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MEMORANDUM

To: District Directors
Environmental Health Managers
Environmental Health Supervisors
Environmental Health Specialists
Office of Environmental Health Services

From: Donald J. Alexander, Director
Division of Onsite Sewage and Water Services

Subject: Section 1.7 of the Sewage Handling and Disposal Regulations, Grandfather Clause

This memorandum contains the background and history, and some of the reasons for the change in the Department's policy regarding the issuance of permits under the grandfather clause. The Department's revised policy is contained in GMP #66.

CHAPTER I: INTRODUCTION

The reasons for this change in policy are factual and ideological. Factually, there have been several cases where the Sewage Handling and Disposal Appeals Review Board has interpreted the grandfather clause in a manner that is inconsistent with the department's 1989 policy. Simply stated, the Board has not recognized a distinction between expired and unexpired permits issued under prior regulations. Also, the Frederick County Circuit Court overturned a decision of the Board involving the grandfather clause, affirming the interpretation of this section as applying to all previously issued permits, not just those that have not expired. Finally, the record of public hearings held at the time of the adoption of the current regulations makes it clear that the intent of the grandfather clause was to evaluate previously issued permit and lots in approved subdivisions under the 1971 regulations, and not to subject those prior approvals to the criteria of the new regulations.

On an ideological level, the issuance of a permit is perceived as a commitment that onsite wastewater disposal is possible on a given site.

The new policy combines public health considerations, technological solutions, and legal decisions with a historical perspective and a resolve to honor the trust the public has placed in our word, and our permits and the commitments they represent. The balance on the side of public health, in some instances, may not be as strong as we would hope for when dealing with a previously unevaluated site. However, the balance in no way ignores the principles of environmental health. Pretreatment and modified designs are intended to make up for as much of the site limitations as possible. In cases were the risks are deemed excessive, permits will be denied. The solutions in many cases will not be the least expensive possible alternative, however, the Department will avoid what it believes to be unnecessarily expensive alternatives.

CHAPTER II: ABOUT THE 1971 REGULATIONS

(Why a grandfather clause at all?)

The 1982 Sewage Handling and Disposal Regulations were written, at least in part, to address severe problems with inconsistent applications of the 1971 regulations. The 1971 regulations contain little specific site criteria on which to base the issuance or denial of a permit. For example, lacking a specific standard, some areas of the state required water tables to be at least 30 inches from the ground surface. This requirement was by no means uniform between counties. There are counties where it can be documented that permits were issued with a water table at 18 inches from the surface.

Further, inadequate training, a general lack of scientific knowledge, together with meager quality control and supervision, allowed many permits to be issued in violation of even this liberal requirement. In some instances, it appears that individual sanitarians set individual standards. As a result, the intent of the 1971 regulations become less and less clear with each passing year. Hence, the need to define the criteria for the reissuance of previously issued permits.

When the 1982 regulations were adopted, the General Assembly typically reviewed regulations being promulgated by executive branch agencies. Suggestions were received from the General Assembly to include a grandfather clause in the new regulations. Apparently this was because citizens were concerned that their permits would be denied if the department applied the requirements of the new regulations to lots with previously issued permits and to lots in subdivisions already approved by the Department.

CHAPTER III: THE OLD POLICY

The Department's 1989 policy was based, in part, on a decision of the Sewage Handling and Disposal Appeals Review Board (Fravel, 1989). According to the Fravel decision and the policy, the Department would evaluate individual lots with previously issued permits which **had not expired** using the 1971 regulations; individual lots with previously issued permits that **had expired** were to be evaluated using the regulations in effect at the time of application.

This policy reflected the idea that permits expire, and with that expiration goes any commitment for a system. In retrospect, this may have been wishful thinking. To further complicate matters, this policy gave greater standing to a lot in an approved subdivision (without a permit) than to a lot with a previously issued permit.

CHAPTER IV: WHAT HAPPENED?

There are several reasons that the Department is revising this policy. Since the 1989 policy was adopted, the Appeals Review Board has reversed the position it took in the Fravel appeal on at least two occasions (Harrison 1992, Bayliss 1990). Essentially, the Board has found that any previously issued permit entitles an owner to standing under the grandfather clause, regardless of whether that permit has expired or even if a system was installed and used for many years.

The Frederick County Circuit Court reviewed the Bayliss appeal and affirmed the Board's position regarding previously issued permits. These events prompted us to look for clues to the intent of the grandfather clause at the time the regulations were adopted.

A. The appeal of C. Eugene Bayliss:

The Bayliss appeal involved multiple issues and was not limited to the grandfather clause. But, with respect to the grandfather clause, this is what happened:

At the formal hearing (October 24, 1990), the Department argued that the grandfather clause did not apply because the subdivision in which the lots were located was not approved by the Department (see § 1.7.A). Bayliss argued that he was entitled to consideration under the 1971 Regulations because permits had been previously issued. Bayliss did not produce copies of permits, but presented other evidence and testimony that permits had been issued.

The Board upheld the Department's finding that the lots were not grandfathered, not because of the subdivision issue, but because there was no record of the permits. In its order upholding the Department's denials, the Board stated, "More particularly, the Department is required to reissue earlier permits 'if the site, soil conditions and the design requirements are in accordance with the 1971 Regulations.'"

B. Bayliss' appeal to Circuit Court:

Bayliss appealed the Board's decision to the Frederick County Circuit Court in June, 1991 (C. Eugene Bayliss v. Virginia State Health Department Sewage Handling and Disposal Appeals Review Board, C91-2, 1991). Although the court did not specifically examine the grandfather clause, it did affirm the Appeal Board's interpretation that a previously issued permit provides standing under the grandfather clause. The Board and the Court both expressed opinions that where there is a previously issued permit, the Department must review an application under the 1971 regulations.

In Circuit Court Bayliss argued that the grandfather clause applied because the evidence showed that individual permits had been issued. In its trial brief the Board echoed its Order, saying, "permits granted prior to the effective date of the 1989 Regulations (Nov. 1, 1982) are grandfathered 'if site and soil conditions would not preclude the successful operation of the system.' More particularly, the Department is required to reissue grandfathered permits 'if the site, soil conditions and the design requirements are in accordance with the 1971 Regulations.'" The Board said, in effect, that if Bayliss had produced the permits he would have been considered under the 1971 regulations.

The Board and the Court did not disagree on the question of whether previously issued permits were grounds for consideration under the grandfather clause. Instead, the court disagreed with the Board as to whether or not the appellant had produced substantial evidence to prove that permits had been issued. The Circuit Court found that Bayliss had produced substantial evidence to prove that permits had been issued and remanded the case to the Board for, among other things, consideration under the 1971 regulations. The Board in turn remanded the applications to the department for consideration under the 1971 regulations.

The Board's position on the grandfather clause, as it relates to previously issued permits, affirmed by the Court,

conflicted with the Department's policy regarding individual lots with previously issued permits.

The decision of the Frederick County Circuit Court is binding only in that specific case. In cases where a copy of a permit does not exist, the Department is not bound (by that ruling) to consider other evidence of a permit's issuance to be proof that a permit was in fact issued. In order to implement the Department's policy on the grandfather clause, we will still require a copy of the actual permit.

C. The appeal of Ms. Eveleen Harrison:

The Appeals Review Board heard this appeal in April, 1992. Like the Bayliss appeal, it involved multiple issues, including the grandfather clause. In this case, a permit was issued for a sewage system in 1956 and a system was installed and operated for many years. An explosion damaged the house in 1981 and the ruins were later removed, leaving only a concrete slab. Harrison asserted that the lot fell under the grandfather clause. The Department disagreed, and argued that in order for the grandfather clause to apply, the permit must not be allowed to lapse. The Board found that the lot was grandfathered and reversed the Department's decision (on the grandfather issue) and remanded the application to the Department for evaluation under the 1971 regulations.

D. The Intent of the Grandfather Clause:

A public hearing was held on June 2, 1982 to receive public comment regarding proposed amendments to the Sewage Handling and Disposal Regulations, specifically including the grandfather clause. It is clear from the transcript of that hearing that the Department's intent was to re-issue those previously issued permits that comply with the 1971 regulations, and not to subject those applications to a review under the (then) new requirements of the Sewage Handling and Disposal Regulations. It is equally clear, however, that the intent of the grandfather clause was **never** to reissue every permit ever issued.

Eric Bartsch, Director of the Office of Water Programs, made it clear that the Department intended to evaluate sites holding previously issued permits, and that, "...the Department is not going to place itself in a position of having to revalidate a permit that has expired if the site

and soil conditions are not satisfactory for the installation of the system. If it is satisfactory for the installation of the system, we will revalidate it." Mr. Bartsch also made it clear that the expiration of a permit would not place it outside the requirements of the grandfather clause, "Even though they may have expired five years ago, we will honor those if we think the system will work. We will apply the criteria that was used at the time the permit was issued."

The transcript of the hearing was enlightening for two reasons. First, it showed that the intent of the grandfather clause was that the Department will reissue permits that comply with the 1971 regulations where site and soil conditions would not, "...preclude the successful operation of the system." Second, it showed that simply reissuing every permit ever issued would not offer a balanced position between public health protection and honoring previous permit commitments.

CHAPTER V: MOVING AHEAD

To realign our interpretation of the grandfather clause to be consistent with the decisions of the Appeals Review Board and the intent of the regulations, the Department is using what we hope is an innovative approach to reviewing grandfathered permits and previously approved subdivision lots. All sites will be reviewed for compliance with the 1982 regulations (current regulations). This is almost always in everyone's best interest because the current regulations contain standards of design, construction, and site criteria, etc. that, if met, provide protection for public health and the environment beyond what the 1971 regulations could provide. Also, the current regulations allow slower percolation rates, less drainfield area for a given percolation rate, and, in some instances, less stand-off to a water table.

CHAPTER VI: CONCLUSION

We are being propelled into an era where permits and approval letters issued by the Department represent virtually unending commitments to property owners. In this era, the health department is recognized as the expert in onsite sewage treatment and disposal. There is an implicit assumption, even an

obligation, that we will modify designs and optimize site characteristics to assure the safety and adequacy of sewage systems as technologies and regulations change.

Considering the ideological changes embodied in SB 415 (Senate Bill 415, 1994), and our renewed commitment to previously issued permits and subdivision approvals under the grandfather clause, our goal must be to honor as many of our previous commitments as is safely possible, using the best available technology and applying what we have learned in the almost 25 years since the 1971 regulations were adopted.