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Periodic Review and Small Business Impact Review Report of Findings

Agency name	State Air Pollution Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9VAC5-170
VAC Chapter title(s)	Regulation for General Administration
Date this document prepared	July 28, 2020

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the **Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code**.

Acronyms and Definitions

Define all acronyms used in this Report, and any technical terms that are not also defined in the "Definitions" section of the regulation.

CAA- Clean Air Act

CFR- Code of Federal Regulations

SIP- State Implementation Plan

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

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 this regulation is the State Air Pollution Control Board.

Federal Requirements

Applicability: 40 CFR 51.230 specifies that each State Implementation Plan (SIP) must show that the state has the legal authority to carry out the plan, including the authority to abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons.

Establishment of regulations and orders: 40 CFR 51.230 specifies that each SIP must show that the state has the legal authority to carry out the plan, including the authority to adopt emission standards and limitations and any other measures necessary for the attainment and maintenance of the national ambient air quality standards.

40 CFR 51.231 requires the identification of legal authority, including the provisions of law or regulation which the state determines provide the authorities required under this section must be specifically identified, and copies of such laws or regulations must be submitted with the SIP.

Enforcement of regulations, permits and orders: 40 CFR 51.230 specifies that each SIP must show that the state has the legal authority to carry out the plan, including the authority to enforce applicable laws, regulations, and standards, and seek injunctive relief; and to abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons.

Availability of information: 40 CFR 51.230 specifies that each SIP must show that the state has the legal authority to carry out the plan, including the authority to make emissions data available to the public as reported and as correlated with any applicable emission standards or limitations.

State Requirements

Establishment of regulations and orders: Section 2.2-4011 of the Code of Virginia exempts from the provisions of the Administrative Process Act regulations necessitated by an emergency situation.

Section 2.2-4007.02 of the Code of Virginia specifies that each agency shall develop guidelines for soliciting public input on the development of its regulations. The guidelines shall set out methods for the identification and notification of interested parties and the means of seeking input from interested persons or groups which the agency intends to use in addition to the Notice of Intended Regulatory Action. The guidelines shall set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering interest in working with the agency. Such policy shall address the circumstances in which the agency considers such panels or consultation appropriate and intends to make use of such panels or consultation.

Section 10.1-1307 A of the Code of Virginia 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 § 10.1-1307 D specifies that the board may, among other activities, hold hearings and enter orders diminishing or abating the causes of air pollution and issue orders to enforce its regulations; and may institute legal proceedings for the enforcement of orders, regulations, and penalties.

Code of Virginia § 10.1-1308 specifies 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.

Code of Virginia § 10.1-1309 specifies that the board shall have the power to issue special orders, under certain circumstances, to owners of facilities emitting air pollution ordering the cessation of operation of those facilities. Such special orders are to be issued only after a hearing with reasonable notice to the affected owners of the time, place, and purpose of the hearing. Such special orders shall become effective not less than five days after service. The board shall also have the power to issue emergency special orders, under certain circumstances, ordering the cessation of operation of polluting facilities without a hearing. Within ten days after the issuance of an emergency special order, the board shall hold a hearing, after reasonable notice as to the time and place thereof to the owner, to affirm, modify, amend, or cancel the emergency special order. If the board finds that an owner who has been issued a special order or an emergency special order is not complying with the terms thereof, it may proceed in accordance with § 10.1-1316 (Enforcement and civil penalties) or § 10.1-1317 (Judicial review of regulations of board).

Virginia Code Commission Regulations Part III sets forth provisions for the adoption of material by reference into state regulations.

Enforcement of regulations, permits and orders: Section 10.1-1185 of the Code of Virginia specifies that the director of the Department of Environmental Quality shall exercise such power and perform such duties as conferred or imposed upon him by law and shall perform such other duties as may be required of him by the Governor and the State Air Pollution Control Board.

Code of Virginia § 10.1-1186 specifies that the Department of Environmental Quality has, among other powers, the power to implement all regulations adopted by the State Air Pollution Control Board.

Code of Virginia § 10.1-1307.3 specifies that the Executive Director or a duly authorized representative shall have the authority to supervise, administer, and enforce the law as well as regulations and orders of the board and to investigate violations of law, regulations, and orders.

Code of Virginia § 10.1-1316 specifies that any owner violating, failing, neglecting or refusing to obey any law, regulation, order, or permit condition may be compelled to comply by injunction, mandamus, or other appropriate remedy. It also specifies that any owner violating, failing, neglecting or refusing to obey a regulation, order, law, or permit condition shall be subject to a civil penalty not to exceed \$32,500 for each violation. Each day of violation shall constitute a separate offense. This section also specifies that the board may, in lieu of civil penalties, provide for the payment of civil charges in specific sums, not to exceed the limit of the civil penalties.

Code of Virginia § 10.1-1320 specifies that any owner knowingly violating any law, regulation, order, or permit condition shall upon conviction be guilty of a misdemeanor and shall be subject to a fine of not more than \$10,000 for each violation within the discretion of the court.

Code of Virginia § 10.1-1322 A specifies that the department may issue, amend, revoke, terminate, reissue, and enforce permits in the same manner as regulations and orders. Failure to comply with any condition of a permit shall be considered a violation of this chapter and investigations and enforcement actions may be pursued in the same manner as is done with regulations and orders.

Hearings and proceedings: Section 2.2-4007.01 B of the Code of Virginia specifies that agencies shall state in the Notice of Intended Regulatory Action whether they plan to hold a public hearing on the proposed regulation after it is published. Agencies shall hold such public hearings if required by basic law, if the Governor directs that the agency shall hold a public hearing, or if the agency receives requests for a public hearing from twenty-five persons or more.

Section 2.2-4007.02 B of the Code of Virginia specifies that, in formulating any regulation, the agency shall afford interested persons an opportunity to submit data, views, and arguments to the agency.

Section 2.2-4007.03 of the Code of Virginia specifies that for all but exempted regulations, the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be published in the Virginia Register of Regulations. In addition, the agency may (i) publish the notice in any newspaper and (ii) publicize the notice through press releases and such other media as will best serve the purpose and subject involved. The Register and any newspaper publication shall be made at least sixty days in advance of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts, summaries or notations of oral presentations, as well as any agency action thereon, shall be matters of public record in the custody of the agency.

Section 2.2-4019 of the Code of Virginia specifies that agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such proceedings shall ensure specific rights of parties to the case. This section also specifies other procedures pertaining to informal fact-findings.

Section 2.2-4020 of the Code of Virginia specifies that the agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures have not been had or have failed to dispose of a case by consent. This section also specifies other procedures pertaining to formal hearings.

Code of Virginia § 10.1-1307 C, D, E and F specifies that the board may grant local variances from regulations and issue orders to that effect only after a public hearing has been conducted pursuant to the public advertisement of the hearing and the public has been given the opportunity to comment on the variance; may hold hearings and enter orders diminishing or abating the causes of air pollution and issue orders to enforce its regulations; may institute legal proceedings for the enforcement of orders, regulations, and penalties; and may designate one of its members, the director, or a staff assistant to conduct the hearings provided for in this chapter. A record of the hearing shall be made and furnished to the board for its use in arriving at a decision.

Section 10.1-1309 of the Code of Virginia specifies that the board shall have the power to issue special orders, under certain circumstances, to owners of facilities emitting air pollution ordering the cessation of operation of those facilities. Such special orders are to be issued only after a hearing with reasonable notice to the affected owners of the time, place, and purpose of the hearing. Such special orders shall become effective not less than five days after service. The board shall also have the power to issue emergency special orders, under certain circumstances, ordering the cessation of operation of polluting facilities without a hearing. Within ten days after the issuance of an emergency special order, the board shall hold a hearing, after reasonable notice as to the time and place thereof to the owner, to affirm, modify, amend, or cancel the emergency special order. If the board finds that an owner who has been issued a special order or an emergency special order is not complying with the terms thereof, it may proceed in accordance with § 10.1-1316 (Enforcement and civil penalties) or § 10.1-1320 (Judicial review of regulations of board).

Variances: Code of Virginia § 10.1-1307 C specifies that the board may grant local variances from regulations and issue orders to that effect only after a public hearing has been conducted pursuant to the public advertisement of the hearing and the public has been given the opportunity to comment on the variance.

Code of Virginia § 10.1-1307.01 specifies that the board shall notify localities particularly affected (i.e., localities bearing any identified disproportionate material air quality impact not experienced by other localities) before promulgating any regulation, granting any variance, or issuing any major permit. Such notice shall appear in a local paper of general circulation at least 30 days prior to the close of any public comment period and shall contain a statement of the estimated local impact of the proposed action. The notice shall be mailed to the chief elected official and chief administrative officer and the planning district commission for those localities particularly affected. Written comments shall be accepted for at least 15 days after any hearing on the regulation, variance, or permit unless the board votes to shorten the period.

Local ordinances: Code of Virginia § 10.1-1321 specifies that the governing body of any locality proposing to adopt an ordinance relating to air pollution after June 30, 1972, shall first obtain the approval of the board as to the provisions of the ordinance or amendment. No ordinance, except one pertaining solely to open burning, shall be approved by the board which regulates any emission source that is required to register with the board or to obtain a permit pursuant to this chapter and the board's regulations.

Appeals: Section 2.2-4019 of the Code of Virginia specifies that agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such proceedings shall ensure specific rights of parties to the case.

Section 2.2-4019 B of the Code of Virginia specifies that agencies may, in their case decisions, rely upon public data, documents, or information only when the agencies have notified all parties with advance notice of their intent to consider such information.

Section 2.2-4021 of the Code of Virginia specifies that when a board or commission meets to render an informal fact-finding decision, and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall have an opportunity to respond at the meeting to any summaries of the prior proceeding.

Section 2.2-4021 B of the Code of Virginia specifies that in any informal fact-finding proceeding in which a hearing officer is not empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within ninety days from the date of the informal fact-finding proceeding or from a later date agreed to by the named party and the agency. If the

agency does not render a decision within ninety days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt of the notice, the decision is deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act (CAA). An agency shall provide notification to the named party of its decision within five days of the decision.

Section 2.2-4021 C of the Code of Virginia specifies that in any informal fact-finding proceeding in which a hearing officer is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within thirty days from the date that the agency receives the hearing officer's recommendation. The other provisions of this subsection are the same as in Section 2.2-4021 B of the Code of Virginia.

Section 2.2-4020 of the Code of Virginia specifies that the agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures have not been had or have failed to dispose of a case by consent.

Section 2.2-4020 B of the Code of Virginia specifies that parties to formal proceedings shall be given reasonable notice of (i) the time, place, and nature thereof, (ii) the basic law or laws under which the agency contemplates its possible exercise of authority, and (iii) the matters of fact and law asserted or questioned by the agency.

Section 2.2-4020 C of the Code of Virginia specifies that in all formal proceedings, the parties shall be entitled to counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct cross-examination, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at such proceedings are empowered to perform specified acts.

Section 2.2-4020 D of the Code of Virginia specifies that, prior to recommendations or decisions, parties concerned shall be given the opportunity to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons. In all cases, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers in all cases in which they make such recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit.

Section 2.2-4020 E of the Code of Virginia specifies that all decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

Section 2.2-4021 A of the Code of Virginia specifies that, in cases where a board or commission meets to render a decision on a litigated issue, and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall have an opportunity to respond at the meeting to any summaries of the prior proceeding.

Section 2.2-4021 A of the Code of Virginia specifies that, in any formal proceeding in which a hearing officer is not empowered by the agency to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within ninety days from the date of the formal proceeding or from a later date agreed to by the named party and the agency. The other provisions of this subsection are the same as in § 2.2-4021.

Section 2.2-4021 C of the Code of Code of Virginia specifies that, in any formal proceeding in which a hearing officer is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within thirty days from the date that the agency receives the hearing officer's recommendation. The other provisions of this subsection are the same as in § 2.2-4021.

Section 2.2-4026 A of the Code of Virginia specifies that any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision, shall

have a right to the direct review by court action against the agency. Such actions may be instituted in any court of competent jurisdiction, and the judgments of such courts shall be subject to appeal to or review by higher courts unless otherwise provided by law. In addition, when any such regulation or case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action, and the judgment or decree shall be appealable as in other cases.

Code of Virginia § 10.1-1318 specifies that any owner and certain other persons aggrieved by a final decision of the board is entitled to judicial review in accordance with the provisions of the Administrative Process Act.

Right of entry: Code of Virginia § 10.1-1307.3 specifies that the Executive Director or his duly authorized representative shall have the authority to supervise, administer, and enforce the law as well as regulations and orders of the board and to investigate violations of law, regulations, and orders. This section also specifies that the Executive Director or his representative shall have the authority to enter any business establishment, construction site, or other area, workplace, or environment for the purpose of inspection and investigation; and to seek from a court an order compelling such entry or inspection in the case of interference.

Code of Virginia § 10.1-1315 specifies that agents of the board and department may at reasonable times enter property, public or private, to obtain information or conduct surveys or investigations.

Delegation of authority: Code of Virginia § 10.1-1185 specifies that the director of the Department of Environmental Quality shall exercise such power and perform such duties as a conferred or imposed upon him by law and shall perform such other duties as may be required of him by the Governor and the State Air Pollution Control Board.

Code of Virginia § 10.1-1307 F specifies that the board may designate one of its members, the director, or a staff assistant to conduct the hearings provided for in this chapter. A record of the hearing shall be made and furnished to the board for its use in arriving at a decision.

Code of Virginia § 10.1-1307.1 B specifies that the Department of Environmental Quality shall administer the policies and regulations established by the board and perform all acts as necessary or convenient to carry out the purposes of the law.

Code of Virginia § 10.1-1307.2 specifies that the Executive Director of the Department of Environmental Quality shall exercise such powers and perform such duties as are conferred or imposed upon him by the law and shall perform such other duties required of him by the Governor and the board. It also specifies that the Executive Director may be vested with the authority of the board when it is not in session, although he may not have the authority to adopt or promulgate any regulation.

Considerations for approval actions: Code of Virginia § 10.1-1307 E specifies that the board in making regulations and in approving variances, control programs, or permits, and the courts in granting injunctive relief under the provisions of this chapter, shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it, including the character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused; the social and economic value of the activity involved; the suitability of the activity to the area in which it is located; and the scientific and economic practicality of reducing or eliminating the discharge resulting from such activity.

Availability of information: Code of Virginia § 10.1-1314 specifies that the board may request owners of air pollution sources to furnish plans, specifications, and other information as may be required by the Board in the discharge of its duties under this chapter. Any information, except emission data, as to secret processes, formulae, or methods of manufacture or production shall not be disclosed in public hearing and shall be kept confidential.

Code of Virginia § 10.1-1314.1 specifies that any information, except emissions data, obtained by the board or department which might reveal a trade secret shall be confidential and shall be limited to those persons who need such information for purposes of enforcement of this chapter or the federal CAA or regulations and orders of the Board. Each owner has the duty to notify the department of the existence of trade secrets when he desires the protection provided herein.

Alternatives to Regulation

Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

Alternatives to the proposal have been considered by the Department. The Department has determined that the retention of the regulation (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 regulation. 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 regulation without amendment. This option is being selected because the current regulation provides 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 does not meet federal mandates, which 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 the regulation or amend it to satisfy the provisions of legally binding state and federal mandates. This option was not selected because the regulation is effective in meeting its goals and already satisfies those mandates.

Public Comment

Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

No comments were received during the public comment period. An informal advisory group was not formed for purposes of this periodic review.

Effectiveness

Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

The regulation has been effective in protecting public health, safety, and welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth.

The Department has determined that the regulation is clearly written and easily understandable by the individuals and entities affected. It is written so as to permit only one reasonable interpretation, is written to adequately identify the affected entity, and, insofar as possible, is written in non-technical language.

Decision

Explain the basis for the promulgating agency’s decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

This regulation satisfies the provisions of the law and legally binding state and federal requirements, and is effective in meeting its goals; therefore, the regulation is being retained without amendment.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (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, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

This regulation continues to be needed. This regulation allows for the consistent application of the general administrative requirements for all regulatory programs.

No comments were received that indicate a need to repeal or revise the regulation.

The regulation's 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.

This regulation does not overlap, duplicate, or conflict with any state law or other state regulation.

This chapter was last amended in 2014. This chapter was also amended in 2008, 2009, and 2013.

Over time, it generally becomes less expensive to characterize, measure, and mitigate the regulated pollutants that contribute to poor air quality. This regulation continues to provide for the consistent application of the general administrative requirements for all regulatory programs.

The department, through examination of the regulation, 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 assess the potential impact of the regulation's impact on the institution of the family and family stability.

It is not anticipated that this regulation will have a direct impact on families.