



## Periodic Review / Retain Regulation Agency Background Document

<b>Agency name</b>	State Air Pollution Control Board
<b>Virginia Administrative Code (VAC) citation</b>	9VAC5-80: Article 3, Federal Operating Permits for Acid Rain Sources Article 4, Insignificant Activities Article 5, State Operating Permits
<b>Regulation title</b>	Permits for Stationary Sources
<b>Document preparation date</b>	March 15, 2013

This form is used when the agency has done a periodic review of a regulation and plans to retain the regulation without change. This information is required pursuant to Executive Orders 14 (2010) and 58 (1999).

### Legal basis

*Please identify the state and/or federal legal authority for the regulation, including (1) the most relevant law and/or regulation, and (2) promulgating entity, i.e., agency, board, or person.*

Section 10.1-1308 of the Virginia Air Pollution Control Law (Title 10.1, Chapter 13 of the Code of Virginia) authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling and prohibiting air pollution in order to protect public health and welfare.

#### Promulgating Entity

The promulgating entity for the regulations is the State Air Pollution Control Board.

#### Federal Requirements - For Articles 3 and 4

Title V of the federal Clean Air Act requires the states to develop operating permit programs to cover all stationary sources defined as major by the Act. Permits issued under these programs must set out standards and conditions that cover all the applicable requirements of the Act for each emission unit at each individual stationary source. The federal regulations under 40 CFR Part 70 specify the minimum Title V elements that must be included in state operating permit programs.

Section 502(a) of the Act and 40 CFR 70.3(a) require that the following sources be covered under the provisions of any Title V program:

1. Affected sources as defined under the acid deposition provisions of Title IV of the Act.
2. Major sources, defined as follows:
  - a. any source of air pollutants with the potential to emit 100 tons per year (tpy) or more of any pollutant;
  - b. in ozone nonattainment areas designated as serious, any source emitting 50 tpy or more of volatile organic compounds (VOCs) or nitrogen oxides (NO<sub>x</sub>); for severe or extreme nonattainment areas, sources emitting 25 and 10 tpy or more of VOCs or NO<sub>x</sub>; and
  - c. any source with the potential to emit 10 tpy of any hazardous air pollutant or 25 tpy of any combination of hazardous air pollutants regulated under § 112 of the Act.
3. Any other source, including an area source, subject to a hazardous air pollutant standard under § 112.
4. Any source subject to new source performance standards under § 111.
5. Any source required to have a preconstruction review permit pursuant to the requirements of the prevention of significant deterioration program under Title I, Part C of the Act or the nonattainment area new source review program under Title I, Part D of the Act.
6. Any other stationary source in a category that EPA designates in whole or in part by regulation, after notice and comment.

Section 502(b) of the Act and 40 CFR 70.4(b) and other provisions of 40 CFR Part 70, as noted, set out the minimum elements that must be included in each program, as follows:

1. Requirements for permit applications, including standard application forms, compliance plans and criteria for determining the completeness of applications (40 CFR 70.5).
2. Monitoring and reporting requirements (40 CFR 70.6(a)(3)).
3. A permit fee system (40 CFR 70.9).
4. Provisions for adequate personnel and funding to administer the program.
5. Authority to issue permits and assure that each permitted source complies with applicable requirements under the Act (40 CFR 70.7(a)(1)).
6. Authority to issue permits for a fixed term, not to exceed five years (40 CFR 70.6(a)(2)).
7. Authority to assure that permits incorporate emission limitations in an applicable implementation plan (40 CFR 70.6(a)(1)).
8. Authority to terminate, modify, or revoke and reissue permits for cause and a requirement to reopen permits in certain circumstances (40 CFR 70.7).
9. Authority to enforce permits, permit fees, and the requirement to obtain a permit, including civil penalty authority in a maximum amount of not less than \$10,000 per day, and appropriate criminal penalties (40 CFR 70.11).

10. Authority to assure that no permit will be issued if EPA objects to its issuance in a timely fashion (40 CFR 70.8(c) and (e)).

11. Procedures for expeditiously determining when applications are complete, processing applications, public notice, expeditious review of permit actions, and state court review of the final permit action (40 CFR 70.5 (a)(2) and 70.7 (h)).

12. Authority and procedures to provide that the permitting authority's failure to act on a permit or renewal application within the deadlines specified in the Act shall be treated as a final permit action solely to allow judicial review by the applicant or anyone also who participated in the public comment process to compel action on the application.

13. Authority and procedures to make available to the public any permit application, compliance plan, permit emissions or monitoring report, and compliance report or certification, subject to the confidentiality provisions of § 114(c) of the Act; the contents of the permit itself are not entitled to confidentiality protection.

14. Provisions to allow operational flexibility at the permitted facility.

Section 503(b) of the Act and 40 CFR 70.5(c) (8) and (9) require that applicants submit with the permit application a compliance plan describing how the source will comply with all applicable requirements of the Act. The compliance plan must include a schedule of compliance and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every six months. The permittee must also certify that the facility is in compliance with any applicable requirements of the permit no less frequently than annually. The permittee must also promptly report any deviations from permit requirements to the permitting authority.

Section 503(d) of the Act and 40 CFR 70.7(b) specify that a source's failure to have an operating permit shall not be a violation of the Act if the source owner submitted a timely and complete application for a permit and if he submitted other information required or requested to process the application in a timely fashion.

Section 503(e) of the Act and 40 CFR 70.4(b)(3)(viii) require that a copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this title, shall be available to the public. Any information that is required of an applicant to submit and which is entitled to protection from disclosure under § 114 (c) of the Act can be submitted separately.

Section 504 of the Act and 40 CFR 70.6(a)-(c) specify what is to be included in each operating permit issued under this program. These provisions require each permit to include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every six months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements, including the requirements of any state implementation plan.

Section 504(b) of the Act indicates that the EPA administrator may prescribe, by rule, procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated by the Act. Continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance.

Section 504(c) of the Act and 40 CFR 70.6(a)(3) require that each permit issued under the program shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to applicable regulations issued under § 504(b) and to any other requirements specified in federal regulation.

Any report required to be submitted by a permit issued to a corporation shall be signed by a responsible corporate official, who shall certify its accuracy.

Section 504(d) of the Act and 40 CFR 70.6(d) allow the state permitting authority to issue a general permit covering numerous similar sources after notice and opportunity for public hearing. Any general permit shall comply with all program requirements. Any source governed by a general permit regulation must still file an application under this program.

Section 504(e) of the Act and 40 CFR 70.6(e) allow the state permitting authority to issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of the Act at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under the Act. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location.

Section 504(f) of the Act and 40 CFR 70.6(f) provide a permit shield for permittees. This section specifies that compliance with a permit issued in accordance with Title V shall be deemed in compliance with § 502, or with the program. Unless otherwise provided by the EPA administrator and by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of the Act that relate to the permittee, if the permit includes the applicable requirements of those provisions, or if the permitting authority makes a determination relating to the permittee that such other provisions are not applicable and the permit includes the determination or a concise summary.

Section 503(c) of the Act and 40 CFR 70.5(a)(1) specify that all sources required to be permitted under a Title V program are required to submit an application within 12 months after the date EPA approves the state's program. The state permitting authority may specify an earlier date for submitting applications. The state permitting authority must establish a phased schedule for acting on permit applications submitted within the first full year after program approval, and must act on at least one-third of the permits each year over a period not to exceed three years after approval of the program. After acting on the initial application, the permitting authority must issue or deny a complete application within 18 months after receiving that application.

Section 505(a) of the Act and 40 CFR 70.8(a) require the state permitting authority to send EPA a copy of each permit application and each permit proposed to be issued. For each permit application or proposed permit sent to EPA § 505(a) and 40 CFR 70.8(b) also require the permitting authority to notify all states whose air quality may be affected and that are contiguous to the state in which the emission originates, or that are within 50 miles of the source. This notice must provide an opportunity for these affected states to submit written recommendations respecting the issuance of the permit and its terms and conditions. § 505(b) and 40 CFR 70.8(c) provide for EPA objections to any permit which contains provisions that are not in compliance with the requirements of the Act or with the applicable implementation plan. This section also provides that any person may petition the EPA administrator within 60 days after the expiration of the 45-day review period, if no objections were submitted by the EPA administrator. Furthermore, the state permitting authority may not issue the permit if the EPA administrator objects to its issuance unless the permit is revised to meet the objection. If the state permitting authority fails to revise and resubmit the permit, EPA must issue or deny the permit in accordance with the requirements of Title V. Under § 505(d) and 40 CFR 70.8(a)(2), the permit program submitted by the state may not have to meet these requirements for sources other than major sources covered by the program. Section 505(e) and 40 CFR 70.7(g) allow the EPA administrator to terminate, modify, or revoke and reissue an operating permit issued under a state's program.

Affected sources as defined under the acid rain provisions of Title IV of the Act are one of the primary source categories required to be covered under the provisions of any Title V program.

Section 408 of Title IV of the Act covers the permit and compliance plan requirements for affected sources, which are those stationary sources that have at least one emission unit emitting air pollutants which cause

acid rain. Section 408(a) states that the requirements of Title IV are to be implemented by permits issued to affected sources in accordance with Title V, as modified by the requirements of Title IV. Any permit issued to an affected source must prohibit all of the following:

1. Annual emissions of sulfur dioxide (SO<sub>2</sub>) in excess of the number of allowances to emit sulfur dioxide that is held for the source. An allowance is the authorization to emit one ton of SO<sub>2</sub> during or after a specified calendar year.
2. Exceedances of applicable emissions rates.
3. The use of any allowance prior to the year for which it was allocated.
4. Contravention of any other provision of the permit.

Permits must be issued for a period of five years. No permit can be issued that is inconsistent with the applicable requirements of Titles IV and V.

Section 408(b) of the Act requires that compliance plans be submitted with each permit application. Alternative methods of compliance may be authorized by permitting authorities; however, a comprehensive description of the schedule and means by which the unit will rely on one or more of these alternative methods must be provided by the applicant. Any transfers of allowances recorded by EPA will automatically amend all applicable proposed or approved permit applications, compliance plans and permits. EPA may also require a demonstration of attainment of national ambient air quality standards for a source or, from the owner of two or more affected sources, an integrated compliance plan providing an overall plan for achieving compliance.

Section 408(d) of the Act describes the requirements for Phase II permits, which are those to be issued by states with EPA-approved Title V programs. The owners of sources subject to Phase II of Title IV must submit their permit applications and compliance plans by January 1, 1996 to the state permitting authority. The states with approved programs must issue the permits no later than December 31, 1997. Permit applications and compliance plans that have been received by January 1, 1996 are binding and are enforceable as a permit for purposes of Titles IV and V until a permit is issued by the permitting authority.

Section 408(e) of the Act covers new sources or emissions units, which are those that commence commercial operation on or after November 15, 1990. New sources must submit a permit application and compliance plan to the permitting authority no later than 24 months before the later of (i) January 1, 2000, or (ii) the date on which the source commences operation. The permitting authority must issue a permit to a new source if the requirements of Titles IV and V are satisfied.

Section 408(f) of the Act covers stationary sources or emissions units subject to NO<sub>x</sub> requirements. Applications and compliance plans must be submitted to permitting authorities no later than January 1, 1998. The permitting authority must issue a permit to these sources or emissions units if the requirements of Titles IV and V are satisfied.

Section 408(g) of the Act allows the applicant to submit a revised application and compliance plan at any time after the initial submission. Section 408(h) states that it is unlawful for an owner or designated representative of the owner to fail to submit applications and compliance plans in the time period required by Title IV or to operate any affected source except in compliance with the terms and conditions of a permit and compliance plan issued by EPA or an approved permitting authority. Section 408(h)(3) prohibits shutdown of an electric utility steam generating unit for failure to have an approved permit or compliance plan. However, the unit may be subject to applicable enforcement provisions under § 113 of the Act.

Section 408(i) of the Act requires that no permit can be issued to an affected source until the designated representative has filed a certificate of representation with regard to the requirements of Title IV, including the

holding and distribution of allowances. This section also describes the requirements for certification of representation when there are multiple holders of a legal or equitable title to, or leasehold interest in, an affected unit or when a utility or industrial customer purchases power from an affected unit under life-of-the-unit, firm power contractual arrangements.

The federal regulations required to be developed under § 408 of Title IV, 40 CFR Part 72 and EPA guidance on Part 72, stipulate specific requirements for affected sources that are different from the requirements of 40 CFR Part 70. The differences include, but are not limited to, the following.

1. Only a designated representative or alternative designated representative of the source owner is authorized to make permit applications and other submissions under the Title IV requirements and must file a certificate of representation with EPA before they can assume these responsibilities (40 CFR 72, Subpart B).

2. The state permitting authority must allow EPA to intervene in any appeal of an acid rain permit (40 CFR Part 72, § 72.72(5)(iv)).

3. The period by which the acid rain portion of an operating permit can be appealed administratively is 90 days. Judicial appeal of an acid rain portion of a permit cannot occur after 90 days (40 CFR Part 72, § 72.72(5)(ii)).

4. An application is binding and enforceable as a permit until the permit is issued (40 CFR Part 72, § 72.72(b)(1)(i)(B)).

5. The acid rain portion of an operating permit must be covered by a permit shield (40 CFR Part 72, § 72.51).

6. The acid rain rules allow for four different types of permit revisions. Two of these are the same as those provided for in 40 CFR Part 70: permit modifications and administrative amendments. The other two are unique to the acid rain program: fast-track modifications and automatic amendments (40 CFR Part 72, Subpart H).

7. In general, permits are issued using Part 70 procedures. However, there are some exceptions. For instance, within 10 days of determining whether an acid rain application is complete, the permitting authority must notify EPA of that determination. The permitting authority must also notify EPA of any state or judicial appeal within 30 days of the filing of the appeal (40 CFR Part 72, §§ 72.72(b)(1)(i)(C) and 72.72(b)(5)(iii)).

#### Federal Requirements - For Article 5

Section 110(a) of the federal Clean Air Act mandates that each state adopt and submit to EPA a plan which provides for the implementation, maintenance, and enforcement of each primary and secondary air quality standard within each air quality control region in the state. The state implementation plan shall be adopted only after reasonable public notice. The plan shall include provisions to accomplish, among other tasks, the following:

1. establish enforceable emission limitations and other control measures as necessary to comply with the provisions of the Act, including economic incentives such as fees, marketable permits, and auctions of emissions rights;

2. establish schedules for compliance;

3. establish a program for the enforcement of the emission limitations and schedules for compliance;  
and

4. require sources of air pollution to install, maintain, and replace monitoring equipment as necessary and to report periodically on emissions-related data.

Section 161 of the Act mandates that a state implementation plan (SIP) include emissions limitations and other such measures as may be necessary to prevent significant deterioration of air quality in each region designated pursuant to  107 as attainment or unclassifiable.

40 CFR Part 51 sets out requirements for the preparation, adoption, and submittal of SIPs. These requirements mandate that any such plan shall include the following.

Subpart F (Procedural Requirements) specifies definitions of key terms, stipulations and format for plan submission, requirements for public hearings, and conditions for plan revisions and federal approval.

Subpart G (Control Strategy) specifies the description of emissions reductions estimates sufficient to attain and maintain the standards, the description of control measures and schedules for implementation, time periods for demonstrations of the control strategy's adequacy, an emissions inventory, an air quality data summary, data availability, special requirements for lead emissions, stack height provisions, and intermittent control systems.

Subpart K (Source Surveillance) specifies procedures for emissions reports and record-keeping, procedures for testing, inspection, enforcement, and complaints, transportation control measures, and procedures for continuous emissions monitoring.

Subpart L (Legal Authority) specifies identification of legal authority to implement plans. Section 51.230 of Subpart L specifies that each SIP must show that the state has the legal authority to carry out the plan, including the authority to perform the following actions:

1. adopt emission standards and limitations and any other measures necessary for the attainment and maintenance of the national ambient air quality standards;
2. enforce applicable laws, regulations, and standards, and seek injunctive relief;
3. obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require recordkeeping and to make inspections and conduct tests of air pollution sources;
4. abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons;
5. prevent construction, modification, or operation of a facility which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of a national standard;
6. require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the state on the nature and amounts of emissions from such stationary sources; and
7. make emissions data available to the public as reported and as correlated with any applicable emission standards or limitations.

Section 51.231 of Subpart L requires the identification of legal authority as follows:

(1) the provisions of law or regulation which the state determines provide the authorities required under  40 CFR 51.231 must be specifically identified, and copies of such laws or regulations must be submitted with the plan; and

(2) the plan must show that the legal authorities specified in Subpart L are available to the state at the time of submission of the plan.

Subpart N (Compliance Schedules) specifies legally enforceable compliance schedules, final compliance schedule dates, and conditions for extensions beyond one year.

As an alternative to traditional administrative means (regulations, orders, and new source permits), EPA has recognized the use of state operating permits for the purpose of making Clean Air Act requirements federally enforceable. This has been done through the promulgation of a final rule (54 FR 27274, June 28, 1989) which addresses the approval of state operating permit programs into SIPs. The final rule also specifies the criteria that must be met by a state operating permit program in order to be approved into a SIP.

### State Requirements

Code of Virginia § 10.1-1300 defines pollution as "the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people of life or property." Excess emissions from operations covered by the articles reviewed are harmful to human health and can significantly interfere with the people's enjoyment of life and property.

Code of Virginia § 10.1-1307 A provides that the board may, among other activities, develop a comprehensive program for the study, abatement, and control of all sources of air pollution in the Commonwealth.

Code of Virginia § 10.1-1308 provides that the board shall have the power to promulgate regulations abating, controlling, and prohibiting air pollution throughout or in any part of the Commonwealth in accordance with the provisions of the Administrative Process Act.

## Alternatives

*Please describe all viable alternatives for achieving the purpose of the existing regulation that have been considered as part of the periodic review process. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving the purpose of the regulation.*

Alternatives for achieving the purpose of the regulations have been considered by the Department. The Department has determined that the retention of the regulations (the first alternative) is appropriate, as it is the least burdensome and least intrusive alternative that fully meets statutory requirements and the purpose of the regulations. The alternatives considered by the Department, along with the reasoning by which the Department has rejected any of the alternatives considered, are discussed below.

1. Retain the regulations without amendment. This option is being selected because the current regulations provide the least onerous means of complying with the minimum requirements of the legal mandates.
2. Make alternative regulatory changes to those required by the provisions of the legally binding state and federal mandates, and associated regulations and policies. This option was not selected because it could result in the imposition of requirements that place unreasonable hardships on the regulated community without justifiable benefits to public health and welfare.
3. Repeal or amend the regulations. This option was not selected because the regulations are effective in meeting their goals and already satisfy those mandates.

## Public comment

*Please summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Please indicate if an informal advisory group was formed for purposes of assisting in the periodic review.*

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No comments were received. No informal advisory group was formed for purposes of assisting in the periodic review.

## Effectiveness

*Please indicate whether the regulation meets the criteria set out in Executive Order 14 (2010), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable.*

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The regulation is necessary for the protection of public health and welfare, as it is needed to meet the following goals:

1. To protect public health and welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth.
2. To provide an administrative mechanism to impose source-specific regulatory requirements with the flexibility to address the individual needs of sources.
3. To provide a mechanism to administer certain air quality control program requirements without the need for federal oversight.

The regulations are clearly written and easily understandable.

## Result

*Please state that the agency is recommending that the regulation should stay in effect without change.*

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These regulations satisfy the provisions of the law and legally binding state and federal requirements, and are effective in meeting their goals; therefore, the regulations are being retained without amendment.

## Small business impact

*In order to minimize the economic impact of regulations on small business, please include, pursuant to § 2.2-4007.1 E and F, a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, include a discussion of the agency's determination whether the*

*regulation should be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses.*

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The regulations continue to be needed. They provide sources with the most cost-effective means of fulfilling ongoing state and federal requirements that protect air quality.

The regulations' level of complexity is appropriate to ensure that the regulated entities are able to meet their legal mandates as efficiently and cost-effectively as possible.

The regulations do not overlap, duplicate, or conflict with any state law or other state regulation.

The specific articles were last reviewed as follows:

Article 3, 2008

Article 4, 2001

Article 5, 2008

In that time, it has generally become less expensive to characterize, measure, and mitigate the regulated pollutants that contribute to poor air quality. The regulations continue to provide the most efficient and cost-effective means to determine the level and impact of excess emissions, to enforce permit and regulatory requirements, and thereby to control those excess emissions.

The Department, through examination of the regulations, has determined that the regulatory requirements currently minimize the economic impact of emission control regulations on small businesses and thereby minimize the impact on existing and potential Virginia employers and their ability to maintain and increase the number of jobs in the Commonwealth.

### Family impact

*Please provide an analysis of the regulation's impact on the institution of the family and family stability.*

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It is not anticipated that the regulations will have a direct impact on the institution of the family and family stability.