

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
SITE SUITABILITY (REV. G20)**

REGULATORY ADVISORY PANEL MEETING MINUTES

**PIEDMONT REGIONAL OFFICE TRAINING ROOM
4949-A COX ROAD, GLEN ALLEN, VIRGINIA
SEPTEMBER 22, 2021**

Members Present:

Gustavo Angeles, Sierra Club	Lisa Kardell, Waste Management
Cathy Binder, King George County	Stephen Moret, VEDP
Dru Branche, Newport News Shipbuilding	Mark Sabath, SELC
Patrick J. Fanning, CBF	Kyle Shreve, VA Agribusiness Council
Eric Gates, Celanese	Mitchell Smiley, VA Municipal League
Michelle Gowdy, Virginia Municipal League	Andrea W. Wortzel, Troutman-Pepper
Jim Guy, Mecklenberg Electric Cooperative	

Members Absent:

Steve Fischbach, VPLC	S.Z. Ritter, City of Chesapeake
Leigh Mitchell, Upper Mattaponi Tribe	Randy Wingfield, Town of Christiansburg
Krupal Shah, VCCA	

Department of Environmental Quality:

Michael G. Dowd, Air Division	Renee Hoyos, Environmental Justice
Irina Calos, Communications	Tamera M. Thompson, Air Division
Stanley Faggert, Air Division	Karen Sabasteanski, Air Division

Facilitators:

James Burke, VCU	Linda Pierce, VCU
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The meeting began at approximately 9:35.

Meeting Purpose: This regulatory advisory panel (RAP) has been established to advise and assist the department in the development of proposed amendments to provisions of board's regulations to provide greater detail as to how the site suitability requirements of Code of Virginia § 10.1-1307 E are to be met. The purpose of this meeting is for DEQ to coordinate and facilitate discussions of this group in an effort to find common ground and elements that could be included in the regulation amendments.

Welcome and Introductions: Ms. Sabasteanski welcomed the group and introduced Dr. Burke and Ms. Pierce of VCU's Performance Management Group, who will be assisting with the process. Ms. Sabasteanski then provided general guidelines for

discussions, and reviewed Freedom of Information Act (FOIA) requirements, Town Hall resources (<https://townhall.virginia.gov/>), and the web page established on the DEQ web site for this project (<https://www.deq.virginia.gov/permits-regulations/laws-regulations/air/site-suitability>). Note that prior to the meeting the group was provided with a summary of FOIA requirements, a list of links to applicable laws and regulations, and a copy of the board's site suitability policy from 1987. Attachment A contains the presentation and Attachment B provides the additional materials.

Overview of the Process: Dr. Burke and Ms. Pierce asked the group members to introduce themselves, and state what would define success for this process. They reviewed the group's charge, which is to develop potential recommendations for the regulations as to how site suitability should be used as a criterion for the issuance of air permits including:

- The definition of site suitability;
- Situations or criteria for when site suitability should be delegated to local zoning authority; and
- Situations or exemptions for when DEQ should use site suitability in its decision-making for air permits.

Group Conversation: The initial conversation revolved primarily around the definition of "site suitability" in the context of § 10.1-1307.E including consideration of the following:

- Environmental justice and the protection of communities, including early involvement in the process, defining specific areas of local and fenceline concern, determining specific local impacts, and identifying and ensuring the fair treatment of particularly affected groups;
- Local government role and responsibilities, including zoning decisions, knowledge of the community, managing protection of a locality's environment and public health with business and development needs; and
- Business needs and responsibilities, including the need for certainty and objective measures of compliance in the context of site selection and development of a successful project that provides environmental protection, and enables a business to act as a good neighbor.

Several key points were generally identified:

- The need for *clarity and certainty*.
 - How to interpret existing law and possibly change existing regulations to make the process easier to understand and implement, whether from a project planning, zoning, or public health and community perspective; i.e., provide needed clarity for all parties.
 - How to determine the timing and content of early engagement and public outreach, that is, the interplay among locally affected communities, project developers, and local governments at the right time.
 - How to determine when early involvement is needed, at what point in the process, and what such involvement should entail.

- How to provide the board with sufficient information to make a site suitability determination in the context of an air permitting decision.
- How to provide the regulated community with a clear understanding of the information that must be included in an application to address site suitability .
- How to distinguish between local concerns compared to concerns raised by those outside of the community.

The need for *tools* to identify and address environmental justice and suitability issues in the context of an evolving environmental justice framework:

- How to balance the need for specificity (certainty) and flexibility to address emerging issues.
- Improved mapping tools are in the works; what can be done in the meantime?
- Can additional mitigation measures help balance the cost/benefit equation?

- How to leverage existing tools such as readily available U.S. Environmental Protection Agency (EPA), Council on Environmental Quality (CEQ) and Federal Interagency Working Group on Environmental Justice and NEPA Committee guidance.

- Other ways to track what a community may or may not want?

The need to create a new *framework* for permit development and review:

- What legal boundaries and areas of expertise can DEQ and the board assume or not assume; how to gather and assess the facts needed to make correct decisions?
- What is the complete package addressing site suitability on which DEQ and the board can act?
- How to balance the protection of environmental justice and other locally affected communities while protecting the right of a locality to encourage or discourage certain types of development, and the right of a business to implement a certain project.

Other points for future discussion:

- Consideration of environmental justice is the law in Virginia, how do we make sure that it is meaningfully integrated in the process?
- Should the law should be interpreted to apply only to new sources, or should apply to both new and modified existing sources?
- Although "site suitability" is directly mentioned in subsection 3 of § 10.1-1307 E, subsections 1, 2 and 4 must also be considered. How are these four factors balanced?

DEQ staff were present at the meeting to listen and provide information. DEQ explained that there are typically 350 air permit applications active at any one time. This is typically broken down into 100 Title V permit renewals and 240 minor new source review permit applications. There was also discussion about the regulatory process.

Next Steps/Future Meetings: Dr. Burke and Ms. Pierce wrapped up the meeting. Future meetings are scheduled for October 6, 12 and 14.

The meeting adjourned at 12:00 p.m.

Attachments

REG\DEV\G20-RP01-MINUTES



VCU

Performance Management Group

L. Douglas Wilder School of Government and Public Affairs

Site Suitability for Air Quality

Regulation Revision G20

Regulatory Advisory Panel (RAP)

First Meeting, September 22, 2021

Site Suitability for Air Quality Permitting RAP Meeting Agenda

Wednesday, September 22, 2021

9:30 – 10:00	Welcome/Introductions
10:30 – 10:40	FOIA Requirements/Other Resources
10:40 – 10:50	Overview of the Process
10:50 – 11:45	Group Conversation
11:45 – 12:00	Wrap Up/Next Steps

A Few Things to Remember...

- Turn off all electronic devices
- Please speak one at a time
- There is no public comment/open forum during this meeting
- Minutes and notes are being taken
- After the meeting please speak for yourself, not for the group

FOIA and Other Resources

- See FOIA handout
 - Contact Karen Sabasteanski or any DEQ FOIA contact for more information or questions
- Town Hall
 - www.townhall.virginia.gov
 - Sign up for notifications; specify “State Air Pollution Control Board”
- DEQ’s Site Suitability web page:
<https://www.deq.virginia.gov/permits-regulations/laws-regulations/air/site-suitability>

Our Charge

- Develop potential recommendations for the regulations as to how site suitability should be used as a criterion for the issuance of air permits including:
 - Definition of site suitability
 - Situations or criteria for when site suitability should be delegated to local zoning authority
 - Situations or exemptions for when DEQ should use site suitability in its decision-making for air permits

Key Texts

Virginia Code § 10.1-1307 E

E. 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:

1. 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;
2. The social and economic value of the activity involved;
3. *The suitability of the activity to the area in which it is located;*
and
4. The scientific and economic practicality of reducing or eliminating the discharge resulting from such activity.

Regulation for General Administration

9VAC5-170-170. Considerations for approval actions.

Pursuant to the provisions of § 10.1-1307 E of the Virginia Air Pollution Control Law, the board, in making regulations and in approving variances, control programs, or permits, shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it, including:

1. 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;
2. The social and economic value of the activity involved;
3. The suitability of the activity to the area in which it is located; and
4. The scientific and economic practicality of reducing or eliminating the discharge resulting from the activity.

Example VAC text

9VAC5-80-1230. Compliance with local zoning requirements.

No provision of this part or any permit issued thereunder shall relieve any owner from the responsibility to comply in all respects with any existing zoning ordinances and regulations in the locality in which the source is located or proposes to be located; provided, however, that such compliance does not relieve the board of its duty under 9VAC5-170-170 and § 10.1-1307 E of the Virginia Air Pollution Control Law to independently consider relevant facts and circumstances.

Chapter 2 of Title 2.2

Article 12

Virginia Environmental Justice Act

§ 2.2-234. Definitions.

§ 2.2-235. Policy regarding environmental justice.

It is the policy of the Commonwealth to promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities.

"Community of color" means any geographically distinct area where the population of color, expressed as a percentage of the total population of such area, is higher than the population of color in the Commonwealth expressed as a percentage of the total population of the Commonwealth. However, if a community of color is composed primarily of one of the groups listed in the definition of "population of color," the percentage population of such group in the Commonwealth shall be used instead of the percentage population of color in the Commonwealth.

- "Environment" means the natural, cultural, social, economic, and political assets or components of a community.
- "Environmental justice" means the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, income, faith, or disability, regarding the development, implementation, or enforcement of any environmental law, regulation, or policy.
- "Environmental justice community" means any low-income community or community of color.

- "Fair treatment" means the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative environmental consequence resulting from an industrial, governmental, or commercial operation, program, or policy.
- "Fenceline community" means an area that contains all or part of a low-income community or community of color and that presents an increased health risk to its residents due to its proximity to a major source of pollution.

- "Low income" means having an annual household income equal to or less than the greater of (i) an amount equal to 80% of the median income of the area in which the household is located, as reported by the Department of Housing and Urban Development, and (ii) 200% of the Federal Poverty Level.
- "Low-income community" means any census block group in which 30% or more of the population is composed of people with low income.

- "Meaningful involvement" means the requirements that (i) affected and vulnerable community residents have access and opportunities to participate in the full cycle of the decision-making process about a proposed activity that will affect their environment or health and (ii) decision makers will seek out and consider such participation, allowing the views and perspectives of community residents to shape and influence the decision.

- "Population of color" means a population of individuals who identify as belonging to one or more of the following groups: Black, African American, Asian, Pacific Islander, Native American, other non-white race, mixed race, Hispanic, Latino, or linguistically isolated.
- "State agency" means any agency, authority, institution, board, bureau, commission, council, or instrumentality of state government in the executive branch of government.

FREEDOM OF INFORMATION ACT (FOIA)

The Virginia Freedom of Information Act (FOIA) ensures ready access to public records and free entry to meetings where the business of the people is being conducted. It is to be liberally construed to promote an increased awareness of governmental activities and afford every opportunity to citizens to witness the operations of government. It is largely a procedural act setting forth the procedures that a public body must follow in conducting an open meeting and convening in a closed meeting and guiding a user as to how to make or respond to a FOIA request for public records.

THINGS TO REMEMBER

The good news is that DEQ as the coordinator for the group will be the custodian of the records of the group and ensure that compliance with meeting notice requirements of FOIA.

When responding to an email, never hit reply to all.

One on one email, discussion and meetings are not a meeting under FOIA. More than 2 members of the body gathering to discuss the business of the group is a meeting under FOIA and must be noticed.

Any material you would like the group to receive should be sent to DEQ for distribution.

Questions on meetings contact Cindy M. Berndt; cindy.berndt@deq.virginia.gov; 804-698-4378
 Questions on records contact DEQ FOIA Officer, Diana Adams, deqfoias@deq.virginia.gov, 540-574-7886, and/or review the DEQ FOIA Policy available on the web at
<http://www.deq.virginia.gov/ConnectWithDEQ/FreedomofInformationAct.aspx>

WHAT IS A MEETING UNDER FOIA? A "meeting" is defined as "meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body" where the business of the public body is being discussed or transacted.

MAY A PUBLIC BODY CONDUCT A MEETING BY CONFERENCE CALL OR OTHER ELECTRONIC METHOD? State public bodies may conduct such meetings under specified circumstances. Special conditions and requirements apply before electronic methods may be utilized.

IF IT IS A MEETING, WHAT DOES FOIA REQUIRE?

1. Notice of the meeting must be given at least three working days prior to the meeting; must contain the date, time, and location of the meeting; and if a state public body includes at least one member appointed by the Governor, the notice must also indicate whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.
2. The meeting must be open to the public; and
3. Minutes of the meeting must be taken and preserved.

WHERE TO POST THE NOTICE? FOIA requires that all public bodies post notice of the meeting on their own websites and on the Commonwealth Calendar website.

MAY THE PUBLIC OR MEDIA RECORD THE MEETING? Yes. Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open, but may not interfere with the proceedings.

WHEN MUST AGENDA MATERIALS BE AVAILABLE TO THE PUBLIC/MEDIA? At least one copy of all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting must be made available for public inspection at the same time the packets or materials are furnished to the members of the public body.

MUST ALL VOTES OF A PUBLIC BODY TAKE PLACE IN AN OPEN MEETING? Yes. Any and all votes taken to authorize the transaction of any public business must be taken and recorded in an open meeting. A public body may not vote by secret or written ballot.

IS IT A FOIA VIOLATION TO POLL MEMBERS OF A PUBLIC BODY? No, nothing in FOIA prohibits separately contacting the membership, or any part thereof, of any public body for the purpose of ascertaining a member's position with respect to the transaction of public business. Such contact may be done in person, by telephone, or by electronic communication, provided the contact is done on a one-on-one basis.

EMAIL & MEETINGS: The use of email can blur the line between correspondence and a meeting under FOIA. Email is similar to traditional paper correspondence in many ways and is a written form of communication that is by definition a record under FOIA. However, from a practical perspective, email is often used as a substitute for a phone call and can be used to communicate quickly with multiple people at once, making it more akin to a meeting.

The use of email by public officials is clearly allowed by FOIA. One member of a public body may individually email other members, even if the email relates to public business. Questions arise based on the manner in which a recipient responds to an email addressed to three or more members of a public body. If a recipient chooses "reply to all," then three or more members of a public body will see not only the initial email, but also another member's response. Other members could then, in turn, respond to the email or the ensuing responses. In the end, three or more members of a public body could have used the chain of email to discuss, and possibly reach a conclusion about, a matter relating to the transaction of public business.

Based on the possibility of email being more akin to a meeting and on recent court decisions, keep in mind the following tips:

1. Remember the underlying principle of the open meeting provisions of FOIA: the public has the right to witness the operations of government. If you question whether your email communication might lead to the deliberation of public business by three or more members of a public body in real time (i.e., has an element of simultaneity), then you may be better served by saving that communication for a public meeting.
2. If you receive an email sent to three or more recipients who are members of the same public body, and you wish to respond, choose "respond to sender" instead of "respond to all." One-on-one communications are clearly allowed under FOIA, and this will avoid an email discussion among three or more members.

WHAT IS A PUBLIC RECORD UNDER FOIA? A "public record" is any writing or recording, in any format, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. For example, public records may be in the form of handwritten notes, typewritten documents, electronic files, audio or video recordings, photographs, or any other written or recorded media.

WHO MAY REQUEST RECORDS UNDER FOIA? Citizens of the Commonwealth; Representatives of newspapers and magazines with circulation in the Commonwealth; and Representatives of radio and television stations broadcasting in or into the Commonwealth.

HOW LONG DOES A PUBLIC BODY HAVE TO RESPOND TO A REQUEST? A public body must respond to a request within five working days of receipt of the request, with some exceptions.

Site Suitability in Air Quality Permits Regulation Revision G20

Useful Links

State laws

Air quality:

<https://law.lis.virginia.gov/vacode/title10.1/chapter13/section10.1-1307/>

Zoning:

<https://law.lis.virginia.gov/vacodefull/title15.2/chapter22/>

Virginia Environmental Justice Act:

<https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP1212+pdf>

State regulations

For minor new source review (NSR):

<https://law.lis.virginia.gov/admincode/title9/agency5/chapter80/section1230/>

For Prevention of Significant Deterioration (PSD) NSR:

<https://law.lis.virginia.gov/admincode/title9/agency5/chapter80/section1665/>

For nonattainment NSR:

<https://law.lis.virginia.gov/admincode/title9/agency5/chapter80/section2150/>

General administration:

<https://law.lis.virginia.gov/admincode/title9/agency5/chapter170/section170/>

SUITABILITY POLICY--STATE AIR POLLUTION CONTROL BOARD

(adopted 9/11/87)

It is the policy of the State Air Pollution Control Board (SAPCB) that the suitability of a proposed facility to a specific location be determined by the local governing body, except as to questions involving the air quality regulatory authority of the SAPCB. This position is consistent with the intent of the Code of Virginia (ref. 1.5.1-427), which encourages and empowers local governments to make use of planning and zoning as a way to govern community development and economic growth in order to protect public health, safety, and welfare. The SAPCB, therefore, shall consider the suitability of a proposed facility only as it pertains to:

1. air quality characteristics and performance requirements defined by SAPCB regulations:
2. the health impact of air quality deterioration which might reasonably be expected to occur during the grace period allowed by SAPCB regulations or the permit conditions to fix malfunctioning air pollution control equipment; or
3. anticipated impact of odor on surrounding communities or violation of the SAPCB Odor Rule.

These criteria give the SAPCB considerable latitude in making judgments: however, it is clearly not the intention of the SAPCB to become a step in the appeal process for those who wish to challenge a local government planning or zoning decision or as a way for local governments to avoid zoning or suitability decisions. The SAPCB, therefore, would consider a decision by a local governing body as to the suitability of a proposed new facility or expansion of an existing facility, but would approve or disapprove a permit application only within the context of the three air quality issues enumerated above. .

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