

**Combustion Permit by Rule (PBR) GUIDANCE**  
**Department of Environmental Quality (DEQ)**  
**Section I: General**

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## Executive Summary

This Guidance document provides DEQ's suggestions on how the requirements of 9VAC15-70, the "Small Renewable Energy Project (Combustion) Permit by Rule" regulations, may be met. It emphasizes the requirements for the "full PBR" (9VAC15-70-30 et seq.) as opposed to the minimal requirements for smaller projects, as found in 9VAC15-70-130. It is written for the benefit of agency staff, permit applicants, and members of the public. It is not a legally-enforceable document but rather an interpretive guide to understanding the Combustion Permit by Rule (PBR) regulations.

DEQ was directed to develop the PBR regulations in order to implement the "Small Renewable Energy Projects Act" (the 2009 statute), which was enacted by the Virginia General Assembly in 2009 (2009 Acts of Assembly, Chapters 808 and 854). Like the 2009 statute and implementing regulations, this Guidance document addresses pre-construction natural-resource analyses, mitigation plans, post-construction monitoring, and other PBR requirements and issues. Where appropriate, the Guidance discusses methods of performing the required regulatory tasks.

### **DISCLAIMER:**

**This document is provided as Guidance and, as such, sets forth standard operating procedures for the agency. It does not mandate any particular method nor does it prohibit any alternative method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.**

### **Electronic Copy:**

An electronic copy of this Guidance is available on DEQ's website at <http://www.deq.state.va.us/Programs/RenewableEnergy/LawsRegulationsGuidance/GuidanceDocuments.aspx>.

### **Contact Information:**

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## General Procedures

### Notice of Intent

The statute and the regulations require the applicant to notify DEQ that he intends to submit a PBR application. The regulation further provides that the applicant do so “as early in the project development process as practicable.” Applicants should furnish notice of intent to DEQ as soon as possible, but certainly after the applicant believes that the proposed project can meet local land use requirements. The actual certification of compliance with land use ordinances is not required until the permit application is formally submitted to DEQ. At a fairly early stage of project development, however, the applicant will know whether he has the “go ahead” concerning local requirements, and it should become “practicable” for him to submit the notice of intent to DEQ, as required by the regulation (9 VAC 15-70-30 A 1). DEQ will then submit the notice of intent for publication in the Virginia Register that the applicant intends to submit a permit by rule (PBR) application.

### Pre-Application Meetings

*Initial Pre-Application Meeting:* As indicated in the letter from DEQ’s Director (posted on DEQ’s website under Renewable Energy program information), DEQ recommends that the applicant meet informally with DEQ staff within the early stages of project planning and development to alert DEQ staff to the general size, location, and technologies envisioned for the proposed project, as well as the applicant’s target timeframe for submitting a complete permit-by-rule application to DEQ. It is also recommended that the applicant continue to keep DEQ apprised of major developments.

*Subsequent Pre-Application Meetings:* The Combustion PBR regulation and Guidance provisions are written with a high degree of specificity, as is the general practice with any permit by rule. Procedural questions, however, may still arise. The applicant is encouraged to ask DEQ to convene a pre-application meeting whenever the applicant has any questions about requirements for pre-construction analyses, mitigation, post-construction monitoring, or any other PBR issue. DEQ staff will host these pre-application meetings. DEQ will invite relevant sister agencies to send representatives, where appropriate or if requested by the applicant, to help ensure that applicants receive a coordinated response from the state to their questions.

The applicant may request varying degrees of formality in pre-application meetings. In many instances, a highly informal, oral discussion may occur. Alternatively, an applicant may choose to submit written documents to DEQ and request formal written confirmation of whether the applicant’s proposed actions meet regulatory requirements. An applicant may also request a mixture of informal oral and formal written feedback. When an applicant submits documents and asks for confirmation of regulatory compliance, DEQ will consult with other agencies in the Secretariat of Natural Resources on substantive technical questions, as appropriate, before providing a response to the applicant.

An applicant is at liberty to consult directly with any state agency at any time. DEQ suggests, however, that the PBR applicant submit documents and requests for pre-application and application meetings to DEQ. DEQ will maintain the official record concerning the application and the project, so it is important that DEQ receive all documents. DEQ will disseminate documents to sister agencies, as appropriate. A DEQ-facilitated approach can also help ensure that, if an applicant and a sister agency disagree about compliance with a particular regulatory requirement, there can be an orderly resolution of the issue under DEQ’s regulatory auspices.

## Application Submission

*Application Meeting:* The applicant is encouraged to schedule a meeting with DEQ at the time he submits his formal PBR application for review and decision. DEQ anticipates that representatives of relevant sister agencies would attend. The meeting would provide an opportunity for the applicant to explain any matters he considers relevant concerning his application, and to answer any preliminary questions from the agencies.

*Application Requirements:* The application should contain all of the information stipulated in the statute (§10.1-1197.5 et seq. of the Code of Virginia) and regulations (9VAC15-70). It is hoped that this Guidance and any pre-application meetings will assist the applicant in preparing and submitting a complete and adequate application.

*Agency Decision:* As provided in the regulation, DEQ will determine within 90 days whether an application is complete and adequate to meet the requirements for PBR coverage. DEQ alone is responsible for making permit decisions; however, DEQ will consult with other agencies in the Secretariat of Natural Resources before making the permit decision.

## Freedom of Information Act (FOIA)

All documents submitted to a state agency – electronically or otherwise – are public documents and subject to Freedom of Information Act (FOIA) requests. This includes documents submitted to DEQ, whether in connection with pre-application meetings, submission of the PBR application, or otherwise. There are, however, certain exemptions to FOIA, including the following:

### FOIA Exemption for Sensitive Information (related to Wildlife)

The locations of and specific information regarding caves and certain plant and animal species are considered sensitive and may be exempt from the Virginia Freedom of Information Act (§ 2.2-3705.7. 10 of the Code of Virginia), which provides as follows: “Records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This exemption shall not apply to requests from the owner of the land upon which the resource is located.” (See <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-3705.7>). The Department of Game and Inland Fisheries (DGIF) and the Department of Conservation and Recreation (DCR) provided the following information in April 2011 regarding the status of these resources under FOIA:

- DGIF deems the species-specific, exact locations of state (or federally) Endangered or Threatened species, excluding bald eagles, to be excluded from the purview of FOIA. DGIF presents exact locations of eagle nests (the center point of a "buffer" circle) on the grounds that public/landowner cooperation can only be gained if people actually know where the nests are.
- DGIF does not consider any locations of habitats or nonlisted Species of Greatest Conservation Need (SGCN) species to be protected under a FOIA exemption. Note,

however, that DGIF classifies hibernacula and maternity and bachelor bat colonies as “wildlife” and not just as habitats.

- Regarding caves, DGIF handles them as "hibernacula" or "maternity or bachelor colonies" (i.e., positive wildlife occurrences) if DGIF knows that they support particular species; however, DGIF defers specific requests for site-specific "cave" data per se, to DCR. DGIF would, for example, produce a project report stating that a given project is or is not within X miles of a cave or hibernaculum, but DGIF would not release the exact location of the cave or hibernaculum; nor would DGIF release site-specific cave data received from the Cave Board or DCR to third parties through licensed data transfers, without concurrence from the source.
- DCR advised that parties may consult with DCR regarding the proper treatment of caves and certain species and habitat questions. DCR noted that information related to the location of caves, and certain plant and animal species as determined by consultation with DGIF and DCR, that is prepared for a PBR application, including any mitigation plans containing location-specific information on caves or species as determined above, should not be released to the general public and should be submitted to DEQ as an appendix to the application and labeled “Sensitive Information – Not For Public Dissemination.”

#### **FOIA Exemption for Sensitive Information (related to Historic Resources)**

The locations of and specific information regarding archaeological sites are considered sensitive and may be exempt from the Virginia Freedom of Information Act (see [http://www.dhr.virginia.gov/pdf\\_files/FOIAPolicyDHR.pdf](http://www.dhr.virginia.gov/pdf_files/FOIAPolicyDHR.pdf)). The archaeological studies prepared for a PBR application, including any surveys or mitigation plans containing specific information on archaeological sites, should not be released to the general public and should be submitted to DEQ as an appendix to the application and labeled “Sensitive Information – Not For Public Dissemination.”

#### **FOIA Exemption for Sensitive Information (related to Proprietary Business Issues)**

If an applicant believes that information he is preparing for a PBR application is eligible for a FOIA exemption as proprietary business information or trade secret, then the applicant should provide DEQ with the legal and factual basis for his belief. It is recommended that the applicant discuss this issue with DEQ during informal pre-application meetings, so that a decision about FOIA requirements may be reached before the applicant submits documents. Where an exemption from FOIA requirements is deemed appropriate by DEQ, the applicant may submit the proprietary information to DEQ as an appendix to the application and labeled “Sensitive Information – Not For Public Dissemination.”

### **Jurisdictional Issues**

In accordance with the 2009 statute, DEQ has jurisdiction to approve PBR applications for combustion projects with a rated capacity of 20 megawatts and less. Even though the regulations provide few, if any, substantive requirements for projects with rated capacity of five megawatts and less (or for projects meeting other specified criteria – see Section 130 of the regulation and Guidance), such projects are still deemed to be covered by the PBR regulation. For projects with a rated capacity over 20 megawatts, the State Corporation Commission (SCC) retains jurisdiction to address wildlife and historic resources issues, just as it did prior to enactment of the 2009 statute.

Within Section II (Methodology) of this Guidance, several other jurisdictional issues are discussed. These issues are also highlighted here, as follows:

There are 14 application criteria set forth in the 2009 statute. These criteria are repeated in the Combustion PBR regulation and referenced in Section II of the Combustion PBR Guidance. Consistent with both formal and informal advice from the Office of the Attorney General, however, DEQ will not automatically view these 14 criteria as being jurisdictional. In other words, if one or more of the 14 criteria are not applicable and therefore not achievable, DEQ will still have jurisdiction over the project and may approve PBR coverage if all the other *relevant* criteria are met.

For example, the statute and regulations require the applicant to submit interconnection studies and the final interconnection agreement (criteria #3 and #4). Particularly in the context of solar and combustion projects, Regulatory Advisory Panel (RAP) members discussed the possibility that not all projects will interconnect. The RAP's utilized the commonly-understood meaning of "interconnect" to connote that the project sells electricity back to the grid at wholesale. In informal advice to the Department, the Office of the Attorney General (OAG) indicated that, if the project does not interconnect and therefore cannot meet the interconnection criteria, then DEQ may still approve PBR coverage if the application indicates compliance with all the other relevant criteria. This advice is consistent with a formal Opinion of the Attorney General on the criterion of local-government certification of land use compliance for wind projects located on state-owned subaqueous bottoms, where no local government has jurisdiction & therefore an applicant cannot meet the criterion. Further, the OAG noted that it appears clear from the SCC's statutory authority and course of dealing that the SCC has authority over renewable energy projects whether they interconnect or not. Since the General Assembly transferred the subject-matter authority underlying DEQ's 2009 statute from the SCC to DEQ, it would be logical for DEQ to have equivalent jurisdiction to the SCC's. Consequently, DEQ believes it has jurisdiction over combustion projects with rated capacity of 20 megawatts and less, whether or not the projects interconnect to the grid.

## **Federal and Other Requirements**

The Combustion PBR regulation and Guidance address the requirements set forth in the 2009 state statute and do not reference federal requirements. To the extent that federal requirements exist, however, an applicant will need to comply with these federal requirements.

The 2009 statute does include provisions relating to local government requirements, as well as to other necessary (state) permits. Pursuant to these provisions, applicants must submit evidence of compliance with these local and state requirements in order to receive PBR coverage.

This PBR regulation does not excuse an applicant from complying with all relevant local, state, and federal requirements.