

MINUTES  
STATE AIR POLLUTION CONTROL BOARD MEETING  
FRIDAY, SEPTEMBER 9, 2011  
HOUSE ROOM C  
GENERAL ASSEMBLY BUILDING  
9<sup>TH</sup> & BROAD STREETS  
RICHMOND, VIRGINIA

**Board Members Present:**

Hullihen Williams Moore, Chair  
Richard D. Langford  
Manning "Chip" Gasch, Jr  
Tedd H. Jett

Sterling E. Rives III, Vice-Chair  
Roger L. Chaffe  
Jo Anne Scott Webb

**Department of Environmental Quality:**

David K. Paylor  
Cindy M. Berndt  
Debra Miller

**Attorney General's Office:**

Kerri L. Nicholas, Assistant Attorney General

The meeting convened at 9:01 a.m., recessed at 10:40 a.m., reconvened at 10:50 a.m., and adjourned at 11:22 a.m.

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**Minute No. 1 - Introduction of New Board Member:** Mr. Tedd H. Jett was introduced as a new member of the Board.

**Minute No. 2 - Review and Approval of Agenda:** The Board, on a motion by Mr. Rives, approved the agenda without modification.

**Minute No. 3 - Minutes:** The Board, on a motion by Mr. Chaffe, unanimously approved the minutes of the June 10, 2011, meeting.

**Minute No. 4 – Repeal of Regulation for Transportation Conformity (9VAC5 Chapter 150, Rev. G11) -** Mr. Gary E. Graham of the Office of Regulatory Affairs presented the proposed repeal of the Regulation for Transportation Conformity using the Fast-Track Process. Mr. Graham explained that the Regulation for Transportation Conformity (9VAC5-150) requires that transportation plans, programs, and projects conform to state air quality requirements and federal requirements established under § 176(c) of the federal Clean Air Act. He advised the Board that a new Regulation for Transportation Conformity (9VAC5-151) was adopted to meet the new federal requirements of 40 CFR Part 93 and replace Chapter 150 regulation and that the necessary revisions to the State Implementation Plan had become effective, allowing for Chapter 150 to be repealed.

Based on the Board book material, staff presentation and Board discussions, the Board, on a motion by Ms. Webb, unanimously:

1. Authorized the department to promulgate the proposed repeal for public comment using the fast-track process established in § 2.2-4012.1 of the Administrative Process Act for regulations expected to be non-controversial. The Board's authorization is also understood to constitute its adoption of the regulation at the end of the public comment period provided that (i) no objection to use of the fast-track process is received

from 10 or more persons, or any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, and (ii) the Department does not find it necessary, based on public comments or for any other reason, to make any changes to the proposal.

2. Set an effective date 15 days after close of the 30-day public comment period provided (i) the proposal completes the fast-track rulemaking process as provided in § 2.2-4012.1 of the Administrative Process Act and (ii) the Department does not find it necessary to make any changes to the proposal.

**Minute No. 5 - Repeal of Exclusionary General Permit for Federal Operating Permit Program (9VAC5 Chapter 500, Rev. H11)** - Mr. Gary E. Graham of the Office of Regulatory Affairs presented the proposed repeal of the Exclusionary General Permit for Federal Operating Permit Program (9VAC5 Chapter 500). Mr. Graham explained that the general permit regulation had been adopted to implement an U.S. Environmental Protection Agency transition policy that allowed states to temporarily defer from applicability under the state Title V permit programs sources with actual emissions below the federal thresholds. Mr. Graham advised the Board that the transition policy was not longer effective, that no sources were currently covered by the general permit and that the general permit should be repealed.

Based on the Board book material, staff presentation and Board discussions, the Board, on a motion by Mr. Langford, unanimously:

1. Authorized the department to promulgate the proposed repeal for public comment using the fast-track process established in § 2.2-4012.1 of the Administrative Process Act for regulations expected to be non-controversial. The Board's authorization is also understood to constitute its adoption of the regulation at the end of the public comment period provided that (i) no objection to use of the fast-track process is received from 10 or more persons, or any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, and (ii) the Department does not find it necessary, based on public comments or for any other reason, to make any changes to the proposal.

2. Set an effective date 15 days after close of the 30-day public comment period provided (i) the proposal completes the fast-track rulemaking process as provided in § 2.2-4012.1 of the Administrative Process Act and (ii) the Department does not find it necessary to make any changes to the proposal.

**Minute No. 6 - Repeal of Variance for Open Burning (9VAC5 Chapter 240, Rev. I11)** - Mr. Gary E. Graham of the Office of Regulatory Affairs presented the proposed repeal of the Variance for Open Burning. Mr. Graham explained that the Board issued a variance to the seasonal restrictions to Gloucester County to provide relief to County residents. Mr. Graham explained that the variance expired on December 31, 2008 and the regulation establishing the variance should be repealed.

Based on the Board book material, staff presentation and Board discussions, the Board, on a motion by Mr. Langford, unanimously authorized the department to promulgate the proposed repeal for public comment.

**Minute No. 7 - Permits for Stationary Sources of Pollutants Subject To Regulation, Greenhouse Gas Tailoring (9VAC5 Chapter 85, Rev. E11)** - Ms. Karen G. Sabasteanski of the Office of Regulatory Affairs presented final amendments to the Board's regulations for permitting of greenhouse gases (GHGs) that would defer, for a 3-year period, the application of the Prevention of Significant Deterioration (PSD) and federal operating (Title V) permitting requirements to carbon dioxide (CO<sub>2</sub>) emissions from bioenergy and other biogenic stationary sources in order for EPA to conduct a detailed examination of the science associated with biogenic CO<sub>2</sub>. Ms. Sabasteanski explained that the amendments were being made to conform to final amendments promulgated on July 20, 2011 (76FR43490) by the U.S. Environmental Protection Agency. Ms. Sabasteanski briefly reviewed the following substantive amendments to the Board's regulations:

1. The federal operating (Title V) definition of "subject to regulation" is revised to exempt biomass from evaluation for a 3-year period. [9VAC5-85-30]

2. The PSD definition of "subject to regulation" is revised to exempt biomass from evaluation for a 3-year period. [9VAC5-85-503]

Ms. Paul Hamel with Dominion Resources appeared in support of the amendments.

Based on the Board book material, staff presentation, public comment and Board discussions, the Board, on a motion by Mr. Chaffe, unanimously adopted the regulation with an effective date as provided in the Administrative Process Act and affirmed that the Board will receive, consider, and respond to petitions by any person at any time with respect to reconsideration or revision, as provided in § 2.2-4006 B of the Administrative Process Act.

**Minute No. 8 - Petition for Rulemaking, Carbon Dioxide Emissions- Public Participation Report and Request for Board Action:** Mr. Michael G. Dowd, Air Division Director, presented the staff report on the Carbon Dioxide Emissions Petition for Rulemaking. Mr. Dowd advised the Board that at the June 10, 2011, meeting the Board received a petition from Emma Serrels, and Alec Loorz and Victoria Loorz (Kids vs. Global Warming) to initiate a rulemaking concerning carbon dioxide (CO<sub>2</sub>) emissions. The petitioners had requested that the board adopt a new regulation that will: (i) ensure that CO<sub>2</sub> emissions from fossil fuels peak in 2012; (ii) adopt a CO<sub>2</sub> emissions reduction plan that, consistent with the best available science, reduces statewide fossil fuel CO<sub>2</sub> emissions by at least 6% annually until at least 2050, and expand Virginia's capacity for carbon sequestration; (iii) establish a statewide greenhouse gas (GHG) emissions accounting, verification and inventory and issue annual progress reports so that the public has access to accurate data regarding the effectiveness of Virginia's efforts to reduce fossil fuel carbon dioxide emissions; and (iv) adopt any policies or regulations to implement the GHG emissions reduction plan.

Mr. Dowd advised the Board that the department issued a notice that provided for receiving written comment during a comment period and presented a summary of the comments received and the staff response. Mr. Dowd then presented the Department's recommendation that the Board deny the petitioner's request based on the following reasons:

1. Climate change and reduction of CO<sub>2</sub>/GHG emissions are global issues that would be most effectively addressed on a global and national level. As indicated in the attached response to board member questions, EPA has begun this process, and Virginia is participating in these federal programs in concert with most other states.
2. As discussed in the attached response to board member questions, it is reasonable to anticipate that a state-specific program for controlling CO<sub>2</sub>/GHG in the manner recommended by the petitioners would have very little, if any, beneficial impact on the Commonwealth's environment, while imposing a substantial disproportionate burden on the Commonwealth's economy, including requiring a significant expenditure of scarce department resources.
3. Given the potential significant impacts of such a program, the elected representatives of the Virginia General Assembly are those in the best position to determine what, if any, measures related to climate change the Commonwealth should adopt in addition to the federal programs.

Mr. John Heard of the Virginia Coal Association appeared to support the staff recommendation that the petition be denied.

Mr. Roger Chaffe made the following motion:

That the Board denies this Petition for the following reasons:

1. While the Board has the legal authority to take the action sought by the Petition, the Board has undertaken such major regulatory actions in the past only when mandated by federal law or directed to do so by the General Assembly. The Board should not change this practice with respect to the Petition.
2. There is no Virginia authority supporting the application of the public trust doctrine to the regulation of air pollution.
3. The Commonwealth through the Attorney General is challenging the authority of EPA to regulate greenhouse gases. The Board, following the lead of the Governor, supports the Attorney General's litigation. Prudence would dictate that to the extent possible any regulatory action of the type sought by the Petition await judicial resolution of this matter.
4. On the merits of the Petition, while temperature increases and changes in climate are well documented, their causes - as well as the nature and efficacy of any regulatory efforts necessary or appropriate to control or reverse them - are not.
5. Any major regulation of greenhouse gases should be carried out through coordination among the federal government and all the states.
6. For the Commonwealth to act alone on a matter of this nature would place Virginia and its regulated businesses at a disadvantage with respect to those of other states and would thereby jeopardize Virginia jobs and pose a serious threat to the economy of the state.
7. Since any program regulating greenhouse gases would have to be carefully designed by DEQ to be enforceable and to produce the results requested implementation of the Petition will require significant new resources of staff time and money from DEQ. These resources are not currently available and current resources are best used to meet the requirements already in place or on the way.

That the Director is requested to provide this response to the Petitioner and to publish it as the decision of the Board as required by law.

The motion was seconded by Mr. Langford.

After some discussion, Mr. Rives moved to amend the motion to remove the listed reasons and merely deny the petition. The motion was seconded by Mr. Moore. The motion to amend failed on a vote of 2 to 5 (Messers. Moore and Rives voted aye and Messers. Langford, Chaffe, Gasch and Jett and Ms. Webb voted nay).

Mr. Chaffe's original motion passed on a vote of 5 to 2 (Messers. Langford, Chaffe, Gasch and Jett and Ms. Webb voted aye and Messers. Moore and Rives voted nay).

The Board, on a motion by Ms. Webb, voted 5 to 2 (Messers. Langford, Chaffe, Gasch and Jett and Ms. Webb voted aye and Messers. Moore and Rives voted nay) to not establish a committee of the Board to work with the State Advisory Board on Air Pollution climate change committee to review Governor Kaine's Climate Change Commission Report, Advisory Board reports on climate change and federal actions to monitor and determine what, if any, role the Board can have on this matter.

**Minute No. 9 – High Priority Violators Report:** Mr. Craig Nicol of the Division of Enforcement presented a report on high priority violators.

**Minute No. 10 – Public Forum:** No one appeared during the public forum.

**Minute No. 11 – Air Division Director Report:** Mr. Michael Dowd, Air Division Director, briefed the Board on the delay of a new ozone standard until 2013, the announcement of GenOn on the plan to close the Potomac River Generating Station by October 2012, and the Cross State Air Pollution Rule.

**Minute No. 12 – Future Meetings:** The Board confirmed December 2 as the date of their next meeting.

*Cindy M. Berndt*  
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Cindy M. Berndt

*Approved Minute  
No. 2 - Dec. 2, 2011*