

Virginia Regulatory Town Hall

Notice of Intended Regulatory Action Agency Background Document

Agency Name:	State Air Pollution Control Board
Regulation Title:	Regulations for the Control and Abatement of Air Pollution
Primary Action:	9 VAC 5-40-160 through -220
Secondary Action(s):	9 VAC 5-50-160 through -320
Action Title:	Emission Standards for Toxic Pollutants (Rev. G00)
Date:	September 5, 2000

This information is required prior to the submission to the Registrar of Regulations of a Notice of Intended Regulatory Action (NOIRA) pursuant to the Administrative Process Act § 9-6.14:7.1 (B). Please refer to Executive Order Twenty-Five (98) for more information.

Purpose *

Please describe the subject matter and intent of the planned regulation.

The purpose of the proposed action is to render the state toxic pollutant program consistent with the federal Clean Air Act, according to a determination made pursuant to the review of existing regulations mandated by Executive Order 15(94).

Statutory Authority

Please identify the section number and provide a brief statement relating the content of the statutory authority to the specific regulation contemplated.

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.

Need *

Please provide an explanation of the need for the contemplated regulation and potential consequences that may result in the absence of the regulation. Also set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of citizens or would be essential for the efficient and economical performance of an important

governmental function. Include a discussion of the problems the regulation's provisions are intended to solve.

Analysis reveals that the regulations are consistent with applicable state, statutory provisions, and judicial decisions. However, factors and circumstances (federal statutes, original intent, state air quality program and air pollution control methodology and technology) which justified the initial issuance of the regulations have changed to a degree that justify a change to the basic requirements of the regulations.

Rules 4-3 and 5-3 were promulgated in 1985 to protect public health by setting significant ambient air concentration guidelines for all existing facilities emitting air toxic substances. At the time, the Clean Air Act authorized EPA to promulgate health-based emission standards for hazardous air pollutants (HAPs). However, due to the long-term nature of the decision-making process for this federal program, only a limited number of National Emissions Standards for Hazardous Air Pollutants (NESHAPs) were promulgated. The process to establish a NESHAP was lengthy, involving a determination of a critical level that triggered significant health effects, followed by a determination of those industry categories that contributed the highest emission level of the HAP under review.

Concurrent with the slow progression of federal assessment of HAPs, a series of significant chemical accidents occurred worldwide, including one in Virginia (the kepone incident in Hopewell). These circumstances led the State Air Pollution Control Board and policy-making groups in many other states to develop state-specific answers to the public health problems of HAPs. The states learned from federal experience that they needed a more expeditious process to assess and regulate HAPs than that used at the federal level. Many states, including Virginia, used occupational standards and extrapolated them for use in the ambient air.

By the late 1980s, the federal government realized that its approach to the evaluation and regulation of HAPs was not addressing the problem quickly enough. Instead of taking the same health effects-based approach, therefore, the 1990 Clean Air Act (the Act) attempted to address the problem more quickly. First, it established a list of 188 critical HAPs. Then, emission standards establishing maximum acceptable control technology (MACT) were developed for source categories that emit these HAPs. After the development of each MACT standard, the federal government will assess what risk to human health remains from sources subject to the MACT standards and will establish further standards for those source categories causing significant public health concerns.

During the development and evaluation of the MACT standards, the state program will remain essential to protect the health of the citizens of the Commonwealth. Depending on the pollutant, health risks even from a small exposure to a HAP can be high. In addition, public concern about HAPs has remained high since multiple accidental releases occurred in the U.S. and abroad in the 1970s and early 1980s. Data reported for certain industries under the requirements established by the Emergency Planning and Community Right to Know Act, or Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III) has heightened public awareness and concern about public health and exposure to HAPs emissions in Virginia by alerting its citizens to the quantity of these

emissions released in the state. The data reported under this program indicates that Virginia has significant air emissions of SARA Title III chemicals. In 1992, Virginia was ranked 16th in the nation for total releases of these chemicals; 94% of those releases were into the air. Despite improvements since then, public concern about the release of toxic air pollutants remains high.

This regulatory action replaces a previous regulatory action (Rev. G97), serving essentially the same purpose, which was withdrawn by the board on July 11, 2000.

Potential Issues *

Please supply a statement delineating any potential issues that may need to be addressed as the regulation is developed.

There are two main issues that must be addressed during the regulation development: (1) exempting from applicability those sources subject to a federal hazardous air pollutant standard and (2) limiting the state program's applicability to the pollutants regulated under § 112 of the federal Clean Air Act as amended in 1990. These actions will be consistent with Recommendation 22 of the Governor's Commission on Government Reform to limit the applicability of the state program as the federal program reaches maturity. These actions will assure the regulated community that the federal and state programs will not overlap while assuring the environmental community that the state program will continue to provide adequate protection for public health while the federal program is being developed. Cost should not be an issue: there should be no increase in costs for either affected entities or the agency because the board's policy has been to focus on the federal hazardous air pollutant list in its implementation of the regulations. In fact, as more federal MACT standards are developed and fewer sources are subject to the state regulations, the overall cost of this program to the regulated community will decrease.

Alternatives *

Please describe the process by which the agency has considered, or will consider, less burdensome and less intrusive alternatives for achieving the need. Also describe, to the extent known, the specific alternatives to the proposal that have been considered and will be considered to meet the need, and the reasoning by which the agency has rejected any of the alternatives considered.

Alternatives to the proposed regulation amendments are being considered by the Department. The Department has tentatively determined that the first alternative is appropriate, as it is the least burdensome and least intrusive alternative that fully meets the purpose of the regulatory action. The alternatives being considered by the Department, along with the reasoning by which the Department has rejected any of the alternatives being considered, are discussed below.

1. Amend the regulations to render the state toxic pollutant program consistent with the federal Clean Air Act. This option is being selected because it reduces the regulatory burden on sources while protecting public health and welfare.

2. Repeal the regulations. This option is not being selected because the regulations are necessary to protect public health while the federal standards are being developed and evaluated.

3. Take no action to amend the regulations. This option is not being selected because the current regulations are unnecessarily burdensome to the regulated community and to department staff without any commensurate advantage to the public.

Public Participation *

Please indicate the nature of the comments the Department is soliciting pursuant to this notice and whether a public meeting is to be held to receive comments on this notice. If a public meeting is to be held, indicate where information on the public meeting (i.e. date, time, and place) may be found. Indicate whether it is the Department's intent to hold at least one public hearing on the proposed regulation after it is published in the Virginia Register.

The Department is soliciting comments on (i) the intended regulatory action, to include ideas to assist the Department in the development of the proposal, and (ii) the costs and benefits of the alternatives stated in this notice or other alternatives. All comments must be received by the Department by 4:30 p.m. within 30 days of the appearance of this notice in the Virginia Register in order to be considered. It is preferred that all comments be provided in writing to the Department, along with any supporting documents or exhibits. Comments may be submitted by mail, facsimile transmission, or e-mail, but must be submitted to Dr. Kathleen Sands, Policy Analyst, Office of Air Regulatory Development, Department of Environmental Quality, P.O. Box 10009, Richmond, Virginia, 23240 (e-mail krsands@deq.state.va.us; fax number 804-698-4510). Comments by facsimile transmission will be accepted only if followed by receipt of the signed original within one week. Comments by e-mail will be accepted only if the name, address, and phone number of the commenter are included. All testimony, exhibits, and documents received are a matter of public record. Only comments (i) related to the potential issues, alternatives, and costs and benefits (see supporting information above) as specified in this notice and (ii) provided in accordance with the procedures specified in this notice will be given consideration in the development of the proposed regulation amendments.

A public meeting will not be held by the Department because the Board has authorized the Department to proceed without holding a meeting.

After publication in the Virginia Register of Regulations, the Department will hold at least one public hearing to provide opportunity for public comment on any regulation amendments drafted pursuant to this notice.

Ad Hoc Advisory Group *

Please indicate the extent to which the participatory approach will be used in the development of the proposed regulation. Indicate whether the Department is will be using an ad hoc advisory group in the development of the proposal.

The Department will not form an ad hoc advisory group to assist in the development of the regulation because the Board has authorized the Department to proceed without the use of the participatory approach.

Legal Requirements

Please identify the state and/or federal source of the legal requirements that necessitate promulgation of the contemplated regulation. The discussion of these requirements should include a description of their scope and the extent to which the requirements are mandatory or discretionary. Full citations for the legal requirements and, if available, web site addresses for locating the text of the cited legal provisions should be provided.

State Requirements

Code of Virginia:

<http://leg1.state.va.us/000/cod/codec.htm>

Virginia Administrative Code (VAC):

<http://leg1.state.va.us/000/reg/toc.htm>

These regulations are not required by any specific state or federal mandate. Rather, Virginia's Air Pollution Control Law gives the State Air Pollution Control Board the discretionary authority to promulgate regulations "abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth" (§ 10.1-1308). The law defines such air pollution as "the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people or life or property" (§ 10.1-1300). The board exercises this authority through the Department of Environmental Quality, whose first statutory purpose is "to assist in the effective implementation of the Constitution of Virginia by carrying out state policies aimed at conserving the Commonwealth's natural resources and protecting its atmosphere, land and waters from pollution" (§ 10.1-1183).

Family Impact Statement

Please provide a preliminary analysis of the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; 4) increase or decrease disposable family income.

It is not anticipated that these regulation amendments will have a direct impact on families. However, there will be positive indirect impacts in that the regulation amendments will ensure that the Commonwealth's air pollution control regulations will

function as effectively as possible, thus contributing to the protection of public health and safety.

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