

REGULATION FOR DISPUTE RESOLUTION (9 VAC 5 CHAPTER 210)

PART I.

DEFINITIONS.

9 VAC 5-210-10. Use of terms.

A. For the purpose of this chapter and subsequent amendments to it, of regulations of the board, or of orders issued by the board, the words or terms shall have the meanings given them in 9 VAC 5-210-20.

B. Unless specifically defined in the Virginia Air Pollution Control Law or in the regulations of the board, terms used shall have the meanings commonly ascribed to them.

9 VAC 5-210-20. Terms defined.

"Board" means the State Air Pollution Control Board.

"Conciliation" means a process in which a neutral facilitator facilitates settlement by clarifying issues and serving as an intermediary for negotiations in a manner which is generally more informal and less structured than mediation.

"Department" means the Department of Environmental Quality.

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"Director" means the director of the Department of Environmental Quality or his designee.

"Dispute resolution," "dispute resolution procedure," "dispute resolution proceeding," or "dispute resolution service" means any structured process in which a neutral facilitator assists disputants in reaching a voluntary settlement by means of dispute resolution techniques such as mediation, conciliation, early neutral evaluation, nonjudicial settlement conferences, or any other proceeding leading to a voluntary settlement conducted consistent with the requirements of this chapter. The term includes the evaluation session.

"Dispute resolution program" means a program that offers dispute resolution services to the public which is run by the Commonwealth or any private for-profit or not-for-profit (including non-profit) organization, political subdivision, or public corporation, or a combination of these.

"Evaluation session" means a preliminary meeting during which the parties and the neutral facilitator assess the case and decide whether to continue with a dispute resolution proceeding or with adjudication.

"Mediation" means a process by which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between the mediator and any party or parties, until

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such time as a resolution is agreed to by the parties or the parties discharge the mediator.

"Mediator" means a neutral facilitator selected by agreement of the parties to a controversy to assist them in mediation. As used in this chapter, this word may refer to a single person or to two or more people.

"Neutral facilitator" means a person who is trained or experienced in conducting dispute resolution proceedings and in providing dispute resolution services. As used in this chapter, this word may refer to a single person or to two or more people.

"Party" means an interested person who has chosen to be and who is eligible to be a disputant in a dispute resolution proceeding. An interested person is eligible if he (i) has attended a public meeting or public hearing on the permit or regulation in dispute and is therefore named in the public record, (ii) is the applicant for the permit in dispute, or (iii) is the department.

"Person" means an individual, a corporation, a partnership, an association, a government body, a municipal corporation, or any other legal entity.

"Virginia Air Pollution Control Law" means Chapter 13 (§10.1-1300 et seq.) of Title 10.1 of the Code of Virginia.

PART II.

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GENERAL PROVISIONS.

9 VAC 5-210-30. Applicability.

A. The provisions of this chapter, unless specified otherwise, shall apply throughout the Commonwealth of Virginia.

B. The provisions of this chapter, unless specified otherwise, shall apply in the administration of all regulations of the board to the extent not covered by a specific regulation of the board. In cases where the provisions of this chapter conflict with another regulation of the board, the provisions of the other regulation shall apply.

C. No provision of this chapter shall limit the power of the board to take appropriate action as necessary to carry out its duties under the Virginia Air Pollution Control Law.

D. By the adoption of this chapter, the board confers upon the director the administrative, enforcement, and decision-making authority articulated in this chapter.

E. Nothing in this chapter shall create or alter any right, action, or cause of action, or be interpreted or applied in a manner inconsistent with the Administrative Process Act (§ 9-6.14:1 et seq.), with applicable federal law, or with any applicable requirement for the Commonwealth to obtain or maintain federal delegation or approval of any regulatory

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program.

E. For a permit in dispute, dispute resolution may not be initiated after the final permit is issued. For a regulation in dispute, dispute resolution may not be initiated after the final regulation is adopted.

9 VAC 5-210-40. Purpose and scope.

A. This chapter shall be construed to encourage the fair, expeditious, voluntary, consensual resolution of disputes. It shall not be construed to preclude collaborative community problem-solving.

B. Dispute resolution shall be used to resolve only those disputes which reveal significant issues of disagreement among parties and may be used unless the board decides that it is not in the public interest to do so.

C. The decision to employ dispute resolution is in the board's sole discretion and is not subject to judicial review.

D. The outcome of any dispute resolution procedure shall not be binding upon the board but may be considered by the board in issuing a permit or promulgating a regulation.

E. Dispute resolution may be used to resolve a dispute relating to the promulgation,

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amendment, or repeal of a regulation that is subject to the public participation process prescribed in Article 2 (section 9-6.14:7.1 et seq.) of the Administrative Process Act.

E. Dispute resolution may be used to resolve a dispute involving any process relating to the issuance of a permit. Dispute resolution may be used in this case only with the consent and participation of the permit applicant and may be terminated at any time at the request of the permit applicant.

G. The board shall consider not using dispute resolution in the circumstances listed in §10.1-1186.3 A of the Code of Virginia.

9 VAC 5-210-50. Costs.

A. Compensation of the neutral facilitator and any other associated common costs, such as rental fees, shall be the responsibility of the parties. Compensation of each party's counsel and other individual costs shall be the responsibility of that party alone, unless the parties agree otherwise.

B. An agreement regarding compensation and other associated costs shall be reached between the neutral facilitator and the parties before the dispute resolution procedure commences and shall be memorialized in writing.

C. [ The parties shall agree on how to allocate costs. ] In the absence of an

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agreement to the contrary, all costs shall be paid by the parties in equal shares.

9 VAC 5-210-60. Date, time, and place.

The dispute resolution procedure shall be conducted in any place within the Commonwealth of Virginia, on any date, and at any time agreeable to the parties and the neutral facilitator.

9 VAC 5-210-70. Attendance at the dispute resolution procedure.

A. [ All parties shall attend all sessions of the dispute resolution procedure. Any party who fails to attend any session shall be conclusively deemed to have dropped out of the dispute resolution procedure. ] A party may satisfy the attendance requirement by sending a representative familiar with the facts of the case. This representative shall have the authority to negotiate and to recommend settlement to the party which he represents.

B. Any party may have the assistance of an attorney or other representative during any session of the dispute resolution procedure.

C. Persons who are not parties or representatives of parties may attend dispute resolution sessions only with the permission of all parties and with the consent of the neutral facilitator.

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9 VAC 5-210-80. Confidentiality.

A. The provisions of § 8.01-576.10 of the Code of Virginia concerning the confidentiality of dispute resolution shall govern all dispute resolution proceedings held pursuant to this chapter except when the board uses or relies on information obtained in the course of such proceeding in issuing a permit or promulgating a regulation. The board shall inform the parties in the order of referral issued under 9 VAC 5-210-150 what this information is expected to be. If the board later decides that it will need additional information before it can issue the permit or promulgate the regulation, it shall so notify the parties as expeditiously as possible. If any of the information requested by the board would normally be protected by the confidentiality provisions of this section, the parties shall waive that protection when delivering the requested information to the board. [Notwithstanding the above, any information qualifying as confidential under the Air Pollution Control Law shall remain confidential.]

B. With the exception noted in subsection A of this section, all memoranda, work products, or other materials contained in the case files of a neutral facilitator are confidential. Any communication made during dispute resolution which relates to the controversy or the proceeding, whether made to the neutral facilitator, to a party, or to any other person, is confidential. Any party's lack of consent to participate in the dispute resolution process, at any point in the process, is confidential.

C. A written settlement agreement shall not be confidential, unless the parties



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otherwise agree in writing.

D. Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding except:

1. When all parties to the dispute resolution process agree, in writing, to waive the confidentiality;

2. To the extent necessary, in a subsequent action between the neutral facilitator and a party for damages arising out of the dispute resolution process; or

3. Statements, memoranda, materials, and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in the dispute resolution procedure.

E. The use of attorney work product in dispute resolution shall not result in a waiver of the attorney work product privilege.

F. Unless otherwise specified by the parties, no dispute resolution procedure shall be electronically or stenographically recorded.

9 VAC 5-210-90. Public participation.

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A. In general, when a dispute has been referred to dispute resolution, the public shall be so notified by a notice placed in the Virginia Register. The public also may be notified by any other means deemed appropriate by the board. The notice shall state the nature of the dispute and the name, telephone number, fax number, postal address, and e-mail address of the department staff person to whom a member of the public should apply in order to become a party. The notice shall allow for a response time of at least [five ten] business days following publication.

B. Anyone who is interested in becoming a party in the pending dispute resolution and who meets the eligibility criteria specified in the definition of "party" in 9 VAC 5-210-20 shall, within the time allotted in the notice, apply to the department staff person listed in the notice. The application shall include the name, telephone number, postal address, and, if applicable, the fax number and e-mail address of the interested person. [The application shall also include a brief statement setting forth the factual nature and the extent of the interest of the requester in the dispute.]

C. The director shall respond to the application of the interested person in writing, explaining the obligations of a party to dispute resolution concerning attendance and costs. The director shall also request that the interested person submit a dated and signed statement as follows: "I understand that by becoming a party to dispute resolution, I am obligated to abide by Virginia law and regulations concerning dispute resolution and that I incur partial financial responsibility for the dispute resolution procedure."

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D. After receiving the signed and dated statement from the interested person as required by subsection C of this section, the director may consider this person a party and proceed accordingly.

9 VAC 5-210-100. ~~Appointment and function~~ Standards for and authority] of neutral facilitator.

A. A neutral facilitator participating in a dispute resolution procedure pursuant to this chapter shall comply with all provisions of this section. A neutral facilitator shall indicate compliance by filing with the director a signed, written statement as follows: "I agree to comply with Virginia's statutes and regulations governing dispute resolution, including § 10.1-1186.3 of the Code of Virginia and 9 VAC 5-210-10 et seq."

B. A neutral facilitator shall adhere to the Judicial Council of Virginia's Standards of Ethics and Professional Responsibility for Certified Mediators.

C. If a complaint is made to the director that a neutral facilitator has failed to comply with all the provisions of the applicable regulations, laws, and Judicial Council Standards during a dispute resolution proceeding, the director shall notify the neutral facilitator of the complaint and shall give the neutral facilitator 10 business days to respond in writing. If the director deems the response unsatisfactory, or if no response is made by the deadline, the director shall remove the neutral facilitator from the ongoing dispute resolution process. The parties to the terminated dispute resolution procedure shall decide whether to continue

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in the same dispute resolution procedure with a new neutral facilitator, to begin a new dispute resolution procedure, or to forego further dispute resolution.

D. The recommendation of a neutral facilitator is not a case decision as defined in § 9-6.14:4 of the Administrative Process Act and therefore may not be appealed.

9 VAC 5-210-110. Resumes of neutral facilitators and descriptions of dispute resolution programs.

The department may maintain a file containing the resumes of neutral facilitators and descriptions of dispute resolution programs. The file shall contain a disclaimer stating, "Inclusion of a resume or dispute resolution program description in this file does not constitute an endorsement of a neutral facilitator or a dispute resolution program, nor should negative implications be drawn from the fact that a neutral facilitator's resume or a dispute resolution program description is not included in this file. Parties are not obligated to choose a neutral facilitator or dispute resolution program from those whose resumes and descriptions are maintained in this file."

9 VAC 5-210-120. Enforcement of written settlement agreement.

The board may incorporate the terms of the written settlement agreement into decisions pertinent to the case.

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9 VAC 5-210-130. Referral of disputes to dispute resolution.

A. The board, consistent with the provisions of 9 VAC 5-210-40 G [ and H], may refer a dispute to dispute resolution.

B. A party other than the board may request dispute resolution by applying to the director.

1. The application shall contain the following:

a. A request for dispute resolution, specifying mediation or another dispute resolution procedure;

b. The names, postal addresses, telephone numbers, fax numbers, e-mail addresses, or other appropriate communication addresses or numbers of all known parties to the dispute and of their attorneys, if known; and

c. A statement of issues and a summary of the basis for the dispute.

2. Filing an application constitutes consent to referral of the dispute to dispute resolution.

3. Filing an application shall not stay any proceeding and shall have no effect

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on any procedural or substantive right of any party to the dispute.

4. Under normal circumstances, within 14 business days of the receipt of an application from a party requesting dispute resolution, the director shall review the application to determine if the dispute is suitable for dispute resolution, shall decide which form of dispute resolution is appropriate, and shall notify the parties in writing accordingly.

5. If the director has decided that mediation is appropriate, the provisions of Part III (9 VAC 5-210-140 et seq.) of this chapter shall apply.

6. If the director has decided that a dispute resolution proceeding other than mediation is appropriate, the director shall specify what that proceeding is. [The appointment of the neutral facilitator for this proceeding shall follow the procedure for the appointment of a mediator as specified in 9 VAC 5-210-140.] The parties and the neutral facilitator shall determine the appropriate procedures for conducting this dispute resolution proceeding.

PART III.

MEDIATION PROCEDURES.

9 VAC 5-210-140. Appointment of mediator.

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A. If the director has decided that mediation is appropriate, any party may nominate a mediator.

B. If all parties agree with the nomination, the director shall appoint that person the mediator for the case and shall notify the parties accordingly.

C. If all parties do not agree with the nomination, the following procedure shall apply:

1. By a date specified by the director, each party shall name up to three mediators who would be acceptable to that party. These mediators may or may not have resumes on file with the department.

2. The director shall compile a list of the names submitted and send it to the parties.

3. Upon receipt of the list, each party may strike two names and return the list to the director within 14 business days following the date on which the list was mailed.

4. On the next business day after the 14-day period expires or as soon as practicable thereafter, the director shall appoint a mediator from the remaining list of names and shall notify the parties accordingly.

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D. Once the mediator is appointed, the director shall send the mediator an acceptance form to sign and return. The acceptance form shall require the mediator to append his signature to the following statements:

1. That the mediator agrees to abide by the applicable dispute resolution statutes, regulations, and ethical standards;

2. That the mediator agrees to attempt to complete the mediation within 60 business days from the date of his appointment; and

3. That the mediator foresees no potential conflict of interest in agreeing to mediate the case. A determination of conflict of interest shall be made by the director or board on a case by case basis.

9 VAC 5-210-150. Evaluation session.

A. Once the mediator has been appointed, the board shall issue a referral to the mediator and the parties. This referral shall include a list of the information which the board, in its preliminary judgment, expects to use in making its final decision regarding the case. This list shall contain the caveat that the board may require other information as yet unspecified at some point in the future. All parties shall attend one evaluation session with the mediator unless excused pursuant to subsection B of this section.



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B. The board shall excuse a party from participation in the evaluation session if, within 14 business days after issuance of the order of referral, a statement signed by the party is filed with the board. This statement shall declare that the mediation process has been explained to the party and that the party does not wish to participate in the evaluation session.

C. The evaluation session shall be conducted at any place within the Commonwealth of Virginia, at any time, and on any date convenient to the mediator and the parties.

D. At least seven business days before the evaluation session, each party shall provide the mediator with a statement outlining his perspective on the facts and issues of the case. At the discretion of the mediator, these statements may be mutually exchanged by the parties.

E. During the evaluation session, the parties, assisted by the mediator, shall determine the manner in which the issues in dispute shall be framed and addressed. In the absence of agreement by the parties, the mediator shall make this determination.

9 VAC 5-210-160. Continuation, termination, and resolution of mediation.

A. Following the evaluation session, mediation shall proceed in any manner agreed on by the parties and the mediator in conformance with the provisions of 9 VAC 5-210-60.

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B. Mediation may be terminated through written notice by the [ permittee permit applicant ] or the director at any time before settlement is reached.

C. Mediation shall continue if a party other than the [ permittee permit applicant] or the director chooses to opt out of mediation following the evaluation session. A party who chooses to opt out of mediation at any time following the evaluation session [ or who, through non-attendance, is conclusively deemed to have dropped out of the dispute resolution procedure ] shall not be bound by any written settlement agreement resulting from the mediation but shall be bound by the cost provisions of 9 VAC 5-210-50 and the confidentiality provisions of 9 VAC 5-210-80.

D. If the mediation is terminated before settlement is reached, the parties shall resume the same status as before mediation and [ shall may ] proceed with the formal adjudication as if mediation had not taken place. The board shall not refer the case to mediation a second time.

E. If the mediation results in settlement, a written settlement agreement shall be signed and dated by each party or by that party's authorized representative.

CERTIFICATION

REGULATION 9 VAC 5 CHAPTER 210, REVISION A00  
CONCERNING  
DISPUTE RESOLUTION

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I certify that this regulation is full, true, and correctly dated.

Signature: \_\_\_\_\_

Name of Certifying Official: Dennis H. Treacy

Title: Director

Agency: Department of Environmental Quality

Date: \_\_\_\_\_

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