

Virginia Regulatory Town Hall

Final Regulation Agency Background Document

Agency Name:	State Air Pollution Control Board
Regulation Title:	Regulation for Dispute Resolution
Primary Action:	9 VAC 5-210-10 through -60
Secondary Action(s):	
Action Title:	Dispute Resolution
Date:	April 4, 2001

Please refer to the Administrative Process Act (§ 9-6.14:9.1 et seq. of the Code of Virginia), Executive Order Twenty-Five (98), and the Virginia Register Form, Style and Procedure Manual for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation.

The regulation encourages the fair, expeditious, voluntary, consensual resolution of disputes by providing an alternative to administrative hearings and litigation. The disputes eligible for referral to voluntary dispute resolution are those relating to the issuance of a permit or to the adoption of a regulation. The decision to employ dispute resolution is in the board's sole discretion, and the outcome of any dispute resolution procedure does not bind the board but may be considered by the board in issuing a permit or promulgating a regulation. The regulation contains provisions addressing situations appropriate for the use of dispute resolution, costs, confidentiality of proceedings, public participation, the use of neutral facilitators, and procedures for mediation.

Substantial Changes Made Since the Proposed Stage

Please briefly and generally summarize any substantial changes made since the proposed action was published. Please provide citations of the sections of the proposed regulation that have been substantially altered since the proposed stage.

1. 9 VAC 5-210-70 A: A provision has been added specifying that parties who fail to attend the dispute resolution procedure or to send representatives shall no longer be considered parties.
2. 9 VAC 5-210-80 A: A provision has been added clarifying the treatment of confidential information during the dispute resolution procedure.
3. 9 VAC 5-210-90 A: The response time following publication of a notice of dispute resolution procedure has been doubled from 5 to 10 business days.
4. 9 VAC 5-210-90 B: A provision has been added requiring more information from an applicant to party status.
5. 9 VAC 5-210-160 D: Recommencement of an aborted dispute resolution procedure has been rendered optional rather than mandatory.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency, including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

On March 26, 2001, the State Air Pollution Control Board adopted a final regulation entitled "Regulation for Dispute Resolution," specifically 9 VAC 5 Chapter 210. The regulation is to be effective on July 1, 2001.

Basis

Please identify the section number and provide a brief statement relating the content of the statutory authority to the specific regulation adopted. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to adopt the regulation and that it comports with applicable state and/or federal law.

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. Written assurance from the Office of the Attorney General that (i) the State Air Pollution Control Board possesses the statutory authority to promulgate the proposed regulation and that (ii) the proposed regulation comports with the applicable state and/or federal law is available upon request.

Purpose

Please provide a statement explaining the rationale or justification of the regulation as it relates to the health, safety or welfare of citizens.

The purpose of the regulation is to provide alternatives which reduce the need for formal administrative actions in resolving environmental disputes. The regulation will enhance public health and welfare by expediting the resolution of environmental disputes in a manner that is faster, more accessible to the public, less adversarial, and less costly than are formal administrative methods of resolving such disputes. The regulation is being proposed to comply with the mandate of §10.1-1186.3 of the Code of Virginia that requires the adoption of regulations for the use of alternative dispute resolution in the development of a regulation or in the issuance of a permit.

Substance

Please identify and explain the new substantial provisions, the substantial changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the changes.

1. The regulation allows the board, at its discretion and pursuant to the situations outlined in § 10.1-1186.3 A of the Code of Virginia, to use a dispute resolution procedure in order to resolve significant areas of disagreement among interested parties to a permit issuance or to the promulgation of a regulation.
2. The outcome of the procedure shall not bind the board but may be considered by the board in issuing a permit or promulgating a regulation.
3. In the case of a dispute over the issuance of a permit, the procedure may be used only with the consent and participation of the permit applicant.
4. The regulation specifies which information resulting from the procedure shall be held confidential and which shall be subject to disclosure.
5. The regulation also specifies how the impending procedure will be advertised to the public and how interested parties may opt to participate in the procedure.
6. The regulation also specifies the function of the third-party neutral in facilitating the procedure.

Issues

Please provide a statement identifying the issues associated with the regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public of implementing the new or amended

provisions; and 2) the primary advantages and disadvantages to the agency or the Commonwealth. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

1. Public: The primary advantages to the public are (1) significant savings in state litigation costs and therefore tax dollars, (2) increased access to and opportunities for participation in the decision-making process, (3) an acceleration of the decision-making process, (4) satisfactory results for all parties rather than just one. There are no disadvantages to the public.
2. Department: The primary advantages to the department are the same as advantages (1), (3), and (4) listed for the public. The only disadvantage to the department is the need to assign staff to administer the regulation.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

A summary and analysis of the public testimony, along with the basis for the decision of the board, is attached.

Detail of Changes

Please detail any changes, other than strictly editorial changes, made since the publication of the proposed regulation. This statement should provide a section-by-section description of changes.

1. 9 VAC 5-210-70 A: A provision has been added specifying that parties who fail to attend the dispute resolution procedure or to send representatives shall no longer be considered parties.
2. 9 VAC 5-210-80 A: A provision has been added clarifying the treatment of confidential information during the dispute resolution procedure.
3. 9 VAC 5-210-90 A: The response time following publication of a notice of dispute resolution procedure has been doubled from 5 to 10 business days.
4. 9 VAC 5-210-90 B: A provision has been added requiring more information from an applicant to party status.
5. 9 VAC 5-210-160 D: Recommencement of an aborted dispute resolution procedure has been rendered optional rather than mandatory.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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; and 4) increase or decrease disposable family income.

It is not anticipated that this regulation will have a direct impact on families. However, there will be positive indirect impacts in that the regulation will ensure that the Commonwealth's air pollution control regulations will function as effectively as possible, thus contributing to reductions in related health and welfare problems.

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COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD
STATE WATER CONTROL BOARD
VIRGINIA WASTE MANAGEMENT BOARD

SUMMARY AND ANALYSIS OF PUBLIC TESTIMONY FOR
REGULATION REVISION A00
CONCERNING
DISPUTE RESOLUTION
9 VAC 5 CHAPTER 210--AIR
9 VAC 20 CHAPTER 15--WATER
9 VAC 25 CHAPTER 15--WASTE

INTRODUCTION

At their joint meeting on July 11, 2000, the three boards authorized the department to promulgate for public comment proposed regulations concerning dispute resolution.

A public hearing was advertised accordingly and held in Richmond on December 4, 2000. The public comment period closed on December 26, 2000. The proposed regulations subject to the hearing are summarized below, followed by a summary of the public participation process and an analysis of the public testimony, along with the basis for the decision of the boards.

SUMMARY OF PROPOSED REGULATIONS

The proposed regulations concern provisions covering dispute resolution. The proposed provisions are listed below by their regulatory citations for the air board's regulation. The regulatory provisions for the other two boards are identical except for the citation numbers and other legal references.

Part I. Definitions.

9 VAC 5-210-10. Use of terms.

9 VAC 5-210-20. Terms defined.

Part II. General Provisions.

9 VAC 5-210-30. Applicability.

9 VAC 5-210-40. Purpose and scope.

9 VAC 5-210-50. Costs.

9 VAC 5-210-60. Date, time, and place.

9 VAC 5-210-70. Attendance at the dispute resolution procedure.

9 VAC 5-210-80. Confidentiality.

9 VAC 5-210-90. Public participation.

9 VAC 5-210-100. Appointment and function of neutral.

9 VAC 5-210-110. Resumes of neutrals and descriptions of dispute resolution programs.

9 VAC 5-210-120. Enforcement of written settlement agreement.

9 VAC 5-210-130. Referral of disputes to dispute resolution.

Part III. Mediation Procedures.

9 VAC 5-210-140. Appointment of mediator.

9 VAC 5-210-150. Evaluation session.

9 VAC 5-210-160. Continuation, termination, and resolution of mediation.

SUMMARY OF PUBLIC PARTICIPATION PROCESS

As required by law, notice of this hearing was given to the public on or about October 23, 2000, in the Virginia Register. In addition, individual notice of this hearing and the opportunity to comment were given by mail to those on the department's list to receive notices of proposed regulations. A public hearing was held in Richmond, Virginia on December 4, 2000. One person attended the hearing. This person did not offer testimony. Two commenters filed written comments during the public comment period. A list of hearing attendees and the complete text of testimony are included in the hearing report, which is on file at the department.

ANALYSIS OF TESTIMONY

Below is a summary of the comments received and the accompanying analysis. Included is a brief statement of the subject, the identification of the commenter, the text of the comment, and the response of the three boards (analysis and action taken). Each issue is

discussed in light of all of the comments received that affect that issue. The boards have reviewed the comments and developed a specific response based on their evaluation of the issue raised. The action of the boards is based on consideration of the overall goals and objectives of their environmental programs and the intended purpose of the regulations.

Regulatory citations below refer to the air board's regulation but comments and responses apply equally to the regulations for the waste and water boards.

1. **SUBJECT**: 9 VAC 5-210-20 Terms Defined; "Neutral Facilitator"

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: This person should be both trained and experienced in conducting dispute resolution proceedings in services.

RESPONSE: The proposed regulatory language derives from the enabling legislation for this regulatory development action, Virginia Code § 8.0 1-576, "Neutral." There is no reason for the regulations to be more stringent than the law. No change was made to the proposal as a result of this comment.

2. **SUBJECT**: 9 VAC 5-210-20 Terms Defined; "Party"

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: We believe that the "(i) has attended a public meeting for public hearing on the permit or regulation and dispute and is, therefore, named in the public record" definition is fair and appropriate only if the Commonwealth substantially improves its public notification system. We offer the following concerns about Virginia's capability to provide for due public notification and participation regarding air pollution control laws, regulations, permits, and as another example, State Air Pollution Control Board meetings.

A. We are concerned that the Virginia Department of Environmental Quality may not maintain currency on its "public notices" web site.

B. The VDEQ's "town home" web site is so cumbersome that we literally had to be walked through it over the phone to find the proposed regulations for dispute resolution (9 VAC 5 Chapter 210) in a timely manner.

C. We are concerned that VDEQ may not have an adequate interested parties general public notification system in place that provides for sufficient advance notice through different media of proposals regarding air pollution laws, regulations, and permits. The Internet notification system is cumbersome, difficult to use and not accessible to many groups and individuals who may wish to participate.

D. Notification is not timely. We typically receive no more than about 10 business days (two or three in a recent case) advance notice of board meeting announcements and agendas. Board meetings are usually held during typical work hours which hampers public attendance and participation.

E. Makeup of the Board does not seem appropriately balanced. It concerns us that the current board appears to lack conservation and human health representation, which may have serious implications for dispute resolution and appeals decision-making.

RESPONSE: Virginia's Administrative Process Act (Virginia Code § 9-6.14:2 et seq.) specifies the official legal forms and schedules for public notification in the Virginia Register. Comments A through D pertain to voluntary forms of notification that the agency uses as a courtesy in addition to (not as replacement for) this official legal notification. Those interested in participating should rely on the Virginia Register. On comment B, the web site referred to is maintained by the Department of Planning and Budget, not by the Department of Environmental Quality. On comment E, the makeup of the State Air Pollution Control Board is governed by law (§ 10.1-1 302), and members are appointed by the governor. No change was made to the proposal as result of this comment.

3. **SUBJECT:** 9 VAC 5-210-30 Applicability D and F

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: Notwithstanding paragraphs B and E of 9 VAC 5-210-30, this provision presents an equity issue with respect to the Commonwealth's final rulemaking in permitting decisions in the lack of the timely opportunities available to address and resolve issues raised by affected stakeholders. By design, dispute resolution tacitly requires legal processes and remedies to be sought by any stakeholder who believes he or she has been wrongfully treated by the process of Commonwealth decision-making. The proposed rule and/or supporting documentation for the rule should explicitly acknowledge that alternative administrative or legal courses of action, including appeals to the Environmental Protection Agency's oversight authority on state issues, are available to offended stakeholders in these situations.

RESPONSE: Appeals are covered elsewhere in the regulations of the boards (e.g., 9 VAC 5-170-20 et seq. for the air board). No change was made to the proposal as result of this comment.

4. **SUBJECT:** 9 VAC 5-210-40 Purpose and Scope

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: This provision renders the dispute resolution process potentially useless. The board appears to be given wide discretion whether to employ the process in the first place and whether to use the results of the dispute resolution process if it is employed. In addition, of significant concern is paragraph F, which gives permit applicants veto power

over the use of the dispute resolution process for permitting issues. In these important respects, the proposed dispute resolution process appears to contradict its stated goal to ensure fairness of process or outcome. Therefore, we urge the Commonwealth to substantially revise or simply eliminate this provision.

RESPONSE: The proposed regulatory language, including that of subsection F, derives from the enabling legislation for the regulations, Virginia Code § 10.1-1186.3. There is no reason for the regulations to be more stringent than the law. No change was made to the proposal as result of this comment.

5. **SUBJECT:** 9 VAC 5-210-50 Costs

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: We recommend the Commonwealth identify special allowances or exceptions regarding cost-sharing in cases where a party is a private citizen with below median income in Virginia, or has other legitimate constraints that would otherwise preclude or seriously hamper his/her ability to adequately serve as a party.

RESPONSE: The cost allocation among the parties should be negotiated by the parties themselves on a case-by-case basis, not dictated by the Commonwealth. No change was made to the proposal as result of this comment.

6. **SUBJECT:** 9 VAC 5-210-80 Confidentiality A and B

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: We believe the Commonwealth should protect the confidentiality of dispute resolution per provisions of § 8.01-576.10, with no exceptions, unless all parties agree in writing to waive the confidentiality.

RESPONSE: Although the general mandate for the treatment of confidentiality derives from Virginia Code § 8.01-576.10, the exception cited in the proposed regulatory language also derives from statute (§ 10.1-1186.3). The board therefore does not have the discretion to make the suggested change. No change was made to the proposal as result of this comment.

7. **SUBJECT:** 9 VAC 5-210-90 Public Participation, Item A

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: We urge the Commonwealth to reasonably but specifically expand upon means of public notification of disputes that have been referred to dispute resolution beyond the currently identified Virginia Register.

RESPONSE: The Virginia Register is the Commonwealth's official publication for legal notices. The proposed regulatory language acknowledges that the boards may choose additional means of notification if appropriate. The costs of such additional notification, however, may be considerable and might have to be incorporated into the costs to be shared by the parties. No change was made to the proposal as result of this comment.

8. **SUBJECT:** 9 VAC 5-210-110 Resumes of neutral facilitators and descriptions of dispute resolution programs

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: Consistent with our 9 VAC 5-210-20 comments, we believe neutral facilitators should be required to maintain current resumes in the department's files through annual or as-needed updates.

RESPONSE: The selection of the neutral facilitator should be within the purview of the parties to a dispute resolution regardless of whether that facilitator has filed a resume with the department. No change was made to the proposal as result of this comment.

9. **SUBJECT:** 9 VAC 5-210-120 Enforcement of Written Settlement Agreement

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: Similar to our 9 VAC 5-210-40 comments, the discretion provided the board in this part renders the process outcome potentially useless to an offended party (i.e., there's no certainty that any agreement reached through dispute resolution will be used or enforced). Therefore, we urge the Commonwealth to add a provision to the dispute resolution proposal requiring the board to compensate offended parties for any and all costs incurred to use the process in cases where the board chooses to disregard agreements.

RESPONSE: The proposed regulatory language derives from Virginia Code § 10.1-1186.3 C. There is no reason for the regulations to be more stringent than the law. Parties undertake dispute resolution with full knowledge that the board is under no legal obligation to use or enforce a written settlement agreement. No change was made to the proposal as result of this comment.

10. **SUBJECT:** 9 VAC 5-210-130 Referral of Disputes to Dispute resolution

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: See our comments to 9 VAC 5-210-40 and also note that the latter provision has no item H.

RESPONSE: See response to comment 4. The words "and H" were struck from 9 VAC 5-210-130 A.

11. **SUBJECT:** 9 VAC 5-210-160 B

COMMENTER: Douglas K. Morris, Superintendent, National Park Service

TEXT: This paragraph provides another inequity in the use of the dispute resolution process by giving sole discretion to continue or stop a dispute resolution process already in progress to a permittee (should be permit applicant) or the director of the VDEQ. We urge the Commonwealth to add a provision to the dispute resolution proposal requiring the permit applicant or the VDEQ to compensate offended parties for any and all costs incurred to use the process when terminated by either the permit applicant or the director.

RESPONSE: The proposed regulatory language derives from Virginia Code § 10.1-1186.3 A 6. There is no reason for the regulations to be more stringent than the law. On the issue of costs, see response to comment 5. "Permittee" was changed to "permit applicant" in 9 VAC 5-210-160 B and C.

12. **SUBJECT:** Dispute resolution in rulemakings

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: The department and the boards employ extensive public participation in the process of adopting regulations. First, the department solicits public comment through publication of the notice of intended regulatory action. In most instances, the department conducts a public meeting on the notice to gather additional verbal as well as written comments from interested members of the public.

Next, the department regularly provides an opportunity for members of the public -- individuals, companies, and organizations -- to affect the outcome of the rulemaking through its use of ad hoc advisory groups. The department empanels advisory groups to assist it in the drafting of regulations to present to the boards for their consideration. In fact, an advisory group assisted the department in drafting these proposed regulations. Typically, the size of an advisory group reflects the level of public interest in the rulemaking, and its composition reflects a cross-section of individuals, companies, and organizations interested in the rulemaking.

Once the advisory group process concludes and the board proposes regulations, the department again solicits public comment in the form of written comments on the proposed regulations. In addition, the department conducts a public hearing on the proposed regulations to allow interested members of the public additional opportunity to submit verbal as well as written comments on the proposed regulations. After considering all of this public input, the board takes final action by adopting the regulations as proposed,

adopting the regulations with appropriate amendments in light of the public comment, or even declining to adopt the regulations in any form.

In sum, by the time the board adopts a regulation, every interested party in Virginia has had numerous opportunities to participate and affect the outcome of the rulemaking. With all of the opportunities described above, no one can claim they were denied a meaningful opportunity to have their point of view heard and considered by the department and the board. In light of this, VMA wonders what additional need the proposed regulations for dispute resolution would serve in the rulemaking context.

The VMA realizes the boards are under a statutory duty to adopt dispute resolution regulations. However, we are concerned about the boards' use of such dispute resolution in the rulemaking process. We believe that to preserve the meaningfulness of all of the public participation that precedes the adoption of regulations, the department ought to engage in the dispute resolution process only in the rarest of instances. No one ought to be able to subvert all of the public participation described above by obtaining another chance to influence the outcome of the rulemaking through the dispute resolution process. Moreover, we support the limitation in the proposed regulations precluding dispute resolution after final adoption of a regulation. We urge the department and the boards to exercise their discretion in administering the dispute resolution program so that it does not marginalize, or worse, supplant the extensive public participation process the boards currently employ in rulemakings in Virginia.

RESPONSE: The circumstances under which the boards may consider using dispute resolution are specified in Virginia Code § 10.1-1186.3 and proposed 9 VAC 5-210-40. Virginia Code § 10.1-1186.3 E says, "Nothing in this section shall create or alter any right, action or cause of action, or be interpreted in any manner inconsistent with the Administrative Process Act (§ 9-6.14:1 et seq.)...." No change was made to the proposal as result of this comment.

13. **SUBJECT:** Dispute resolution in a permit issuance

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: The proposed regulations contain an essential safeguard against potential abuse of the dispute resolution process in the context of the permit issuance -- the permit applicant must agree to the dispute resolution process. The dispute resolution process cannot be initiated unilaterally by a member of the public who is upset with the terms and conditions of a proposed permit. The permit applicant must consent to the process. Moreover, the dispute resolution process must be terminated at the request of the applicant. VMA strongly supports these safeguards. We believe this dispute resolution process must be truly voluntary. Permit applicants should not be forced or coerced in any way to participate in this process.

While the regulations ought not to compel permit applicants to participate in the dispute resolution process, they may welcome the opportunity. We believe the dispute resolution process may prove to be useful in resolving the concerns of permit applicants short of formal administrative or judicial proceedings. In cases where an applicant has agreed to the terms and conditions of a permit, the regulations ought to encourage the use of mediation and similar techniques as alternatives to ultimately suing the board in court. The VMA supports the proposed regulations because they establish a workable framework for alternative approaches to resolving the concerns of permit applicants.

RESPONSE: Support for the proposal is appreciated. No change was made to the proposal as result of this comment.

14. **SUBJECT:** 9 VAC 5-210-20 Terms defined

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: The definition of the term "party" is an important key to the success of the dispute resolution regulations. It defines who is eligible to participate in the dispute resolution process once the board decides to undertake that process. Of course, the department (or should it be the board as represented by the department?) must be a party to any dispute over either a regulation or permit. Moreover, as noted above, the applicant must be a willing participant in any dispute resolution process concerning a proposed permit.

The VMA supports the requirement in the proposed definition of "party" that to be eligible to participate, an "interested person" has to have "attended a public meeting or public hearing on the permit" in dispute and be "named in the public record" on that permit. This requirement establishes a safeguard against potential abuses of the dispute resolution process by those who failed to avail themselves of the opportunities for public participation.

RESPONSE: Support for the proposal is appreciated. No change was made to the proposal as result of this comment.

15. **SUBJECT:** 9 VAC 5-210-30 Applicability

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: The VMA supports the limitation in proposed subsection F that would preclude the dispute resolution process after the board has adopted the regulation or issued the permit in dispute. We support this limitation principally for the reason noted above -- we do not want a post hoc dispute resolution process to marginalize or supplant the elaborate public participation processes leading to the adoption of a regulation or the issuance of a permit in Virginia. Once the board takes final action to adopt a regulation or

the board (or department by delegation) issues a permit, the time for an informal dispute resolution is over. The VMA would object to dispute resolution regulations that provide someone with yet another opportunity to change a regulation or permit after the board has taken final action in response to all the prior public input. Anyone aggrieved by such final actions of the board should avail themselves of the formal mechanisms established by the boards' appeal regulations and by the Virginia Administrative Process Act.

RESPONSE: Support for the proposal is appreciated. No change was made to the proposal as result of this comment.

16. **SUBJECT:** 9 VAC 5-210-50 Costs

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: The issue of who should pay the costs for the dispute resolution process was the subject of considerable debate among members of the ad hoc advisory group who assisted the department in drafting the proposed regulations. The VMA strongly believes that each and every party who participates in the dispute resolution process must equally share in the costs of the process, unless all the parties agree otherwise.

We understand that some members of the public might not have the financial resources that many of our member companies have. Nevertheless, dispute resolution is an extraordinary process, over and above the elaborate public participation opportunities available to every interested person in the Commonwealth. We believe that anyone who wants to participate in this extraordinary dispute resolution process must be prepared to share the extraordinary costs of the process equally with the other participants. Therefore, we support the proposed requirement that in the absence of an agreement by all of the parties to the contrary, all parties in the dispute resolution process share the costs equally.

We recommend the first sentence in subsection C be deleted. This sentence commands the parties in the dispute resolution process to agree on how to allocate the costs. The second sentence goes on to say that in the absence of a cost-sharing agreement, the parties must share the costs equally. The second sentence in subsection C alone suffices to address the issue of cost allocation.

RESPONSE: Support for the proposal is appreciated. The boards agree that the first sentence in 9 VAC 5-210-50 C is unnecessary. This sentence was deleted.

17. **SUBJECT:** 9 VAC 5-210-70 Attendance at the dispute resolution procedure

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: Subsection A of this section states, in part: "A party may satisfy the attendance requirement by sending a representative familiar with the facts of the case."

This indicates that there is a requirement that parties attend dispute resolution proceedings. We cannot find such a requirement in the proposed regulations.

The advisory group discussed the attendance issue during its deliberations. The general conclusion was that attendance by all parties at all dispute resolution proceedings should be mandatory. The VMA supports a mandatory attendance requirement. If interested persons claim to be so aggrieved by a proposed regulation or permit that they want the department, and in the case of a permit, the applicant, to engage in dispute resolution, the very least those interested persons can do is show up for the proceedings. If they don't, they should be expelled permanently from the process and be required to pay their share of the costs up to the point of their expulsion. The VMA requests that the board insert a provision in the final regulations clearly establishing this mandatory attendance requirement. (This issue is discussed further in our comment below on proposed 9 VAC 5-210-160.)

RESPONSE: The boards agree that the attendance requirement implicit in 9 VAC 5-210-70 A should be made explicit. This change was made to the proposal.

18. **SUBJECT:** 9 VAC 5-210-80 Confidentiality

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: The VMA is very concerned about the confidentiality provisions of the proposed regulations. We believe the dispute resolution process must have, from start to finish, built-in safeguards to protect, at a minimum, confidential business information divulged during the process. Confidentiality is essential to the free exchange of information in the voluntary dispute resolution process. Thus, the regulations should ensure the protection of all confidential business information divulged during the dispute resolution process. We are concerned that the proposed regulations might be interpreted to do the opposite.

Proposed subsection A states that the general rule of confidentiality in Virginia Code § 8.01-576.10 would not apply "when the board uses or relies on information obtained in the course of such [dispute resolution] proceeding in issuing a permit or promulgating a regulation." Proposed subsection A goes on to require a party who divulges information that "would normally be protected by the confidentiality provisions of this section" to "waive that protection" when the information is given to the board.

We realize that the first sentence in Virginia Code § 10.1-1186.3.E, part of the statute requiring the board to adopt dispute resolution regulations, says confidentiality cannot be accorded to information divulged in the dispute resolution proceeding if the board relies on it in issuing a permit or promulgating a regulation. However, the second sentence in subsection E goes on to state, "Nothing in this section shall create or alter any right...." The Virginia Air Pollution Control Law and the air board's regulations, 9 VAC 5-170-60, create a right of confidentiality for confidential business information provided to the board,

even if the board relies on the confidential business information in issuing a permit. Thus, notwithstanding the first sentence of subsection E, the board cannot disclose to the public any confidential business information it learns through the dispute resolution process.

We also believe Virginia Code § 10.1-1186.3.E provides no exception to the general rule of confidentiality binding parties other than the boards. The exception from the general rule of confidentiality in the first sentence of subsection E is clearly intended to apply to the boards. This sentence does not absolve any other parties to the dispute resolution proceedings from the general rule of confidentiality, Virginia Code § 8.01-576.10, cited in subsection E.

In short, the VMA believes the correct reading of the applicable confidentiality statutes and regulations is that any confidential business information divulged during the dispute resolution proceeding must be held confidential under all circumstances by the board and by the other parties to the proceedings. This guarantee of confidentiality for confidential business information is absolutely essential for the full and frank exchange of information necessary for the dispute resolution process to work. Therefore we advocate adding clarifying language to proposed 9 VAC 5-210-80 stating that notwithstanding any other provisions, any information that qualifies as confidential business information that is divulged in the dispute resolution proceeding shall be treated as confidential pursuant to applicable statutes and board regulations.

RESPONSE: The second sentence of Virginia Code § 10.1-1186.3 E reads, "Nothing in this section shall create or alter any right, action or cause of action, or be interpreted or applied in a manner inconsistent with the Administrative Process Act (§ 9-6.14:1 et seq.), with applicable federal law or with the applicable requirement for the Commonwealth to obtain or maintain federal delegation or approval of any regulatory program." The commentor interprets this sentence to mean that nothing in this section shall create or alter any right, action or cause of action, *without qualification*. The board, on the other hand, interprets this sentence to mean that nothing in this section shall create or alter any right, action or cause of action *inconsistent with the Administrative Process Act, with applicable federal law or with the applicable requirement for the Commonwealth to obtain or maintain federal delegation or approval of any regulatory program*. That is, the board interprets the phrase beginning "inconsistent with the" as a restrictive modifier qualifying the grammatical objects "right, action or cause of action." Therefore, the board does not believe it has the discretion to override the exception to the confidentiality provision specified in the first sentence of § 10.1-11 86.3 E.

Nevertheless, as a result of this comment, the board has added the following sentence to the end of 9 VAC 5-210-80 A: "Notwithstanding the above, any information qualifying as confidential under the Air Pollution Control Law shall remain confidential."

19. **SUBJECT:** 9 VAC 5-210-90 Public participation

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: Subsection A calls for the department to notify the public when it will initiate the dispute resolution process. The VMA is concerned that the five-day response time in which to notify the department of interest in participating is far too short. We suggest the response time be doubled to 10 days.

Subsection D states that after receiving from an interested person an application and a signed statement acknowledging, among other things, the financial burden of participating, "the director [of the department] may consider this person a party and proceed accordingly." (Emphasis added.) This language indicates the director does not have to consider every interested person to be a party to a dispute resolution process. What criteria would the director use to deny an interested person's application to participate in the process? No criteria are articulated in the proposed regulations.

The VMA suggests that the "application" specified in subsection B should include a statement by the interested person detailing his concerns with the proposed regulation or permit with sufficient particularity that the director can ascertain whether the interested person's concerns are relevant and whether his participation would facilitate or impede the resolution of any disputes over the regulation or permit. For example, if an interested person states objections to a permit applicant's use of property that would be a zoning or land use concern outside the purview of the air board, then the interested person should be denied party status because he did not raise a relevant air quality concern. In any event, we suggest that language be included in the regulations indicating, at least in general terms, the criteria the director may use to screen and deny applicants for party status.

RESPONSE: The minimum response time has been doubled to 10 days. A statement has been added to 9 VAC 5-210-90 B requiring each applicant for party status to state the nature and extent of that applicant's interest in the dispute. This statement will provide the director with a clearer basis on which to evaluate the applicant's suitability to be admitted to party status.

20. **SUBJECT:** 9 VAC 5-210-120 Enforcement of written settlement agreement

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: A successful dispute resolution process will yield a written agreement by the parties. The proposed regulation states that "the board may incorporate the terms of the written agreement into decisions pertinent to the case." The language in the draft from the advisory group contained the qualification that the board could do so "upon the request of all parties." We are unaware of the reason the department deviated from the advisory group's version by deleting this language. However, we favor the advisory group's version because it gives the parties to the dispute resolution the ultimate control over the outcome of the voluntary participation.

RESPONSE: The language in question was deleted to clarify the position of the board as the ultimate arbiter of the terms and language for its case decisions. The "ultimate control over the outcome of the voluntary participation" rests with the board, not the parties. No change was made to the proposal as a result of this comment.

21. **SUBJECT:** 9 VAC 5-210-130 Referral of disputes to dispute resolution

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: Subsection A refers to subsections G and H of proposed 9 VAC 5-210-40. There is no subsection H in that section. The advisory group's draft contained subsections G and H, but the board deleted subsection G from the advisory group's version and redesignated subsection H to subsection G in the proposed regulation.

RESPONSE: The reference to subsection H was deleted.

22. **SUBJECT:** 9 VAC 5-210-160 Continuation, termination, and resolution of mediation

COMMENTER: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

TEXT: The VMA supports this proposed section, particularly the stipulation in subsection C that a party who drops out of the dispute resolution process shall be bound by the cost and confidentiality provisions in the regulation. We also advocate including a provision stating that a party shall be conclusively deemed to have dropped out if the party fails to attend any dispute resolution proceeding.

Subsection D says that if a mediation is terminated before settlement is reached, "the parties shall resume the same status as before mediation and shall proceed with the formal adjudication as if the mediation had not taken place." However, if mediation of the dispute over a proposed regulation or permit is terminated, there is no certainty that one or more of the parties will press forward with a formal adjudication. It may well be that notwithstanding the failure of the mediation, none of the parties will press forward with "formal adjudication" whether by administrative or judicial process. Thus, we suggest deleting the phrase "with the formal adjudication" in the first sentence of subsection D.

RESPONSE: 9 VAC 5-210-70 A was changed to include the recommended provision concerning failure to attend. 9 VAC 5-210-150 D was changed from "shall proceed" to "may proceed."