

GMP #66

MEMORANDUM

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

From: Donald R. Stern, M.D., M.P.H.
Acting State Health Commissioner

Date: April 19, 1995

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

**THIS POLICY IS EFFECTIVE IMMEDIATELY AND SUPERSEDES ALL
FORMER POLICIES, INCLUDING GMP #59, REGARDING § 1.7, THE
GRANDFATHER CLAUSE.**

PURPOSE: Section 1.7 of the Sewage Handling and Disposal
Regulations requires the Department to use the 1971 regulations
to evaluate lots in subdivisions approved prior to November 1,
1982. In addition, this section provides that permits granted
prior to November 1, 1982 will be reissued, **if the site and soil
requirements meet the 1971 regulations and if those conditions
would not preclude the successful operation of the system.** The
grandfather clause does not require the Department to issue, or
reissue, a permit for every grandfathered lot.

OVERVIEW: This policy is an interpretation of § 1.7 and
establishes a procedure for processing applications for permits
under the grandfather clause. It also contains an interpretation
of the site and soil criteria of the 1971 regulations. There may
be increased costs, as well as increased risk, with some of the
systems that may be permitted under the 1971 regulations and,
because these permits may not fully comply with current
standards, fair notice to owners and future owners is required.

A separate memorandum from Donald J. Alexander, Director for
the Division of Onsite Sewage and Water Services, details the
historical background for this policy and the rationale for the
present interpretation.

GOAL: The Department's goal is to serve the citizens of the

Commonwealth fairly and to conduct the affairs of the

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department with integrity and honesty. In dealing with grandfather situations, which essentially represent past commitments to our clients, the Department faces one of the greatest challenges in the onsite sewage program. With this challenge also comes the opportunity to serve, to educate, and to honor many of those past commitments.

First and foremost, the Department's goal is to issue a permit that complies with the current regulations. This assures that the public health benefits of the current regulations are realized to the fullest extent. Beyond this, the Department will strive to honor previous commitments to the greatest extent possible, within the framework of the 1971 regulations, while taking the opportunity to improve designs and optimize site characteristics for the benefit of public health and the environment.

DEFINITIONS:

1. **Previously issued permit-** any permit issued prior to November 1, 1982 in accordance with the regulations in effect at the time the permit was issued. There is no distinction between an expired permit and one that has been continually renewed.
2. **Grandfathered lot-**
 - A. any lot upon which no permit has been issued and which is in a subdivision approved by the Department prior to November 1, 1982, in accordance with a local subdivision ordinance. Individual lots may or may not have been evaluated.
 - B. any lot, parcel, or portion thereof with a previously issued permit (see definition above), or a specific, written approval from the Department.

PROCEDURES FOR ALL LOTS:

Generally, the procedure for handling applications for permits under the grandfather clause will be used only if a permit cannot be issued for a site on a lot under the current regulations. The following apply:

1.Applications and fees are received by the local health Department in the same manner that they are currently received.

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2.The environmental health specialist senior performs site and soil evaluations in accordance with current Department procedures and policies.

3.If the site and soil characteristics meet the minimum criteria of the current regulations, a permit is issued meeting the design requirements of the current regulations.

4.If a permit cannot be issued under the current regulations, the environmental health specialist senior will consider whether the lot is grandfathered. If it is grandfathered, this policy will be used to determine whether a permit may be issued under the 1971 regulations. The determination of grandfather status is an integral part of all denials.

5.For previously issued permits, reserve areas are not required unless there was a local requirement for reserve area at the time the permit was issued **and** if the permit included a reserve area. For subdivision lots, reserve areas are not required unless there was a local requirement. Reserve areas are strongly encouraged wherever there is sufficient area.

6.The current regulations should be used to determine wastewater design flow and system design.

7.Special designs, such as low pressure distribution or additional pretreatment, may be required and must meet either the requirements of the 1971 regulations or the current regulations for design and construction. The minimum trench installation depth may be reduced to 12 inches, with at least 6 inches of topsoil or appropriate cover material. Cover material should be mounded to enhance surface drainage and stabilized with grass or other vegetation.

8.Permits issued under the grandfather clause shall be recorded and indexed in the grantor index under the holder's name in the land records of the clerk of the circuit court having jurisdiction over the site of the system. The appropriate statement from Attachment #1 shall be included on the permit.

ADDITIONAL PROCEDURES FOR LOTS IN APPROVED SUBDIVISIONS:

1. A search of the county records should be sufficient to determine if there is a signature on the recorded

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subdivision plat, or a letter from the responsible Health Department official to the responsible local government official, indicating that the subdivision was approved by the Department under a local ordinance.

2. Applications are evaluated using the criteria of the 1971 regulations and a permit is issued if the site and soil conditions meet these criteria. Special designs may be required.
3. If a permit for a system meeting the minimum criteria of the 1971 regulations cannot be issued, the minimum depth from the surface to seasonal water table, rock, and impervious strata may be reduced by 6 inches if pretreatment is provided using a sand filter.
4. If a permit cannot be issued using either 2 or 3 above, the application shall be denied. The local health Department shall send a letter of denial to both the owner of the lot and the owner of the subdivision by certified mail, return receipt requested. The denial letter must state the reasons why the application is denied under the current regulations and the 1971 regulations pursuant to § 1.7.

ADDITIONAL PROCEDURES FOR LOTS WITH PREVIOUSLY ISSUED PERMITS:

1. A search of the records of the local health Department and a documented inquiry to the applicant should be sufficient to determine if there is a previously issued permit.
2. Applications are to be evaluated using the criteria of the 1971 regulations. Where the site and design requirements of the previously issued permit meet the minimum criteria of the 1971 regulations, the previously issued permit should be reissued. Special designs may be required.
3. Where the site and design requirements of the previously issued permit are not in compliance with the 1971 regulations, but a system meeting the requirements of the 1971 regulations can be placed on the site, the permit shall be reissued to contain the corrected design. Special designs may be required.

- 4.If a permit for a system meeting the minimum criteria of the 1971 regulations cannot be issued, the minimum

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depth from the surface to seasonal water table, rock, and impervious strata may be reduced by 6 inches if pretreatment is provided using a sand filter.

- 5.If a permit cannot be issued using either 2, 3, or 4 above, the application shall be denied. The denial letter must state the reasons why the application is denied under the current regulations and the 1971 regulations pursuant to § 1.7.

INTERPRETATION OF THE MINIMUM SITE AND SOIL REQUIREMENTS OF THE 1971 REGULATIONS:

The following criteria, together with the text of the 1971 regulations (see Attachment #2), shall be used to implement this policy. These criteria are intended to establish the minimum site and soil conditions of the 1971 regulations that the Department believes would not preclude the successful operation of a system in most cases. This procedure supersedes all local applications of the 1971 regulations and shall be used statewide to determine if a permit is to be issued under the 1971 regulations.

- A.Percolation rate \leq 120 min/inch (should use current regulations for sizing)
- B.Depth to rock/impervious strata 24" below surface
- C.Depth to seasonal water table 24" below surface
- D.Setback distances as listed in the 1971 regulations

ADDITIONAL NOTES:

- 1.The definition of rock shall be as applied under the 1971 regulations and the Sewage Handling and Disposal Regulations:

"...any material that is continuous and cannot be penetrated with a hand auger or posthole digger."

- 2.If a grandfathered lot is found to have a site that is suitable for a mound system under § 4.31 of the

Sewage Handling and Disposal Regulations and one that is suitable under the 1971 regulations as interpreted under this policy, it

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- shall not be mandatory to install the mound system. The decision as to which type of system to install in this case should be based on site and soil conditions.
3. The site and soil criteria of the 1971 regulations allow the installation of systems in soils and in situations that do not provide the same level of public health protection as the current regulations. Therefore, special designs may be required on a case by case basis by the local or district Health Department where it finds the site and soil conditions meet the interpretation above, and where the special design is necessary to enhance the functioning of a system, overcome a specific site limitation, or to reduce the risk to public health.
 4. A certification letter may be issued in lieu of a permit under this policy. The appropriate statement from Attachment #1 shall be incorporated into the certification letter. Also, the local health department must document in its files any special design requirements upon which the issuance of the certification is based (i.e. pretreatment, low pressure distribution, etc.). A copy of this documentation may be attached to the certification letter or provided to the owner upon request. All certification letters for grandfathered lots must be recorded.

ATTACHMENT #1

I. Lot in approved subdivision

This permit is issued pursuant to § 1.7, the "grandfather clause," of the Sewage Handling and Disposal Regulations (current regulations). The grandfather clause requires the Health Department to use the 1971 regulations to evaluate lots in subdivisions that were approved by the Department prior to November 1, 1982. The subdivision in which this lot is located was approved by the health Department on date.

The site and soil conditions on this lot do not meet the minimum criteria established under the current regulations, however, they do meet the minimum criteria of the 1971 regulations. This sewage system may have increased costs due to design requirements imposed by the Department in order to protect public health and the environment.

The issuance of this permit is not an assurance by the Department that the system will function for any specified period of time. If the system malfunctions, the owner will be required to make any necessary repairs, and initiate corrective actions necessary to protect public health; the owner may be subject to enforcement action by the Department if necessary to secure any repair or corrective action.

II. Lot with previously issued permit or specific written approval

This permit is issued pursuant to § 1.7, the "grandfather clause," of the Sewage Handling and Disposal Regulations (current regulations). The grandfather clause requires the Health Department to reissue permits issued prior to November 1, 1982, if the site, soil conditions, and the design requirements are in compliance with the 1971 regulations. A construction permit or specific written approval for this lot was issued on date.

The site and soil conditions on this lot do not meet the minimum criteria established under the current regulations, however, they do meet the minimum criteria of the 1971 regulations. This sewage system may have increased costs due to design requirements imposed by the Department in order to protect public health and the environment.

The issuance of this permit is not an assurance by the Department that the system will function for any specified period of time. If the system malfunctions, the owner will be required to make any necessary repairs, and initiate corrective actions necessary to protect public health; the owner may be subject to enforcement action by the Department if necessary to secure any repair or corrective action.

ATTACHMENT #2: 1971 Regulations

9/18/2007
Rescinded



COMMONWEALTH of VIRGINIA

Department of Health

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ACTING STATE HEALTH COMMISSIONER

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April 19, 1995

MEMORANDUM

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

From: Donald J. Alexander, Director *Donald J. Alexander*
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.

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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 where 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.

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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.

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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,

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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

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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

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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.

9/18/2007 rescinded