

**Code of Virginia**  
**Administrative Process Act**  
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## **Article 1. General Provisions.**

### **§ 2.2-4000. Short title; purpose.**

A. This chapter may be cited as the "Administrative Process Act."

B. The purpose of this chapter 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. This chapter shall not supersede or repeal additional procedural requirements in such basic laws.

1975, c. 503, §§ 9-6.14:1. 9-6.14:3; 1977, c. 647; 1984, c. 5; 2001, c. [844](#).

### **§ 2.2-4001. Definitions.**

As used in this chapter, unless the context requires a different meaning:

"Agency" means any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases.

"Agency action" means either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency or court.

"Basic law" or "basic laws" means provisions of the Constitution and statutes of the Commonwealth authorizing an agency to make regulations or decide cases or containing procedural requirements therefor.

"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (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.

"Guidance document" means the same as that term is defined in § [2.2-4101](#).

"Hearing" means agency processes other than those informational or factual inquiries of an informal nature provided in §§ [2.2-4007.01](#) and [2.2-4019](#) and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § [2.2-4009](#) in connection with the making of regulations or (ii) a similar right of private parties or requirement of public agencies as provided in § [2.2-4020](#) in connection with case decisions.

"Hearing officer" means an attorney selected from a list maintained by the Executive Secretary of the Supreme Court in accordance with § [2.2-4024](#).

"Public assistance and social services programs" means those programs specified in § [63.2-100](#).

"Registrar" means the Registrar of Regulations employed as provided in § [2.2-4102](#).

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

"Subordinate" means (i) one or more but less than a quorum of the members of a board constituting an agency, (ii) one or more of its staff members or employees, or (iii) any other person or persons designated by the agency to act in its behalf.

"Virginia Register of Regulations" means the publication issued under the provisions of Article 6 (§ [2.2-4031](#) et seq.).

"Virginia Regulatory Town Hall" means the website operated by the Department of Planning and Budget, which has online public comment forums and displays information about regulatory actions under consideration in the Commonwealth and sends this information to registered public users.

1975, c. 503, § 9-6.14:4; 1977, cc. 377, 381; 1979, c. 613; 1984, c. 187; 1985, cc. 67, 602; 1997, c. [11](#); 2001, c. [844](#); 2002, c. [747](#); 2007, cc. [873](#), [916](#); 2011, cc. [241](#), [315](#); 2017, c. [488](#); 2018, c. [820](#); 2019, c. [362](#).

#### **§ 2.2-4002. Exemptions from chapter generally.**

A. Although required to comply with § [2.2-4103](#) of the Virginia Register Act (§ [2.2-4100](#) et seq.), the following agencies shall be exempted from the provisions of this chapter, except to the extent that they are specifically made subject to §§ [2.2-4024](#), [2.2-4030](#), and [2.2-4031](#):

1. The General Assembly.
2. Courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.
3. The Department of Wildlife Resources in promulgating regulations regarding the management of wildlife and for all case decisions rendered pursuant to any provisions of Chapters 2 (§ [29.1-200](#) et seq.), 3 (§ [29.1-300](#) et seq.), 4 (§ [29.1-400](#) et seq.), 5 (§ [29.1-500](#) et seq.), and 7 (§ [29.1-700](#) et seq.) of Title 29.1.
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.

6. Educational institutions operated by the Commonwealth, provided that, with respect to § [2.2-4031](#), such educational institutions shall be exempt from the publication requirements only with respect to regulations that 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 in promulgating regulations regarding (i) producers' licenses and bases, (ii) classification and allocation of milk, computation of sales and shrinkage, and (iii) class prices for producers' milk, time and method of payment, butterfat testing and differential.
8. The Virginia Resources Authority.
9. Agencies expressly exempted by any other provision of this Code.
10. The Department of General Services in promulgating standards for the inspection of buildings for asbestos pursuant to § [2.2-1164](#).
11. The State Council of Higher Education for Virginia, in developing, issuing, and revising guidelines pursuant to § [23.1-207](#).
12. The Commissioner of Agriculture and Consumer Services in adopting regulations pursuant to subsection B of § [3.2-6002](#) and in adopting regulations pursuant to § [3.2-6023](#).
13. The Commissioner of Agriculture and Consumer Services and the Board of Agriculture and Consumer Services in promulgating regulations pursuant to subsections B and D of § [3.2-3601](#), subsection B of § [3.2-3701](#), § [3.2-4002](#), subsections B and D of § [3.2-4801](#), §§ [3.2-5121](#) and [3.2-5206](#), and subsection A of § [3.2-5406](#).
14. The Board of Optometry when specifying therapeutic pharmaceutical agents, treatment guidelines, and diseases and abnormal conditions of the human eye and its adnexa for TPA-certification of optometrists pursuant to Article 5 (§ [54.1-3222](#) et seq.) of Chapter 32 of Title 54.1.
15. The Commissioner of the Department of Veterans Services in adopting regulations pursuant to § [2.2-2001.3](#).
16. The State Board of Education, in developing, issuing, and revising guidelines pursuant to § [22.1-203.2](#).
17. The Virginia Racing Commission, (i) when acting by and through its duly appointed stewards or in matters related to any specific race meeting or (ii) in promulgating technical rules regulating actual live horse racing at race meetings licensed by the Commission.
18. The Virginia Small Business Financing Authority.
19. The Virginia Economic Development Partnership Authority.

20. The Board of Agriculture and Consumer Services in adopting, amending or repealing regulations pursuant to subsection A (ii) of § [59.1-156](#).

21. The Insurance Continuing Education Board pursuant to § [38.2-1867](#).

22. The Board of Health in promulgating the list of diseases that shall be reported to the Department of Health pursuant to § [32.1-35](#) and in adopting, amending or repealing regulations pursuant to subsection C of § [35.1-14](#) that incorporate the Food and Drug Administration's Food Code pertaining to restaurants or food service.

23. The Board of Pharmacy when specifying special subject requirements for continuing education for pharmacists pursuant to § [54.1-3314.1](#).

24. The Virginia Department of Veterans Services when promulgating rules and regulations pursuant to § [58.1-3219.7](#) or [58.1-3219.11](#).

25. The Virginia Department of Criminal Justice Services when developing, issuing, or revising any training standards established by the Criminal Justice Services Board under § [9.1-102](#), provided such actions are authorized by the Governor in the interest of public safety.

B. Agency action relating to the following subjects shall be 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, militia, 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 health facilities or 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 pools authorized by Chapter 47 (§ [2.2-4700](#) et seq.).
15. Any rules for the conduct of specific lottery games, so long as such rules are not inconsistent with duly adopted regulations of the Virginia 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 Article 2 (§ [28.2-803](#) et seq.) of Chapter 8 of Title 28.2.
17. Any operating procedures for review of child deaths developed by the State Child Fatality Review Team pursuant to § [32.1-283.1](#), any operating procedures for review of adult deaths developed by the Adult Fatality Review Team pursuant to § [32.1-283.5](#), any operating procedures for review of adult deaths developed by the Maternal Mortality Review Team pursuant to § [32.1-283.8](#), and any operating procedures for review of the deaths of persons with a developmental disability developed by the Developmental Disabilities Mortality Review Committee pursuant to § [37.2-314.1](#).
18. The regulations for the implementation of the Health Practitioners' Monitoring Program and the activities of the Health Practitioners' Monitoring Program Committee pursuant to Chapter 25.1 (§ [54.1-2515](#) et seq.) of Title 54.1.
19. The process of reviewing and ranking grant applications submitted to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Article 12 (§ [51.5-178](#) et seq.) of Chapter 14 of Title 51.5.
20. Loans from the Small Business Environmental Compliance Assistance Fund pursuant to Article 4 (§ [10.1-1197.1](#) et seq.) of Chapter 11.1 of Title 10.1.
21. The Virginia Breeders Fund created pursuant to § [59.1-372](#).
22. The types of pari-mutuel wagering pools available for live or simulcast horse racing.
23. The administration of medication or other substances foreign to the natural horse.
24. Any rules adopted by the Charitable Gaming Board for the approval and conduct of game variations for the conduct of raffles, bingo, network bingo, and instant bingo games, provided that such rules are (i) consistent with Article 1.1:1 (§ [18.2-340.15](#) et seq.) of Chapter 8 of Title 18.2 and (ii) published and posted.

C. Minor changes to regulations published in the Virginia Administrative Code under the Virginia Register Act (§ [2.2-4100](#) et seq.), made by the Virginia Code Commission pursuant to § [30-150](#), shall be exempt from the provisions of this chapter.

1985, c. 602, § 9-6.14:4.1; 1986, c. 615; 1987, cc. 375, 652; 1988, cc. 364, 424, 498, 723, 765, 820; 1989, cc. 54, 299, 478; 1990, cc. 721, 968; 1991, cc. 80, 294, 344; 1992, cc. 200, 409, 488, 592, 793; 1993, cc. 537, 669, 898; 1994, cc. [237](#), [577](#), [649](#), [740](#), [743](#), [801](#); 1995, cc. [103](#), [499](#), [516](#); 1996, cc. [51](#), [152](#), [158](#), [189](#), [205](#), [279](#), [320](#), [345](#), [573](#), [590](#), [598](#), [638](#), [705](#), [735](#), [818](#), [1012](#); 1997, cc. [87](#), [88](#), [109](#), [212](#), [390](#), [439](#), [567](#), [624](#), [785](#), [806](#), [845](#), [850](#), [861](#), [868](#); 1998, cc. [39](#), [619](#), [784](#); 1999, cc. [412](#), [421](#), [433](#), [603](#); 2000, cc. [382](#), [400](#), [924](#), [1011](#); 2001, cc. [465](#), [523](#), [688](#), [820](#), [844](#); 2003, cc. [639](#), [695](#); 2004, c. [802](#); 2006, c. [442](#); 2007, cc. [41](#), [870](#), [932](#); 2008, c. [672](#); 2009, c. [472](#); 2010, cc. [65](#), [178](#), [480](#), [728](#); 2012, cc. [476](#), [507](#), [594](#), [803](#), [835](#); 2013, cc. [59](#), [234](#), [760](#), [780](#); 2014, c. [225](#); 2015, c. [108](#); 2017, cc. [266](#), [584](#); 2018, c. [646](#); 2019, c. [834](#); 2020, cc. [201](#), [356](#), [851](#), [958](#).

#### **§ 2.2-4002.1. Guidance documents.**

A. Guidance documents shall be exempt from the provisions of this chapter, pursuant to this section. Guidance documents do not include agency (i) rulings and advisory opinions, (ii) forms and instructions, (iii) bulletins and legislative summaries, (iv) studies and reports, and (v) internal manuals and memoranda.

B. The agency that develops a guidance document shall certify that the document conforms to the definition of a guidance document in § [2.2-4101](#).

The guidance document shall be subject to a 30-day public comment period, to include public comment through the Virginia Regulatory Town Hall website, after publication in the Virginia Register of Regulations and prior to its effective date.

The agency shall provide notice of the opportunity for public comment to interested parties as identified under § [2.2-4007.02](#) prior to the start of the 30-day public comment period.

C. If a written comment is received during a public comment period asserting that the guidance document is contrary to state law or regulation, or that the document should not be exempted from the provisions of this chapter, the effective date of the guidance document by the agency shall be delayed for an additional 30-day period. During this additional period, the agency shall respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter. Any person who remains aggrieved after the effective date of the final guidance document may avail himself of the remedies articulated in Article 5 (§ [2.2-4025](#) et seq.).

2018, c. [820](#).

#### **§ 2.2-4003. Venue.**



In all proceedings under § [2.2-4019](#) or [2.2-4020](#) venue shall be in the city or county where the administrative agency maintains its principal office or as the parties may otherwise agree. In all proceedings under § [2.2-4026](#), venue shall be as specified in subdivision 1 of § [8.01-261](#).

1975, c. 503, § 9-6.14:5; 1977, c. 624; 2001, c. [844](#); 2007, cc. [873](#), [916](#).

#### **§ 2.2-4004. Severability.**

The provisions of regulations adopted under this chapter or the application thereof to any person or circumstances that are held invalid shall not affect the validity of other regulations, provisions or applications that can be given effect without the invalid provisions or applications. The provisions of all regulations are severable unless (i) the regulation specifically provides that its provisions are not severable or (ii) it is apparent that two or more regulations or provisions must operate in accord with one another.

1987, c. 55, § 9-6.14:5.1; 2001, c. [844](#).

#### **§ 2.2-4005. Review of exemptions by Joint Legislative Audit and Review Commission; Joint Commission on Administrative Rules.**

A. The Joint Legislative Audit and Review Commission shall conduct a review periodically of the exemptions authorized by this chapter. The purpose of this review shall be to assess whether there are any exemptions that should be discontinued or modified.

B. Beginning November 1, 2017, the Joint Commission on Administrative Rules shall conduct a review of the exemptions authorized by this chapter on a schedule established by the Joint Commission on Administrative Rules. The purpose of this review shall be to assess whether any such exemption should be discontinued or modified.

C. Beginning August 1, 2017, each agency having an exemption authorized by this chapter, other than the courts, any agency of the Supreme Court, and any agency that by the Constitution of Virginia is expressly granted any of the powers of a court of record, shall submit a written report to the Joint Commission on Administrative Rules on or before August 1, 2017, which report shall include the date the exemption was enacted, a summary of the necessity for the exemption, and a summary of any rule or regulation adopted pursuant to the exemption in the immediately preceding two fiscal years, if any. Every two years thereafter, each such agency shall submit a written report to the Joint Commission on Administrative Rules that summarizes any rule or regulation adopted pursuant to the exemption in the immediately preceding two fiscal years, if any.

D. In the event that an agency having an exemption authorized by this chapter fails to submit the report required pursuant to subsection C, the Joint Commission on Administrative Rules shall recommend to the Governor and the General Assembly that such agency's exemption be discontinued.

1985, c. 602, § 9-6.14:4.1; 1986, c. 615; 1987, cc. 375, 652; 1988, cc. 364, 424, 498, 723, 765, 820; 1989, cc. 54, 299, 478; 1990, cc. 721, 968; 1991, cc. 80, 294, 344; 1992, cc. 200, 409, 488, 592, 793; 1993, cc. 537, 669, 898; 1994, cc. [237](#), [577](#), [649](#), [740](#), [743](#), [801](#); 1995, cc. [103](#), [499](#), [516](#); 1996, cc. [51](#), [152](#), [158](#), [189](#), [205](#), [279](#), [320](#), [345](#), [573](#), [590](#), [598](#), [638](#), [705](#), [735](#), [818](#), [1012](#); 1997, cc. [87](#), [88](#), [109](#), [212](#), [390](#), [439](#), [567](#), [624](#), [785](#), [806](#), [845](#), [850](#), [861](#), [868](#); 1998, cc. [39](#), [619](#), [784](#); 1999, cc. [412](#), [421](#), [433](#), [603](#); 2000, cc. [382](#), [400](#), [924](#), [1011](#); 2001, c. [844](#); 2017, c. [678](#).

## Article 2. Regulations.

### § 2.2-4006. Exemptions from requirements of this article.

A. The following agency actions otherwise subject to this chapter and § [2.2-4103](#) of the Virginia Register Act shall be exempted from the operation of this article:

1. Agency orders or regulations fixing rates or prices.
2. Regulations that establish or prescribe agency organization, internal practice or procedures, including delegations of authority.
3. Regulations that 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 that are:
  - a. Necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. However, such regulations shall be filed with the Registrar within 90 days of the law's effective date;
  - b. Required by order of any state or federal court of competent jurisdiction where no agency discretion is involved; or
  - c. 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 determination shall be published in the Virginia Register not less than 30 days prior to the effective date of the regulation.
5. Regulations of the Board of Agriculture and Consumer Services adopted pursuant to subsection B of § [3.2-3929](#) or clause (v) or (vi) of subsection C of § [3.2-3931](#) after having been considered at two or more Board meetings and one public hearing.
6. Regulations of (i) the regulatory boards served by the Department of Labor and Industry pursuant to Title 40.1 and the Department of Professional and Occupational Regulation or the

Department of Health Professions pursuant to Title 54.1 and (ii) the Board of Accountancy that are limited to reducing fees charged to regulants and applicants.

7. The development and issuance of procedural policy relating to risk-based mine inspections by the Department of Mines, Minerals and Energy authorized pursuant to §§ [45.1-161.82](#) and [45.1-161.292:55](#).

8. General permits issued by the (a) State Air Pollution Control Board pursuant to Chapter 13 (§ [10.1-1300](#) et seq.) of Title 10.1 or (b) State Water Control Board pursuant to the State Water Control Law (§ [62.1-44.2](#) et seq.), Chapter 24 (§ [62.1-242](#) et seq.) of Title 62.1 and Chapter 25 (§ [62.1-254](#) et seq.) of Title 62.1, (c) Virginia Soil and Water Conservation Board pursuant to the Dam Safety Act (§ [10.1-604](#) et seq.), and (d) the development and issuance of general wetlands permits by the Marine Resources Commission pursuant to subsection B of § [28.2-1307](#), if the respective Board or Commission (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of § [2.2-4007.01](#), (ii) following the passage of 30 days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit, (iii) provides notice and receives oral and written comment as provided in § [2.2-4007.03](#), and (iv) conducts at least one public hearing on the proposed general permit.

9. The development and issuance by the Board of Education of guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance to the American flag in public schools pursuant to § [22.1-202](#).

10. Regulations of the Board of the Virginia College Savings Plan adopted pursuant to § [23.1-704](#).

11. Regulations of the Marine Resources Commission.

12. Regulations adopted by the Board of Housing and Community Development pursuant to (i) Statewide Fire Prevention Code (§ [27-94](#) et seq.), (ii) the Industrialized Building Safety Law (§ [36-70](#) et seq.), (iii) the Uniform Statewide Building Code (§ [36-97](#) et seq.), and (iv) § [36-98.3](#), provided the Board (a) provides a Notice of Intended Regulatory Action in conformance with the provisions of § [2.2-4007.01](#), (b) publishes the proposed regulation and provides an opportunity for oral and written comments as provided in § [2.2-4007.03](#), and (c) conducts at least one public hearing as provided in §§ [2.2-4009](#) and [36-100](#) prior to the publishing of the proposed regulations. Notwithstanding the provisions of this subdivision, any regulations promulgated by the Board shall remain subject to the provisions of § [2.2-4007.06](#) concerning public petitions, and §§ [2.2-4013](#) and [2.2-4014](#) concerning review by the Governor and General Assembly.

13. Amendments to regulations of the Board to schedule a substance pursuant to subsection D or E of § [54.1-3443](#).

14. Waste load allocations adopted, amended, or repealed by the State Water Control Board pursuant to the State Water Control Law (§ [62.1-44.2](#) et seq.), including but not limited to Article

4.01 (§ [62.1-44.19:4](#) et seq.) of the State Water Control Law, if the Board (i) provides public notice in the Virginia Register; (ii) if requested by the public during the initial public notice 30-day comment period, forms an advisory group composed of relevant stakeholders; (iii) receives and provides summary response to written comments; and (iv) conducts at least one public meeting. Notwithstanding the provisions of this subdivision, any such waste load allocations adopted, amended, or repealed by the Board shall be subject to the provisions of §§ [2.2-4013](#) and [2.2-4014](#) concerning review by the Governor and General Assembly.

15. Regulations of the Workers' Compensation Commission adopted pursuant to § [65.2-605](#), including regulations that adopt, amend, adjust, or repeal Virginia fee schedules for medical services, provided the Workers' Compensation Commission (i) utilizes a regulatory advisory panel constituted as provided in subdivision F 2 of § [65.2-605](#) to assist in the development of such regulations and (ii) provides an opportunity for public comment on the regulations prior to adoption.

16. Amendments to the State Health Services Plan adopted by the Board of Health following receipt of recommendations by the State Health Services Task Force pursuant to § [32.1-102.2:1](#) if the Board (i) provides a Notice of Intended Regulatory Action in accordance with the requirements of § [2.2-4007.01](#), (ii) provides notice and receives comments as provided in § [2.2-4007.03](#), and (iii) conducts at least one public hearing on the proposed amendments.

B. Whenever regulations are adopted under this section, 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 section shall be in accordance with the provisions of § [2.2-4015](#), except in the case of emergency regulations, which shall become effective as provided in subsection B of § [2.2-4012](#).

C. A regulation for which an exemption is claimed under this section or § [2.2-4002](#) or [2.2-4011](#) and that 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.

1985, c. 602, § 9-6.14:4.1; 1986, c. 615; 1987, cc. 375, 652; 1988, cc. 364, 424, 498, 723, 765, 820; 1989, cc. 54, 299, 478; 1990, cc. 721, 968; 1991, cc. 80, 294, 344; 1992, cc. 200, 409, 488, 592, 793; 1993, cc. 537, 669, 898; 1994, cc. [237](#), [577](#), [649](#), [740](#), [743](#), [801](#); 1995, cc. [103](#), [499](#), [516](#); 1996, cc. [51](#), [152](#), [158](#), [189](#), [205](#), [279](#), [320](#), [345](#), [573](#), [590](#), [598](#), [638](#), [705](#), [735](#), [818](#), [1012](#); 1997, cc. [87](#), [88](#), [109](#), [212](#), [390](#), [439](#), [567](#), [624](#), [785](#), [806](#), [845](#), [850](#), [861](#), [868](#); 1998, cc. [39](#), [619](#), [784](#); 1999, cc. [412](#), [421](#), [433](#), [603](#); 2000, cc. [382](#), [400](#), [924](#), [1011](#); 2001, c. [844](#); 2003, c. [436](#); 2005, c. [102](#); 2006, cc. [632](#), [719](#); 2007, cc. [873](#), [916](#); 2010, c. [65](#); 2011, c. [464](#); 2012, cc. [803](#), [835](#); 2013, cc. [756](#), [793](#); 2014, cc. [202](#), [674](#), [719](#); 2016, cc. [221](#), [279](#), [290](#); 2017, cc. [416](#), [432](#); 2018, cc. [46](#), [77](#); 2020, c. [1271](#).

**§ 2.2-4006. (Effective October 1, 2021) Exemptions from requirements of this article.**

A. The following agency actions otherwise subject to this chapter and § 2.2-4103 of the Virginia Register Act shall be exempted from the operation of this article:

1. Agency orders or regulations fixing rates or prices.

2. Regulations that establish or prescribe agency organization, internal practice or procedures, including delegations of authority.

3. Regulations that 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 that are:

a. Necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. However, such regulations shall be filed with the Registrar within 90 days of the law's effective date;

b. Required by order of any state or federal court of competent jurisdiction where no agency discretion is involved; or

c. 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 determination shall be published in the Virginia Register not less than 30 days prior to the effective date of the regulation.

5. Regulations of the Board of Agriculture and Consumer Services adopted pursuant to subsection B of § 3.2-3929 or clause (v) or (vi) of subsection C of § 3.2-3931 after having been considered at two or more Board meetings and one public hearing.

6. Regulations of (i) the regulatory boards served by the Department of Labor and Industry pursuant to Title 40.1 and the Department of Professional and Occupational Regulation or the Department of Health Professions pursuant to Title 54.1 and (ii) the Board of Accountancy that are limited to reducing fees charged to regulants and applicants.

7. The development and issuance of procedural policy relating to risk-based mine inspections by the Department of Energy authorized pursuant to §§ 45.2-560 and 45.2-1149.

8. General permits issued by the (a) State Air Pollution Control Board pursuant to Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 or (b) State Water Control Board pursuant to the State Water Control Law (§ 62.1-44.2 et seq.), Chapter 24 (§ 62.1-242 et seq.) of Title 62.1 and Chapter 25 (§ 62.1-254 et seq.) of Title 62.1, (c) Virginia Soil and Water Conservation Board pursuant to the Dam Safety Act (§ 10.1-604 et seq.), and (d) the development and issuance of general wetlands permits by the Marine Resources Commission pursuant to subsection B of § 28.2-1307, if the

respective Board or Commission (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of § 2.2-4007.01, (ii) following the passage of 30 days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit, (iii) provides notice and receives oral and written comment as provided in § 2.2-4007.03, and (iv) conducts at least one public hearing on the proposed general permit.

9. The development and issuance by the Board of Education of guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance to the American flag in public schools pursuant to § 22.1-202.

10. Regulations of the Board of the Virginia College Savings Plan adopted pursuant to § 23.1-704.

11. Regulations of the Marine Resources Commission.

12. Regulations adopted by the Board of Housing and Community Development pursuant to (i) Statewide Fire Prevention Code (§ 27-94 et seq.), (ii) the Industrialized Building Safety Law (§ 36-70 et seq.), (iii) the Uniform Statewide Building Code (§ 36-97 et seq.), and (iv) § 36-98.3, provided the Board (a) provides a Notice of Intended Regulatory Action in conformance with the provisions of § 2.2-4007.01, (b) publishes the proposed regulation and provides an opportunity for oral and written comments as provided in § 2.2-4007.03, and (c) conducts at least one public hearing as provided in §§ 2.2-4009 and 36-100 prior to the publishing of the proposed regulations. Notwithstanding the provisions of this subdivision, any regulations promulgated by the Board shall remain subject to the provisions of § 2.2-4007.06 concerning public petitions, and §§ 2.2-4013 and 2.2-4014 concerning review by the Governor and General Assembly.

13. Amendments to regulations of the Board to schedule a substance pursuant to subsection D or E of § 54.1-3443.

14. Waste load allocations adopted, amended, or repealed by the State Water Control Board pursuant to the State Water Control Law (§ 62.1-44.2 et seq.), including but not limited to Article 4.01 (§ 62.1-44.19:4 et seq.) of the State Water Control Law, if the Board (i) provides public notice in the Virginia Register; (ii) if requested by the public during the initial public notice 30-day comment period, forms an advisory group composed of relevant stakeholders; (iii) receives and provides summary response to written comments; and (iv) conducts at least one public meeting. Notwithstanding the provisions of this subdivision, any such waste load allocations adopted, amended, or repealed by the Board shall be subject to the provisions of §§ 2.2-4013 and 2.2-4014 concerning review by the Governor and General Assembly.

15. Regulations of the Workers' Compensation Commission adopted pursuant to § 65.2-605, including regulations that adopt, amend, adjust, or repeal Virginia fee schedules for medical services, provided the Workers' Compensation Commission (i) utilizes a regulatory advisory panel constituted as provided in subdivision F 2 of § 65.2-605 to assist in the development of

such regulations and (ii) provides an opportunity for public comment on the regulations prior to adoption.

16. Amendments to the State Health Services Plan adopted by the Board of Health following receipt of recommendations by the State Health Services Task Force pursuant to § [32.1-102.2:1](#) if the Board (i) provides a Notice of Intended Regulatory Action in accordance with the requirements of § [2.2-4007.01](#), (ii) provides notice and receives comments as provided in § [2.2-4007.03](#), and (iii) conducts at least one public hearing on the proposed amendments.

B. Whenever regulations are adopted under this section, 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 section shall be in accordance with the provisions of § [2.2-4015](#), except in the case of emergency regulations, which shall become effective as provided in subsection B of § [2.2-4012](#).

C. A regulation for which an exemption is claimed under this section or § [2.2-4002](#) or [2.2-4011](#) and that 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.

1985, c. 602, § 9-6.14:4.1; 1986, c. 615; 1987, cc. 375, 652; 1988, cc. 364, 424, 498, 723, 765, 820; 1989, cc. 54, 299, 478; 1990, cc. 721, 968; 1991, cc. 80, 294, 344; 1992, cc. 200, 409, 488, 592, 793; 1993, cc. 537, 669, 898; 1994, cc. [237](#), [577](#), [649](#), [740](#), [743](#), [801](#); 1995, cc. [103](#), [499](#), [516](#); 1996, cc. [51](#), [152](#), [158](#), [189](#), [205](#), [279](#), [320](#), [345](#), [573](#), [590](#), [598](#), [638](#), [705](#), [735](#), [818](#), [1012](#); 1997, cc. [87](#), [88](#), [109](#), [212](#), [390](#), [439](#), [567](#), [624](#), [785](#), [806](#), [845](#), [850](#), [861](#), [868](#); 1998, cc. [39](#), [619](#), [784](#); 1999, cc. [412](#), [421](#), [433](#), [603](#); 2000, cc. [382](#), [400](#), [924](#), [1011](#); 2001, c. [844](#); 2003, c. [436](#); 2005, c. [102](#); 2006, cc. [632](#), [719](#); 2007, cc. [873](#), [916](#); 2010, c. [65](#); 2011, c. [464](#); 2012, cc. [803](#), [835](#); 2013, cc. [756](#), [793](#); 2014, cc. [202](#), [674](#), [719](#); 2016, cc. [221](#), [279](#), [290](#); 2017, cc. [416](#), [432](#); 2018, cc. [46](#), [77](#); 2020, c. [1271](#); 2021, Sp. Sess. I, c. [532](#).

#### **§ 2.2-4007. Petitions for new or amended regulations; opportunity for public comment.**

A. Any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation. The petition shall state (i) the substance and purpose of the rulemaking that is requested, including reference to any applicable Virginia Administrative Code sections, and (ii) reference to the legal authority of the agency to take the action requested.

B. Within 14 days of receiving a petition, the agency shall send a notice identifying the petitioner, the nature of the petitioner's request and the agency's plan for disposition of the petition to the Registrar for publication in the Virginia Register of Regulations in accordance with the provisions of subsection B of § [2.2-4031](#).

C. A 21-day period for acceptance of written public comment on the petition shall be provided after publication in the Virginia Register. The agency shall issue a written decision to grant or deny the petitioner's request within 90 days following the close of the comment period.



However, if the rulemaking authority is vested in an entity that has not met within that 90-day period, the entity shall issue a written decision no later than 14 days after it next meets. The written decision issued by the agency shall include a statement of its reasons and shall be submitted to the Registrar for publication in the Virginia Register of Regulations. Agency decisions to initiate or not initiate rulemaking in response to petitions shall not be subject to judicial review.

1984, c. 5, § 9-6.14:7.1; 1985, c. 602; 1989, c. 71; 1991, c. 488; 1993, cc. 898, 944; 1994, c. [938](#); 1995, cc. [25](#), [677](#), [717](#), [790](#); 1997, c. [87](#); 2001, c. [844](#); 2002, cc. [241](#), [391](#), [747](#); 2003, c. [224](#); 2005, cc. [619](#), [682](#); 2007, cc. [873](#), [916](#).

#### **§ 2.2-4007.01. Notice of intended regulatory action; public hearing.**

A. In the case of all regulations, except those regulations exempted by § [2.2-4002](#), [2.2-4006](#), [2.2-4011](#), or [2.2-4012.1](#), an agency shall (i) provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation and (ii) allow at least 30 days for public comment, to include an on-line public comment forum on the Virginia Regulatory Town Hall, after publication of the Notice of Intended Regulatory Action.

Whenever a Virginia statutory change necessitates a change to, or repeal of, all or a portion of a regulation or the adoption of a new regulation, the agency shall file a Notice of Intended Regulatory Action with the Registrar within 120 days of such law's effective date.

An agency shall not file proposed regulations with the Registrar until the public comment period on the Notice of Intended Regulatory Action has closed.

B. 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 the agency to hold a public hearing or (ii) the agency receives requests for a public hearing from at least 25 persons.

2007, cc. [873](#), [916](#); 2011, c. [464](#).

#### **§ 2.2-4007.02. Public participation guidelines.**

A. Public participation guidelines for soliciting the input of interested parties in the formation and development of its regulations shall be developed, adopted, and used by each agency pursuant to the provisions of this chapter. 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 that 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 the panels or consultation appropriate and intends to make use of the panels or consultation.

B. In formulating any regulation, including but not limited to those in public assistance and social services programs, the agency pursuant to its public participation guidelines shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency, to include an online public comment forum on the Virginia Regulatory Town Hall, or other specially designated subordinate and (ii) be accompanied by and represented by counsel or other representative. However, the agency may begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit comments.

2007, cc. [873](#), [916](#); 2012, c. [795](#).

#### **§ 2.2-4007.03. Informational proceedings; effect of noncompliance.**

A. In the case of all regulations, except those regulations exempted by § [2.2-4002](#), [2.2-4006](#), or [2.2-4011](#), the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations in accordance with the provisions of subsection B of § [2.2-4031](#). In addition, the agency may, in its discretion, (i) publish the notice in any newspaper and (ii) publicize the notice through press releases and such other media as will best serve the purpose and subject involved. The Register and any newspaper publication shall be made at least 60 days in advance of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts and 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.

B. If an agency wishes to change a proposed regulation before adopting it as a final regulation, it may choose to publish a revised proposed regulation, provided the latter is subject to a public comment period of at least 30 additional days and the agency complies in all other respects with this section.

C. In no event shall the failure to comply with the requirements of this section be deemed mere harmless error for the purposes of § [2.2-4027](#).

2007, cc. [873](#), [916](#).

#### **§ 2.2-4007.04. Economic impact analysis.**

A. Before delivering any proposed regulation under consideration to the Registrar as required in § [2.2-4007.05](#), the agency shall submit on the Virginia Regulatory Town Hall a copy of that regulation to the Department of Planning and Budget. In addition to determining the public benefit, the Department of Planning and Budget in coordination with the agency shall, within 45 days, prepare an economic impact analysis of the proposed regulation, as follows:

1. The economic impact analysis shall include but need not be limited to the projected number of businesses or other entities to which the regulation would apply; the identity of any localities and types of businesses or other entities particularly affected by the regulation; the projected number of persons and employment positions to be affected; the impact of the regulation on the use and value of private property, including additional costs related to the development of real estate for commercial or residential purposes; and the projected costs to affected businesses, localities, or entities of implementing or complying with the regulations, including the estimated fiscal impact on such localities and sources of potential funds to implement and comply with such regulation. A copy of the economic impact analysis shall be provided to the Joint Commission on Administrative Rules; and

2. If the regulation may have an adverse effect on small businesses, the economic impact analysis shall also include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. As used in this subdivision, "small business" has the same meaning as provided in subsection A of § [2.2-4007.1](#).

B. In the event the Department cannot complete an economic impact statement within the 45-day period, it shall advise the agency and the Joint Commission on Administrative Rules as to the reasons for the delay. In no event shall the delay exceed 30 days beyond the original 45-day period.

C. Agencies shall provide the Department with such estimated fiscal impacts on localities and sources of potential funds. The Department may request the assistance of any other agency in preparing the analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation, which shall comment thereon as provided in § [2.2-4007.05](#), a copy to the Registrar for publication with the proposed regulation, and an electronic copy to each member of the General Assembly. No regulation shall be promulgated for consideration pursuant to § [2.2-4007.05](#) until the impact analysis has been received by the Registrar. For purposes of this section, the term "locality, business, or entity particularly affected" means any locality, business, or entity that bears any identified disproportionate material impact that would not be experienced by other localities, businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of public review and comment on the proposed regulation. The accuracy of the estimate shall in no way affect the validity of the regulation, nor shall any failure to comply with or otherwise follow the procedures set forth in this subsection create any cause of action or provide standing for any person under Article 5 (§ [2.2-4025](#) et seq.) or otherwise to challenge the actions of the Department hereunder or the action of the agency in adopting the proposed regulation.

D. In the event the economic impact analysis completed by the Department reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the

Department shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period. The Joint Commission on Administrative Rules shall review such rule or regulation and issue a statement containing the Commission's findings in accordance with § [30-73.3](#).

E. The Department shall revise and reissue its economic impact analysis within the time limits set forth for the Department's review of regulations at the final stage pursuant to the Governor's executive order for executive branch review if any of the following conditions is present that would materially change the Department's analysis:

1. Public comment timely received at the proposed stage indicates significant errors in the economic impact analysis; or
2. There is significant or material difference between the agency's proposed economic impact analysis and the anticipated negative economic impacts to the business community as indicated by public comment.

The determination of whether a condition is present under this subsection shall be made by the Department and shall not be subject to judicial review.

2007, cc. [316](#), [561](#), [873](#), [916](#); 2015, c. [608](#); 2017, cc. [483](#), [493](#), [599](#).

#### **§ 2.2-4007.04:01. Notice required of certain departments.**

A. At or prior to the time a new regulation is posted to the Virginia Regulatory Town Hall, the Department of Medical Assistance Services shall provide direct notice to stakeholders affected by the new regulatory change that such change has been initiated. At the time that the final stage of a regulation is posted to the Virginia Regulatory Town Hall, the Department shall provide direct notice to stakeholders affected by the regulatory change that such final stage has been posted.

B. At the time a change to a provider manual is being developed, the Department of Medical Assistance Services shall provide direct notice to stakeholders affected by the provider manual change that such change has been initiated. The Department shall post a notice of such change to the Virginia Regulatory Town Hall, to include a public comment forum, for a period of 30 days. Such notice shall include a description of the change and provide contact information for the Department's designated contact person.

C. At or prior to the time a new regulation relating to licensed providers is posted to the Virginia Regulatory Town Hall, the Department of Behavioral Health and Developmental Services shall provide direct notice to licensed providers affected by the new regulatory change that such change has been initiated.

D. At the time that the final stage of a regulation is posted to the Virginia Regulatory Town Hall, the Department of Behavioral Health and Developmental Services shall provide direct notice to licensed providers affected by the regulatory change that such final stage has been posted.

E. At the time any change to guidance documents related to licensure requirements is being developed, the Department of Behavioral Health and Developmental Services shall provide direct notice to licensed providers affected by the change that such change has been initiated. The Department shall post the proposed change to the Virginia Regulatory Town Hall, to include a public comment forum, for a period of 30 days. Such notice shall include a description of the change and provide contact information for the Department's designated contact person. If it is anticipated that the change shall have an impact on staffing or payment matters for the affected stakeholders, the direct notice to stakeholders shall note this fact and request specific comments regarding an appropriate time frame for the implementation of such changes.

2017, c. [599](#).

#### **§ 2.2-4007.05. Submission of proposed regulations to the Registrar.**

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 (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 agency's response to the economic impact analysis submitted by the Department of Planning and Budget pursuant to § [2.2-4007.04](#). Any economic impact estimate included in the agency's response 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 that the requirements of this subsection are met prior to publication of the proposed regulation in the Register. The summary; the statement of the basis, purpose, substance, and issues; the economic impact analysis; and the agency's response shall be published in the Virginia Register of Regulations and be available on the Virginia Regulatory Town Hall, together with the notice of opportunity for oral or written submittals on the proposed regulation.

2007, cc. [873](#), [916](#).

#### **§ 2.2-4007.06. Changes between proposed and final regulations.**

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 30 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 25 persons for an opportunity to submit oral and written comments on the changes to the regulation, the agency shall (i) suspend the regulatory process

for 30 days to solicit additional public comment and (ii) file notice of the additional 30-day public comment period with the Registrar of Regulations, unless the agency determines that the changes made are minor or inconsequential in their impact. The comment period, if any, shall begin on the date of publication of the notice in the Register. Agency denial of petitions for a comment period on changes to the regulation shall be subject to judicial review.

2007, cc. [873](#), [916](#).

#### **§ 2.2-4007.07. State Air Pollution Control Board; variances.**

The provisions of §§ [2.2-4007](#) through [2.2-4007.06](#) shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

2007, cc. [873](#), [916](#).

#### **§ 2.2-4007.1. Regulatory flexibility for small businesses; periodic review of regulations.**

A. As used in this section, "small business" means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.

B. In addition to the requirements of §§ [2.2-4007](#) through [2.2-4007.06](#), prior to the adoption of any proposed regulation, the agency proposing a regulation shall prepare a regulatory flexibility analysis in which the agency shall consider utilizing alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small businesses. The agency shall consider, at a minimum, each of the following methods of reducing the effects of the proposed regulation on small businesses:

1. The establishment of less stringent compliance or reporting requirements;
2. The establishment of less stringent schedules or deadlines for compliance or reporting requirements;
3. The consolidation or simplification of compliance or reporting requirements;
4. The establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and
5. The exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

C. Prior to the adoption of any proposed regulation that may have an adverse effect on small businesses, each agency shall notify the Joint Commission on Administrative Rules, through the Virginia Regulatory Town Hall, of its intent to adopt the proposed regulation. The Joint

Commission on Administrative Rules shall advise and assist agencies in complying with the provisions of this section.

D. In addition to other requirements of § [2.2-4017](#), all regulations shall be reviewed every four years to determine whether they should be continued without change or be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact on small businesses in a manner consistent with the stated objectives of applicable law. When a regulation has undergone a comprehensive review as part of a regulatory action that included the solicitation of public comment on the regulation, a periodic review shall not be required until four years after the effective date of the regulatory action.

E. The regulatory review required by this section shall include consideration of:

1. The continued need for the rule;
2. The nature of complaints or comments received concerning the regulation from the public;
3. The complexity of the regulation;
4. The extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and
5. The length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

F. Prior to commencement of the regulatory review required by subsection D, the agency shall publish a notice of the review in the Virginia Register of Regulations and post the notice on the Virginia Regulatory Town Hall. The agency shall provide a minimum of 21 days for public comment after publication of the notice. No later than 120 days after close of the public comment period, the agency shall publish a report of the findings of the regulatory review in the Virginia Register of Regulations and post the report on the Virginia Regulatory Town Hall.

2005, cc. [619](#), [682](#); 2007, cc. [873](#), [916](#); 2011, cc. [241](#), [315](#).

#### **§ 2.2-4007.2. Regulations requiring the submission of documents or payments.**

A. On or after January 1, 2010, each agency having regulations promulgated in accordance with the Administrative Process Act (§ [2.2-4000](#) et seq.) that require the submission of documents or payments, including fees and fines, shall (i) examine such regulations to determine whether the submission of the required documents or payments may be accomplished by electronic means, and (ii) if so, consider amending the regulation that is being promulgated to offer the alternative of submitting the documents or payments by electronic means. If an agency chooses to amend the regulation to provide the alternative of submitting required documents or payments by electronic means, such action shall be exempt from the operation of Article 2 (§ [2.2-4006](#) et seq.) of Chapter 40 of Title 2.2 provided the amended regulation is (a) adopted by December 31, 2010, and (b) consistent with federal and state law and regulations.

B. Nothing in this section shall be construed to create an independent or private cause of action to enforce its provisions.

C. Unless otherwise exempt, any amendments to an agency's regulations pursuant to this section made after December 31, 2010, shall be subject to the requirements of the Administrative Process Act (§ [2.2-4000](#) et seq.).

D. For the purposes of this section,

"Agency" and "regulations" mean the same as those terms are defined in § [2.2-4001](#).

"Electronic" means the same as that term is defined in § [59.1-480](#).

2009, cc. [85](#), [624](#).

#### **§ 2.2-4008. Repealed.**

Repealed by Acts 2017, c. [488](#), cl. [2](#).

#### **§ 2.2-4009. Evidentiary hearings on regulations.**

Where an agency proposes to consider the exercise of authority to promulgate a regulation, it may conduct or give interested persons an opportunity to participate in a public evidentiary proceeding; and the agency shall always do so where the basic law requires a hearing. Evidentiary hearings may be limited to the trial of factual issues directly related to the legal validity of the proposed regulation in any of the relevant respects outlined in § [2.2-4027](#).

General notice of the proceedings shall be published as prescribed in § [2.2-4007.03](#). In addition, where the proposed regulation is to be addressed to named persons, the latter shall (i) also be given the same notice individually by mail or otherwise if acknowledged in writing and (ii) be entitled to be accompanied by and represented by counsel or other representative. The proceedings may be conducted separately from, and in any event the record thereof shall be separate from, any other or additional proceedings the agency may choose or be required to conduct for the reception of general data, views, and argument pursuant to § [2.2-4007.02](#) or otherwise. Any probative evidence may be received except that the agency shall as a matter of efficiency exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, and may deny rebuttal, or cross-examination. Testimony may be admitted in written form provided those who have prepared it are made available for examination in person.

The agency or one or more of its subordinates specially designated for the purpose shall preside at the taking of evidence and may administer oaths and affirmations. The proceedings shall be recorded verbatim and the record thereof shall be made available to interested persons for transcription at their expense or, if transcribed by or for the agency, for inspection or purchase at cost.



Where subordinates preside at the taking of the evidence, they shall report their recommendations and proposed findings and conclusions that shall be made available upon request to the participants in the taking of evidence as well as other interested persons and serve as a basis for exceptions, briefs, or oral argument to the agency itself. Whether or not subordinates take the evidence, after opportunity for the submittal of briefs on request and such oral argument as may be scheduled, the agency may settle the terms of the regulation and shall promulgate it only upon (a) its findings of fact based upon the record of evidence made pursuant to this section and facts of which judicial notice may be taken, (b) statements of basis and purpose as well as comment upon data received in any informational proceedings held under § [2.2-4007.03](#) and (c) the conclusions required by the terms of the basic law under which the agency is operating.

1975, c. 503, § 9-6.14:8; 1985, c. 602; 2001, c. [844](#); 2007, cc. [873](#), [916](#); 2012, c. [795](#).

#### **§ 2.2-4010. Pilot programs for regulations imposing local government mandates.**

Where an agency proposes to consider the exercise of authority to promulgate a regulation that will impose a statewide mandate on the Commonwealth's localities, the agency shall consider, where appropriate, implementing the regulation on a limited basis with a representative number of localities. An agency may use such a pilot program to determine the effectiveness or impact of proposed regulations prior to statewide adoption.

1993, c. 168, § 9-6.14:8.1; 2001, c. [844](#).

#### **§ 2.2-4011. Emergency regulations; publication; exceptions.**

A. Regulations that an agency finds are necessitated by an emergency situation may be adopted by an agency upon consultation with the Attorney General, which approval shall be granted only after the agency has submitted a request stating in writing the nature of the emergency, and the necessity for such action shall be at the sole discretion of the Governor.

B. Agencies may also adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment and the regulation is not exempt under the provisions of subdivision A 4 of § [2.2-4006](#). In such cases, the agency shall state in writing the nature of the emergency and of the necessity for such action and may adopt the regulations. Pursuant to § [2.2-4012](#), such regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations.

C. All emergency regulations shall be limited to no more than 18 months in duration. During the 18-month period, an agency may issue additional emergency regulations as needed addressing the subject matter of the initial emergency regulation, but any such additional emergency regulations shall not be effective beyond the 18-month period from the effective date of the initial emergency regulation. If the agency wishes to continue regulating the subject matter governed by the emergency regulation beyond the 18-month limitation, a regulation to replace the emergency regulation shall be promulgated in accordance with this article. The Notice of



Intended Regulatory Action to promulgate a replacement regulation shall be filed with the Registrar within 60 days of the effective date of the emergency regulation and published as soon as practicable, and the proposed replacement regulation shall be filed with the Registrar within 180 days after the effective date of the emergency regulation and published as soon as practicable.

D. In the event that an agency concludes that despite its best efforts a replacement regulation cannot be adopted before expiration of the 18-month period described in subsection C, it may seek the prior written approval of the Governor to extend the duration of the emergency regulation for a period of not more than six additional months. Any such request must be submitted to the Governor at least 30 days prior to the scheduled expiration of the emergency regulation and shall include a description of the agency's efforts to adopt a replacement regulation together with the reasons that a replacement regulation cannot be adopted before the scheduled expiration of the emergency regulation. Upon approval of the Governor, provided such approval occurs prior to the scheduled expiration of the emergency regulation, the duration of the emergency regulation shall be extended for a period of no more than six months. Such approval shall be in the sole discretion of the Governor and shall not be subject to judicial review. Agencies shall notify the Registrar of Regulations of the new expiration date of the emergency regulation as soon as practicable.

E. Emergency regulations shall be published as soon as practicable in the Register.

F. The Regulations of the Marine Resources Commission shall be excluded from the provisions of this section.

1975, c. 503, § 9-6.14:9; 1977, cc. 450, 459; 1981, c. 387; 1982, c. 425; 1983, c. 295; 1984, c. 5; 1985, c. 602, § 9-6.14:4.1; 1986, c. 615; 1987, cc. 375, 652; 1988, cc. 364, 424, 498, 723, 765, 820; 1989, cc. 54, 71, 299, 478; 1990, cc. 721, 968; 1991, cc. 80, 294, 344; 1992, cc. 200, 409, 488, 592, 793, 829; 1993, cc. 537, 669, 898; 1994, cc. [237](#), [577](#), [649](#), [740](#), [743](#), [801](#), [938](#); 1995, cc. [103](#), [499](#), [516](#); 1996, cc. [51](#), [152](#), [158](#), [189](#), [205](#), [279](#), [320](#), [345](#), [573](#), [590](#), [598](#), [638](#), [705](#), [735](#), [818](#), [1012](#); 1997, cc. [87](#), [88](#), [109](#), [212](#), [390](#), [439](#), [567](#), [624](#), [785](#), [806](#), [845](#), [850](#), [861](#), [868](#); 1998, cc. [39](#), [619](#), [784](#); 1999, cc. [412](#), [421](#), [433](#), [603](#); 2000, cc. [382](#), [400](#), [924](#), [1011](#); 2001, c. [844](#); 2007, cc. [873](#), [916](#); 2013, c. [629](#).

#### **§ 2.2-4012. Purpose; adoption; effective date; filing; duties of Registrar of Regulations.**

A. The purpose of the regulatory procedures shall be to provide a regulatory plan that is predictable, based on measurable and anticipated outcomes, and is inclined toward conflict resolution.

B. Subject to the provisions of §§ [2.2-4013](#) and [2.2-4014](#), all regulations, including those that agencies, pursuant to § [2.2-4002](#), [2.2-4006](#), or [2.2-4011](#), may elect to dispense with the public procedures provided by §§ [2.2-4007.01](#) and [2.2-4009](#), may be formally and finally adopted by the signed order of the agency so stating. No regulation except an emergency regulation or a noncontroversial regulation promulgated pursuant to § [2.2-4012.1](#) shall be effective until the expiration of the applicable period as provided in § [2.2-4015](#). In the case of an emergency

regulation filed in accordance with § [2.2-4011](#), the regulation shall become effective 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 for public inspection or copying. Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as required by other laws.

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 the economic impact estimate of the regulation submitted by the Department of Planning and Budget and the agency's response thereto as required by § [2.2-4007.04](#) 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 the regulations and, where the regulations are required to 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 the economic impact estimate of the regulation submitted by the Department of Planning and Budget, 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.

1975, c. 503, § 9-6.14:9; 1977, cc. 450, 459; 1981, c. 387; 1982, c. 425; 1983, c. 295; 1984, c. 5; 1989, c. 71; 1992, c. 829; 1993, c. 898; 1994, c. [938](#); 2001, c. [844](#); 2003, c. [224](#); 2007, cc. [873](#), [916](#).

#### **§ 2.2-4012.1. Fast-track rulemaking process.**

Notwithstanding any other provision, rules that are expected to be noncontroversial may be promulgated or repealed in accordance with the process set out in this section. Upon the concurrence of the Governor, and after written notice to the applicable standing committees of the Senate of Virginia and the House of Delegates, and to the Joint Commission on Administrative Rules, the agency may submit a fast-track regulation without having previously published a Notice of Intended Regulatory Action. The fast-track regulation shall be published in the Virginia Register of Regulations and posted on the Virginia Regulatory Town Hall, along with an agency statement setting out the reasons for using the fast-track rulemaking process. Such regulations shall be subject to the requirements set out in §§ [2.2-4007.03](#), [2.2-4007.04](#), and [2.2-4007.05](#), except that the time for receiving public comment need not exceed 30 days after (i) publication of the regulation in the Virginia Register of Regulations and (ii) a public comment forum opens on the Virginia Regulatory Town Hall. The time for preparation of the economic

impact analysis shall not exceed 30 days. If an objection to the use of the fast-track process is received within the public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall (i) file notice of the objection with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process set out in this article with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action. Otherwise, the regulation will become effective or shall be repealed as appropriate, 15 days after the close of the comment period, unless the regulation or repeal is withdrawn or a later effective date is specified by the agency.

2003, c. [224](#); 2007, cc. [873](#), [916](#).

**§ 2.2-4013. 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; and (ii) examination by the Governor to determine if the proposed regulations are (a) necessary to protect the public health, safety and welfare and (b) clearly written and easily understandable. The procedures may also include review of the proposed regulation by the appropriate Cabinet Secretary.

The Governor shall transmit his comments, if any, on a proposed regulation to the Registrar and the agency no later than fifteen days following the completion of the public comment period provided for in § [2.2-4007.03](#). The Governor may recommend amendments or modifications to any regulation that would bring that regulation into conformity with statutory authority or state or federal laws, regulations or judicial decisions.

Not less than fifteen days following the completion of the public comment period provided for in § [2.2-4007.03](#), the agency may (i) adopt the proposed regulation if the Governor has no objection to the regulation; (ii) modify and adopt the proposed regulation after considering and incorporating the Governor's objections or suggestions, if any; or (iii) 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. 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, he may require the agency to provide an additional thirty days to solicit additional public comment on the changes by transmitting notice of the additional public comment period to the agency and to the Registrar within the 30-day final adoption period described in subsection D, and publishing the notice in the Register. The additional public

comment period required by the Governor shall begin upon publication of the notice in the Register.

D. A 30-day final adoption period for regulations shall commence upon the publication of the final regulation in the Register. The Governor may review the final regulation during this 30-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 § [2.2-4014](#), 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 30-day final adoption period. The Governor shall be deemed to have acquiesced 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 § [2.2-4014](#). 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 § [2.2-4015](#).

E. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

1984, c. 5, § 9-6.14:9.1; 1993, cc. 551, 772, 898; 1995, cc. [25](#), [736](#); 2001, c. [844](#); 2007, cc. [873](#), [916](#); 2015, cc. [29](#), [450](#).

#### **§ 2.2-4014. Legislative review of proposed and final regulations.**

A. After publication of the Register pursuant to § [2.2-4031](#), the standing committee of each house of the General Assembly to which matters relating to the content of the regulation are most properly referable or the Joint Commission on Administrative Rules 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 21 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 or the Joint Commission on Administrative Rules, and the Governor. If a legislative objection is filed within the final adoption period, subdivision A 1 of § [2.2-4015](#) 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 or the Joint Commission on Administrative Rules may suspend the effective date of any portion or all of a final regulation with the Governor's concurrence. The Governor and (i) the applicable standing committee of each house or (ii) the Joint Commission on Administrative Rules may direct, through a statement signed by a majority of their respective members 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 30-day final adoption period,

or if a later effective date is specified by the agency the statement may be transmitted at any time prior to the specified later effective date, 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 A 4 a of § [2.2-4006](#), if it makes no changes to the regulation other than those required by statutory law or (ii) shall follow the provisions of §§ [2.2-4007.01](#) through [2.2-4007.06](#), 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 shall 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 § [2.2-4015](#).

D. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

1984, c. 5, § 9-6.14:9.2; 1993, cc. 551, 772; 2001, c. [844](#); 2002, c. [677](#); 2003, c. [212](#); 2004, c. [777](#); 2007, cc. [873](#), [916](#); 2015, cc. [29](#), [450](#).

#### **§ 2.2-4015. Effective date of regulation; exception.**

A. A regulation adopted in accordance with this chapter and the Virginia Register Act (§ [2.2-4100](#) et seq.) shall become effective at the conclusion of the thirty-day final adoption period provided for in subsection D of § [2.2-4013](#), or any other later date specified by the agency, unless:

1. A legislative objection has been filed in accordance with § [2.2-4014](#), in which event the regulation, unless withdrawn by the agency, shall become effective on a date specified by the agency that shall be after the expiration of the applicable twenty-one-day extension period provided in § [2.2-4014](#);
2. The Governor has exercised his authority in accordance with § [2.2-4013](#) to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn by the agency, shall become effective on a date specified by the agency that shall be after the period for which the Governor has provided for additional public comment;
3. The Governor and (i) the appropriate standing committees of each house of the General Assembly or (ii) the Joint Commission on Administrative Rules have exercised their authority in accordance with subsection B of § [2.2-4014](#) to suspend the effective date of a regulation until the end of the next regular legislative session; or
4. The agency has suspended the regulatory process in accordance with § [2.2-4007.06](#), or for any reason it deems necessary or appropriate, in which event the regulation, unless withdrawn by the agency, shall become effective in accordance with subsection B.

B. Whenever the regulatory process has been suspended for any reason, any action by the agency that either amends the regulation or does not amend the regulation but specifies a new effective date shall be considered a readoption of the regulation for the purposes of appeal. If the regulation is suspended under § [2.2-4007.06](#), such readoption shall take place after the thirty-day public comment period required by that subsection. Suspension of the regulatory process by the agency may occur simultaneously with the filing of final regulations as provided in subsection B of § [2.2-4013](#).

When a regulation has been suspended, the agency must set the effective date no earlier than fifteen days from publication of the readoption action and any changes made to the regulation. During that fifteen-day period, if the agency receives requests from at least twenty-five persons for the opportunity to comment on new substantial changes, it shall again suspend the regulation pursuant to § [2.2-4007.06](#).

C. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

1984, c. 5, § 9-6.14:9.3; 1993, cc. 551, 772, 898; 1995, c. [25](#); 2001, c. [844](#); 2002, cc. [391](#), [677](#); 2004, c. [777](#); 2007, cc. [873](#), [916](#).

#### **§ 2.2-4016. Withdrawal of regulation.**

Nothing in this chapter shall prevent any agency from withdrawing any regulation at any time prior to the effective date of that regulation. A regulation may be repealed after its effective date only in accordance with the provisions of this chapter that govern the adoption of regulations.

1984, c. 5, § 9-6.14:9.4; 1985, c. 602; 2001, c. [844](#).

#### **§ 2.2-4017. Periodic review of regulations.**

Each Governor shall mandate through executive order a procedure for periodic review during that Governor's administration of regulations of agencies within the executive branch of state government. The procedure shall include (i) a review by the Attorney General to ensure statutory authority for regulations and (ii) a determination by the Governor whether the regulations are (a) necessary for the protection of public health, safety and welfare and (b) clearly written and easily understandable.

The Governor may require each agency (i) to review all regulations promulgated by that agency to determine whether new regulations should be adopted and old regulations amended or repealed, and (ii) to prepare a written report summarizing the agency's findings about its regulations, its reasons for its findings and any proposed course of action.

1984, c. 5, § 9-6.14:25; 2001, c. [844](#).

## **Article 3. Case Decisions.**

### **§ 2.2-4018. Exemptions from operation of Article 3.**

The following agency actions otherwise subject to this chapter shall be exempted from the operation of this article.

1. The assessment of taxes or penalties and other rulings in individual cases in connection with the administration of the tax laws.
2. The award or denial of claims for workers' compensation.
3. The grant or denial of public assistance or social services.
4. Temporary injunctive or summary orders authorized by law.
5. The determination of claims for unemployment compensation or special unemployment.
6. The suspension of any license, certificate, registration or authority granted any person by the Department of Health Professions or the Department of Professional and Occupational Regulation for the dishonor, by a bank or financial institution named, of any check, money draft or similar instrument used in payment of a fee required by statute or regulation.
7. The determination of accreditation or academic review status of a public school or public school division or approval by the Board of Education of a school division corrective action plan required by § [22.1-253.13:3](#).

1985, c. 602, § 9-6.14:4.1; 1986, c. 615; 1987, cc. 375, 652; 1988, cc. 364, 424, 498, 723, 765, 820; 1989, cc. 54, 299, 478; 1990, cc. 721, 968; 1991, cc. 80, 294, 344; 1992, cc. 200, 409, 488, 592, 793; 1993, cc. 537, 669, 898; 1994, cc. [237](#), [577](#), [649](#), [740](#), [743](#), [801](#); 1995, cc. [103](#), [499](#), [516](#); 1996, cc. [51](#), [152](#), [158](#), [189](#), [205](#), [279](#), [320](#), [345](#), [573](#), [590](#), [598](#), [638](#), [705](#), [735](#), [818](#), [1012](#); 1997, cc. [87](#), [88](#), [109](#), [212](#), [390](#), [439](#), [567](#), [624](#), [785](#), [806](#), [845](#), [850](#), [861](#), [868](#); 1998, cc. [39](#), [619](#), [784](#); 1999, cc. [412](#), [421](#), [433](#), [603](#); 2000, cc. [382](#), [400](#), [924](#), [1011](#); 2001, c. [844](#); 2002, c. [747](#); 2004, c. [965](#).

### **§ 2.2-4019. Informal fact finding proceedings.**

A. Agencies shall 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 shall include rights of parties to the case to (i) have reasonable notice thereof, which notice shall include contact information consisting of the name, telephone number, and government email address of the person designated by the agency to answer questions or otherwise assist a named party; (ii) appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer for the informal presentation of factual data, argument, or proof in connection with any case; (iii) have notice of



any contrary fact basis or information in the possession of the agency that can be relied upon in making an adverse decision; (iv) receive a prompt decision of any application for a license, benefit, or renewal thereof; and (v) 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.

1975, c. 503, § 9-6.14:11; 1986, c. 615; 1989, c. 601; 1993, c. 898; 1994, c. [748](#); 1995, c. [398](#); 2001, c. [844](#); 2016, c. [39](#).

#### **§ 2.2-4020. Formal hearings; 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 § [2.2-4019](#) have not been had or have failed to dispose of a case by consent.

B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof; (ii) basic law under which the agency contemplates its possible exercise of authority; (iii) matters of fact and law asserted or questioned by the agency; and (iv) contact information consisting of the name, telephone number, and government email address of the person designated by the agency to respond to questions or otherwise assist a named party. 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 § [2.2-4019](#).

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 the proceedings may (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 a 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 F of § [2.2-4024](#), 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 the 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 (a) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make such recommendations or decisions or (b) 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, 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.

1975, c. 503, § 9-6.14:12; 1986, c. 615; 1991, c. 584; 1993, c. 898; 1995, c. [398](#); 2001, c. [844](#); 2016, cc. [39](#), [694](#).

#### **§ 2.2-4020.1. Summary case decisions.**

A. Any person who has (i) applied for a permit, certificate, or license from an agency or (ii) received written notice of a potential violation from an agency may request a summary case decision from the agency. The request for a summary case decision shall be in writing, signed by or on behalf of the requestor, and be submitted to the agency secretary as defined by the Rules of the Supreme Court of Virginia. The request shall include:

1. A statement that no material facts are in dispute;
2. A proposed stipulation of all such undisputed material facts concerning the application or notice;
3. A clear and concise statement of the questions of law to be decided by summary case decision; and
4. A statement that the requestor waives his right to any other administrative proceeding provided in this article by the agency on the questions of law to be decided by summary case decision.

B. Within 21 days of receipt of a complete request for summary case decision, the agency shall determine whether the matter in dispute properly may be decided by summary case decision and shall promptly notify the requestor of its determination in writing. If a request for summary case decision is not complete, the agency may request additional specific information from the requestor. The agency shall decide the matter by summary case decision if it determines that there are no disputed issues of material fact. However, if (i) an informal fact-finding proceeding as provided in § [2.2-4019](#), a formal hearing as provided in § [2.2-4020](#), or other proceeding

authorized by the agency's basic law concerning the application or notice has been scheduled, the requestor has been notified, and the issues that are the subject of such proceeding or hearing include questions that are the subject of the request for summary case decision or (ii) the matter must be decided through any public participation requirements under this chapter or the agency's basic law, the agency shall not be required to decide the matter by summary case decision.

C. Denial of a request for summary case decision shall not be subject to judicial review in accordance with this chapter and the Rules of the Supreme Court of Virginia, and shall not prejudice any rights the requestor has or may have under this chapter or the agency's basic law. Nothing in this article shall prevent an agency from consolidating the summary case decision proceeding into, or proceeding with, a separate informal fact-finding proceeding, formal hearing, or other proceeding authorized by the agency's basic law concerning the matter in question.

D. Upon granting a request for summary case decision, the agency shall establish a schedule for the parties to submit briefs on the questions of law in dispute and may, by agreement of the parties, provide for oral argument.

E. All decisions or recommended decisions shall be served on the requestor, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence contained in 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.

2006, c. [702](#).

#### **§ 2.2-4020.2. Default.**

A. Unless otherwise provided by law, if a party without good cause fails to attend or appear at a formal hearing conducted in accordance with § [2.2-4020](#), or at an informal fact-finding proceeding conducted pursuant to § [2.2-4019](#), the presiding officer may issue a default order.

B. A default order shall not be issued by the presiding officer unless the party against whom the default order is entered has been sent the notice that contains a notification that a default order may be issued against that party if that party fails without good cause to attend or appear at the hearing or informal fact-finding proceeding that is the subject of the notice.

C. If a default order is issued, the presiding officer may conduct all further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party.

D. A recommended, initial, or final order issued against a defaulting party may be based on the defaulting party's admissions or other evidence that may be used without notice to the defaulting party. If the burden of proof is on the defaulting party to establish that the party is entitled to the agency action sought, the presiding officer may issue a recommended, initial, or final order without taking evidence.

E. Not later than 15 days after notice to a party subject to a default order that a recommended, initial, or final order has been rendered against the party, the party may petition the presiding officer to vacate the recommended, initial, or final order. If good cause is shown for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding officer shall deny the motion to vacate.

F. The provisions of this section shall not apply to any administrative hearings process that is governed by § [32.1-325.1](#) relating to provider appeals.

2015, c. [638](#).

#### **§ 2.2-4021. Timetable for decision; exemptions.**

A. In cases where a board or commission meets to render (i) an informal fact-finding decision or (ii) 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.

B. In any informal fact-finding, formal proceeding, or summary case decision proceeding in which a hearing officer 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 90 days from the date of the informal fact-finding, formal proceeding, or completion of a summary case decision proceeding, or from a later date agreed to by the named party and the agency. If the agency does not render a decision within 90 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 30 days from agency receipt of the notice, the decision shall be deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act, (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act, or (iii) the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act. An agency shall provide notification to the named party of its decision within five days of the decision.

C. In any informal fact-finding, formal proceeding, or summary case decision proceeding in which a hearing officer is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within 30 days from the date that the agency receives the hearing officer's recommendation. If the agency does not render a decision within 30 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 30 days from agency receipt of the notice, the decision is deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act, (ii)

the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act, or (iii) the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act. An agency shall provide notice to the named party of its decision within five days of the decision.

D. The provisions of subsection B notwithstanding, if the board members or agency personnel who conducted the informal fact-finding, formal proceeding, or summary case decision proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency, then the timeframe provisions of subsection B shall be reset and commence from the date that either new board members or agency personnel are assigned to the matter or a new proceeding is conducted if needed, whichever is later. An agency shall provide notice within five days to the named party of any incapacity of the board members or agency personnel that necessitates a replacement or a new proceeding.

1975, c. 503, §§ 9-6.14:11, 9-6.14:12; 1986, c. 615; 1989, c. 601; 1991, c. 584; 1993, c. 898; 1994, c. [748](#); 1995, c. [398](#); 2001, c. [844](#); 2005, c. [102](#); 2006, c. [702](#).

#### **§ 2.2-4022. Subpoenas, depositions and requests for admissions.**

The agency or its designated subordinates may, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence. Any person so subpoenaed who objects may, if the agency does not quash or modify the subpoena at his timely request as illegally or improvidently granted, immediately procure by petition a decision on the validity thereof in the circuit court as provided in § [2.2-4003](#); and otherwise in any case of refusal or neglect to comply with an agency subpoena, unless the basic law under which the agency is operating provides some other recourse, enforcement, or penalty, the agency may procure an order of enforcement from such court. Depositions de bene esse and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations therefor may be challenged or enforced in the same manner as subpoenas. Nothing in this section shall be taken to authorize discovery proceedings.

1975, c. 503, § 9-6.14:13; 2001, c. [844](#).

#### **§ 2.2-4023. Final orders.**

The terms of any final agency case decision, as signed by it, shall be served upon the named parties by mail unless service otherwise made is duly acknowledged by them in writing. The signed originals shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies; and they, or facsimiles thereof, together with the full record or file in every case shall be made available for public inspection or copying except (i) so far as the agency may withhold the same in whole or part for the purpose of protecting individuals mentioned from personal embarrassment, obloquy, or disclosures of a private nature including statements respecting the physical, mental, moral, or financial condition of such individuals or (ii) for trade secrets or, so far as protected by other laws, other commercial or industrial information imparted in confidence. Final orders may be recorded, enforced, and satisfied as

orders or decrees of a circuit court upon certification of such orders by the agency head or his designee.

1975, c. 503, § 9-6.14:14; 2001, c. [844](#); 2009, c. [797](#).

#### **§ 2.2-4023.1. Reconsideration.**

A. A party may file a petition for reconsideration of an agency's final decision made pursuant to § [2.2-4020](#). The petition shall be filed with the agency not later than 15 days after service of the final decision and shall state the specific grounds on which relief is requested. The petition shall contain a full and clear statement of the facts pertaining to the reasons for reconsideration, the grounds in support thereof, and a statement of the relief desired. A timely filed petition for reconsideration shall not suspend the execution of the agency decision nor toll the time for filing a notice of appeal under Rule 2A:2 of the Rules of Supreme Court of Virginia, unless the agency provides for suspension of its decision when it grants a petition for reconsideration. The failure to file a petition for reconsideration shall not constitute a failure to exhaust all administrative remedies.

B. The agency shall render a written decision on a party's timely petition for reconsideration within 30 days from receipt of the petition for reconsideration. Such decision shall (i) deny the petition, (ii) modify the case decision, or (iii) vacate the case decision and set a new hearing for further proceedings. The agency shall state the reasons for its action.

C. If reconsideration is sought for the decision of a policy-making board of an agency, such board may (i) consider the petition for reconsideration at its next regularly scheduled meeting; (ii) schedule a special meeting to consider and decide upon the petition within 30 days of receipt; or (iii) notwithstanding any other provision of law, delegate authority to consider the petition to either the board chairman, a subcommittee of the board, or the director of the agency that provides administrative support to the board, in which case a decision on the reconsideration shall be rendered within 30 days of receipt of the petition by the board.

D. Denial of a petition for reconsideration shall not constitute a separate case decision and shall not on its own merits be subject to judicial review. It may, however, be considered by a reviewing court as part of any judicial review of the case decision itself.

E. The agency may reconsider its final decision on its own initiative for good cause within 30 days of the date of the final decision. An agency may develop procedures for reconsideration of its final decisions on its own initiative.

F. Notwithstanding the provisions of this section, (i) any agency may promulgate regulations that specify the scope of evidence that may be considered by such agency in support of any petition for reconsideration and (ii) any agency that has statutory authority for reconsideration in its basic law may respond to requests in accordance with such law.

2016, c. [694](#).

## **Article 4. Hearing Officers.**

### **§ 2.2-4024. Hearing officers.**

A. In all formal hearings conducted in accordance with § [2.2-4020](#), 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 informal fact-finding proceedings conducted pursuant to § [2.2-4019](#) 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 may promulgate rules necessary for the administration of the hearing officer system and shall have the authority to establish the number of hearing officers necessary to preside over administrative hearings in the Commonwealth.

Prior to being included on the list, 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 shall be assigned to a proceeding before that agency.

B. On request from the head of an agency, the Executive Secretary shall 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 appointed in accordance with this section shall be subject to disqualification as provided in § [2.2-4024.1](#). If the hearing officer denies a petition for disqualification pursuant to § [2.2-4024.1](#), the petitioning party may request reconsideration of the denial by filing a written request with the Executive Secretary along with 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 10 days prior to the hearing by the Executive Secretary.

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 as follows:

1. If the agency's written regulations or procedures require the hearing officer to render a recommendation or conclusion within a specified time period, the hearing officer shall render the recommendation or conclusion on or before the expiration of the specified period; and



2. In all other cases, the hearing officer shall render the recommendation or conclusion within 90 days from the date of the case decision proceeding or from a later date agreed to by the named party and the agency.

If the hearing officer does not render a decision within the time required by this subsection, then the agency or 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 30 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.

E. The Executive Secretary shall remove hearing officers from the list, upon a showing of cause after written notice and an opportunity for 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 this chapter.

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 Virginia Alcoholic Beverage Control Authority, the Virginia Workers' Compensation Commission, the State Corporation Commission, the Virginia Employment Commission, the Department of Motor Vehicles under Title 46.2 (§ [46.2-100](#) et seq.), § 58.1-2409, or Chapter 27 (§ [58.1-2700](#) et seq.) of Title 58.1, or the Motor Vehicle Dealer Board under Chapter 15 (§ [46.2-1500](#) et seq.) of Title 46.2; or (iii) any panel of a health regulatory board convened pursuant to § [54.1-2400](#), including any panel having members of a relevant advisory board to the Board of Medicine. All employees hired after July 1, 1986, pursuant to §§ [65.2-201](#) and [65.2-203](#) by the Virginia Workers' Compensation Commission to conduct hearings pursuant to its basic laws shall meet the minimum qualifications set forth in subsection A. Agency employees who are not licensed to practice law in the Commonwealth, and are presiding as hearing officers in proceedings pursuant to clause (ii) shall participate in periodic training courses.

G. Notwithstanding the exemptions of subsection A of § [2.2-4002](#), this article shall apply to hearing officers conducting hearings of the kind described in § [2.2-4020](#) for the Department of Wildlife Resources, the Virginia Housing Development Authority, the Milk Commission, and the Virginia Resources Authority pursuant to their basic laws.

1986, c. 615, § 9-6.14:14.1; 1988, c. 865; 1990, c. 219; 1991, c. 214; 1992, c. 659; 1993, c. 898; 1995, cc. [744](#), [776](#), [803](#), [805](#); 1996, cc. [189](#), [205](#), [639](#), [658](#); 2001, c. [844](#); 2002, cc. [448](#), [698](#); 2009, c. [806](#); 2012, cc. [803](#), [835](#); 2015, cc. [38](#), [636](#), [730](#); 2018, c. [613](#); 2020, c. [958](#).

#### **§ 2.2-4024.1. Disqualification.**

A. An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has

served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the presiding officer or hearing officer in the same case. An agency head who has participated in a determination of probable cause or other preliminary determination in an adjudication may serve as the presiding officer in the adjudication unless a party demonstrates grounds for disqualification under subsection B.

B. A presiding officer or hearing officer is subject to disqualification for any factor that would cause a reasonable person to question the impartiality of the presiding officer or hearing officer, which may include bias, prejudice, financial interest, or ex parte communications; however, the fact that a hearing officer is employed by an agency as a hearing officer, without more, is not grounds for disqualification. The presiding officer or hearing officer, after making a reasonable inquiry, shall disclose to the parties all known facts related to grounds for disqualification that are material to the impartiality of the presiding officer or hearing officer in the proceeding. The presiding officer or hearing officer may self-disqualify and withdraw from any case for reasons listed in this subsection.

C. A party may petition for the disqualification of the presiding officer or hearing officer promptly after notice that the person will preside or, if later, promptly on discovering facts establishing a ground for disqualification. The petition must state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rules of ethics that require disqualification. The petition may be denied if the party fails to promptly request disqualification after discovering a ground for disqualification.

D. A presiding officer not appointed pursuant to the provisions of § [2.2-4024](#), whose disqualification is requested shall decide whether to grant the petition and state in a record the facts and reasons for the decision. The decision to deny disqualification by a hearing officer appointed pursuant to § [2.2-4024](#) shall be reviewable according to the procedure set forth in subsection C of § [2.2-4024](#). In all other circumstances, the presiding officer's or hearing officer's decision to deny disqualification is subject to judicial review in accordance with this chapter, but is not otherwise subject to interlocutory review.

2015, c. [636](#).

#### **§ 2.2-4024.2. Ex parte communications.**

A. Except as otherwise provided in this section, while a formal hearing conducted in accordance with § [2.2-4020](#) is pending, the hearing officer shall not communicate with any person concerning the hearing without notice and opportunity for all parties to participate in the communication.

B. A hearing officer may communicate about a pending formal hearing conducted in accordance with § [2.2-4020](#) with any person if the communication is authorized by law or concerns an uncontested procedural issue. A hearing officer may communicate with any person on ministerial matters about a pending formal hearing conducted in accordance with § [2.2-4020](#) if the communication does not augment, diminish, or modify the evidence in the record.



C. If a hearing officer makes or receives a communication prohibited by this section, the hearing officer shall make a part of the hearing record: (i) a copy of the communication or, if it is not written, a memorandum containing the substance of the communication; (ii) the response thereto; and (iii) the identity of the person who made the communication.

D. If a communication prohibited by this section is made, the hearing officer shall notify all parties of the prohibited communication and permit the parties to respond not later than 15 days after the notice is given. For good cause, the hearing officer may permit additional evidence in response to the prohibited communication.

E. If necessary to eliminate any prejudicial effect of a communication made that is prohibited by this section, a hearing officer may (i) be disqualified under § [2.2-4024.1](#); (ii) seal the parts of the record pertaining to the communication by protective order; or (iii) grant other appropriate relief, including an adverse ruling on the merits of the case.

2016, c. [478](#).

## **Article 5. Court Review.**

### **§ 2.2-4025. Exemptions operation of this article; limitations.**

A. This article shall not apply to any agency action that (i) is placed beyond the control of the courts by constitutional or statutory provisions expressly precluding court review, (ii) involves solely the internal management or routine of an agency, (iii) is a decision resting entirely upon an inspection, test, or election save as to want of authority therefor or claim of arbitrariness or fraud therein, (iv) is a case in which the agency is acting as an agent for a court, or (v) encompasses matters subject by law to a trial de novo in any court.

B. The provisions of this article, however, shall apply to case decisions regarding the grant or denial of Temporary Assistance for Needy Families, Medicaid, food stamps, general relief, auxiliary grants, or state-local hospitalization. However, no appeal may be brought regarding the adequacy of standards of need and payment levels for public assistance and social services programs. Notwithstanding the provisions of § [2.2-4027](#), the review shall be based solely upon the agency record, and the court shall be limited to ascertaining whether there was evidence in the agency record to support the case decision of the agency acting as the trier of fact. If the court finds in favor of the party complaining of agency action, the court shall remand the case to the agency for further proceedings. The validity of any statute, regulation, standard or policy, federal or state, upon which the action of the agency was based shall not be subject to review by the court. No intermediate relief shall be granted under § [2.2-4028](#).

1975, c. 503, §§ 9-6.14:4.1, 9-6.14:15, 9-6.14:16; 1986, c. 615; 1989, cc. 677, 734; 2001, c. [844](#); 2002, c. [747](#).

### **§ 2.2-4026. Right, forms, venue; date of adoption or readoption for purposes of appeal.**

A. Any person affected by and claiming the unlawfulness of any regulation or party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements of Article 2 (§ [2.2-4006](#) et seq.) or 3 (§ [2.2-4018](#) et seq.) shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the Rules of Supreme Court of Virginia. Actions may be instituted in any court of competent jurisdiction as provided in § [2.2-4003](#), and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases.

B. In any court action under this section by a person affected by and claiming the unlawfulness of any regulation on the basis that an agency failed to follow any procedure for the promulgation or adoption of a regulation specified in this chapter or in such agency's basic law, the burden shall be upon the party complaining of the agency action to designate and demonstrate the unlawfulness of the regulation by a preponderance of the evidence. If the court finds in favor of the party complaining of the agency action, the court shall declare the regulation null and void and remand the case to the agency for further proceedings.

C. Notwithstanding any other provision of law or of any executive order issued under this chapter, with respect to any challenge of a regulation subject to judicial review under this chapter, the date of adoption or readoption of the regulation pursuant to § [2.2-4015](#) for purposes of appeal under the Rules of Supreme Court shall be the date of publication in the Register of Regulations.

1975, c. 503, § 9-6.14:16; 1986, c. 615; 1989, cc. 677, 734; 2001, c. [844](#); 2014, c. [699](#); 2016, c. [359](#).

#### **§ 2.2-4027. Issues on review.**

The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency if its proceeding was required to be conducted as provided in § [2.2-4009](#) or [2.2-4020](#) or, as to subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for opportunity for an agency record of and decision upon the evidence therein.

In addition to any other judicial review provided by law, a small business, as defined in subsection A of § [2.2-4007.1](#), that is adversely affected or aggrieved by final agency action shall

be entitled to judicial review of compliance with the requirements of subdivision A 2 of § [2.2-4007.04](#) and § [2.2-4007.1](#) within one year following the date of final agency action.

When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be to determine whether there was substantial evidence in the agency record to support the agency decision. The duty of the court with respect to the issues of law shall be to review the agency decision de novo. The court shall enter judgment in accordance with § [2.2-4029](#).

Where there is no agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency file, minutes, and records of its proceedings under § [2.2-4007.01](#) or [2.2-4019](#) as augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within the scope of the legal authority of the agency.

Whether the fact issues are reviewed on the agency record or one made in the review action, the court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.

1975, c. 503, § 9-6.14:17; 1989, c. 601; 2001, c. [844](#); 2005, cc. [619](#), [682](#); 2007, cc. [873](#), [916](#); 2013, c. [619](#).

#### **§ 2.2-4028. Intermediate relief.**

When judicial review is instituted or is about to be, the agency concerned may, on request of any party or its own motion, postpone the effective date of the regulation or decision involved where it deems that justice so requires. Otherwise the court may, on proper application and with or without bond, deposits in court, or other safeguards or assurances as may be suitable, issue all necessary and appropriate process to postpone the effective dates or preserve existing status or rights pending conclusion of the review proceedings if the court finds the same to be required to prevent immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only substantial but that there is probable cause for it to anticipate a likelihood of reversible error in accordance with § [2.2-4027](#). Actions by the court may include (i) the stay of operation of agency decisions of an injunctive nature or those requiring the payment of money or suspending or revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely applications for renewal are duly determined by the agency.

1975, c. 503, § 9-6.14:18; 2001, c. [844](#).

#### **§ 2.2-4029. Court judgments.**

Unless an error of law as defined in § [2.2-4027](#) appears, the court shall dismiss the review action or affirm the agency regulation or decision. Otherwise, it may compel agency action unlawfully

and arbitrarily withheld or unreasonably delayed except that the court shall not itself undertake to supply agency action committed by the basic law to the agency. Where a regulation or case decision is found by the court not to be in accordance with law under § [2.2-4027](#), the court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law.

1975, c. 503, § 9-6.14:19; 2001, c. [844](#).

**§ 2.2-4030. Recovery of costs and attorney fees from agency.**

A. In any civil case brought under Article 5 (§ [2.2-4025](#) et seq.) or § [2.2-4002](#), [2.2-4006](#), [2.2-4011](#), or [2.2-4018](#), in which any person contests any agency action, such person shall be entitled to recover from that agency, including the Department of Wildlife Resources, reasonable costs and attorney fees if such person substantially prevails on the merits of the case and (i) the agency's position is not substantially justified, (ii) the agency action was in violation of law, or (iii) the agency action was for an improper purpose, unless special circumstances would make an award unjust. The award of attorney fees shall not exceed \$25,000.

B. Nothing in this section shall be deemed to grant permission to bring an action against an agency if the agency would otherwise be immune from suit or to grant a right to bring an action by a person who would otherwise lack standing to bring the action.

C. Any costs and attorney fees assessed against an agency under this section shall be charged against the operating expenses of the agency for the fiscal year in which the assessment is made and shall not be reimbursed from any other source.

1981, c. 446, § 9-6.14:21; 1997, c. [692](#); 2001, c. [844](#); 2016, c. [625](#); 2020, c. [958](#).

## **Article 6. Virginia Register of Regulations.**

**§ 2.2-4031. Publication of Virginia Register of Regulations; exceptions; notice of public hearings of proposed regulations.**

A. The Registrar shall publish every two weeks a Virginia Register of Regulations that shall include (i) proposed and final regulations; (ii) emergency regulations; (iii) executive orders; (iv) notices of all public hearings on regulations; and (v) petitions for rulemaking made in accordance with § [2.2-4007](#). The entire proposed regulation shall be published in the Register; however, if an existing regulation has been previously published in the Virginia Administrative Code, then only those sections of regulations to be amended need to be published in the Register. If the length of the regulation falls within the guidelines established by the Registrar for the publication of a summary in lieu of the full text of the regulation, then, after consultation with the promulgating agency, the Registrar may publish only the summary of the regulation. In this event, the full text of the regulation shall be available for public inspection at the office of the Registrar and the promulgating agency.

If a proposed regulation is adopted as published or, in the sole discretion of the Registrar of Regulations, the only changes that have been made are those that can be clearly and concisely explained, the adopted regulation need not be published at length. Instead, the Register shall contain a notation that the proposed regulation has been adopted as published as a proposed regulation without change or stating the changes made. The proposed regulation shall be clearly identified with a citation to the issue and page numbers where published.

A copy of all reporting forms the promulgating agency anticipates will be incorporated into or be used in administering the regulation shall be published with the proposed and final regulation in the Register.

B. Each regulation shall be prefaced with a summary explaining that regulation in plain and clear language. Summaries shall be prepared by the promulgating agency and approved by the Registrar prior to their publication in the Register. The notice required by § [2.2-4007.03](#) shall include (i) a statement of the date, time and place of the hearing at which the regulation is to be considered; (ii) a brief statement as to the regulation under consideration; (iii) reference to the legal authority of the agency to act; and (iv) the name, address and telephone number of an individual to contact for further information about that regulation. Agencies shall present their proposed regulations in a standardized format developed by the Virginia Code Commission in accordance with subdivision 2 of § [2.2-4104](#) of the Virginia Register Act (§ [2.2-4100](#) et seq.). Notwithstanding the exemptions allowed under § [2.2-4002](#), [2.2-4006](#) or [2.2-4011](#), the proposed and final regulations of all agencies shall be published in the Register. However, proposed regulations of the Marine Resources Commission and regulations exempted by subject from the provisions of this chapter by subsection B of § [2.2-4002](#) shall be exempt from this section.

C. The Virginia Register of Regulations shall be published by posting the Register on the Virginia Code Commission's website. The Virginia Code Commission may arrange for the printing of the Virginia Register as provided in § [30-146](#).

1984, c. 5, § 9-6.14:22; 1985, cc. 67, 602; 1986, c. 615; 1988, c. 364; 1989, c. 71; 1992, c. 216; 2001, c. [844](#); 2002, c. [241](#); 2003, c. [212](#); 2007, cc. [300](#), [873](#), [916](#); 2011, c. [800](#).

#### **§ 2.2-4032. Repealed.**

Repealed by Acts 2003, c. [212](#), cl. 2, effective March 16, 2003.