

WASTEWATER ADVISORY COMMITTEE

A G E N D A

TOWN OF CHINCOTEAGUE, VIRGINIA

June 21, 2012, 9:00 A.M. – Council Chambers - Town Hall

CALL TO ORDER

ROLL CALL

AGENDA ADDITIONS OR ADOPTION

1. Summary/Conclusions on Business Owner Survey – S. Chesson
2. Comparison Study of Similar Communities – S. Papadopoulos
 - a. Review of decision matrix
 - b. Comments from Committee Member review of study materials
 - Chatham (T. Clark)
 - Block Island (K. Conklin)
 - Oak Island (M. Tolbert, S. Chesson)
 - Tybee Island (S. Papadopoulos)
 - c. Evaluate/Rank alternatives
3. Newsletter – Review outline and content – W. Neville
4. Updates for Discussion
 - a. Status of Main Street Force Main
 - b. Health Department Response to Questions
 - c. Atlantic Town Center
 - d. Next Steps - Council work session in September or October
5. Committee Member Comments

ADJOURN

Wastewater Advisory Committee
17 May 2012
Informational Meeting Notes

Members Present:

Mr. Spiro Papadopoulos, Chair
Mr. Kelly Conklin

Mr. Tommy Clark
Mayor Jack Tarr

Guests: None

Staff: Robert Ritter, Town Manager
Harvey Spurlock, Public Works Director
William Neville, Planning Director

Public Present: (0)

Members Absent:

Mr. Scott Chesson
Mr. Mike Tolbert

Summary/Conclusions on Business Owner Survey

Chairman Papadopoulos asked if the committee members had reviewed the survey results and commented that in general the response to a possible central wastewater system was positive. Concerns about cost, financing and future use charges were identified. Lack of land for a replacement septic system is the main reason for many businesses to support the idea. Mr. Chesson was requested to prepare a summary report.

Comparison Study of Similar Communities

Research of information about similar coastal communities which have recently transitioned from individual drainfields to centralized wastewater treatment systems was presented by Mr. Neville. Criteria for selection of 4 sample communities included: similar population, a summer peak of visitors, around 1 million gallons of peak water use, and current cost information.

Selected communities include Chatham MA, Block Island RI, Oak Island NC, and Tybee Island GA. Several examples are illustrated of a hybrid system with both central treatment in the center of town and continued use of individual drainfields in areas of suitable soil. A range of treated wastewater disposal solutions are highlighted including direct marine discharge, rapid infiltration basins, and reuse/land application. These examples allow the committee to compare the profiles of other communities to see where there may be similar conditions to Chincoteague Island.

Mr. Neville advised that the cost information contained in this early research should be kept in context with the study work of the committee and not used to influence public opinion at this time. Other documents have been provided that describe the basic design choices for different types of treatment systems and how the cost and responsibility for wastewater treatment typically changes with the size of the community. He recommended that a general review of all the documents could allow the committee to determine what steps should be taken next.

Chairman Papadopoulos suggested that each member of the committee should take one portion of the study material to read in detail and report back on what is the most important information. This process make take several months given the limited time available during the summer season.

- Chatham (T. Clark)*
- Block Island (K. Conklin)*
- Oak Island (M. Tolbert, S. Chesson)*
- Tybee Island (S. Papadopoulos)*

The committee may need to schedule a work session and develop a matrix to compare the different alternatives. The goal will be to find similarities that will guide a recommendation for what will be best for Chincoteague Island.

The draft planning report was presented as an outline that will collect the findings of the committee as the research information is boiled down into a presentation and recommendation for Town Council. Mr. Neville stated that the Preliminary Engineering Report for Chincoteague prepared by Clark Nexsen should be compared with the research materials for other communities.

Status Report on Main Street force main

Public Works Director Harvey Spurlock provided a report that Mr. Burbage is proceeding with the installation to two parallel force mains to be installed in Main Street from the vicinity of Sea Star to the Sunset Bay Utilities treatment facility. This will allow connection of 4 laterals that have been installed to serve a common area connection at Post Office Street, Bills Restaurant, the Town restrooms, and the Fire Station. The line can also be extended to Landmark Plaza in the future.

The committee discussed the installation and paving of Main Street within several weeks and that individual hookups and operation was dependant on private construction and agreements with the Utility Company. Mr. Clark confirmed that each property owner was responsible to design and construct the necessary connection to the system. Mr. Burbage's engineer, Stacy Hart, is available to design the necessary pump/filter/tank however the cost is in addition to the connection fee.

Mr. Conklin asked several questions to determine who was approving the ultimate wastewater system and the design of the individual parts. The committee concluded that Stacy Hart was ultimately responsible to the Sunset Bay Utility

Company to meet DEQ standards under their existing permit. Mr. Ritter reviewed with the committee that Mr. Burbage proposed a \$10,000 per EDU connection fee, plus a 1/26 percentage cost to complete the force main (estimated at \$2-3,000), plus the individual cost for a pump and lateral connection. Mr. Clark stated that he may need 9 EDUs for his restaurant based on his summer peak use which will cost around \$120,000.

Chairman Papadopoulos led a discussion of the alternative for business to install an individual advanced drainfield system if central wastewater treatment is not available. Mr. Clark commented on the high cost of commercial land and the potential disturbance to adjacent open space areas. Mr. Conklin offered that the new system installed for just the Island Creamery cost over \$50,000. Mr. Clark confirmed that the estimated cost to build an advanced treatment mound system for Don's Seafood restaurant was between \$150,000 and \$175,000 to replace the existing drainfield.

The committee concluded that there were operational costs for both types of systems that needed to be better understood. Mr. Conklin shared the results of a County committee that compared both the installation and maintenance/replacement costs of both 'backyard' and 'centralized' solutions. Often the costs are similar over time.

Status Report on Health Department Response

Chairman Papadopoulos asked staff if VDH had responded to the questions raised during the previous meeting?

- 1. Provide a copy of the policy that allows for a one time waiver to install a replacement system – specifically what allows VDH to attach a 'lien' or deed restriction against the property.*
- 2. Provide a list of new or replacement drainfields and advanced treatment systems on Chincoteague Island (since 2008)*
- 3. Provide a copy of approved engineers, soil scientists, installers and surveyors for ESVA*

Staff will follow up with the VDH.

Request for Planning Commission Review of Zoning Tools for Phase One Wastewater Treatment Service Area

Chairman Papadopoulos identified the phase one area proposed in the Clark Nexsen study as a possible project for the Planning Commission to review for zoning implications of providing new centralized sewer service. Mr. Conklin agreed that the business survey included skepticism for whether the Town is prepared to handle, zoning-wise, what may happen.

Mr. Ritter stated that the primary zoning controls available today are building height and parking requirements that would restrict large scale redevelopment. He

suggested that the Planning Commission should investigate what other ‘teeth’ the zoning ordinance needs to control development. Mr. Neville provided an example from Chatham, MA that restricts connections to the proposed central sewer to a 3 bedroom house (or equivalent) without a special permit approval. This approach to connect existing uses first allows the community to reasonably plan for water demand and the size of the wastewater treatment facilities. Chairman Papadopoulos raised the question of whether the Town would need new utility design standards, a new type of ‘trade permit’ for qualified installers to connect individual properties, and an inspection program.

Committee Member/Public Comments

Chairman Papadopoulos reported on the recent meeting of the ESVA Groundwater committee and the DEQ meeting scheduled for June 6th.

The next meeting of the Committee will be on September 20, 2012 at 9am.

Comparison Matrix of Similar Communities

Community	State	Population	Seasonal Population	Disposal Method	Private-Septic	Private-Sewer	Public Sewer	Disposal Area	Drainfields	Individual AWT	Marine Discharge	Land Application	Rapid Infiltration Basins	Reuse	Treatment Capacity
Chatham	MA	6500	20000	Public Sewer/Private Septic	•		•	Rapid Infiltration Basins/Drainfields	•				•		2.3 mgd
Block Island	RI	1000	10000	Public Sewer/Private Septic	•		•	Drainfields/Marine Discharge	•		•				0.45mgd
Chincoteague Island	VA	4000	15000	Private Septic/Private Sewer	•	•		Drainfields/Marine Discharge	•	•	•				0.15mgd
Oak Island	NC	8000	35000	Public Sewer			•	Reuse, Land Application				•		•	1.4mgd
Tybee Island	GA	3700	8000-30000	Public Sewer			•	Marine Discharge			•				1.0mgd

October 15, 2004

To: District Health Directors
District Environmental Health Managers
Office of Environmental Health Services
Authorized Onsite Soil Evaluators (AOSEs)

From: Robert B. Stroube, State Health Commissioner

Subject: Implementation of House Bill 930

Guidance Memoranda and Policies (GMP) # 128

I. Background.

The 2004 General Assembly passed House Bill 930 (Acts of Assembly, Chapter 916, 2004) which amends § 32.1-164.1:1 of the *Code of Virginia* by adding the following subsection:

- B. Further, whenever any onsite sewage system is failing and the Board's regulations for repairing such failing system impose (i) a requirement for treatment beyond the level of treatment provided by the existing onsite sewage system when operating properly or (ii) a new requirement for pressure dosing, the owner may request a waiver from such requirements. The Commissioner shall grant any request for such waiver, unless he finds that the failing system was installed illegally without a permit. Any such waivers shall be recorded in the land records of the clerk of the circuit court in the jurisdiction in which the property on which the relevant onsite sewage system is located. Except between a husband and a wife, waivers granted hereunder shall not be transferable and shall be null and void upon transfer or sale of the property on which the onsite sewage system is located. Additional treatment or pressure dosing requirements shall be imposed in such instances when the property is transferred or sold.*

The owner of the relevant property shall disclose, in writing, to any and all potential purchasers or mortgage holders that any operating permit for the onsite sewage system that has been granted a waiver authorized by this subsection shall be null and void at the time of transfer or sale of the property and that the Board's regulatory requirements for additional treatment or pressure dosing shall be required before an operating permit may be reinstated.

This guidance document replaces GMP #124 and outlines procedures for processing applications for repair permits (construction permits) pursuant to § 32.1-164.1:1.B and 12 VAC 5-610-280.C.2. The policy also contains suggested letters, a flow chart, and an Agreement to be executed by any owner who requests the Waiver. **GMP #124 is hereby rescinded.**

II. General.

Section 32.1-164.1:1.B of the *Code* offers financial relief (a waiver) to the current owner of a property whose system is failing and who is facing a new requirement(s) for secondary treatment, pressure dosing (PD), or both. In practical terms, this means that a system originally permitted (in either primary or reserve areas) to disperse secondary or better effluent (SE) must be repaired using similar treatment. The owner of such a system would not be eligible for a waiver from the *treatment* requirements of the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20 et seq., as amended July 1, 2000, the *Regulations*). That owner, however, would be eligible for a waiver from pressure dosing as long as his original permit did not require pressure dosing in either the primary or reserve areas. The same reasoning also applies to a system originally permitted for pressure dosing in either the primary or reserve areas- the owner of such a system is not eligible for a waiver from pressure dosing. An owner with a system originally permitted for both PD and SE in either the primary or reserve areas is not eligible for a waiver.

A qualified owner may request a waiver and the waiver must be granted unless the Commissioner finds “that the failing system was installed illegally without a permit.” The waiver is transferable only between a husband and a wife. Any other transfer of the property voids the waiver and the current operating permit for the system, even if that system is not failing at the time of the transfer. To obtain a new operating permit, the new owner must comply with the *Regulations* that were waived as well as any subsequent requirements that may have been imposed since the waiver was granted. Any owner who receives a waiver must record the Waiver in the land records of the circuit court and disclose the waiver in writing to any potential purchaser or mortgage holder.

Section 280.C.2 of the *Regulations* provides that the district health director or environmental health manager may, in cases of economic hardship, waive the requirement for secondary treatment for repairs. Effective immediately, this policy shall be used to implement § 280.C.2 of the *Regulations*.

III. System Designs.

To ensure the financial relief intended by the law, Virginia Department of Health (VDH) personnel will continue to design gravity-flow or simple pump STE systems if requested by the owner.¹ VDH employees are advised that they should refrain from designing systems with SE and/or PD. Such system designs require either the practice of engineering or

¹ GMP #125 contains general guidance for VDH employees and others regarding exemptions from the Practice of Engineering.

the need to name specific product brands. VDH regulates the onsite sewage industry and issues approvals for manufacturers and proprietary products. Hence, it is inappropriate for VDH to design onsite systems with PD or SE because that would give the appearance of VDH endorsing one product over another one. Further, extensive consulting is required between the designer and the owner to assure that the owner's needs are met and appropriate products are chosen and used. Such individual and extensive consulting is not supported by the fees currently established for onsite sewage system applications and VDH does not have sufficient resources to support such activities.

Section 32.1-164.1:1.B of the *Code* requires that any system with a waiver must be upgraded with the current regulations upon transfer of the property (transfers between husbands and wives are exempted). This means that the SE and/or PD requirements that were waived for the current owner will be added for the new owner. Therefore, it is in the owner's best interest to consider the current and future costs of complying with the *Regulations* by seeking appropriate consultation outside of VDH. For example, installing a system under a waiver could necessitate a more expensive repair system in the future, it might delay a property transfer while a system is upgraded, or it could negatively impact the property's value because a system installed under the waiver may not comport with what the industry's current body of knowledge and experience.

It is the owner's responsibility to determine whether he is best served with a repair system in accordance with § 32.1-164.1:1.B and this policy. The owner should consult with experts in the private sector to determine whether he would prefer a system that anticipates the subsequent inclusion of SE and/or pressure-dosing components or a system designed by VDH that usually will not include those considerations (as stated before, VDH does not have the resources to extensively consult with the owner on the hundreds of design options currently available in the marketplace). For these reasons it is imperative that owners be made aware of the importance of seeking advice from competent private design professionals, even if VDH staff is designing his system pursuant to the waiver provided by the law.

This policy shall not be construed as imposing any obligation on VDH to provide consulting services, to minimize or maximize an owner's financial liability, or to guarantee that any system designed and permitted by VDH will function for any specified period of time. All stakeholders must understand that any system designed with a waiver under § 32.1-164.1:1.B does not comply with the *Regulations* for new construction nor does it meet the industry's current expectations for system designs.

IV. Procedures.

The responsible Environmental Health Specialist Senior (EHSS) will determine whether an owner qualifies for a waiver under § 32.1-164.1:1.B as part of the routine processing of a repair application. Attachment #4 is a flowchart for determining whether an owner qualifies for a waiver from SE, PD, or both. The shaded boxes indicate decision paths where owners may request VDH staff to design the repair system.

Attachment #1 is a letter notifying the owner of the requirement(s) for SE and/or PD and that the waiver is available. This suggested letter should be applicable to the majority of cases that local health departments will see. **In these cases the owner may elect to ask VDH to design a system under the Waiver because the system does not require SE or PD.** The owner may also choose to hire an AOSE/PE to prepare plans and specifications for the repair system. Attachment #2 is similar to Attachment #1 and contains suggested language for notifying an owner that he is eligible for only one of the waivers (SE or PD) or that he is not eligible for any waiver. Attachment #2 will require substantial modification to tailor it to a specific situation and it should not be used as a “form letter.”

Prior to sending a letter by certified mail notifying an owner that he is eligible for a waiver, the EHSS must determine whether the failing system was installed illegally without a permit. If the EHSS finds substantial evidence that the system was installed illegally without a permit, then he should immediately inform the appropriate VDH supervisory personnel to initiate enforcement proceedings. The letters in Attachments #1 and #2 do not apply to any system that was installed illegally without a permit.

The responsible EHSS is expected to make reasonable efforts to educate owners about the public health and environmental benefits of secondary treatment and/or pressure dosing, and also the benefits of going to the private sector for design and financial consultation. Such reasonable efforts to inform the owner must not, however, unnecessarily delay him from obtaining a permit to construct a repair. VDH staff shall not advise owners about whether to request a waiver; but instead, staff should encourage owners to seek advice from private advisors such as attorneys, designers, or real estate professionals.

An owner wishing to receive a waiver must return the properly executed waiver request and agreement found in Attachment #3. When properly executed by the owner, Attachment #3 constitutes the request for waiver, the owner's agreement to release VDH and the Commonwealth of liabilities associated with the waiver, and the waiver itself. If an owner is asking VDH staff to design a repair system under a waiver, that waiver must be properly executed and in the hands of the responsible EHSS before a construction permit is released. The process for issuing a construction permit with a waiver is the same as issuing a conditional permit under § 250.J of the *Regulations*. When the owner produces written proof (certification) that he has recorded the waiver in the land records, the construction permit is released and it becomes effective one day later.

Responsibility and authority for implementing § 32.1-164.1:1.B is hereby delegated to the district health directors.

III. Terms.

Pressure Dosing- means any system under the *Regulations* that requires a pump to pressurize a dosing system or device. Examples include drip dispersal, drip irrigation, manifold systems, mound systems, and low pressure distribution systems, etc. The definition does not

include gravity systems, systems that pump effluent to a higher elevation (distribution box with or without enhanced flow), or systems that require a pump because the ground surface over the soil absorption area is higher than the elevation of the lowest fixture in the house.

Treatment beyond the level of treatment provided by the existing system when operating properly- The *Regulations* require an owner to provide secondary treatment for the repair of a failing system if the repair or replacement system does not “substantially comply” with the requirements of the *Regulations* for a system with STE. The most common application of this term is expected to occur when an owner of a individual single-family home needs a repair permit that involves replacing all or part of the soil absorption system, the existing system is a STE system, and the site and soil conditions do not substantially comply with the *Regulations* for a STE system. In such cases the owner is required to provide secondary treatment (SE) as part of the design of the repair system.

For the purposes of implementing House Bill 930 any system installed under any regulation other than the *Regulations* is deemed to have had a requirement for STE, unless treatment beyond STE was specifically required at the time the system was originally permitted. Examples of such specific additional treatment requirements include, but are not limited to variances, terms of settlement of appeals or orders of the Appeal Review Board, Orders of the Board of Health (includes consent orders), mass drainfields, designs by a PE or by an AOSE/PE, and proprietary pre-engineered systems approved by VDH (listed in GMPs).

System “installed illegally without a permit”- means that there is substantial evidence that an owner (either the current one or a previous one) installed an onsite sewage system intentionally without a permit at a time when there was a requirement to obtain a permit prior to installing an onsite sewage system. The mere lack of permit documentation in VDH files is not substantial evidence that a system was installed illegally without a permit. There must be additional evidence that supports a conclusion that a person knew a permit was required and intentionally installed a system without one. In other cases VDH has relied upon evidence such as a prior permit denial for the same property, a building permit issued for a different type of structure (i.e. building permit issued for a barn or shed, but instead a home was built), and records of other local government offices. Please contact the Division of Onsite Sewage and Water Services if there are questions about a specific case.

List of Attachments:

1. Attachment #1: Letter to Applicant, SE with or without PD Dosing Required
2. Attachment #2: Suggested letter to be modified by VDH staff as appropriate
3. Attachment #3: Request for Waiver/Release and Hold Harmless Agreement/Waiver
4. Attachment #4: Flow chart for determining when the waiver applies.

Attachment 1
Date

Owner Name
Address
City, State Zip

Certified Mail

Dear [Owner]:

On [date], the [] County Health Department received your application for a sewage system repair permit which did not include supporting documentation from an AOSE/PE.² Based on our site and soil evaluations (copy attached), the conditions on your lot do not substantially comply with the minimum requirements of the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20, as amended July 1, 2000, the *Regulations*) for a Septic Tank Effluent (STE, *Regulations*, § 594) system for the following reasons:³

(Choose one or more or add as appropriate.)

1. Insufficient depth to a limiting factor such as the seasonal water table, a restrictive horizon, rock, etc.
2. Insufficient horizontal separation from well, shellfish waters, etc....
3. Insufficient area of suitable soil.

The repair system for your property must have Secondary Effluent (SE, *Regulations*, § 280)⁴, pressure dosing⁵, or both as part your repair system's design. **[Note: modify this paragraph to fit the specific situation]** These requirements assure that public health and groundwater supplies are protected and that the risk for human disease transmission is minimized.

Employees of the Virginia Department of Health (VDH) typically do not design sewage systems with SE or pressure dosing because of the complexity of these designs and the wide variety of brand-name products and equipment available. These types of designs require extensive consultation between the owner and an AOSE/PE to assure that the owner's needs are met. VDH does not have the resources to provide this extensive consultation and cannot choose specific products because of our regulatory relationship with all product manufacturers.

The Virginia General Assembly passed a law, effective July 1, 2004, that provides an opportunity for you to receive a Waiver from the requirements for SE, pressure dosing, or both

² AOSE/PE means a Professional Engineer (PE) working in consultation with an Authorized Onsite Soil Evaluator (AOSE) or an AOSE.

³ Septic Tank Effluent means "effluent characterized by a five-day biochemical oxygen demand between 120 and 200 mg/l; total suspended solids between 70 and 150 mg/l; fats, oils, and grease of 30 mg/l or less; and having no other toxic, hazardous, or constituents not routinely found in residential wastewater flows (*Regulations*, § 120)."

⁴ Secondary Effluent means "effluent treated to reduce five-day biochemical oxygen demand to 30 mg/l or less, total suspended solids to 30 mg/l or less, and fats, oils, and grease to less than 5 mg/l (*Regulations*, § 120)."

⁵ Pressure Dosing means any system under the *Regulations* that requires a pump to pressurize a dosing system or device. Examples include drip dispersal, drip irrigation, manifold systems, mound systems, and low pressure distribution systems, etc. The definition does not include gravity systems, systems that pump to a higher elevation (distribution box with or without enhanced flow), or systems that require a pump because the ground surface over the soil absorption area is higher than the elevation of the lowest fixture in the house.

as long as your system was not installed illegally without a permit and as long as there was no requirement for these in your original permit and approval documents (Va. Code, § 32.1-164.1:1). I have determined that you are eligible for the Waiver if you choose to apply for it.

If you choose to receive the Waiver, VDH staff will design your system, at your request, as long as the requirements are relatively simple. If you do not want to receive the Waiver or if you do not want VDH to design your system, you will need to hire a qualified consultant to design your repair or replacement system. Currently, VDH recognizes PEs (Professional Engineers licensed in the Commonwealth of Virginia) for any type of system design and AOSEs (Authorized Onsite Soil Evaluators certified by VDH) for certain system designs that do not require the practice of engineering. If you wish to receive the Waiver and **do not** want VDH to design the repair system, please complete the enclosed Waiver Request, Agreement, and Waiver document (“Waiver”) and return it to this office with your AOSE/PE plans for the repair or replacement system- **do not check the box requesting VDH to design your system**. If you want the Waiver and prefer that VDH design your system, simply complete the Waiver, check the design request box, and return it to our office (address noted on the letterhead). As soon as we receive this information, we will act accordingly and issue you a repair permit as soon as possible.

If you are signing the Waiver agreement, you will need to have your signature notarized. This is a legal document and you should review it carefully. You may wish to seek legal advice from an attorney to explain what the Waiver means and its future consequences when you transfer the property to a new owner. The law requires that you record the Waiver in the land records of the clerk of the circuit court in the jurisdiction in which your property is located. A Waiver is only transferable between a husband and wife.

The Waiver and the operating permit for your system are both null and void immediately whenever your property is transferred to any person (or entity) other than your spouse (husband or wife). It is unlawful to operate an onsite sewage system without a valid operating permit (*Regulations*, § 240). This means that any new owner will not be able to lawfully occupy the dwelling/structure and operate the sewage system until he obtains a new operating permit. The new owner will need to apply for and obtain a new construction permit that complies with those parts of the *Regulations* that were waived (i.e. secondary treatment and/or pressure dosing) and any new requirements that may have been adopted after the Waiver was granted. The operating permit for the system can only be reinstated after the upgrades are completed. You are required by law to disclose these conditions in writing to any and all potential purchasers or mortgage holders. *These requirements apply to your system, even if it does not appear to be failing at the time of transfer.*

If you want an AOSE/PE to design your system under the Waiver, please remember to tell your consultant so that he can submit plans that incorporate your wishes. VDH will not change your expert’s design and an AOSE/PE must approve the system’s final construction.

If you request the Waiver and ask for a VDH design, please remember that VDH does not have the resources to consider, inform, and consult with you about all of the design options

available in the marketplace for a repair. There are hundreds of design options and potentially hundreds of products from which to choose within each possible design. Depending on your specific needs, please consider that VDH could design a system that would not meet your immediate or long-term interests because of our lack of resources to provide you with complete consultation services. VDH regulates the onsite sewage industry and approves (or denies) requests from product manufacturers- we cannot recommend one product over another just as we cannot design or recommend a specific proprietary pre-engineered system. Without being able to recommend certain products or proprietary designs because of our unique position as a regulator and having scarce resources to provide you with detailed consultation, it is possible that you could get an inferior design as compared to a private consultant. A private consultant would not necessarily have VDH's limitations and could propose specific products and provide more in depth consultation.⁶

Also remember that VDH cannot advise you about how a system under a Waiver might affect your ability to sell the property since you are required to upgrade the system at the time of property transfer; nor can we advise you about liability issues should your system fail and adversely impact drinking water supplies. A system installed under a Waiver does not comply with the *Regulations* which were adopted by the Board of Health to provide the least intrusive methods to adequately protect groundwater supplies and public health.

You will soon receive (or have already received) a letter from this office notifying you that the failure of your sewage system may constitute a violation of the *Regulations*. Please follow any directions contained in that letter and carefully heed any time limits for repairing your failing system. Because your sewage system has failed, your sewage system operation permit is null and void in accordance with 12 VAC 5-610-340 of the *Regulations*. As I mentioned earlier in this letter, you are required to have an operating permit in order to use an onsite sewage system and I encourage you to complete the steps necessary to get a new operating permit as quickly as possible.

You have the right to challenge the results of VDH's site and soil evaluations and the decisions we have made regarding your repair application (see the first and second paragraphs of this letter) by requesting an informal hearing. Your written request for a hearing (also called an informal fact-finding conference) must be received in this office within 30 days from your receipt of this letter. Thank you for your prompt attention and action in this matter. Please call me at (____) ____ - ____ if you have more questions.

Sincerely,

EHSS

Attachments: (2)

⁶ Some private consultants are affiliated with only one product brand and may not provide you with a complete list of possible designs.

Attachment 2
Date

Owner Name
Address
City, State Zip

Certified Mail

Dear [Owner]:

On [date], the [] County Health Department received your application for a sewage system repair permit which did not include supporting documentation from an AOSE/PE.⁷ Based on our site and soil evaluations (copy attached), the conditions on your lot do not substantially comply with the minimum requirements of the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20, as amended July 1, 2000, the *Regulations*) for a gravity or non-pressure-dosed Septic Tank Effluent (STE, *Regulations*, § 594) system for the following reasons:

State reasons, such as insufficient depth of suitable soil above a limiting factor (SWT, rock, etc.), insufficient area, etc.

The repair system for your property must use a pressure dosed system,⁹ a system that provides secondary or better effluent¹⁰, or a system that provides both pressure dosing and secondary or better effluent [**Note: modify this paragraph to fit the specific situation**]. This requirement in the *Regulations* provides additional public health and groundwater protections where failed systems pose relatively high risks for human disease transmission.

Employees of the Virginia Department of Health (VDH) typically do not design sewage systems with SE or pressure dosing because of the complexity of these designs and the wide variety of brand-name products and equipment available. These types of designs require extensive consultation between the owner and an AOSE/PE to assure that the owner's needs are met. VDH does not have the resources to provide this extensive consultation and cannot choose specific products because of our regulatory relationship with all product manufacturers. You will need to retain the services of a qualified private designer to design your repair system. Currently, VDH recognizes PEs (licensed in the Commonwealth of Virginia) for any type of system design and AOSEs for certain system designs that do not require the practice of engineering.

⁷ AOSE/PE means a Professional Engineer (PE) working in consultation with an Authorized Onsite Soil Evaluator (AOSE) or an AOSE.

⁸ Septic Tank Effluent means "effluent characterized by a five-day biochemical oxygen demand between 120 and 200 mg/l; total suspended solids between 70 and 150 mg/l; fats, oils, and grease of 30 mg/l or less; and having no other toxic, hazardous, or constituents not routinely found in residential wastewater flows (*Regulations*, § 120)."

⁹ Pressure Dosing means any system under the *Regulations* that requires a pump to pressurize a dosing system or device. Examples include drip dispersal, drip irrigation, manifold systems, mound systems, and low pressure distribution systems, etc. The definition does not include gravity systems, systems that pump to a higher elevation (distribution box with or without enhanced flow), or systems that require a pump because the ground surface over the soil absorption area is higher than the elevation of the lowest fixture in the house.

¹⁰ Secondary Effluent means "effluent treated to reduce five-day biochemical oxygen demand to 30 mg/l or less, total suspended solids to 30 mg/l or less, and fats, oils, and grease to less than 5 mg/l (*Regulations*, § 120)."

The Virginia General Assembly passed a law, effective July 1, 2004, that provides an opportunity for you to receive a Waiver from the requirements for SE, pressure dosing, or both as long as your system was not installed illegally without a permit and as long as there was no requirement for these in your original permit and approval documents (Va. Code, § 32.1-164.1:1). I have determined that you are eligible for a Waiver from (PD or SE) if you choose to apply for it. **[Note: This paragraph will not apply in cases where the owner is not eligible for a waiver. The paragraph will need to be modified to fit specific situations where an owner may receive a waiver from one element, such as PD, but not from the other- see Flow Chart in Attachment 4]**

If you wish to receive the Waiver, please complete the enclosed Waiver Request, Agreement, and Waiver document (“Waiver”) and return it to this office with your AOSE/PE plans for the repair or replacement system. As soon as we receive this information, we will act accordingly and issue you a repair permit as soon as possible. **[Note: This paragraph is not applicable in cases where owner is not eligible for a waiver.]**

If you are signing the Waiver agreement you will need to have your signature notarized. This is a legal document and you should review it carefully. You may wish to seek legal advice from an attorney to explain what the Waiver means and its future consequences when you transfer the property to a new owner. The law requires that you record the Waiver in the land records of the clerk of the circuit court in the jurisdiction in which your property is located. A Waiver is only transferable between a husband and wife. **[Note: This paragraph is not applicable in cases where owner is not eligible for a waiver.]**

The Waiver and the operating permit for your system are both null and void immediately whenever your property is transferred to any person (or entity) other than your spouse (husband or wife). It is unlawful to operate an onsite sewage system without a valid operating permit (*Regulations*, § 240). This means that any new owner will not be able to lawfully occupy the dwelling/structure and operate the sewage system until he obtains a new operating permit. The new owner will need to apply for and obtain a new construction permit that complies with those parts of the *Regulations* that were waived (i.e. secondary treatment and/or pressure dosing) and any new requirements that may have been adopted after the Waiver was granted. After the upgrades are completed, then the operating permit for the system can be reinstated. You are required by law to disclose these conditions in writing to any and all potential purchasers or mortgage holders. *These requirements apply to your system, even if it does not appear to be failing at the time of transfer.* **[Note: This paragraph is not applicable in cases where owner is not eligible for a waiver.]**

Please remember to tell your AOSE/PE consultant if you are requesting a waiver so that he can submit plans that incorporate your wishes. VDH will not change your expert’s design and an AOSE/PE must approve the system’s final construction. **[Note: This paragraph is not applicable in cases where owner is not eligible for a waiver.]**

Please remember that VDH does not have the resources to consider, inform, and consult with you about all of the design options available in the marketplace for a repair. There are hundreds of design options and hundreds of products from which to choose within each possible design. Depending on your specific needs, please consider that VDH might recommend a system that would not meet your immediate or long-term interests because of our lack of resources to provide you with complete consultation services. VDH regulates the onsite sewage industry and approves requests from product manufacturers so we cannot recommend one product over another just as we cannot design or recommend a specific proprietary pre-engineered system. A private consultant would not necessarily have VDH's limitations and can propose specific products and provide more in depth consultation.¹¹

Also remember that VDH cannot advise you about how a system under the Waiver might affect your ability to sell the property since you are required to upgrade the system at the time of property transfer. And VDH cannot advise you about liability issues should your system fail and adversely impact drinking water supplies. A system installed under the Waiver does not comply with the *Regulations* and the *Regulations* are written to provide the least intrusive methods to adequately protect groundwater supplies and public health. **[Note: This paragraph is not applicable in cases where owner is not eligible for a waiver.]**

You will soon receive (or have already received) a letter from this office notifying you that the failure of your sewage system may constitute a violation of the *Regulations*. Please follow any directions contained in that letter and carefully heed any time limits established for repairing your failing system. Because your sewage system has failed, your sewage system operation permit is null and void in accordance with 12 VAC 5-610-340 of the *Regulations*. As I mentioned earlier in this letter, you are required to have an operating permit in order to use an onsite sewage system and I encourage you to complete the steps necessary to get a new operating permit as quickly as possible.

You have the right to challenge VDH's site and soil evaluations and the decisions we have made regarding your repair application (see the first and second paragraphs of this letter) by requesting an informal hearing. Your written request for a hearing (also called an informal fact-finding conference) must be received in this office within 30 days from your receipt of this letter. Thank you for your prompt attention and action in this matter. Please call me at (____) ____ - ____ if you have more questions.

Sincerely,

EHSS

Attachments: (1 or 2 depending on whether owner is eligible for Waiver)

¹¹ Some private consultants are affiliated with only one product brand and may not provide you with a complete list of possible designs.

Attachment 3

REQUEST FOR WAIVER, RELEASE, HOLD HARMLESS
and INDEMNIFICATION AGREEMENT, & WAIVER

This document, which includes a REQUEST FOR WAIVER, a RELEASE, HOLD HARMLESS, and INDEMNIFICATION AGREEMENT, and a WAIVER (collectively, “AGREEMENT”), is made and entered into this _____ Day of _____, 2004, by and between [insert full legal name of Owner or Owners], his/their HEIRS, SUCCESSORS, DEVISEES, AGENTS, ASSIGNS, REPRESENTATIVES and INTERESTS (hereinafter “OWNER”) and the COMMONWEALTH OF VIRGINIA, acting through the Department of Health (DEPARTMENT), including, without limitation, any and all of its agencies, boards, and commissions, their insurer(s), officers, directors, employees, representatives, and agents, (hereinafter the COMMONWEALTH OF VIRGINIA).

WHEREAS, OWNER is the owner of that certain parcel described as _____ [insert legal description of property] containing, among other improvements, an occupied structure consisting of _____ [describe occupied structure- i.e. four bedroom single family dwelling] (hereinafter “PROPERTY”); and

WHEREAS, the DEPARTMENT, in accordance with the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20 *et seq.*, as amended July 1, 2000, the REGULATIONS), has determined that the onsite sewage system serving the PROPERTY is failing and must be repaired or replaced; and

WHEREAS, the DEPARTMENT has determined that, under the REGULATIONS, the repair or replacement system must provide Secondary Effluent and/or Pressure Dosing [**Note to VDH Staff: modify this clause according to whether both SE and PD are required or whether one or the other is required- see Flow Chart in Attachment 4**] in order to adequately protect public health and ground and surface water resources; and

WHEREAS, § 32.1- 164.1:1 of the *Code of Virginia* provides that whenever any onsite sewage system is failing and the regulations for repairing such failing system impose (i) a requirement for treatment beyond the level of treatment provided by the existing onsite sewage

system when operating properly or (ii) a new requirement for pressure dosing, an owner may request a waiver (hereinafter "WAIVER") from the requirements of the REGULATIONS pertaining to Secondary Effluent and/or Pressure Dosing for a repair system; and

WHEREAS, the State Health Commissioner shall grant such WAIVER, provided that the owner's failing system was not installed illegally without a permit; and

WHEREAS, the DEPARTMENT has determined, and OWNER affirms, that the failing system currently serving the PROPERTY was not installed illegally without a permit, and

REQUEST FOR WAIVER

WHEREAS, OWNER, by executing this AGREEMENT, hereby requests that the State Health Commissioner grant the WAIVER provided at §32.1-164.1:1 B. of the *Code of Virginia* from the requirements for _____ Secondary Effluent and/or _____ Pressure Dosing [**Note to VDH Staff: modify this clause according to whether both SE and PD are required or whether one or the other is required- see Flow Chart in Attachment 4**].

WAIVER

NOW, THEREFORE, in exchange for the mutual promises contained herein, the parties agree as follows:

The WAIVER provided at §32.1-164.1:1 B. of the *Code of Virginia* is hereby granted and shall be effective 24 hours after OWNER provides certification to the DEPARTMENT that this AGREEMENT has been recorded in the land records of the Circuit Court having jurisdiction over the PROPERTY.

RELEASE, HOLD HARMLESS, and INDEMNIFICATION AGREEMENT

OWNER agrees to, and hereby does, release the COMMONWEALTH OF VIRGINIA from any and all claims, complaints, demands, actions, causes of action, liabilities, and obligations of whatever source or nature, whether administrative, legal or equitable, whether known or unknown, which OWNER now has or may have in the future relating to or arising from the WAIVER, including, without limitation, any and all claims due to the failure of any person to comply with federal, state, or local laws or regulations, claims under the Virginia Tort Claims Act, the Virginia Constitution, the United States Constitution and amendments thereto, or under common law. Furthermore, OWNER expressly releases the COMMONWEALTH OF VIRGINIA from any and all claims, actions, causes of action, or obligations under the Virginia

Onsite Sewage Indemnification Fund, §32.1-164.1:01 of the *Code of Virginia*, that may arise from or be related to the repair, replacement, and/or operation of OWNER's onsite sewage disposal system pursuant to the WAIVER.

OWNER also agrees to hold harmless and indemnify the COMMONWEALTH OF VIRGINIA for any sum of money or judgment against the COMMONWEALTH OF VIRGINIA, as well as costs and reasonable attorneys' fees incurred in the defense of any action arising out of or related to the WAIVER.

Severability. If any portion of this AGREEMENT is held to be void or deemed unenforceable for any reason, the remaining portion shall survive and remain in effect, unless the effect of such severance shall defeat the parties' intent as set forth herein, with the parties asking the Court to construe the remaining portions consistent with the expressed intent of the parties.

Entire Agreement. OWNER acknowledges that OWNER has had an opportunity to consult with an attorney concerning OWNER's rights and obligations. OWNER acknowledges that OWNER has had sufficient time and opportunity to consider this AGREEMENT with the COMMONWEALTH OF VIRGINIA, that OWNER has read this AGREEMENT, that OWNER fully understands and agrees to its terms and conditions, and that there exists no other promises, representations, inducements or agreements related to this AGREEMENT, except as specifically set forth herein. Furthermore, OWNER acknowledges that this constitutes the entire agreement between OWNER and the COMMONWEALTH OF VIRGINIA.

[Name]
District Health Director

REQUEST FOR DEPARTMENT TO DESIGN A REPAIR SYSTEM

Check Here if this Section Applies.

OWNER hereby requests that an employee of the Virginia Department of Health design OWNER's sewage system. OWNER understands that the DEPARTMENT cannot serve as OWNER's consultant and that there are design choices that, depending upon OWNER's needs,

may increase costs in the long run because of the requirement to upgrade OWNER's sewage system at the time the PROPERTY is transferred. OWNER furthermore understands and affirms that the DEPARTMENT cannot provide such in-depth consulting as OWNER might need or desire, and that it may be in OWNER's best interests to seek advice from competent private professionals to discuss the legal and financial considerations for all of the possible design options available in the marketplace. OWNER acknowledges and accepts that OWNER may receive an inferior design from the DEPARTMENT because the DEPARTMENT has limited resources for detailed consulting and because the DEPARTMENT cannot propose specific proprietary products which may benefit OWNER because of its regulatory relationship with manufacturers. OWNER acknowledges and understands that OWNER may receive a more complete and well-advised design if OWNER seeks advice from private consultants because private consultants are not subject to the same resource restrictions and regulatory relationships as the DEPARTMENT.

Understood and Accepted:

[Full Legal Name of Owner or Owners]

Date

COMMONWEALTH OF VIRGINIA

CITY / COUNTY OF _____.

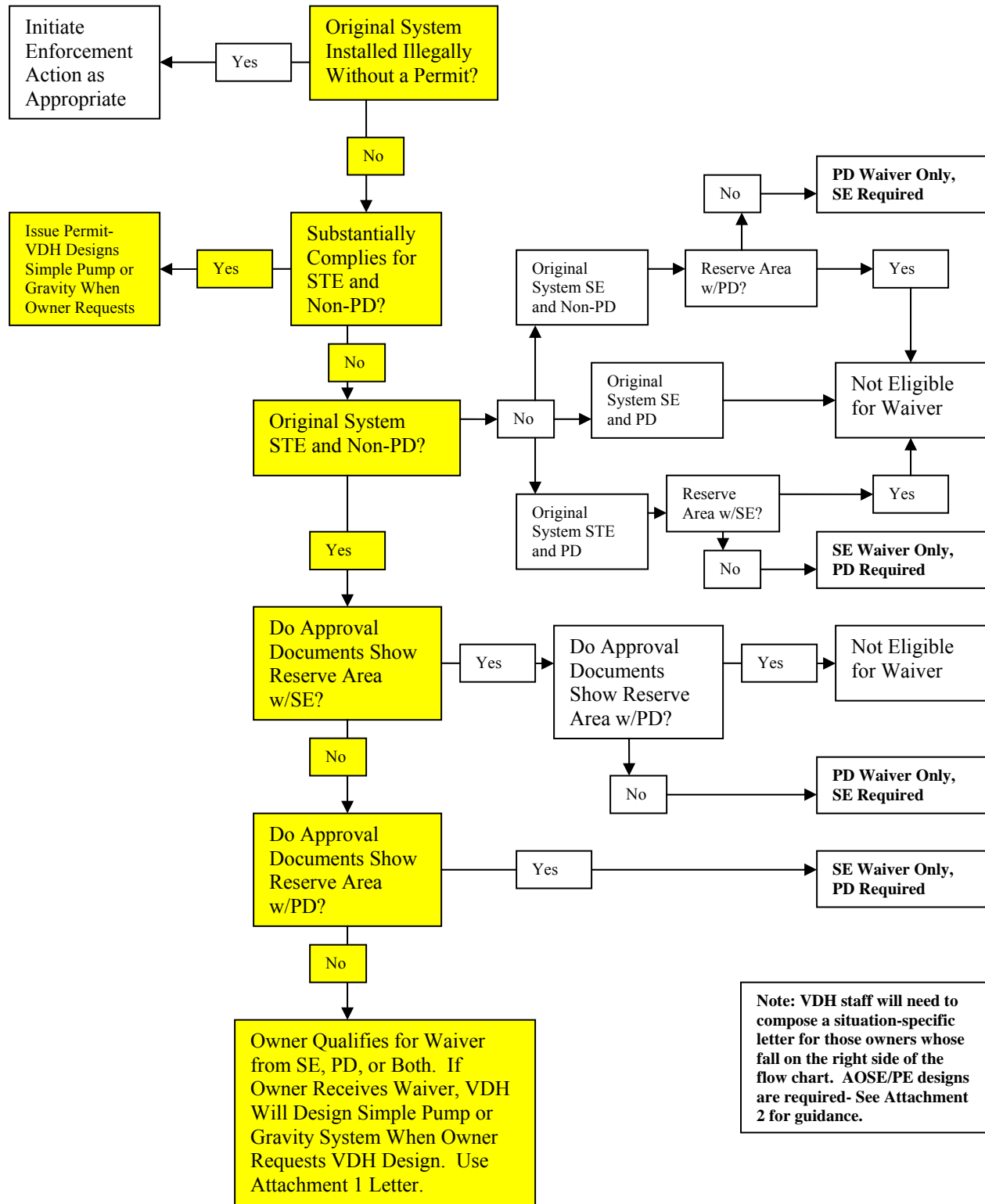
On this the _____ day of _____, 2004, appeared before me _____ and _____ who affirmed that he/they have the authority to enter into this AGREEMENT and that the signatures thereto are their own.

Notary Public

My Commission expires:

Attachment #4: Flow Chart

Note: Highlighted boxes indicate common paths for most requests



Note: VDH staff will need to compose a situation-specific letter for those owners whose fall on the right side of the flow chart. AOSE/PE designs are required- See Attachment 2 for guidance.



COMMONWEALTH of VIRGINIA

Karen Remley, MD, MBA, FAAP
State Health Commissioner

Department of Health
P O BOX 2448
RICHMOND, VA 23218

TTY 7-1-1 OR
1-800-828-1120

DATE: June 16, 2011

TO: District Health Directors
District Environmental Health Managers
Office of Environmental Health Services Staff
VPI/SU Soil Scientist

GMP #155

FROM: Karen Remley, M.D., M.B.A., F.A.A.P.
State Health Commissioner

THROUGH: Robert W. Hicks, Director
Office of Environmental Health Services

SUBJECT: Guidelines for Voluntary Upgrades to Onsite and Alternative
Discharging Sewage Systems.

Legislative Overview

Legislation approved in 2011 (Acts of Assembly, CH.394) amended Title 32.1 of the *Code of Virginia* as follows:

Be it enacted by the General Assembly of Virginia:

1. That § 32.1-164.1:1 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 32.1-164.1:3 as follows:

§ 32.1-164.1:1. Validity of certain septic tank permits.

A. Any septic tank permit issued shall be valid for a period of 18 months from the date of issuance unless there has been a substantial, intervening change in the soil or site conditions where the septic system is to be located. However, if a building permit has been obtained or building construction has commenced, the permit may be extended for an additional 18 months. Applicants shall be informed of the septic tank permit validity period and advised to apply only when ready to begin construction.

B. Further, whenever any onsite sewage system is failing, *or an owner has elected to voluntarily upgrade an onsite sewage system pursuant to § 32.1-164.1:3*, and it is on or serves real property consisting of not less than one nor more than four dwelling units and the Board's regulations ~~for repairing such failing system~~ impose (i) a requirement for treatment beyond the level of treatment provided by the existing onsite sewage system when operating properly or (ii) a new requirement for pressure dosing, the owner may request a waiver from such requirements. The Commissioner shall grant any request for such waiver, unless he finds that the ~~failing~~ system was installed illegally without a permit. Any such waivers shall be recorded in the land records of the clerk of the circuit court in the jurisdiction in which the property on which the relevant onsite sewage system is located. Except as provided in subsection C, waivers granted hereunder shall not be transferable and shall be null and void upon transfer or sale of the property on which the onsite sewage system is located. Additional treatment or pressure dosing requirements shall be imposed in such instances when the property is transferred or sold.

The owner of the relevant property shall disclose, in accordance with subsection D, that any operating permit for the onsite sewage system that has been granted a waiver authorized by this subsection shall be null and void at the time of transfer or sale of the property and that the Board's regulatory requirements for additional treatment or pressure dosing shall be required before an operating permit may be reinstated.

The provisions of this subsection shall apply only with respect to transfers by sale, exchange, installment land sales contract, or lease with option to buy residential real property consisting of not less than one nor more than four dwelling units, whether or not the transaction is with the assistance of a licensed real estate broker or salesperson.

C. The following are specifically allowed under the provisions of subsection B:

1. Transfers pursuant to court order including, but not limited to, transfers ordered by a court in administration of an estate, transfers pursuant to a writ of execution, transfers by foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.
2. Transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default, transfers by a trustee under a deed of trust pursuant to a foreclosure, or transfers by a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a foreclosure sale under a deed of trust or has acquired the real property by deed in lieu of foreclosure.
3. Transfers not for value by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.
4. Transfers between spouses resulting from a decree of divorce or a property settlement stipulation pursuant to the provisions of Title 20.
5. Transfers to or from any governmental entity or public or quasi-public housing authority or agency.

6. *Transfers pursuant to real estate purchase contracts where the owner has obtained a permit to voluntarily upgrade an onsite sewage system pursuant to § [32.1-164.1:3](#).*

7. Other transfers consistent with criteria established by the Board of Health and the Real Estate Board.

D. The owner of residential real property subject to subsection B shall deliver to the purchaser a written disclosure prior to the acceptance of a real estate purchase contract. The written disclosure statement shall be in a separate document, developed by the Real Estate Board on or before January 1, 2006. Prior to that time, it shall be the obligation of the owner of such residential real property to prepare the written disclosure statement and provide it to the purchaser as otherwise provided herein.

E. If the disclosure required by subsection B is delivered to the purchaser after the acceptance of the real estate purchase contract, the purchaser's sole remedy shall be to terminate the real estate purchase contract at or prior to the earliest of the following: (i) three days after delivery of the disclosure in person; (ii) five days after the postmark if the disclosure is deposited in the United States mail, postage prepaid, and properly addressed to the purchaser; (iii) settlement upon purchase of the property; (iv) occupancy of the property by the purchaser; (v) the execution by the purchaser of a written waiver of the purchaser's right of termination under this chapter contained in a writing separate from the real estate purchase contract; or (vi) the purchaser making written application to a lender for a mortgage loan where such application contains a disclosure that the right of termination shall end upon the application for the mortgage loan.

In order to terminate a real estate purchase contract when permitted by this subsection, the purchaser shall, within the time required by this chapter, give written notice to the owner either by hand delivery or by United States mail, postage prepaid, and properly addressed to the owner. If the purchaser terminates a real estate purchase contract in compliance with this chapter, the termination shall be without penalty to the purchaser, and any deposit shall be promptly returned to the purchaser. Any rights of the purchaser to terminate the contract provided by this chapter shall end if not exercised prior to the earlier of (i) the making of a written application to a lender for a mortgage loan where the application contains a disclosure that the right of termination shall end upon the application for the mortgage loan or (ii) settlement or occupancy by the purchaser, in the event of a sale, or occupancy, or in the event of a lease with option to purchase.

F. A real estate licensee representing an owner of residential real property as the listing broker shall have a duty to inform each such owner represented by that licensee of the owner's rights and obligations under subsection B. A real estate licensee representing a purchaser of residential real property or, if the purchaser is not represented by a licensee, the real estate licensee representing an owner of residential real estate and dealing with the purchaser shall have a duty to inform each such purchaser of the purchaser's rights and obligations under subsection B. Provided a real estate licensee performs those duties, the licensee shall have no further duties to the parties to a residential real estate transaction under this section, and shall not be liable to any party to a residential real estate transaction for a violation of subsection B or for any failure to disclose any information regarding any real property subject to subsection B.

G. For the purposes of this section:

"Acceptance" means the full execution of a real estate purchase contract by all parties; ~~and~~.

"Real estate purchase contract" means a contract for the sale, exchange, or lease with option to buy of real estate subject to this section.

H. The Real Estate Board shall enforce subsections D, E, and F pursuant to the provisions of Chapter 21 of Title 54.1 (§ [54.1-2100](#) et seq.).

§ [32.1-164.1:3](#). *Permits for voluntary system upgrades.*

Any owner desiring to voluntarily upgrade an onsite or alternative discharging sewage system that is not failing shall file an application, according to instructions from the Board, to obtain a construction permit to improve the system in accordance with the laws and regulations of the Board for repairing failing systems, provided such upgrade is for the purposes of reducing threats to the public health, or to ground and surface waters, including the reduction of nitrogen discharges.

The Department shall attach a statement to any permit issued pursuant to this section clearly stating that the upgrades specified in the permit are voluntary and not required by law. The Department may require the owner to indemnify and hold harmless the Department prior to the issuance of any such permit. Any permits issued pursuant to this section shall be subject to the provisions of § [32.1-164.1:1](#).

2. That an emergency exists and this act is in force from its passage.

Background

Owners of onsite and alternative discharging sewage systems may wish to upgrade those systems even when they are not failing. These types of requests typically arise during real estate transactions when a private inspector has indicated that an existing sewage system is not performing adequately, or when an owner desires to enhance the performance or extend the life of his system. Historically, the Virginia Department of Health (VDH) has been unable to issue permits for many of these owners because site conditions do not meet the minimum regulatory requirements and the repair clauses of the controlling regulations could not be invoked because the systems are not failing as defined by those regulations. The recent changes to the *Code of Virginia (Code)* allow and require VDH to issue construction permits for voluntary upgrades of non-failing systems using the same rules that would apply to the systems if they were failing.

Under the new legislation, a new system must comply with current regulations if possible. For onsite sewage systems, if such compliance is not possible, the permit must comply with Parts IV and V of the *Sewage Handling and Disposal Regulations* (12VAC5-610, SHDR) to the greatest extent possible. Where compliance with the SHDR would require the use of additional treatment or pressure dosing that was not required by the original construction permit, the owner may request a waiver to the use of additional treatment and/or pressure dosing. A waiver shall be granted if requested. Unlike waivers granted to repair failing onsite sewage systems, waivers granted for voluntary upgrades are not null and void upon sale of the property. All voluntary upgrades must be for the purposes of reducing threats to public health or to ground and surface waters.

Scope/Applicability

This policy provides guidance for VDH staff and the public for implementing the new provisions of Title 32.1 regarding voluntary upgrades of onsite and alternative discharging sewage systems. This policy applies to the voluntary upgrade of any legally installed onsite sewage disposal system or alternative

discharging sewage system that is not failing and serves four or fewer residential dwelling units. Upgrades shall be for the purposes of reducing threats to public health or to ground and surface waters. Dwellings may or may not be occupied. **There shall not be any proposed increase in flow or strength of sewage from what is currently permitted.** Any increase in sewage flow or strength requires that the owner modify an existing system, thereby making it ineligible for a permit under the voluntary upgrade statute. System modifications or upgrades that are required *for any reason*, including the authorization of building permits pursuant to *Code* § 32.1-165, building expansions, replacement of faulty components, and the repair of failing systems are not considered to be voluntary and *are not covered by this policy*.

Definition

Voluntary upgrade –A change to or replacement of an existing non-failing onsite or alternative discharging sewage disposal system without an increase in the permitted volume or strength of sewage in accordance with the regulations for repairing failing systems for the purposes of reducing threats to the public health or to ground and surface waters.

Procedure

Immediately, VDH will accept applications and designs for voluntary upgrades of onsite and alternative discharging sewage disposal systems. Applications must include a description of the nature of the voluntary upgrade requested.

Application fees will be waived following 12VAC5-620-80.C.

Applications will be reviewed following current VDH policy.

If necessary, voluntary upgrade applications will be granted an exception in accordance with 12VAC5-610-280.C.2. which requires the upgraded system serving a dwelling with indoor plumbing to comply with Parts IV and V of the SHDR to the greatest extent possible. Substantial compliance is required concerning setback distances to shellfish waters and drinking water wells unless the existing sewage system is already closer, in which case the upgraded system shall not be closer than the existing system. In determining whether a proposed upgrade complies with 12VAC5-280.C.2 (i.e. complies to the greatest extent possible) it is acceptable to include the existing non-failing drainfield in any calculation of required trench-bottom area.

If site conditions in any new soil absorption area require additional treatment or pressure dosing that was not a requirement of the original permit for the existing sewage system, the owner may request a waiver. (See Appendices A and B.)

Owners who apply for voluntary upgrade permits must indemnify and hold harmless VDH prior to the issuance of a construction permit. (See Appendix C)

All construction permits issued for voluntary upgrades shall have the following statement attached: “The upgrades specified in this construction permit are completely voluntary and not required by law.”

Appendix A

Date

Owner Name
Address
City, State Zip

Certified Mail

Dear [Owner]:

On [date], the [] County Health Department received your application for a voluntary upgrade sewage system permit which [did/did not] include supporting documentation from an Onsite Soil Evaluator (OSE) licensed by the Department of Professional and Occupational Regulation or a Professional Engineer (PE) licensed in Virginia. Based on the site and soil evaluations (copy attached), the conditions on your lot do not substantially comply with the minimum requirements of the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20, as amended July 1, 2000, the *Regulations*) for a Septic Tank Effluent (STE, *Regulations*, § 594) system for the following reasons:¹

(Choose one or more or add as appropriate.)

1. Insufficient depth to a limiting factor such as the seasonal water table, a restrictive horizon, rock, etc.
2. Insufficient horizontal separation from well, shellfish waters, etc....
3. Insufficient area of suitable soil.

In order to assure that public health and groundwater supplies are protected and that the risk for human disease transmission is minimized, the voluntary upgrade system for your property must have Treatment Level 2 Effluent (TL-2)² or Treatment Level 3 Effluent (TL-3)³, pressure dosing⁴, or both as part of your voluntary upgrade design unless these requirements are waived pursuant to Va. Code § 32.1-164.1:1. **[Note: modify this paragraph to fit the specific situation]** Va. Code § 32.1-164.1:1 provides an opportunity for you to receive a Waiver from the requirements for TL-2 or TL-3 effluent, pressure dosing, or both as long as your system was not installed illegally without a permit and as long as there was no requirement for these in your original permit and approval documents. I have determined that you are eligible for the Waiver if you choose to apply for it.

Employees of the Virginia Department of Health (VDH) typically do not design sewage systems with TL-2 or TL-3 effluent or pressure dosing because of the complexity of these designs and the wide variety of brand-name products and equipment available. These types of designs require extensive consultation between the owner and an OSE or PE to assure that the owner's needs are met. VDH does not have the resources to provide this extensive consultation and cannot choose specific products because of our regulatory relationship with all product manufacturers.

If you choose to receive the Waiver, VDH staff will design your system, at your request, as long as the requirements are relatively simple. If you do not want to receive the Waiver or if you do not want VDH to

¹ Septic Tank Effluent means "effluent characterized by a five-day biochemical oxygen demand between 120 and 200 mg/l; total suspended solids between 70 and 150 mg/l; fats, oils, and grease of 30 mg/l or less; and having no other toxic, hazardous, or constituents not routinely found in residential wastewater flows (*Regulations*, § 120)."

² Treatment Level 2 Effluent or TL-2 Effluent means effluent that has been treated to produce BOD₅ and TSS concentrations equal to or less than 30 mg/l each.

³ Treatment Level 3 Effluent or TL-3 Effluent means effluent that has been treated to produce BOD₅ and TSS concentrations equal to or less than 10 mg/l each.

⁴ Pressure Dosing means any system under the *Regulations* that requires a pump to pressurize a dosing system or device. Examples include drip dispersal, drip irrigation, manifold systems, mound systems, and low pressure distribution systems, etc. The definition does not include gravity systems, systems that pump to a higher elevation (distribution box with or without enhanced flow), or systems that require a pump because the ground surface over the soil absorption area is higher than the elevation of the lowest fixture in the house.

Owner' Name
Page 2

design your system, you will need to hire a qualified consultant to design the voluntary upgrade for your sewage system. Currently, VDH recognizes PEs for any type of system design and OSEs for certain system designs that do not require the practice of engineering. If you wish to receive the Waiver and **do not** want VDH to design the voluntary upgrade system, please complete the enclosed Waiver Request, Agreement, and Waiver document ("Waiver") and return it to this office with your OSE or PE plans for the voluntary upgrade system- **do not check the box requesting VDH to design your system**. If you want the Waiver and prefer that VDH design your system, simply complete the Waiver, check the design request box, and return it to our office (address noted on the letterhead). Your application must include a description of the nature of the upgrade you are requesting. As soon as we receive this information, we will process your application accordingly.

If you are signing the Waiver agreement, you will need to have your signature notarized. This is a legal document and you should review it carefully. You may wish to seek legal advice from an attorney to explain what the Waiver means. The law requires that you record the Waiver in the land records of the clerk of the circuit court in the jurisdiction in which your property is located. A Waiver may be transferred pursuant to real estate purchase contracts where the owner has obtained a permit to voluntarily upgrade an onsite sewage system pursuant to § 32.1-164.1:3.

If you want an OSE or PE to design your system under the Waiver, please remember to tell your consultant so that he can submit plans that incorporate your wishes. VDH will not change your expert's design and an OSE or PE must approve the system's final construction.

If you request the Waiver and ask for a VDH design, please remember that VDH does not have the resources to consider, inform, and consult with you about all of the design options available in the marketplace for a voluntary upgrade. There are hundreds of design options and potentially hundreds of products from which to choose within each possible design. Depending on your specific needs, please consider that VDH could design a system that would not meet your immediate or long-term interests because of our lack of resources to provide you with complete consultation services. VDH regulates the onsite sewage industry and approves (or denies) requests from product manufacturers- we cannot recommend one product over another just as we cannot design or recommend a specific proprietary pre-engineered system. Without being able to recommend certain products or proprietary designs because of our unique position as a regulator and having scarce resources to provide you with detailed consultation, it is possible that you could get an inferior design as compared to a private consultant. A private consultant would not necessarily have VDH's limitations and could propose specific products and provide more in depth consultation.

A system installed under a Waiver does not comply with the *Regulations* which were adopted by the Board of Health to provide the least intrusive methods to adequately protect groundwater supplies and public health; therefore VDH cannot advise you about liability issues should your system fail and adversely impact drinking water supplies.

You have the right to challenge the results of VDH's site and soil evaluations and the decisions we have made regarding your voluntary upgrade application (see the first and second paragraphs of this letter) by requesting an informal fact-finding conference (IFFC). Your written request for an IFFC must be received in this office within 30 days from your receipt of this letter. Please call me at (____) ____ - ____ if you have more questions.

Sincerely,

EHSS

Appendix B

VOLUNTARY UPGRADE
REQUEST FOR WAIVER, RELEASE, HOLD HARMLESS
and INDEMNIFICATION AGREEMENT, & WAIVER

This document, which includes a REQUEST FOR WAIVER, a RELEASE, HOLD HARMLESS, and INDEMNIFICATION AGREEMENT, and a WAIVER (collectively, "AGREEMENT"), is made and entered into this _____ Day of _____, 2011, by and between [insert full legal name of Owner or Owners], his/their HEIRS, SUCCESSORS, DEVISEES, AGENTS, ASSIGNS, REPRESENTATIVES and INTERESTS (hereinafter "OWNER") and the COMMONWEALTH OF VIRGINIA, acting through the Department of Health ("DEPARTMENT"), including, without limitation, any and all of its agencies, boards, and commissions, their insurer(s), officers, directors, employees, representatives, and agents, (hereinafter the COMMONWEALTH OF VIRGINIA).

WHEREAS, OWNER is the owner of that certain parcel described as _____ [**insert legal description of property**] containing, among other improvements, a structure consisting of _____ [describe occupied structure- i.e. four bedroom single family dwelling] (hereinafter "PROPERTY"); and

WHEREAS, the DEPARTMENT has determined that, under the *Sewage Handling and Disposal Regulations*, 12VAC5-610 ("REGULATIONS"), the voluntary upgrade system must provide Treatment Level 2 Effluent or Treatment Level 3 Effluent and/or Pressure Dosing in order to adequately protect public health and ground and surface water resources; and

WHEREAS, § 32.1- 164.1:1 of the *Code of Virginia* provides that whenever an owner has elected to voluntarily upgrade an onsite sewage disposal system pursuant to 32.1-164.1:3 and the regulations impose (i) a requirement for treatment beyond the level of treatment provided by the existing onsite sewage system when operating properly or (ii) a new requirement for pressure dosing, an owner may request a waiver (hereinafter "WAIVER") from the requirements of the REGULATIONS pertaining to Treatment Level 2 Effluent or Treatment Level 3 Effluent and/or Pressure Dosing for a voluntary upgrade system; and

WHEREAS, the State Health Commissioner shall grant such WAIVER, provided that the owner's existing system to be upgraded was not installed illegally without a permit; and

WHEREAS, the DEPARTMENT, as designee of the State Health Commissioner, has determined and OWNER affirms that the existing system to be upgraded currently serving the PROPERTY was not installed illegally without a permit, and

REQUEST FOR WAIVER

WHEREAS, OWNER, by executing this AGREEMENT, hereby requests that the State Health Commissioner grant the WAIVER provided at §32.1-164.1:1 B. of the *Code of Virginia* from the requirements for _____ Treatment Level 2 Effluent or _____ Treatment Level 3 Effluent and/or _____ Pressure Dosing.

WAIVER

NOW, THEREFORE, in exchange for the mutual promises contained herein, the parties agree as follows:

The WAIVER provided at §32.1-164.1:1 B. of the *Code of Virginia* is hereby granted and shall be effective 24 hours after OWNER provides certification to the DEPARTMENT that this AGREEMENT has been recorded in the land records of the Circuit Court having jurisdiction over the PROPERTY.

RELEASE, HOLD HARMLESS, and INDEMNIFICATION AGREEMENT

OWNER agrees to, and hereby does, release the COMMONWEALTH OF VIRGINIA from any and all claims, complaints, demands, actions, causes of action, liabilities, and obligations of whatever source or nature, whether administrative, legal or equitable, whether known or unknown, which OWNER now has or may have in the future relating to or arising from the WAIVER, including, without limitation, any and all claims due to the failure of any person to comply with federal, state, or local laws or regulations, claims under the Virginia Tort Claims Act, the Virginia Constitution, the United States Constitution and amendments thereto, or under common law. Furthermore, OWNER expressly releases the COMMONWEALTH OF VIRGINIA from any and all claims, actions, causes of action, or obligations under the Virginia Onsite Sewage Indemnification Fund, §32.1-164.1:01 of the *Code of Virginia*, that may arise from or be related to the repair, replacement, and/or operation of OWNER's onsite sewage disposal system pursuant to the WAIVER.

OWNER also agrees to hold harmless and indemnify the COMMONWEALTH OF VIRGINIA for any sum of money or judgment against the COMMONWEALTH OF VIRGINIA, as well as costs

and reasonable attorneys' fees incurred in the defense of any action arising out of or related to the WAIVER.

Severability. If any portion of this AGREEMENT is held to be void or deemed unenforceable for any reason, the remaining portion shall survive and remain in effect, unless the effect of such severance shall defeat the parties' intent as set forth herein, with the parties asking the Court to construe the remaining portions consistent with the expressed intent of the parties.

Entire Agreement. OWNER acknowledges that OWNER has had an opportunity to consult with an attorney concerning OWNER's rights and obligations. OWNER acknowledges that OWNER has had sufficient time and opportunity to consider this AGREEMENT with the COMMONWEALTH OF VIRGINIA, that OWNER has read this AGREEMENT, that OWNER fully understands and agrees to its terms and conditions, and that there exists no other promises, representations, inducements or agreements related to this AGREEMENT, except as specifically set forth herein. Furthermore, OWNER acknowledges that this constitutes the entire agreement between OWNER and the COMMONWEALTH OF VIRGINIA.

[Name]

District Health Director

REQUEST FOR DEPARTMENT TO DESIGN A VOLUNTARY UPGRADE SYSTEM

Check Here if this Section Applies.

OWNER hereby requests that an employee of the Virginia Department of Health design OWNER's sewage system. OWNER understands that the DEPARTMENT cannot serve as OWNER's consultant and that there are design choices that, depending upon OWNER's needs, may increase costs in the long run because of the requirement to upgrade OWNER's sewage system at the time the

PROPERTY is transferred. OWNER furthermore understands and affirms that the DEPARTMENT cannot provide such in-depth consulting as OWNER might need or desire, and that it may be in OWNER's best interests to seek advice from competent private professionals to discuss the legal and financial considerations for all of the possible design options available in the marketplace. OWNER acknowledges and accepts that OWNER may receive an inferior design from the DEPARTMENT because the DEPARTMENT has limited resources for detailed consulting and because the DEPARTMENT cannot propose specific proprietary products which may benefit OWNER because of its regulatory relationship with manufacturers. OWNER acknowledges and understands that OWNER may receive a more complete and well-advised design if OWNER seeks advice from private consultants because private consultants are not subject to the same resource restrictions and regulatory relationships as the DEPARTMENT.

Understood and Accepted:

[Full Legal Name of Owner or Owners]

Date

COMMONWEALTH OF VIRGINIA

CITY / COUNTY OF _____.

On this the _____ day of _____, 2011, appeared before me _____
and _____ who affirmed that he/they have the authority to enter into this
AGREEMENT and that the signatures thereto are their own.

Notary Public _____

ID# _____

My Commission expires:

Appendix C

VOLUNTARY UPGRADE
RELEASE, HOLD HARMLESS
and INDEMNIFICATION AGREEMENT

This document, which includes a RELEASE, HOLD HARMLESS, and INDEMNIFICATION AGREEMENT, (collectively, "AGREEMENT"), is made and entered into this _____ day of _____, 2011, by and between [insert full legal name of Owner or Owners], his/their HEIRS, SUCCESSORS, DEVISEES, AGENTS, ASSIGNS, REPRESENTATIVES and INTERESTS (hereinafter "OWNER") and the COMMONWEALTH OF VIRGINIA, acting through the Department of Health ("DEPARTMENT"), including, without limitation, any and all of its agencies, boards, and commissions, their insurer(s), officers, directors, employees, representatives, and agents, (hereinafter the COMMONWEALTH OF VIRGINIA).

WHEREAS, OWNER is the owner of that certain parcel described as _____ **[insert legal description of property]** containing, among other improvements, a structure consisting of _____ [describe occupied structure- i.e. four bedroom single family dwelling] (hereinafter "PROPERTY"); and

WHEREAS, the DEPARTMENT has determined that, under Permits for voluntary upgrades, §32.1-164.1:3 of the *Code of Virginia*, a construction permit (hereinafter "VOLUNTARY UPGRADE PERMIT") has been issued; and

WHEREAS, the DEPARTMENT, as designee of the State Health Commissioner has determined and OWNER affirms that the existing system to be upgraded currently serving the PROPERTY was not installed illegally without a permit.

RELEASE, HOLD HARMLESS, and INDEMNIFICATION AGREEMENT

OWNER agrees to, and hereby does, release the COMMONWEALTH OF VIRGINIA from any and all claims, complaints, demands, actions, causes of action, liabilities, and obligations of whatever source or nature, whether administrative, legal or equitable, whether known or unknown, which OWNER now has or may have in the future relating to or arising from the VOLUNTARY UPGRADE PERMIT, including, without limitation, any and all claims due to the failure of any person to comply with federal, state, or local laws or regulations, claims under the Virginia Tort Claims Act,

the Virginia Constitution, the United States Constitution and amendments thereto, or under common law. Furthermore, OWNER expressly releases the COMMONWEALTH OF VIRGINIA from any and all claims, actions, causes of action, or obligations under the Virginia Onsite Sewage Indemnification Fund, §32.1-164.1:01 of the *Code of Virginia*, that may arise from or be related to the repair, replacement, and/or operation of OWNER's onsite sewage disposal system pursuant to the VOLUNTARY UPGRADE PERMIT.

OWNER also agrees to hold harmless and indemnify the COMMONWEALTH OF VIRGINIA for any sum of money or judgment against the COMMONWEALTH OF VIRGINIA, as well as costs and reasonable attorneys' fees incurred in the defense of any action arising out of or related to the VOLUNTARY UPGRADE PERMIT.

Severability. If any portion of this AGREEMENT is held to be void or deemed unenforceable for any reason, the remaining portion shall survive and remain in effect, unless the effect of such severance shall defeat the parties' intent as set forth herein, with the parties asking the Court to construe the remaining portions consistent with the expressed intent of the parties.

Entire Agreement. OWNER acknowledges that OWNER has had an opportunity to consult with an attorney concerning OWNER's rights and obligations. OWNER acknowledges that OWNER has had sufficient time and opportunity to consider this AGREEMENT with the COMMONWEALTH OF VIRGINIA, that OWNER has read this AGREEMENT, that OWNER fully understands and agrees to its terms and conditions, and that there exists no other promises, representations, inducements or agreements related to this AGREEMENT, except as specifically set forth herein. Furthermore, OWNER acknowledges that this constitutes the entire agreement between OWNER and the COMMONWEALTH OF VIRGINIA.

[Name]

District Health Director

Understood and Accepted:

[Full Legal Name of Owner or Owners] _____
Date

COMMONWEALTH OF VIRGINIA

CITY / COUNTY OF _____.

On this the _____ day of _____, 2011, appeared before me _____
and _____ who affirmed that he/they have the authority to enter into this
AGREEMENT and that the signatures thereto are their own.

Notary Public _____

ID # _____

My Commission expires:
