law, or (ii) shall follow the provisions of § 9-6.14:7.1, if it wishes to also make discretionary changes to the regulation. If a bill to nullify all or a portion of the suspended regulation, or to modify the statutory authority for the regulation, is not passed at the next regular legislative session, then the suspended regulation will become effective at the conclusion of the session, unless the suspended regulation is withdrawn by the agency.

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

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

§ 9-6.14:9.3. Effective date of regulation.--A regulation adopted in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) and the Virginia Register Act (§ 9-6.15 et seq.), shall become effective at the conclusion of the thirty-day final adoption period provided for in subsection D of § 9-6.14:9.1, or any other later date specified by the promulgating agency, unless:

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

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

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

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

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