

Guidelines for Meeting through Electronic Communications in Non-Emergency and Emergency Situations

The purpose of this document is to provide some basic information about meetings held through electronic communications means as per §2.2-3708.2 and §2.2-3708.3 as they apply to Virginia's Soil and Water Conservation Districts (SWCDs). Prior to September 1, 2022, all provisions for electronic communications meetings were found in §2.2-3708.2. Effective September 1, 2022, provisions for electronic communications meetings, including the new provision for all-virtual public meetings, can be found in §2.2-3708.2 and §2.2-3708.3. This document addresses provisions effective September 1, 2022. Please reference §2.2-3708.2 and §2.2-3708.3 for the full code reference. For a more thorough and detailed explanation of this section of FOIA and for sample electronic communication participation policy language, please reference the Virginia FOIA Council's document titled *Electronic Meetings Under the Virginia Freedom of Information Act* which can be found at <https://foiacouncil.dls.virginia.gov/ref/E-Meetings%20Guide%202023.docx>.

General Overview of the Use of Electronic Communications Meetings

❖ What are the three general categories of electronic meetings?

- 1) Remote Participation: “...*participation by an individual member of a public body by electronic communication means in a public meeting where a quorum of the public body is otherwise physically assembled.*”
- 2) All-Virtual Public Meetings: “...a public meeting (i) conducted by a public body, other than those excepted pursuant to subsection C of § 2.2-3708.3, using electronic communication means, (ii) during which *all members of the public body who participate do so remotely rather than being assembled in one physical location*, and (iii) to which public access is provided through electronic communication means”.
- 3) State of Emergency: Requires declaration by the Governor or the locality where the public body is located.

Code § 2.2-3701; § 2.2-3708.2; § 2.2-3708.3 (Emphasis Added).

❖ Are there any specific requirements that need to be included in minutes taken at electronic communications meetings?

Yes. “...for electronic communications meetings conducted in accordance with § 2.2-3708.2 or § 2.2-3708.3, minutes shall include:”

- 1) “...the identity of the members of the public body who participated in the meeting through electronic communication means,”
- 2) “...the identity of the members of the public body who were physically assembled at one physical location,” and

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- 3) "...the identity of the members of the public body who were not present at the location identified in clause (2) but who monitored such meeting through electronic communication means."

Code § 2.2-3707(I).

❖ **Are there any prohibitions on using electronic communications in order to increase public participation in public meetings?**

No. A public body is encouraged to provide additional ways for the public to participate in meetings beyond that of the physically assembled location and avenues for public comment (Code § 2.2-3708.3(A)). The provisions in §2.2-3708.3 do not apply to the participation of the general public but to the participation of members of the public body.

❖ **Are there any requirements that must be met before a public body can utilize the remote participation and the all-virtual public meeting provisions to address the need for meeting through electronic communications as noted in §2.2-3708.3(B) and in §2.2-3708.3(C), respectively?**

Yes. The public body must have a policy in place as noted in the code reference below.

Code § 2.2-3708.3(D):

"Before a public body uses all-virtual public meetings as described in subsection C or allows members to use remote participation as described in subsection B, the public body shall first adopt a policy, by recorded vote at a public meeting, that shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting..."

It is important to note that if a member uses electronic communications to join a meeting and the public body has not yet adopted a written electronic communications meeting participation policy, then the member is limited to a listening and/or watching role only. The member cannot participate in discussion or vote since FOIA does not allow for application of the provision until the public body has formally adopted a written policy allowing for and governing electronic communications participation.

❖ **Are there any specific requirements that must be met with the policy?**

Certainly!

"...The policy shall:

- 1) "Describe the circumstances under which an all-virtual public meeting and remote participation will be allowed and the process the public body will use for making requests to use remote participation, approving or denying such requests, and creating a record of such requests;" and
- 2) "Fix the number of times remote participation for personal matters or all-virtual public meetings can be used per calendar year, not to exceed the limitations set forth in subdivisions B 4 and C 9."

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Code § 2.2-3708.3(D)(1-2).

❖ Do the remote participation and all-virtual public meeting provisions apply to committees?

Absolutely! However, in order for committees to utilize this provision, each respective committee may adopt its own policy, or the public body may adopt a policy on behalf of its committees and denote the applicability of the policy to the committees in the committees' use of the remote participation and all-virtual public meeting provisions. This adoption and the specific applicability of the policy to committees must be recorded explicitly in the minutes. General approval adoption of a policy does not automatically extend to committees...

Code § 2.2-3708.3(D):

“Any public body that creates a committee, subcommittee, or other entity however designated of the public body to perform delegated functions of the public body or to advise the public body may also adopt a policy on behalf of its committee, subcommittee or other entity that shall apply to the committee, subcommittee, or other entity’s use of individual remote participation and all-virtual public meetings.”

Remote Participation Provision:

❖ When can a member of a public body use the remote participation provision?

The Code of Virginia allows a public body to use this provision when:

- 1) "The member has a temporary or permanent disability or other medical condition that prevents the member’s physical attendance;”
- 2) “A medical condition of a member of the member’s family requires the member to provide care that prevents the member’s physical attendance;”
- 3) “The member’s principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting;”
- 4) The member is unable to attend the meeting due to a personal matter and identifies with specificity the nature of the personal matter. However, the member may not use remote participation due to personal matters more than two meetings per calendar year or 25 percent of the meetings held per calendar year rounded up to the next whole number, whichever is greater.”

Code §2.2-3708.3(B)(1-4).

❖ Is a quorum required in order for a member to use this provision?

Yes! This is stated in the definition of “remote participation” as noted in the code reference below.

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Code § 2.2-3701:

““Remote participation” means participation by an individual member of a public body by electronic communication means in a public meeting where a quorum of the public body is otherwise physically assembled.”

❖ **Is advance notice from the requesting member required?**

Yes, the member must notify the public body chair of the member’s inability to attend the meeting due to one of the circumstances listed above.

Code § 2.2-3708.3(B):

“Individual members of a public body may use remote participation instead of attending a public meeting in person if, in advance of the public meeting...the member notifies the public body chair that...”

❖ **Does the reason need to be cited in the minutes?**

Yes! The Code prescribes a certain level of documentation that is required to be in the public meeting minutes. Please note that the specific disability or medical condition does not have to be recorded in the minutes.

Code § 2.2-3708.3(B):

“...If participation is approved pursuant to subdivision 1 or 2, the public body shall also include in its minutes the fact that the member participated through electronic communication means due to a (i) temporary or permanent disability or other medical condition that prevented the member’s physical attendance or (ii) family member’s medical condition that required the member to provide care for such family member, thereby preventing the member’s physical attendance. If participation is approved pursuant to subdivision 3, the public body shall also include in its minutes the fact that the member participated through electronic communication means due to the distance between the member’s principal residence and the meeting location. If participation is approved pursuant to subdivision 4, the public body shall also include in its minutes the specific nature of the personal matter cited by the member.”

❖ **Does the remote location of the member using the provision in subsection B have to be open to the public?**

No, the remote location of the member does not have to be open to the public but should be recorded in the minutes.

Code § 2.2-3708.3(B):

“If participation by a member through electronic communication means is approved pursuant to this subsection, the public body holding the meeting shall record in its minutes the remote location from which the member participated; however, the remote location need not be open to the public and may be identified in the minutes by a general description.”

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❖ **What if the request for use of the provision in subsection B is disapproved?**

If the request is disapproved, the disapproval shall be recorded in the minutes with specificity. The member may still call into the meeting but only as a listener rather than a participant and may not make motions, vote or participate.

Code § 2.2-3708.3(B):

“If a member’s participation from a remote location pursuant to this subsection is disapproved because such participation would violate the policy adopted pursuant to subsection D, such disapproval shall be recorded in the minutes with specificity.”

All-Virtual Public Meeting Provision:

❖ **How often can a public body use the all-virtual meeting provision?**

Per the Code of Virginia, a public body cannot convene an all-virtual public meeting:

- 1) “...more than two times per calendar year or 25 percent of the meetings held per calendar year rounded up to the next whole number, whichever is greater;” or
- 2) “...consecutively with another all-virtual public meeting”

Code §2.2-3708.3(C)(9)

❖ **Is a quorum required in order for a member of a public body to use this provision?**

No! This is stated in the definition of “all-virtual public meeting” as noted in the code reference below.

Code § 2.2-3701:

““All-virtual public meeting” means a public meeting...during which all members of the public body who participate do so remotely rather than being assembled in one physical location...”

❖ **Are there any special logistical requirements associated with this provision?**

Yes, there are 10 requirements that must be met by a public body when using this provision.

- 1) “An indication of whether the meeting will be an in-person or all-virtual public meeting is included in the required meeting notice along with a statement notifying the public that the method by which a public body chooses to meet shall not be changed unless the public body provides a new meeting notice in accordance with the provisions of §2.2-3707;”
- 2) “Public access to the all-virtual public meeting is provided via electronic communication means;”
- 3) “The electronic communication means used allows the public to hear all members of the public body participating in the all-virtual public meeting and, when audio-visual technology is available, to see the members of the public body as well;”

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- 4) “A phone number or other live contact information is provided to alert the public body if the audio or video transmission of the meeting provided by the public body fails, the public body monitors such designated means of communication during the meeting, and the public body takes a recess until public access is restored if the transmission fails for the public;”
- 5) “A copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of the public body for a meeting is made available to the public in electronic format at the same time that such materials are provided to members of the public body;”
- 6) “The public is afforded the opportunity to comment through electronic means, including by way of written comments, at those public meetings when public comment is customarily received;”
- 7) “No more than two members of the public body are together in any one remote location unless that remote location is open to the public to physically access;”
- 8) “If a closed session is held during an all-virtual public meeting, transmission of the meeting to the public resumes before the public body votes to certify the closed meeting as required by subsection D of §2.2-3712;”
- 9) “The public body does not convene an all-virtual public meeting (i) more than two times per calendar year or 25 percent of the meetings held per calendar year rounded up to the next whole number, whichever is greater, or (ii) consecutively with another all-virtual public meeting; and”
- 10) “Minutes of all-virtual public meetings held by electronic communication means are taken as required by §2.2-3707 and include the fact that the meeting was held by electronic communication means and the type of electronic communication means by which the meeting was held...”

Code §2.2-3708.3(C)(1-10).

❖ **What if a member’s use of the provision in subsection C is disapproved?**

The disapproval shall be recorded in the minutes with specificity. The member may still call into the meeting but only as a listener rather than a participant and may not make motions, vote or participate.

Code § 2.2-3708.3(C)(10):

“If a member’s participation from a remote location pursuant to this subsection is disapproved because such participation would violate the policy adopted pursuant to subsection D, such disapproval shall be recorded in the minutes with specificity.”

State of Emergency Provision:

❖ **What meeting provision is in place for public bodies in emergency situations?**

“Any public body...may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a

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state of emergency...or the locality in which the public body is located has declared a local state of emergency...”

Code § 2.2-3708.2.

❖ **Are there specific applications of this provision?**

Yes. A public body cannot simply use this provision to hold an electronic meeting. It must meet two requirements set forth in the Code.

- 1) “...the catastrophic nature of the declared emergency makes it impractical or unsafe to assemble a quorum in a single location and...”*and*
- 2) “...the purpose of the meeting is to provide for the continuity of operations of the public body or the discharge of its lawful purposes, duties, and responsibilities.”

“The provisions of this section shall be applicable only for the duration of the emergency declared...”

Code § 2.2-3708.2.

❖ **Are there any requirements that need to be met when using this provision?**

Of course! Per the Code, “The public body convening a meeting in accordance with this section shall:

- 1) Give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body conducting the meeting;
- 2) Make arrangements for public access to such meeting through electronic communication means, including videoconferencing if already used by the public body;
- 3) Provide the public with the opportunity to comment at those meetings of the public body when public comment is customarily received; and
- 4) Otherwise comply with the provisions of this chapter.

Code § 2.2-3708.2(1-4).

❖ **Are there any specific notations that should be included in the minutes when using this provision?**

Yes. “The nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held shall be stated in the minutes.”

Code § 2.2-3708.2.

❖ **Does a SWCD need to have a policy in place in order to utilize this provision?**

No, an adopted electronic communications policy is not required when using the electronic communications provision for emergency situations.

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