

***Proposed Resolution #1 for the "Point of Adoption for Purposes of Appeal" Issue, Hinging Upon Date of Publication of the Regulation:***

**- Amend § 2.2-4013(D) as follows:**

"A thirty-day final adoption period for regulations shall commence upon the publication of the final regulation in the Register, and such date of publication shall serve as the date of adoption for purposes of appeal except for emergency regulations as described in § 2.2-4011; fast track regulations as described in § 2.2-4012.1; suspended regulations as described in § 2.2-4015(B); and Marine Resources Commission regulations as described in the Commission's basic law. The Governor may review the final regulation..." [Note: the MRC reference would be dropped if the workgroup chooses not to address that issue.]

**- Amend § 2.2-4011 (emergency regulations) as follows:**

"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. C. Pursuant to § 2.2-4012, such all emergency regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations. Notice of such filing shall be posted concurrently on the Virginia Regulatory Town Hall, and the date of filing of such regulations shall serve as the date of adoption for purposes of appeal. CD. 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. DE. 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. EF. Emergency regulations shall be published as soon as practicable in the Register. FG. The Regulations of the Marine Resources Commission shall be excluded from the provisions of this section.

**- Amend § 2.2-4012.1 (fast-track regulations) as follows:**

"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, 15-30 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. The date of adoption of a fast-track regulation for purposes of appeal shall be 30 days after the close of the public comment period.

**- Amend § 2.2-4015(B) (suspended regulations) as follows:**

"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 a regulation is suspended under § 2.2-4007.06, such readoption-subsequent agency action on the regulation shall take place after the thirty-day public comment period required by that subsection. Suspension of the regulatory process by an agency may occur simultaneously with the filing of final regulations as provided in subsection B of § 2.2-4013. Whenever the regulatory process has been suspended for any reason and the agency subsequently acts to amend the regulation or to specify a new effective date, the date of publication of that subsequent action in the Register shall serve as the date of adoption for purposes of appeal.

When a regulation has been suspended, the agency must set the effective date no earlier than thirty fifteen days from publication in the Register of the subsequent action on readoption action and any changes made to the regulation. During that fifteen-thirty-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."

***Proposed Resolution #2 for the "Point of Adoption for Purposes of Appeal" Issue, Hinging Upon the Date of Action by the Agency for Some & Date of Publication for Others:***

Notwithstanding any other provision of law or of any executive order issued under this Chapter, with respect to any regulation subject to judicial review under this Chapter, the date of adoption or readoption pursuant to § 2.2-4015 for purposes of appeal under the Rules of the Supreme Court shall be as follows:

1. the date the agency takes final regulatory action if such action is taken at a public meeting or proceeding.
2. the date of publication in the Virginia Register with respect to final agency action not taken at a public meeting or proceeding.

**[Note: We need to discuss what happens with fast-track regulations if we choose this approach.]**

### ***Proposed Resolution for the VMRC Regulations' Effective Date Issue:***

#### **- Amend § 2.2-4006 as follows:**

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: ...

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.

...

11. Regulations of the Marine Resources Commission.

...

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 subsection 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, and Marine Resources Commission regulations, which shall become effective as provided in the Commission's basic law.

#### **- Amend § 28.2-212 in the VMRC basic law as follows:**

**The Commission shall adopt regulations at its public meetings after receiving public comment.** A regulation may be adopted in the form in which it was filed or as amended at the public meeting hearing, provided the amendments do not alter the primary purpose of the regulation. **Regulations shall be effective upon adoption unless a later date is specified by the Commission. Adoption of a regulation at a Commission meeting shall be the point of adoption for purposes of appeal of the regulation.**

**[Note: The VMRC's basic law already provides in § 28.2-213, Distribution of new regulations: "A copy of any regulation of general application adopted by the Commission shall be sent to the Registrar of Regulations, the clerks of the circuit courts of all counties and cities in Tidewater Virginia, and to all Commission officers."]**

#### **- Amend § 2.2-4103 in the Virginia Register Act as follows:**

It shall be the duty of every agency to have on file with the Registrar the full text of all of its currently operative regulations, together with the dates of adoption, revision, publication, or amendment thereof and such additional information requested by the Commission or the Registrar for the purpose of publishing the Virginia Register of Regulations and the Virginia Administrative Code. Thereafter, coincidentally with the issuance thereof, each agency shall from day to day so file, date, and supplement all new regulations and amendments, repeals, or additions to its previously filed regulations. The filed regulations shall (i) indicate the laws they implement or carry out, (ii) designate any prior regulations repealed, modified, or supplemented, (iii) state any special effective or terminal dates, and (iv) be accompanied by a statement or certification, either in original or electronic form, that the regulations are full, true, and correctly dated. No regulation or amendment or repeal thereof shall be effective until filed with the Registrar.

**Regulations of the Marine Resources Commission, which are exempt from the requirements of the Administrative Process Act as provided by subsection A of § 2.2-4006, shall become effective as provided in the Commission's basic law. Such regulations shall be filed with the Registrar for prompt publication.**

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, which are exempt from the requirements of the Administrative Process Act (§ 2.2-4000 et seq.) as provided in subsection A of § 2.2-4002, shall be effective on the date specified by the promulgating agency. Such orders shall continue to be filed with the Registrar either before or after their effective dates in order to satisfy the need for public availability of information respecting the regulations of state agencies.

An order setting a date of closure for the Chesapeake Bay purse seine fishery for Atlantic menhaden for reduction purposes pursuant to § 28.2-1000.2, which is exempt from the requirements of the Administrative Process Act as provided by subsection A of § 2.2-4002, shall be effective on the date specified. Such orders shall be filed with the Registrar for prompt publication.

