



# COMMONWEALTH OF VIRGINIA

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November 9, 2009

The Honorable Edward T. Scott  
Member, House of Delegates  
206 South Main Street, Suite 203  
Culpeper, Virginia 22701

Dear Delegate Scott:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

Assuming that the Board of Health (the “Board”) adopts emergency regulations pursuant to §§ 2.2-4011 and 2.2-4012 and the regulations become final, you ask whether these regulations will trigger the applicability of § 15.2-2157(C)-(D) and meet the requirements of § 32.1-163.6. If not, you ask what the Board must do to meet such requirements.

## Response

It is my opinion that adoption by the Board of Health of the emergency regulations required by the enactment language of the 2009 amendments to § 32.1-163.6 will trigger the applicability § 15.2-2157(C)-(D) upon the effective date of such regulations.<sup>1</sup>

## Applicable Law and Discussion

The 2009 Session of the General Assembly made significant changes to the laws regarding both traditional and alternative onsite sewage treatment systems and specifically amended § 32.1-163.6 (“2009 Amendment 1”) to require that engineered onsite sewage systems “*comply with operation, maintenance, and monitoring requirements as set forth in regulations implementing [Chapter 6].*”<sup>2</sup> The second enactment clause of 2009 Amendment 1 required the Board to adopt regulations within 280 days to establish performance requirements and horizontal setbacks for alternative systems permitted by the Board’s regulations implementing Chapter 6.<sup>3</sup> The General Assembly also required that the regulations contain operation and maintenance requirements consistent with the requirements for alternative onsite sewage systems in § 32.1-164.<sup>4</sup>

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<sup>1</sup>Because I answer your first inquiry in the affirmative, there is no need to address your second question.

<sup>2</sup>2009 Va. Acts ch. 220, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?091+ful+CHAP0220+pdf> (adding subsection I to § 32.1-163.6).

<sup>3</sup>*Id.*, cl. 2.

<sup>4</sup>*Id.*

Additionally, the 2009 Session of the General Assembly amended § 15.2-2157 (“2009 Amendment 2”) to prohibit localities from banning “*the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health*” in areas where sewers or sewerage disposal facilities are not available.<sup>5</sup> The amendments to § 15.2-2157 further provide that localities “*shall not require maintenance standards and requirement for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.*”<sup>6</sup> The second enactment clause of 2009 Amendment 2 provides that “**the provisions contained in subsections C and D of § 15.2-2157 of the Code of Virginia shall become effective 30 days following final promulgation by the Board of Health of regulations governing the operation and maintenance of alternative onsite sewage systems[.]**”<sup>7</sup>

The Board is tasked with the “supervision and control over the safe and sanitary collection, conveyance, transportation, treatment, and disposal of sewage by onsite sewage systems and alternative discharging sewage systems, and treatment works as they affect the public health and welfare.”<sup>8</sup> Further, regulations adopted by the Board “shall govern the collection, conveyance, transportation, treatment and disposal of sewage by onsite sewage systems and alternative discharging sewage systems.”<sup>9</sup>

The Virginia Administrative Process Act<sup>10</sup> (the “APA”) governs the adoption of regulations by agencies of the Commonwealth. Section 2.2-4011 of APA permits agencies to “adopt emergency regulations in situations in which Virginia statutory law ... requires that a regulation be effective in 280 days or less from its enactment.” Emergency regulations are limited to twelve months in duration.<sup>11</sup> The inclusion of the 280-day requirement for regulations in an enactment clause of 2009 Amendment 1 demonstrates the General Assembly’s intention that such regulations be promulgated as emergency regulations pursuant to § 2.2-4011.

Section 2.2-4012(B) of APA mandates that an emergency regulation “shall become effective upon its adoption and filing with the Registrar of Regulations, unless a later date is specified.” APA provides several methods for the promulgation and adoption of regulations<sup>12</sup> and distinguishes between regulations

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<sup>5</sup> See 2009 Va. Acts ch. 786, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?091+ful+CHAP0786+pdf> (adding subsection C to § 15.2-2157).

<sup>6</sup> *Id.* (adding subsection D to § 15.2-2157).

<sup>7</sup> *Id.*, cl. 2. I note that enactment clause 2 refers to promulgation by the Board of regulations governing the operation and maintenance of alternative onsite sewage systems as required by the 2007 Session of the General Assembly in its amendments to § 32.1-164. See 2007 Va. Acts chs. 892, 924, at 2426, 2429, 2543, 2547, respectively (adding subsection H to § 32.1-164). It appears that the Board has not adopted such regulations.

<sup>8</sup> VA. CODE ANN. § 32.1-164(A) (2009).

<sup>9</sup> Section 32.1-164(B).

<sup>10</sup> See VA. CODE ANN. §§ 2.2-4000 to 2.2-4031 (2008 & Supp. 2009).

<sup>11</sup> Section 2.2-4011(C) (2008). If an agency wishes to continue regulating the subject matter beyond the 12-month effective period for emergency regulations, it is to promulgate a permanent regulation to replace the emergency regulation in accordance with the procedures set out in Article 2 of the APA. See 1999 Op. Va. Att’y Gen. 36, 39 n.11 (interpreting § 9-6.14:4.1(C)(5), predecessor to § 2.2-4011).

<sup>12</sup> See, e.g., § 2.2-4007(A) (2008 (providing that any person may petition agency to request development of new regulation or amendment of existing one).

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with respect to proposed and final stages.<sup>13</sup> I find no indication that emergency regulations may not be adopted as final regulations by the agency. However, § 2.2-4011 describes the steps an agency must take “[i]f the agency wishes to continue regulating the subject matter governed by the emergency regulation beyond the twelve-month limitation.”<sup>14</sup>

### Conclusion

Accordingly, it is my opinion that adoption by the Board of Health of the emergency regulations required by the enactment language of the 2009 amendments to § 32.1-163.6 will trigger the applicability § 15.2-2157(C)-(D) upon the effective date of such regulations.<sup>15</sup>

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "W. C. Mims", with a stylized flourish at the end.

William C. Mims

1:1426; 1:941/09-062

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<sup>13</sup> See § 2.2-4007.06 (2008).

<sup>14</sup> See also *supra* note 11.

<sup>15</sup> See *supra* note 1.