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## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	State Air Pollution Control Board
<b>Virginia Administrative Code (VAC) citation(s)</b>	Article 2, 9VAC5-80 (Permit Program Emissions Fees for Stationary Sources); Article 10, 9VAC5-80 (Permit Application Fees for Stationary Sources); and Article 11, 9VAC5-80 (Annual Permit Maintenance Fees for Stationary Sources)
<b>Regulation title(s)</b>	Regulations for the Control and Abatement of Air Pollution
<b>Action title</b>	Title V Program Fees (Revision K16)
<b>Date this document prepared</b>	November 21, 2016

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Subject matter and intent

*Please describe briefly the subject matter, intent, and goals of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.*

Title V of the 1990 Clean Air Act Amendments requires that states develop permit fee programs to pay for all of the direct and indirect costs of the state's Title V Permit Program. Virginia's Title V Permit Program is projected to become underfunded in fiscal year (FY) 2018 because air emission fee revenue is decreasing and because the fee schedule does not reflect actual costs of the program. The intent of this regulatory action is to comply with state and federal requirements to fully fund Virginia's Title V Permit Program. The goal of this proposed action is to increase Title V fees enough to fully fund the Title V program, to restructure the existing Title V fee schedule to better reflect actual costs of the program, and to make other amendments determined to be necessary including clarification of the regulatory text.

### Acronyms and Definitions

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.*

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“Board” means the State Air Pollution Control Board

“CAAA” means the 1990 Clean Air Act Amendments.

“CFR” means the Code of Federal Regulations.

“EPA” means the United States Environmental Protection Agency.

“FY” means fiscal year (as opposed to calendar year), and refers to the Commonwealth of Virginia’s fiscal year that begins on July 1 and ends on June 30.

“GHG” means greenhouse gas.

“SAG” means Stakeholder Advisory Group.

“Title V” means the fifth Title of the federal Clean Air Act.

### Legal basis

*Please identify (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.*

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#### Statutory Authority

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.

#### Promulgating Entity

The promulgating entity for this regulation is the State Air Pollution Control Board.

#### Federal Requirements

The federal statutory basis for the regulation is Title V, Sections 501-507 of the federal Clean Air Act (42 USC 7401 et seq., 91 Stat 685).

The 1990 Clean Air Act Amendments (CAAA) created a major change to the approach taken by the U.S. Congress in previous promulgations of the federal Clean Air Act. Title V of the CAAA requires the states to develop operating permit programs to cover all stationary sources defined as major by the Act. Permits issued under the permit programs must set out standards and conditions that cover all the applicable requirements of the Act for each emission unit at each individual stationary source. Section 502 of the Act requires that states develop permit fee programs to pay for the costs of the state’s Title V Permit Program.

Section 502 (b)(3) of the CAAA sets out the minimum elements that must be included in each state's permit fee program. The owner or operator of all sources subject to the requirements to obtain a permit must pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of Title V, including the cost of the small business technical assistance program. Section 502 (b)(3)(A) specifies what is meant by reasonable costs, as follows:

1. Reviewing and acting upon any application for a permit.
2. Implementing and enforcing the terms and conditions of the permit, but not including any court costs or other costs associated with any enforcement action.
3. Emissions and ambient monitoring.
4. Preparing generally applicable regulations or guidance.
5. Modeling, analyses, and demonstrations.
6. Preparing inventories and tracking systems.

Section 502 (b)(3)(B) specifies the requirements for the total amount of fees to be collected by the state permitting authority, as follows:

1. The state must demonstrate that, except as otherwise provided, the program will collect in the aggregate from all sources subject to the program an amount not less than \$25 per ton of each regulated pollutant, or such other amount as the EPA administrator may determine adequately reflects the reasonable costs of the permit program.
2. "Regulated pollutant" means (a) a volatile organic compound; (b) each pollutant regulated under Section 111 or 112 of the Act; and (c) each pollutant for which a national primary ambient air quality standard has been promulgated (except carbon monoxide).
3. In determining the amount to be collected, the permitting authority is not required to include any amount of regulated pollutant emitted by any source in excess of 4,000 tons per year of that pollutant.
4. The requirements of paragraph 1 above will not apply if the permitting authority can demonstrate that collecting an amount less than \$25 per ton of each regulated pollutant will meet the requirements of 502 (b)(3)(A).
5. The fee calculated under paragraph 1 above shall be increased (consistent with the need to cover the reasonable costs authorized by 502 (b)(3)(A) in each year beginning after the year of the enactment of the Act by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989.

Section 502 (b)(3)(C) specifies the requirements of a federal permit fee program if the EPA administrator finds that the fee provisions of a state program are inadequate or if the Title V operating permit program itself is inadequate and EPA has to administer the fee program itself. This section allows the EPA administrator to collect additional fees to cover the administrator's costs of administering a federal fee program and specifies that the EPA administrator may collect additional penalties and interest for failure to pay fees.

Section 502 (b)(4) specifies that the minimum elements for the permit program include requirements for adequate personnel and funding to administer the program.

Section 507 (f) specifies that the state may reduce any fee required under Title V to take into account the financial resources of small business stationary sources.

The federal regulatory basis for the Title V Fee Program is 40 CFR § 70.9.

Section 70.9 (a) specifies that the state program require that the owners or operators of part 70 sources pay annual fees that are sufficient to cover the permit program costs and that any fee required by this section will be used solely for Title V permit program costs.

Section 70.9 (b)(1) specifies that the state establish a fee schedule that results in the collection and retention of revenues sufficient to cover the permit program costs. These costs shall include, but are not limited to:

1. Preparing generally applicable regulations or guidance regarding the Title V permit program or its implementation or enforcement;
2. Reviewing and acting on any permit application including the development of an applicable requirement;
3. General administrative costs of running the permit program, including the supporting and tracking of permit applications, compliance certification, and related data entry;
4. Implementing and enforcing the terms of any Title V permit;
5. Emissions and ambient monitoring;
6. Modeling, analyses, or demonstrations;
7. Preparing inventories and tracking emissions; and
8. Providing direct and indirect support to sources under the Small Business Stationary Source Technical and Environmental Compliance Assistance Programs in determining and meeting their obligations under the Title V permit program.

Section 70.9 (b)(2) provides a fee schedule that EPA will presume meets the requirements of 40 CFR § 70.9 (b)(1), which includes collecting not less than \$25 per year per ton of actual emissions of each regulated pollutant adjusted annually for increases in the Consumer Price Index as of August 31 of the most recent calendar year. The presumptive fee includes a greenhouse gas (GHG) adjustment based upon the hourly burden for GHG permit activities. This section also provides certain exclusions from the actual emissions calculation that the state may use, including a 4,000 ton per year cap on actual emissions of regulated pollutants used in the calculation, the actual emissions used in the minimum fee calculation, and actual emissions from insignificant activities not required in the Title V permit application pursuant to 40 CFR § 70.5 (c). "Actual Emissions" is defined for 40 CFR Part 70 sources as follows:

"Actual emissions" means the actual rate of emissions in tons per year of any regulated pollutant (for presumptive fee calculation) emitted from a part 70 source over the preceding calendar year or any other period determined by the permitting authority to be representative of normal source operation and consistent with the fee schedule approved pursuant to this section. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and in-place control equipment, types of materials processed, stored, or combusted during the preceding calendar year or such other time period established by the permitting authority pursuant to the preceding sentence.

Section 70.9 (b)(3) specifies that the state's fee schedule may include emissions fees, application fees, service-based fees, other types of fees, or any combination thereof to meet the fee schedule requirement to cover Title V permit program costs. It further specifies that nothing in 40 CFR § 70.9 shall require the

permitting authority to calculate fees on any particular basis or in the same manner for all sources, provided that the permitting authority collects a total amount of fees sufficient to meet the program support requirements of § 70.9 (b)(1).

Section 70.9 (b)(5) specifies that the state shall provide an accounting that its fee schedule results in the collection and retention of revenues sufficient to cover the permit program costs if (i) the state sets a fee schedule that would result in collections less than the presumptive fee schedule, or (ii) EPA has serious questions as to whether the state's fee schedule is sufficient to cover the program costs.

Sections 70.9 (c) and (d) further require the state to provide a demonstration that the collection of fees is sufficient to meet all of the Title V program requirements and that the fees are used solely to cover the costs of meeting those program requirements.

### State Requirements

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.

Section 10.1-1322 of this same law authorizes the State Air Pollution Control Board to adopt requirements for permits and to collect fees from air pollution sources.

Section 10.1-1322 B authorizes the State Air Pollution Control Board to provide for the collection of annual permit program emissions fees from air pollution sources, based upon actual emissions of each regulated pollutant not to exceed 4000 tons per year of each pollutant for each source. The annual permit program emissions fees are not to exceed a base year amount of \$25 per ton using 1990 as the base year, and are to be adjusted annually by the Consumer Price Index. Permit program fees for air pollution sources who receive state operating permits in lieu of Title V operating permits shall be paid in the first year and thereafter shall be paid biennially. This section also authorizes the board to collect permit application fee amounts not to exceed \$30,000 from applicants for a permit for a new major stationary source.

Section 10.1-1322.1 of the Virginia Air Pollution Control Law specifies that all moneys collected pursuant to §§ 10.1-1322 and 10.1-1322.2 be paid into the state treasury and credited to a special non-reverting fund known as the Air Pollution Permit Program Fund. Any moneys remaining in this fund are not to revert to the general fund but are to remain in the Fund. Utilization of the fees collected pursuant to this section is to be limited to the agency's direct and indirect costs of processing permits.

Item 369, paragraph B of Chapter 780 of the 2016 Acts of Assembly continued language initially included in item 365, paragraph B of Chapter 3 of the 2012 (Special Session 1) Acts of Assembly authorizing the board to adjust permit program emissions fees collected pursuant to § 10.1-1322 of the Code of Virginia and to establish permit application fees and permit maintenance fees sufficient to ensure that the revenues collected from all fees cover the direct and indirect costs of the program, consistent with the requirements of Title V of the Clean Air Act. It further specified that (i) permit application fees collected not be credited toward the amount of annual emissions fees owed pursuant to § 10.1-1322, (ii) that all fees be adjusted annually by the Consumer Price Index, (iii) that regulations initially implementing these provisions be exempt from Chapter 40 of Title 2.2, Code of Virginia (the Administrative Process Act), and (iv) that any further amendments to the fee schedule beyond those initially implementing these provisions would not be exempt from provisions of the Administrative Process Act.

## Purpose

*Please describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.*

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Federal law requires that the Title V Permit Program be fully funded through Title V program fees. The purpose of this regulatory action is to increase Title V fees and restructure the Title V fee schedule to (i) fully fund the Title V Permit Program and (ii) better reflect the actual costs of the Title V permit program thereby improving Title V fee revenue stability. Properly funding the Title V Permit Program will result in fewer emissions of regulated air pollutants into the ambient air and is essential to protecting the health, safety and welfare of the general public.

### Substance

*Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.*

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As the Title V Air Permit Program progresses toward achieving its goal of reducing air emissions, Title V program emissions fees produce less revenue. Most of the Title V program revenue is generated from emissions fees. As a result, the Title V program is projected to become underfunded in FY 2018. Federal law requires that the Title V Permit Program be fully funded through Title V program fees. The current Title V program fee schedule does not reflect the actual costs of the program. This regulatory action will increase Title V program fees for applicable sources, apply Title V program fees to new types of applicable sources, make other amendments determined to be necessary to support the fee program including clarification of regulatory text, and restructure the Title V program fee schedule to (i) fully fund the Title V Permit Program, and (ii) better reflect the actual costs of the Title V permit program thereby improving Title V program fee revenue stability. This action will implement recommendations made to the Director, Department of Environmental Quality by a Title V Fee stakeholder advisory group (SAG) convened specifically for this purpose.

### Alternatives

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

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Alternatives to the proposal are being considered by the board. The board 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 board, along with the reasoning by which the board has rejected any of the alternatives being considered, are discussed below.

1. Amend the regulations to satisfy the provisions of the law and associated regulations and policies. This option is being selected because it meets the stated purpose of the regulatory action: to (i) fully fund the program and (ii) better reflect the actual costs of the Title V permit program, thereby improving Title V fee revenue stability.
2. Make alternative regulatory changes to those required by the provisions of the law and associated regulations and policies. This option is not being selected because it does not meet federal and state

statutory requirements, and will result in loss of state authorization for the program and the imposition of federal Title V program fees and penalties.

3. Take no action to amend the regulations and continue to implement a fee schedule that will not fully fund the Title V Permit Program. This option is also not being selected because it does not meet federal and state statutory requirements, and will result in loss of state authorization for the program and the imposition of federal Title V program fees and penalties

### Public participation

*Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: (1) a panel will be appointed and the agency’s contact if you’re interested in serving on the panel is \_\_\_\_\_; (2) a panel will not be used; or (3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.*

The agency is seeking comments on this regulatory action, including but not limited to: (1) ideas to be considered in the development of this proposal; (2) the costs and benefits of the alternatives stated in this background document or other alternatives; (3) potential impacts of the regulation; and, (4) impacts of the regulation on farm and forest land preservation. A panel will not be used and a public hearing will not be held to receive comments at this stage of the regulatory action.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Gary Graham, Office of Regulatory Affairs, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, Phone: 804-698-4103, e-mail: [gary.graham@deq.virginia.gov](mailto:gary.graham@deq.virginia.gov), Fax: 804-698-4019. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site (<http://www.townhall.virginia.gov>). Written comments must include the name and address of the commenter. In order to be considered, comments must be received before midnight on the last day of the public comment period.

### Public hearing at proposed stage

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>).

### Regulatory panel

*Please indicate, to the extent known, if advisers (e.g., regulatory advisory panel or negotiated rulemaking panel) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using a panel in the development of the proposal; 2) the agency is using a panel in the development of*

*the proposal; or 3) the agency is inviting comment on whether to use a panel to assist the agency in the development of a proposal.*

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A Title V Fees stakeholder advisory group (SAG) was convened on July 26, 2016 by the Department of Environmental Quality and met four times for the purpose of (i) reviewing the Title V schedule of fees specified in Articles, 2, 10, and 11 of 9VAC5 Chapter 80 of the Regulations for the Control and Abatement of Air Pollution and (ii) making recommendations for changes to ensure that there is sufficient funding to cover the costs of the Title V Permit Program. A General Notice seeking participation on the SAG was published on the Virginia Regulatory Town Hall website on June 23, 2016 and for two weeks thereafter. Minutes of the Title V Fee SAG meetings are available on the Virginia Regulatory Town Hall website. The Board intends to use the work of the SAG when developing a proposal and does not intend to establish a separate regulatory advisory panel.

### **Family Impact**

*Assess 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; and 4) increase or decrease disposable family income.*

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It is not anticipated that the proposal will have a direct impact on the institution of the family and family stability.