

§ 2.2-4020. Formal hearings; litigated issues.

D. Upon the motion of the agency or of a party the presiding officer may conduct a closed hearing, issue necessary protective orders, and seal all or part of the hearing record as may be necessary to allow the agency upon issuance of its final case decision to implement the provisions of § 2.2-4023.

## § 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](#).

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

## **Fiscal Impact Review** **2017 General Assembly Session**

**Date:** April 27, 2017

**Bill:** HB 2370; Administrative Process Act, reconsideration of an agency's final decision, intermediate relief, suspension of effective date of a regulation or agency decision

**Review requested by:** Chairman Gilbert, House General Laws Committee

### **JLARC Staff Fiscal Estimates**

JLARC staff concur with the Department of Planning and Budget (DPB) impact statement that the fiscal impact of HB 2370 is indeterminate but that it would likely increase costs. HB 2370 would change the reconsideration provision under the Administrative Process Act by expanding the types of agency decisions for which a petition for reconsideration can be filed and delaying agency action and the time for filing a court appeal until the agency renders an opinion. These changes would likely lead to an increase in petitions for reconsideration and additional workload at some agencies. HB 2370 would also make changes to intermediate relief during judicial review, which would likely lead to an increase in lawsuits against state agencies. HB 2370 may cause additional financial impact to agencies by delaying the collection of fees and penalties and the recovery of funds.

The substitute bill would have a smaller fiscal impact due to a narrower scope of changes to the reconsideration provision. The substitute also drops the changes to judicial review.

*An explanation of the JLARC staff review is included on the pages that follow.*

**Authorized for release:**



**Hal E. Greer, Director**

**Bill summary:** HB 2370 would make several changes to the reconsideration and intermediate relief provisions of the Administrative Process Act (§ 2.2-4023.1). If enacted, HB 2370 would suspend the agency decision when a petition for reconsideration is filed, and toll the time for filing a notice of appeal with the circuit court until the agency renders an opinion on the petition. Under current law, the agency decision is not suspended and the time for filing a court appeal is not tolled unless the agency provides for such action when it grants the petition.

HB 2370 would expand the types of agency decisions for which a petition for reconsideration can be filed to include agency decisions made pursuant to informal fact-finding proceedings (§ 2.2-4019). Under current law, parties may file a petition for reconsideration of a final agency decision made only pursuant to a formal hearing (§ 2.2-4020).

HB 2370 would also amend the provision for intermediate relief during judicial review of an agency regulation or decision, by requiring the agency to postpone the effective date of the regulation or decision until conclusion of the review proceedings. Under current law, the agency or court *may* postpone the agency regulation or decision during judicial review but is not required to do so (§ 2.2-4028).

The substitute for HB 2370 would limit when an agency decision could be suspended and the time for filing a court appeal tolled under the reconsideration process. The substitute also drops the inclusion of informal fact-finding proceedings in the reconsideration process and the changes to the intermediate relief provision during judicial review.

### **Fiscal implications**

JLARC staff concur with the DPB impact statement that the fiscal impact of HB 2370 is indeterminate. The bill would impact many state agencies, and it is difficult to predict how much the bill would increase the number of petitions for reconsideration or lawsuits. It is likely that HB 2370 would lead to increased costs, according to information provided by several agencies that would be affected by the bill. The substitute (HB 2370-S) would increase costs less than the introduced version.

*HB 2370 would lead to more petitions for reconsideration and result in added costs and lost revenue*

There would likely be an increase in filings of petitions for reconsideration under HB 2370. HB 2370 would significantly expand the agency decisions for which petitions for reconsideration could be filed to include agency decisions made through informal fact-

finding proceedings rather than just decisions made pursuant to formal hearings, as under current law. There are many more informal fact-finding proceedings than formal hearings, according to agencies contacted by JLARC staff.

HB 2370 would also create a further incentive to file petitions for reconsideration because, unlike under current law, the agency decision would not take effect until the agency renders an opinion on the petition. The time available for parties to file a court appeal would also be extended by the amount of time taken for the reconsideration, providing another incentive to file a petition.

The additional workload resulting from increased petitions for reconsideration would likely increase costs for some agencies. Some agencies have not received a petition for reconsideration since legislation was enacted in 2016 allowing such petitions. Although it is difficult to project the increase in petitions for reconsideration resulting from HB 2370, comparing the number of formal hearings to the number of informal fact-finding proceedings provides insight on the potential increase in petitions (Table). For this review, several agencies provided information on the number of formal hearings and informal fact-finding proceedings they conducted in FY16:

Department of Medical Assistance Services (DMAS),  
Department of Professional and Occupational Regulation (DPOR),  
Department of Health (VDH), and  
Department of Environmental Quality (DEQ)

Several of these agencies indicated that a significant portion of informal fact finding decisions (anywhere from 25% to 75%) could result in petitions for reconsideration. (Agencies that conduct formal hearings indicated that approximately 50% to 75% of formal hearings could result in petitions for reconsideration under HB 2370.) The agencies also provided estimates for the increased costs they could incur in dealing with additional petitions for reconsideration expected under HB 2370. Adjusted for the volume of informal fact-finding proceedings at each agency, the estimated cost increases provided by the agencies were similar. The costs reflect additional staff that would be needed to process the petitions for reconsideration.

**Potential increase in workload and costs resulting from increased petitions for reconsideration under HB 2370**

<b>Agency</b>	<b>Formal hearings (FY16)</b>	<b>Informal fact-finding proceedings (FY16)</b>	<b>Estim. annual cost for increased petitions for reconsideration</b>
DMAS	54	2,480	\$488,000
DPOR	0 <sup>1</sup>	514	\$172,000-\$344,000
<b>VDH<sup>2</sup></b>			
Office of Environmental Health Services	2	55	Up to \$23,000
Office of Licensure & Certification	0	18	Up to \$10,000
DEQ	0	13	\$7,000

SOURCE: Virginia Department of Health.

<sup>1</sup> DPOR does not conduct formal hearings. <sup>2</sup> Costs for VDH offices are based on average estimated cost per petition for reconsideration times 75% of the number of informal fact-finding proceedings. <sup>3</sup> The informal fact-finding proceedings that DEQ provided information on are related to its enforcement program, which are the most likely to result in a petition for reconsideration, according to DEQ staff.

HB 2370 could also lead to a loss in revenue for state agencies. Under current law, fines, penalties, or interest are often collected immediately and, at least in some cases, the amounts owed accrue until a final case decision is made. Because HB 2370 would suspend the execution of the agency decision until the agency renders an opinion on the petition, agencies indicate that they would have to delay collection of fines and penalties, and the amounts owed would not accrue during the reconsideration process.

*HB 2370 could lead to more lawsuits and related costs*

Several agencies expressed concern that the changes to intermediate relief (§ 2.2-4028) under HB 2370 would likely lead to an increase in lawsuits filed against state agencies. HB 2370 would require that, when a court review of an agency’s regulation or decision is instituted or about to be, the agency *must* postpone the effective date of the regulation or decision pending conclusion of the review proceedings. Current law permits agencies or the court to postpone the effective date of a regulation or decision, but postponement is not required and is not typical. HB 2370 would provide an additional incentive for parties to bring lawsuits against state agencies, because it would require agencies to suspend issuance of a permit or license, implementation of a regulation, or enforcement of a regulation or disciplinary action.

The proposed change to intermediate relief could result in significant fiscal impacts, according to some agencies interviewed for this review. If a regulatory change is

required to impose or increase an agency fee, agencies would be unable to collect the increased revenue until the conclusion of the court proceeding. Similarly, agencies would be unable to collect fines or recover funds for violations until conclusion of the proceedings. According to the agencies, the lawsuits themselves can be costly in terms of staff time and resources. Court cases may take years to conclude, and lost fees and collections, or added costs would continue over this time frame.

#### Substitute bill

A substitute for HB 2370 would narrow the scope of the bill and significantly reduce the fiscal impact on state agencies. The substitute would not expand the reconsideration process to include informal fact-finding proceedings, and it would omit the changes to intermediate relief during judicial review. The intent of the substitute appears to be that suspension of agency decisions and tolling the time for filing a notice of appeal would only apply to petitions filed by the aggrieved party. This would remove the incentive for other parties to file a petition, although there would still be an incentive for aggrieved parties to file a petition.

The substitute should be clarified to ensure consistency with other provisions of the Administrative Process Act regarding agency case decisions and to specify that it applies to a named party in a case decision. As currently drafted, the substitute makes reference to *persons applying*, a condition that occurs before the agency decision, so the bill's provisions would not apply. The substitute also makes reference to a *potential violation*, which is interpreted differently by different agencies.

**Budget amendment necessary?** Not initially. Budget amendments could be necessary in future years if HB 2370 results in significant increases in agency workload.

**Agencies affected:** State agencies that have regulations which are not exempt from the Administrative Process Act.

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