

**REPORT OF THE VIRGINIA  
DEPARTMENT OF HEALTH**

**Reductions of Average Time for  
Certificate of Public Need  
Review (Chapter 1271, 2020)**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



**SENATE DOCUMENT NO. 7**

**COMMONWEALTH OF VIRGINIA  
RICHMOND  
2021**



REDUCTIONS OF AVERAGE  
TIME FOR CERTIFICATE OF  
PUBLIC NEED REVIEW

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REPORT TO THE GENERAL ASSEMBLY

VIRGINIA DEPARTMENT OF HEALTH  
OFFICE OF LICENSURE AND CERTIFICATION  
DIVISION OF CERTIFICATE OF PUBLIC NEED



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## PREFACE

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The Virginia Department of Health (VDH) is submitting this report in response to the legislative mandate in the second enactment clause of Chapter 1271 of the 2020 Acts of Assembly, which directed VDH to develop recommendations to reduce the duration of the average review cycle for applications for Certificates of Public Need to not more than 120 days from the date of receipt of a Letter of Intent. The legislative mandate requires VDH to report its recommendations “to the Governor and the General Assembly by December 1, 2020.”

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## EXECUTIVE SUMMARY

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The Commonwealth of Virginia maintains control over the supply of certain medical care facilities and health services through its certification of public need (COPN) program. Certain projects (e.g., opening a hospital, adding beds to a nursing home, etc.) require the project owner to demonstrate that there is a public need for that specific project before the project can be commenced. Depending on the project, it may be eligible for an expedited review process. The process of reviewing COPN applications can be a lengthy one. The General Assembly directed the Virginia Department of Health (VDH) to develop recommendations to reduce the duration of the average review cycle for the review of a COPN request to not more than 120 days. VDH is recommending the following changes to the COPN program to achieve an average review cycle of 120 or fewer days from receipt of the Letter of Intent (LOI) to the State Health Commissioner's (Commissioner) decision:

1. Reduce the time between the LOI and application submission from 30 days to 14 days, which is a reduction of 16 days.
2. Reduce the time between the application submission and start of the review cycle from 40 days to 5 days, which is a reduction of 35 days.
3. Reduce the time for staff review of COPN applications from 70 days to 65 days, which is a reduction of 5 days.
4. Reduce the time between an informal fact-finding conference and the close of the record from 30 days to 28 days, which is a reduction of 2 days.
5. Reduce the time between the close of the record and State Health Commissioner's decision from 45 days to 40 days, which is a reduction of 5 days.
6. Expand the types of COPN requests that are eligible for expedited review to include non-competing requests with capital expenditures below the statutory threshold from existing medical care facilities to increase capacity in an existing service through the addition of:
  - a. medical/surgical beds;
  - b. hospice beds;
  - c. psychiatric beds;
  - d. rehabilitation beds;
  - e. cardiac catheterization laboratories;
  - f. operating rooms;
  - g. computed tomographic imaging machines;
  - h. magnetic resonance imaging machines;
  - i. positron emission tomography machines; and
  - j. linear accelerators.

Implementation of these recommendations would require certain amendments to the Code of Virginia and to the Virginia Medical Facilities Certificate of Public Need Rules and Regulations as described herein.





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## INTRODUCTION

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The Division of Certificate of Public Need (DCOPN) in the Virginia Department of Health’s (VDH) Office of Licensure and Certification (OLC) is the unit responsible for the administration of the Certificate of Public Need (COPN) program.

### REPORT MANDATE

The second enactment clause of Chapter 1271 (2020 Acts of Assembly) requires that recommendations to reduce the duration of the average review cycle for the review of a COPN request be reduced to not more than 120 days be submitted to the Governor and General Assembly by 1 December 2020. The recommendations contained in this report are to achieve an average of no more than 120 days from receipt of the Letter of Intent (LOI) to the State Health Commissioner’s (Commissioner) decision.

### CURRENT COPN REVIEW PROCESS

The applicability and process for the COPN program is established in Article 1.1 (§ 32.1-102.2 *et seq.*) of Chapter 4 of Title 32.1 of the Code of Virginia. More specifically, the administrative procedures for reviewing a COPN request are established at Va. Code § 32.1-102.6. The regulations for the COPN program (12VAC5-220-10 *et seq.*) provide additional process direction for the review of COPN requests.

#### “BATCH” CYCLES

Va. Code § 32.1-102.2 provides the Board of Health (Board) authority to establish a “structured batching process” for the review of COPN requests. Batch review cycles are not to exceed 190 calendar days from the start of the review cycle.<sup>1</sup> The COPN regulations establish seven “batches,” with each batch grouping like or similar project types (Table 1) and setting the start date for each batch review cycle. Each batch review cycle occurs twice a year with the exception of “Batch Group G,” which is nursing home-related COPN requests, occurring six times per year.

Batch Group	General Description	Review Start
A	General hospitals, obstetrical services, neonatal special care services	Feb. 10
		Aug. 10
B	Open heart surgery, cardiac catheterization, ambulatory surgery centers / operating room additions, transplant services	Mar. 10
		Sep. 10
C	Psychiatric facilities, substance abuse treatment, mental retardation facilities	Apr. 10
		Oct. 10
D/F	Diagnostic imaging facilities/services, selected therapeutic facilities/services	May 10
		Nov. 10
E	Medical rehabilitation beds/services	Jun. 10
		Dec. 10
D/F	Diagnostic imaging facilities/services, selected therapeutic facilities/services	Jul. 10
		Jan. 10
G	Nursing home beds at retirement communities, bed relocations, miscellaneous expenditures by nursing homes	Jan. 10
		Mar. 10
		May 10
		Jul. 10
		Sep. 10
		Nov. 10

*Table 1: Batch Groups*

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<sup>1</sup> See Va. Code § 32.1-102.6.

## LETTER OF INTENT

Each COPN review, other than an expedited review, is initiated by an LOI. The LOI is a regulatory requirement<sup>2</sup> and is not addressed in the Code of Virginia. The LOI provides public notice of pending projects and affords an opportunity for submission of competing applications in the batch cycle. Prior to continuous document availability online and essentially universal access to the web by potential applicants, the LOI was also necessary to provide an opportunity for applicants to receive a copy of the application form and the relevant section of the State Medical Facilities Plan (SMFP).<sup>3</sup> LOIs are due at least 70 days before the start of the applicable batch review cycle, which is also 30 days before the applicable application due date. LOIs can also be submitted after the 70-day deadline for up to 10 days after the first LOI was submitted for review of the same or similar service, in the same planning district and the same batch cycle. LOIs are valid for up to a year from receipt by VDH. There is no fee or cost from VDH for the submission of an LOI.

## APPLICATION SUBMISSION

Applications are due at least 40 days before the start of the applicable batch review cycle.<sup>4</sup> Forty days allows for the review of the application by DCOPN staff to determine if the application is complete and provide the applicant the opportunity to submit material needed to complete the application. Prior to July 1, 2020,<sup>5</sup> within the 40 days between receipt of the COPN application and the start of the COPN review cycle, 15 days were provided for DCOPN (and if applicable, the Regional Health Planning Agency (RHPA)), to determine if the application was complete, generate a list of missing material, and communicate that to the applicant.<sup>6</sup> The applicant then had 20 days to submit the listed missing material. Five additional days were provided for DCOPN (and if applicable, the RHPA) to review the additional material submitted by the applicant and determine if the application was then complete and generate a letter accepting the application for review in the batch review cycle.<sup>7</sup>

The amendments made by Chapter 1271 (2020 Acts of Assembly) requires that COPN applications be complete by the application submission deadline, with responses to all relevant sections of the application form. Complete applications should be able to support a decision without submitting additional supporting material.<sup>8</sup> As such, since July 1, 2020, there is no longer a need for a “completeness review” period within which the applicant has an opportunity to complete the application form after submission.

## APPLICATION STAFF REVIEW

### *Public Comment*

The requirement to conduct a public hearing was changed by Chapter 1271 (2020 Acts of Assembly) to only require public hearings for competing COPN reviews or upon request.<sup>9</sup> Public hearings, when required, are conducted by the RHPA in Health Planning Region II (HPR II)<sup>10</sup> and by DCOPN staff when conducted elsewhere.

Within 10 days of the start of the review cycle, notice of the review soliciting public comment must be posted. Receipt of public comment closes not later than 45 days from the date that the notice soliciting public comment is posted. At the latest, public comment, including those comments received via any public hearing, must be received by the 55th day of the review cycle.

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<sup>2</sup> See 12VAC5-220-180.

<sup>3</sup> Chapter 1271 (2020 Acts of Assembly) has renamed the State Medical Facilities Plan to the State Health Services Plan.

<sup>4</sup> See 12VAC5-220-180(C).

<sup>5</sup> The effective date of Chapter 1271 (2020 Acts of Assembly).

<sup>6</sup> See 12VAC5-220-190.

<sup>7</sup> Ibid.

<sup>8</sup> See Va. Code § 32.1-102.6(A).

<sup>9</sup> See Va. Code § 32.1-102.6(B).

<sup>10</sup> HPR II is in northern Virginia, and comprises the Alexandria, Arlington, Fairfax, Loudoun, and Prince William health districts.

### *Regional Health Planning Agency Review*

Assuming the COPN request is for a project in HPR II, the RHPA has 60 days from the start of the cycle to conduct a public hearing, perform their own review and analysis, and conduct a meeting to vote to make a written recommendation to the Commissioner as to whether he should approve the request.<sup>11</sup> The RHPA review period runs concurrent with the public comment period and with the DCOPN staff review.

### *Division of Certificate of Public Need Staff Review*

The DCOPN has 70 days starting with the start of the cycle to conduct a public hearing, perform their own review and analysis, and make a written recommendation to the Commissioner as to whether he should approve the request. The DCOPN review period runs concurrent with the public comment period and the RHPA review, if applicable.

## COPN DECISION PROCESS

Within four days of the written recommendation from DCOPN—which is the 74th day of the review cycle—any person other than the applicant(s) seeking party status must file a petition for good cause, seeking an informal fact finding conference (IFFC). On the 75th day of the review cycle, a determination must be made as to the need for an IFFC.<sup>12</sup> The need for an IFFC is based on whether:

- there is a petition seeking good cause;
- either the RHPA or DCOPN has recommended denial of the COPN request; or
- the applicant does not agree to any aspect of the approval recommendation or the recommended conditions.

### *No Informal Fact Finding Conference*

If it is determined there is no need for an IFFC, the record for the review closes on the 75th day of the review cycle.<sup>13</sup> A decision package is sent to the Commissioner for consideration, approximately seven days later. The Commissioner has up to 45 days,<sup>14</sup> from the close of the record on the 75th day of the review cycle, to consider the record and make a decision; assuming the Commissioner takes the entire 45 days to render a decision, this results in a total review cycle length of 120 days. By letter, the Commissioner may add 25 additional days,<sup>15</sup> extending the decision deadline and the review cycle to 145 days. After day 145, the request is deemed approved.<sup>16</sup> Typically, the Commissioner makes a decision within 14 days of receipt of the decision package, which is approximately the 96th day of the review cycle.

### *With an Informal Fact Finding Conference*

If an IFFC is determined to be necessary, it will be held between the 80th and 90th day of the review cycle, on a date set when the project was accepted for review.<sup>17</sup> There are 30 days<sup>18</sup> allowed between the date of the IFFC and close of the record. Within those 30 days, the Adjudication Officer can review the documents and testimony presented at IFFC, and consolidate his notes. The court reporter produces and distributes a verbatim

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<sup>11</sup> See Va. Code § 32.1-102.6(B).

<sup>12</sup> See Va. Code § 32.1-102.6(E).

<sup>13</sup> See Va. Code § 32.1-102.6(E)(5).

<sup>14</sup> See Va. Code § 32.1-102.6(E)(6).

<sup>15</sup> Ibid.

<sup>16</sup> See Va. Code § 32.1-102.6(E)(7).

<sup>17</sup> See Va. Code § 32.1-102.6(E)(1).

<sup>18</sup> See Va. Code § 32.1-102.6(E)(4).

transcript of the IFFC proceedings, generally within one to two weeks following the date of the IFFC. The applicant(s) develop and submit proposed findings of fact, followed by rebuttals in competing reviews.

After the close of the record, there is a 45-day period, with an additional 25 days allowed with notice<sup>19</sup> for the Adjudication Officer to develop a recommendation for the Commissioner based on the record as amended through the IFFC process. Within the same 45 days, the Commissioner must review:

- the recommendation of the RHPA (if applicable);
- the recommendation of DCOPN;
- the recommendation of the Adjudication Officer; and
- the record.

The Commissioner renders a decision on the COPN request to approve, deny or partially approve in accordance with the eight required considerations.<sup>20</sup> The 45-day period can be extended by the Commissioner to 70 days by providing written notice of an additional 25 days. If no decision is made by the end of the 25 extended days—which is day 190 of the review cycle—the COPN request is deemed approved.<sup>21</sup>

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<sup>19</sup> See Va. Code § 32.1-102.6(E)(6).

<sup>20</sup> See Va. Code § 32.1-102.3.

<sup>21</sup> See Va. Code § 32.1-102.6(E)(7).

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## REDUCTION OF THE AVERAGE COPN REVIEW TIME

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### STAKEHOLDER INPUT

On August 5, 2020, an email was sent to over 100 COPN stakeholders, including medical care facilities, consultants, associations, and attorneys most active in participating in the COPN process. DCOPN requested feedback by September 4, 2020, on their ideas for how to reduce the average review time for COPN requests. Seven responses were received from two physician providers, two hospital systems, one provider association, one consultant and one attorney. Much of the feedback did not address the goal of reducing the average length of the review period, though it did contain good ideas for improving the COPN review process. The feedback that did address the time reduction goal is summarized in Appendix A.

The Adjudication Officer who conducts IFFCs for COPN reviews was contacted by email on July 21, 2020, for his feedback on draft recommendations, with a follow-up telephone call discussion on August 4, 2020. The Adjudication Officer's feedback was either incorporated into the recommendations or discussed at each step of the recommendation discussion.

### EXPEDITED REVIEW

The expedited review process authorized by Va. Code § 32.1-102.2(A)(5) is addressed in 12VAC5-220-280 through 12VAC5-220-310. Project requests subject to expedited review:

- are not required to submit an LOI;
- are not subject to the batching process; and
- must be decided within 45 days of receipt of a complete application, unless it is determined the request is not eligible for expedited review, in which case the request is moved to the full review process.

Currently, very few<sup>22</sup> COPN requests undergo review through an expedited process. Only those projects with capital expenditures greater than \$20,136,175 requested by persons other than a general hospital may be reviewed under the expedited review process.<sup>23</sup> Chapter 1271 (2020 Acts of Assembly, Special Session I) requires the State Health Services Plan Task Force (SHSP Task Force) to make recommendations to the Board whether certain projects should be subject to expedited review rather than the full review process.<sup>24</sup> Recommendations for a comprehensive State Health Services Plan (SHSP) are due from the SHSP Task Force on or before November 1, 2021.

Since projects subject to expedited review have a serious impact on the average length of a COPN review, certain project requests were included hypothetically as a proxy for calculating the overall average review period. Selected as the proxy requests were non-competing requests from existing medical care facilities that are beneath statutory capital expenditures threshold and that are increase existing capacity in an existing service by adding:

- medical/surgical beds;
- hospice beds;
- psychiatric beds;
- rehabilitation beds;
- cardiac catheterization laboratories;
- operating rooms;
- computed tomographic imaging machines;
- magnetic resonance imaging machines;
- positron emission tomography machines; and

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<sup>22</sup> The current annual average is zero.

<sup>23</sup> See Va. Code § 32.1-102.2(A)(5).

<sup>24</sup> See Va. Code § 32.1-102.2:1(A).

- linear accelerators.

These project types were selected for the expedited review proxy because these projects tend to be less controversial since they are not included in a competitive review cycle, are likely to be approved, and are adding capacity to existing established services. Within a typical year, eight COPN requests of the type proposed for expedited review would be expected.

### OPPORTUNITIES FOR REDUCTION IN REVIEW TIME

#### REDUCE TIME BETWEEN LETTER OF INTENT AND APPLICATION FROM 30 DAYS TO 14 DAYS (REDUCTION OF 16 DAYS)

This reduction of time can be achieved by amending the regulatory requirement<sup>25</sup> for an LOI so that an applicant’s LOI is due to the Commissioner 14 days prior to application submission, rather than 30 days prior. With “near live” posting of the LOI to the VDH website, the public notice goal is served in real time. The online availability of application forms, regulations, and SMFP<sup>26</sup> criteria eliminates an applicant’s need for delay between an LOI and an application. Fourteen days allows for one day for acknowledgement response and posting to the website and 13 days that provide public notice of pending project, an opportunity for competing applications in the batch cycle, and alerts to the community of the pending COPN request.

LOIs can currently be submitted at any time and are valid for up to a year from the date submitted. Since an LOI starts the clock for the calculation of average review time, reducing the time between LOI and application would result in either:

- batch cycles being eliminated, allowing submission of COPN requests at any time, impacting DCOPN’s ability to manage workflow and competitive review; or
- LOIs only being accepted on predetermined due dates and being valid only for that specific batch cycle submitted.

Single date submission effectively eliminates the opportunity for responsive competitive LOIs. There are three potential solutions to address this issue. One option would be to allow LOI submission and acknowledgment at any time, with the LOI only being considered active and valid as of the due date. Another option would be to allow LOI submission at any time prior to the due date and for seven days after receipt of the first LOI for a like service, in the same planning district, in the same cycle. A final option would be to calculate the average length of a COPN review from the LOI due date regardless of when a specific LOI was received.

#### REDUCE TIME BETWEEN APPLICATION SUBMISSION AND CYCLE START FROM 40 DAYS TO 5 DAYS (REDUCTION OF 35 DAYS)

Chapter 1271 (2020 Acts of Assembly) amended Va. Code § 32.1-102.6(A) to provide that a completed application is to be submitted without need for additional material submission; essentially, a complete application is due by the established deadline for submission. If the application is determined to be complete, notice is sent to the applicant accepting the application for review in the review cycle scheduled to begin in 30 days. The DCOPN (and if applicable, the RHPA) can at this point—or at any other time in the review—request supplemental or clarifying material not considered necessary to “complete” the application. Va. Code § 32.1-102.6(A) retains the existing allowance of ten days for DCOPN (and if applicable, the RHPA) to review the applications for completeness. If the application is not complete, DCOPN is required to transmit:

- a list of missing material to the applicant within ten days of receipt of the application;
- a notice that the application is not complete and therefore not accepted for review; and

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<sup>25</sup> Specifically, 12VAC5-220-180(A) would require amendment.

<sup>26</sup> As noted in Footnote 3, Chapter 1271 (2020 Acts of Assembly) has renamed the SMFP to the SHSP.

- the date by which a complete application must be received to be included the next appropriate batch review cycle.

The time from application submission could reasonably be reduced from 40 days to five days. Five days would be sufficient for review of the application for completeness and acceptance for review, or notification to the applicant if not accepted for review with a list of missing material. In reducing this period of time, policymakers may want to consider that there may be a possible need for an appeal process for applications not accepted for review and that the COPN application forms would require substantial revision. Current application forms for hospitals have been in use since at least 1992 and the nursing home application forms were last modified in 2010. By law, the applications may only require “data necessary for review of an application” and to reflect the “statutory requirements.”<sup>27</sup> Clarification of the elements in the application form provides a better platform for the application to comply with submission of a complete application, but does not reduce the time required for a review. Policymakers should further be aware that adoption of the reduced time between application submission and cycle start requires amendment to Va. Code § 32.1-102.6(A) to reduce the time required for determination of completeness to four days, which in turn would require amendments to 12VAC5-220-180, 12VAC5-220-190, 12VAC5-220-200, and 12VAC5-220-230.

#### REDUCE TIME FOR STAFF REVIEW FROM 70 DAYS TO 65 DAYS (REDUCTION OF 5 DAYS)

Va. Code § 32.1-102.6 and 12VAC5-220-230 allows 60 days for the review of the application by the RHPA. The RHPA review involves:

- holding a public hearing when required;
- soliciting and receiving public comment outside the public hearing;
- evaluating the application against the 8 required considerations at Va. Code § 32.1-102.3 and any local criteria;
- producing a written evaluation and/or recommendation for the RHPA’s board or designated committee of the RHPA’s board; and
- conducting a meeting of the RHPA’s board or designated committee of the RHPA’s board to:
  - hear the recommendation;
  - hear a presentation from the applicant;
  - have an opportunity to question the applicant; and
  - vote on a recommendation to forward to the Commissioner.

Currently, Va. Code § 32.1-102.6(B) permits the RHPA to submit its recommendation to the Commissioner “within 10 calendar days after the completion of its 60-calendar-day review....” Running concurrent with and beyond the RHPA review, the DCOPN has 70 days to complete their review and make a recommendation. A complete review by DCOPN includes:

- receiving and incorporating the review and recommendation from the RHPA, if applicable;
- holding a public hearing when required if there is no RHPA;
- soliciting and receiving public comment outside the public hearing;
- evaluating the application against the 8 required considerations at Va. Code § 32.1-102.3; and
- producing a written evaluation and recommendation.

Public hearings are only required for competing reviews (approximately 19% of reviews) or by request of an elected local official, a member of the Virginia General Assembly, the Commissioner, the applicant or a member of the public. Given the variability of how a public hearing can be triggered, predicting the number of public hearings is difficult. Conduct of the public hearing, when required, occurs within the public comment period. Public comment must be solicited within 10 days of cycle start and end *no later than* 45 days from public notice, so at latest, 55 days from start of cycle.

The time from start of the review cycle to the completion of the DCOPN staff review could reasonably be reduced from 70 days to 65 days. The RHPA would need to be able to complete their required work within 60

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<sup>27</sup> See Va. Code § 32.1-102.6(A).

days. The sole remaining RHPA<sup>28</sup> has reviewed an average of 14.8 COPN requests per year for the last five years, which is 31% of the COPN requests received by VDH. The RHPA reviews an average of more than one COPN request per month. Five days for DCOPN to incorporate the recommendations of the RHPA into the DCOPN report is likely adequate, and would allow the RHPA to complete their work by the sixtieth day of the cycle. The RHPA would have the same review period as they do currently, with the change being having to transmit their recommendation on the same day their review is complete instead of 10 days later. Available technology should ensure that is not a problem.

In reducing this period of time, policymakers may want to consider the RHPA's ability to meet a 60-day review schedule, especially since it would require transmission of the RHPA's board's recommendation within that same 60-day period. Further, Va. Code § 32.1-102.6 requires that the period for public comment begin no later than 10 days from the start of the review cycle and end not later than 45 days after the public notice soliciting public comment, which would be the 55th day of the review period; the maximum period of time of receipt of public comments is therefore 55 days. Requiring the RHPA to transmit its recommendations by the end of the 60-day review cycle requires amendment of Va. Code § 32.1-102.6(B) to remove the 10 days allowed for DCOPN's receipt of a recommendation from the RHPA. 12VAC5-220-230(A) and (B) would also need to be amended to:

- reduce the time allowed for DCOPN's receipt of a recommendation from the RHPA from 70 to 60 days;
- reduce the time allowed for DCOPN to complete their review and recommendation;
- eliminate the 10 days for transmission of the recommendation; and
- change the day by when DCOPN is to proceed as if the RHPA has recommended approval of the proposed project to the 61st day of the review cycle.

#### REDUCE TIME BETWEEN IFFC AND CLOSE OF THE RECORD FROM 30 DAYS TO 28 DAYS (REDUCTION OF 2 DAYS)

Va. Code § 32.1-102.6(E)(4) provides 30 days between the date of the IFFC and close of the record to allow the Adjudication Officer to review the documents and testimony presented at IFFC and consolidate his notes; the court reporter to produce and distribute the verbatim written record of the IFFC proceedings; and the parties to develop and submit proposed findings of fact followed by rebuttals in competing reviews. The time between the IFFC and record close may be reasonably reduced by two days, from 30 to 28 days. Reduction to less than 28 days may not allow adequate time for the applicants to adequately prepare and submit proposed findings of fact and rebuttals to any proposed findings submitted by competing applicants.

The current Adjudication Officer has expressed concerns with any reduction at this step. The court reporter has stated that the production of the verbatim written record of the IFFC can be accelerated to as little as four days, leaving adequate time for the applicant(s) to respond; however, such accelerated record production will be at an increased cost to VDH. If policymakers wish to make this reduction, it would require amendments to Va. Code § 32.1-102.6(E)(4) and 12VAC5-220-230(B).

#### REDUCE TIME BETWEEN CLOSE OF THE RECORD AND DECISION FROM 45 DAYS TO 40 DAYS (REDUCTION OF 5 DAYS)

Va. Code § 32.1-102.6(E)(6) provides 45 days for the Adjudication Officer to develop a recommendation for the Commissioner based on the record as amended through the IFFC process. Within this same 45 days, the Commissioner must review the recommendation of the RHPA (if applicable), the recommendation of DCOPN, the recommendation of the Adjudication Officer, and the record, and render a decision on the COPN request to approve, deny or partially approve the COPN request(s) in accordance with the 8 required considerations in Va. Code § 32.1-102.3. The 45-day period for the Commissioner's review can be extended

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<sup>28</sup> Health Systems Agency of Northern Virginia.



by the Commissioner to 70 days by adding 25 days, with written notice from the Commissioner. If no decision is made by the end of the additional 25 days, the COPN request is deemed approved.

The time between the close of the record and the Commissioner's decision may be reasonably reduced by 5 days, from 45 days to 40 days. The current Adjudication Officer has concerns with any reduction at this step, though the availability of additional adjudication officers may facilitate this option, or facilitate even further reduce the time period. If policymakers wish to make this reduction, it would require amendments to Va. Code § 32.1-102.6(E)(6) and 12VAC5-220-230(C).

#### NO REASONABLE OPPORTUNITIES FOR TIME REDUCTION

There exists no reasonable opportunity to reduce the time after publication of DCOPN staff report available for good cause petition. Va. Code § 32.1-102.6(E)(3) currently allows four days. Further reduction would leave a time period that is too short for a potential petitioner to review and respond to the recommendations on a COPN request. Additionally, no reasonable opportunity exists to reduce the window in which an IFFC can be scheduled to be held. Va. Code § 32.1-102.6(E)(1) provides a 10-day window in which to schedule an IFFC. Scheduling for potentially multiple IFFCs with a single hearing officer in less than the ten day period, which would be between six and eight working days, is impractical.

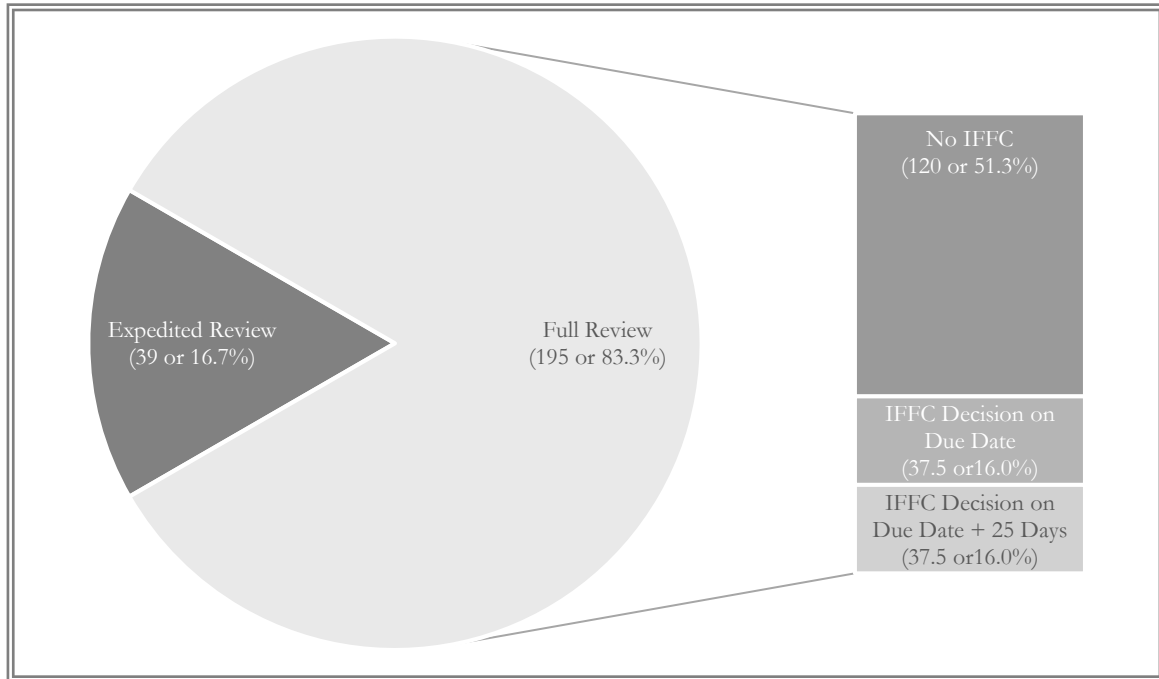
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## RECOMMENDATIONS

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### ANALYSIS

There were a total of 234 COPN requests received for the period calendar year 2015 through calendar year 2019, excluding any projects deregulated from COPN by Chapter 1271 (2020 Acts of Assembly)<sup>29</sup>; this equates to an average of 47 COPN requests in a typical year. Of the 234 COPN requests, 39 would be reviewed under expedited review with the discussed expansion of that process (see “Expedited Review” above) and 195 would undergo full cycle review. Of the 195 requests expected to undergo full cycle review, 75 requests (38.5%) are expected to go to IFFC. Of the 75 COPN requests at IFFC, half of those requests can be expected to require the additional 25 days review allowable beyond the 45 days currently allowed after the close of the record<sup>30</sup> (Figure 1).



*Figure 1: Number of COPN Requests by Review Type*

The time allowed for each step—from receipt of the LOI to the decision—was calculated at the statutory limit maximum, tolling any time added at the applicant’s request or consent<sup>31</sup>, for each of four scenarios:

- requests that were required to go to IFFC, which had a total review time of 235 days;
- requests that were required to go to IFFC that also required the additional 25 days, which had a total review time of 250 days;
- requests that did not require IFFC, which had a total review time of 190 days; and
- requests that were subject to an expanded expedited review process, which had a total review time of 45 days.

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<sup>29</sup> The deregulated projects are obstetrics, lithotripsy, nuclear medicine imaging, and linear accelerator based stereotactic radiotherapy/surgery.

<sup>30</sup> See Va. Code § 32.1-102.6(E)(6).

<sup>31</sup> Va. Code § 32.1-102.6(I) states, “The applicants, and only the applicants, shall have the authority to extend any of the time periods specified in this section. If all applicants consent to extending any time period in this section, the Commissioner, with the concurrence of the applicants, shall establish a new schedule for the remaining time periods.”

Using the five year (2015 – 2019) annual average of total decisions, a weighted average of projects that were required to go to IFFC, those that were not required to go to IFFC, and those that may be included in an expanded expedited review was used to calculate the *average* time of a COPN review. The time allowed for the various steps of a review were modified, until the average review time was at or below 120-days, using the formula below:

$$\frac{\left(\frac{1}{2} \times \text{IFFC Projects} \times \text{Days for IFFC}\right) + \left(\frac{1}{2} \times \text{IFFC Projects} \times (\text{Days for IFFC} + 25)\right) + (\text{Expedited Projects} \times \text{Days for Expedited}) + (\text{Non IFFC Projects} \times \text{Days for No IFFC})}{\text{Total Number of Projects}}$$

Table 2 illustrates the time reductions for projects requiring an IFFC and *Table 3* illustrates the time reductions for projects not requiring an IFFC.

	LOI to App	App to Start	Start to Rpt	Rpt to IFFC	IFFC to Close	Close to Decision	+ 25 Days	Total
Current Days	30	40	70	20	20	45	25	260
Reduced Days	14	5	65	20	38	40	25	197
Days Saved	16	35	5	0	2	5	0	63

*Table 2: COPN Projects Requiring IFFC*

	LOI to App	App to Start	Start to Rpt	Rpt to Close	Close to Decision	Total
Current Days	30	40	70	5	45	190
Reduce to X Days	14	5	65	5	14	103
Days Saved	16	35	5	0	31	87

*Table 3: COPN Projects That Do Not Require IFFC*

Using the formula above, adoption of all the recommendations is expected to result in an average review time for COPN reviews of 119.5 calendar days (rounded to the nearest tenth decimal place), as measured from the deadline for receipt of the LOI to the Commissioner’s decision.

$$\frac{\left(\frac{1}{2} \times 75 \times 172\right) + \left(\frac{1}{2} \times 75 \times (172 + 25)\right) + (39 \times 45) + (120 \times 103)}{234}$$

Assuming all recommendations are adopted, COPN requests heard at IFFC may take as long as 197 calendar days from receipt of the LOI to the decision. COPN requests that do not require a hearing at IFFC may take up to 103 calendar days from receipt of the LOI to the decision. The maximum review cycle, prior to the point a COPN request is deemed approved, will be 178 calendar days from the start of the cycle to the decision, 12 days less than the current 190 days. Currently, with the unexpanded list of projects eligible for expedited review, the maximum review time for a COPN request, absent a delay requested by the applicant, as measured from the deadline for receipt of the LOI to the Commissioner’s decision, is 260 calendar days; the current average time for the review of a COPN request, from deadline for receipt of the LOI to a decision, disregarding any delays requested or authorized by the applicant, is 208 calendar days. Adoption of all the recommendations will reduce the maximum number of days to 197 calendar days, a reduction of 63 calendar days and the average review time to 119.5 days, a reduction of 88.5 calendar days.

**NO. 1: REDUCE TIME BETWEEN LETTER OF INTENT AND APPLICATION**

DCOPN recommends reducing the time between submission of the LOI and submission of the application from 30 to 14 days by amending 12VAC5-220-180(A) to:

- change the due date for submission of a LOI to 14 days before the due date for submission of an application,

- change the post submission deadline for submission of competing LOIs for the same or similar service in the same planning district or medical service area in the same cycle to seven days,
- add that an LOI must specify which specific batch review cycle the LOI is intended,
- change the time period within which the Department will acknowledge receipt and transmit the appropriate documents to the applicant to one day, and
- change the time at which point an LOI will be considered void to the start of appropriate batch cycle.

**NO. 2: REDUCE TIME BETWEEN APPLICATION SUBMISSION AND CYCLE START**

DCOPN recommends reducing the time between application submission and cycle start from 40 to five days by amending:

- Va. Code § 32.1-102.6(A) to reduce the time required for determination of completeness to five days;
- 12VAC5-220-180(C) to change the date for submission of a complete COPN application to five days prior to the first day of the review cycle;
- 12VAC5-220-190 to change the day that the department will notify the applicant if the submitted application is complete and accepted for review to four days after receipt of the application, and eliminate language providing for the submission of additional information to complete an application;
- 12VAC5-220-200 to change the title of the section from “One hundred ninety-day review cycle” to “One hundred seventy-eight-day review cycle,” and change the REVIEW CYCLE Ends dates in the table from:
  - August 18 to August 6;
  - February 16 to February 4;
  - September 16 to September 4;
  - March 19 to March 7;
  - October 17 to October 5;
  - April 18 to April 6;
  - November 16 to November 4;
  - May 19 to May 7;
  - December 17 to December 5;
  - June 18 to June 6;
  - January 16 to January 4; and
  - July 18 to July 6;
- 12VAC5-220-230(A) to change the days between which the IFFC will be scheduled from between the 80th and 90th to between the 70th and 80th days; and
- 12VAC5-220-230(B) to change the period for determining if an application is complete to five days.

The regulatory amendments listed above are contingent on the success of the proposed amendment to Va. Code § 32.1-102.6(A)

**NO. 3: REDUCE TIME FOR STAFF REVIEW**

DCOPN recommends reducing review time allotted for its staff from 70 to 65 days by amending:

- Va. Code § 32.1-102.6(B) to reduce the maximum duration of a review cycle from 190 days to 178 days;
- Va. Code § 32.1-102.6(D) to reduce the maximum duration of a review cycle from 190 days to 178 days;
- Va. Code § 32.1-102.6(E) to reduce the maximum duration of a review cycle from 190 days to 178 days;
- 12VAC5-220-230(A) to reduce the time allowed for DCOPN’s receipt of a recommendation from the RHPA from 70 days to 60 days, and to change the review cycle day by which DCOPN will complete their review and recommendation from the seventieth day to the sixty-fifth day; and
- 12VAC5-220-230(B) to eliminate the ten days for transmission of the recommendation and to change the day which DCOPN is to consider the recommendation to default to approval to the 61st day.

The regulatory amendments listed above are contingent on the success of the proposed amendments to Va. Code § 32.1-102.6(B), (D), and (E).

#### **NO. 4: REDUCE TIME BETWEEN IFFC AND CLOSE OF THE RECORD**

DCOPN recommends reducing the time between the IFFC and the close of the record from 30 days to 28 days by amending

- Va. Code § 32.1-102.6(E)(4) to change when the record closes from 30 calendar days to 28 calendar days, and
- 12VAC5-220-230(B) to change the day for the close of the record when an IFFC is held from 30 days to 28 days.

The regulatory amendment listed above is contingent on the success of the proposed amendments to Va. Code § 32.1-102.6(E)(4).

#### **NO. 5: REDUCE TIME BETWEEN CLOSE OF THE RECORD AND DECISION**

DCOPN recommends reducing the time between close of record and the Commissioner's decision from 45 days to 40 days by:

- Va. Code § 32.1-102.6(E)(6) to change the number of days post-closing of the record by which the Commissioner must make a decision on a COPN request or provide notice of deemed approval in 25 calendar days, absent a decision, from 45 calendar days to 40 calendar days;
- Va. Code § 32.1-102.6(E)(7) to change the number of days post-closing of the record by which, absent a decision by the Commissioner, a COPN request is deemed approved from 70 calendar days to 65 calendar days;
- 12VAC5-220-230(C) to change the number of days post-closing of the record by which:
  - the Commissioner must make a decision on a COPN request or provide notice of deemed approval in 25 calendar days, absent a decision, from 45 calendar days to 40 calendar days;
  - absent a decision by the Commissioner, a COPN request is deemed approved from 70 calendar days to 65 calendar days, and
  - absent a decision by the Commissioner, any person who has filed an application competing in the relevant batch review cycle or who has filed an application in response to the relevant request for applications may, prior to the application being deemed approved, petition for immediate injunctive relief from 45 calendar days to 40 calendar days.

The regulatory amendment listed above is contingent on the success of the proposed amendments to Va. Code § 32.1-102.6(E)(6) and (7).

#### **NO. 6: EXPAND ELIGIBILITY FOR EXPEDITED REVIEW**

DCOPN recommends expanding the types of COPN requests that are eligible for expedited review. This would require amendment of Va. Code § 32.1-102.2(A)(5) to include non-competing requests with capital expenditures below the statutory threshold from existing medical care facilities to increase capacity in an existing service through the addition of:

- medical/surgical beds;
- hospice beds;
- psychiatric beds;
- rehabilitation beds;
- cardiac catheterization laboratories;
- operating rooms;
- computed tomographic imaging machines;
- magnetic resonance imaging machines;
- positron emission tomography machines; and
- linear accelerators.

Provided that this proposed statutory amendment is successful, 12VAC5-220-280 would need to be amended to reflect the additional types of COPN requests eligible for expedited review.

**APPENDIX A – SUMMARY OF STAKEHOLDER COMMENTS**

<b>Comment Summary</b>	<b>Response</b>
<i>Review of "uncontested" projects (4 comments)</i>	
Remove uncontested and those projects that are rarely competing from the batch review cycle. Reduce the time for the review of such projects. Use an expanded expedited review process.	Will explore expanded use of expedited review. SHSP Task Force now tasked with exploring expanded use of expedited review 32.1-102.2:1(A). Removal from the batch cycle does not result in a means to shorten the average review time needed for an individual request.
<i>Letter of Intent (6 comments)</i>	
Maintain the 7 day response time for the LOI	The 7 day response time is for the DCOPN response. With near real time notice of receipt of LOIs DCOPN is unsure of the benefit of retaining the 7 day response period.
Address the fluid nature of LOI deadlines & 1 yr. life span of an LOI	Agreed. LOIs would need to be due on a single date and valid only for the cycle filed for.
Maintain 30 days between a LOI & submitting an application	Understand this preserves public notice & opportunity to competitively respond. With near real time posting of notice of receipt of LOIs and online availability of application forms and review criteria so that applicants can begin development of applications well in advance of LOI submission, DCOPN is unsure of the benefit of retaining the 30 day period.
Make LOI & application due same day	This would negate any utility provided by the LOI, rendering it useless.
Make LOI to Application 15 days	This only allows 8 days for application, if 7 days are allowed for response to LOI. If response to LOI is shortened this may be adequate.
<i>Application Submission and Completeness Review (10 comments)</i>	
Decrease the 70 days prior to the start of the review cycle to 30 days.	We will explore ways to accomplish this. Especially since applications must be complete on submission.
Seven comments to eliminate the time for completeness review.	32.1-102.6 now requires the application to be complete when submitted. Completeness review has been eliminated in practice, but not yet in Regulation.
Three comments to reduce the time for completeness to between 25 and 30 days.	32.1-102.6 now requires the application to be complete when submitted. Completeness review has been eliminated in practice, but not yet in Regulation.
<i>Public Comment (1 comment)</i>	
Decrease the solicitation and response time for public comment from 55 to 20 days	Public comment period runs concurrent with the review by the RHPA and the DCOPN.

<i>Regional Health Planning Agency (4 comments)</i>	
Require the RHPA review to be concurrent with the DCOPN review and/or be due at the end of public comment. Eliminate RHPA review time when no RHPA exists or add time when they do exist.	RHPA & DCOPN reviews are concurrent.
<i>DCOPN Staff Review (2 comment)</i>	
Staff Report could be produced within 15-30 days of the Public Hearing	Currently staff report is due by the 70th day. Since the Code allows 10 days to notice public comment, & 45 days for public comment, the staff report is within 15 days of close of public comment.
When there is no IFFC, reduce the current 50 day period for a decision by the Commissioner. (15-30 days of staff report)	When there is no IFFC the Commissioner's practice is to make a decision typically within 15-30 days of the DCOPN staff report now. Will consider formalizing this.
<i>Informal Fact Finding Conference and Decision (8 comments)</i>	
Determine if IFFC is needed at completeness review & schedule right away, not in 15 days.	The IFFC is scheduled at acceptance. The need for an IFFC is determined based on a denial recommendation on day 70 or receipt of a good cause petition based on the staff recommendation.
If IFFC needed, determine if there is good cause at completeness review & schedule right away, not in 15 days.	Good cause is based on factors not known until staff recommendations are complete.
Reduce time for IFFC to 10 days or 31-35 days	These comments were read to refer to the time from holding the IFFC to decision. Currently 100 days. The IFFC transcript is available in 10 working days, at an increased cost can be expedited to 4 work days. Parties are given time to submit proposed findings and rebuttal statements. Hearing officer and Commissioner need adequate time to evaluate the COPN request. Will consider opportunities to reduce the time allowed for IFFC to decision.
Close the record & Commissioner's decision in one week-10 days	IFFC transcript available in 10 work days, at an increased cost can be expedited to 4 work days. Adequate time is needed for the hearing officer & the Commissioner to carefully consider the record
Increase the amount of ALJ time available for COPN IFFCs.	Requires additional FTEs and funding. Will be considered based on need arising from changes adopted.
Toll the time of review delays requested by applicants from the calculation of average time of review.	Agreed.



**APPENDIX B – COMPARISON OF CURRENT AND PROPOSED REVIEW SCHEDULES**

<b>Legal Authority</b>	<b>Current COPN Review Schedule</b>	<b>Event</b>	<b>Proposed COPN Review Schedule</b>
12VAC5-220-180(A)	-70 days from cycle start	LOI due	-19 days from cycle start
12VAC5-220-180(A)	+7 days after LOI receipt	LOI response due	+1 day after LOI received
Va. Code § 32.1-102.6(A) 12VAC5-220-180(C)	-5 days from cycle start	Application due	-70 days from cycle start
Va. Code § 32.1-102.6(A) 12VAC5-220-190 <sup>32</sup>	+10 days after application receipt	DCOPN determines completeness	+4 days after application receipt
Va. Code § 32.1-102.6(D) 12VAC5-220-230(A)	0 days from cycle start	Application accepted for review	0 days from cycle start
Va. Code § 32.1-102.6(D) 12VAC5-220-200	<i>Start of review cycle for complete applications</i>		
Va. Code § 32.1-102.6(B)	+0 – 10 days after cycle start	Public comment starts	+0 – 10 days after cycle start
Va. Code § 32.1-102.6(B)	+45 – 55 days after cycle start	Public comment ends	+45 – 55 days after cycle start
Va. Code § 32.1-102.6(B) 12VAC5-220-230(B)	+60 days after cycle start	RHPA review complete	+60 days after cycle start
	+70 days after cycle start	RHPA report due	
12VAC5-220-230(A)		DCOPN review complete and report due	+65 days after cycle start
Va. Code § 32.1-102.6(E)(2) 12VAC5-220-230(A)	+74 days after cycle start	Petition for good cause due	+69 days after cycle start
Va. Code § 32.1-102.6(E)(5)	+75 days after cycle start	Determination of need for IFFC (record closes if no IFFC needed)	+70 days after cycle start
Va. Code § 32.1-102.6(E)(1)	+80 – 90 days after cycle start	IFFC held	+70 – 80 days after cycle start

<sup>32</sup> This regulation was based on prior statutory language that was repealed by Chapter 1271 (2020 Acts of Assembly); efforts are underway to amend this regulation to conform to the new Va. Code § 32.1-102.6(A).

<b>Legal Authority</b>	<b>Current COPN Review Schedule</b>	<b>Event</b>	<b>Proposed COPN Review Schedule</b>
12VAC5-220-230(A)			
Va. Code § 32.1-102.6(E)(4)	+30 days after IFFC	Close of record after IFFC	+30 days after IFFC
Va. Code § 32.1-102.6(E)(6)	+45 days after record closes	Commissioner's decision due	+14 or +40 days after record closes
Va. Code § 32.1-102.6(E)(7)	+70 days after record closes	Deemed approval if no decision issued	+65 days after record closes
Va. Code § 32.1-102.6(D)	+190 days after cycle start	End of review cycle	+178 days after cycle start



