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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) Chapter citation(s)</b>	Primary: 9VAC5-80 Secondary: 9VAC5-170
<b>VAC Chapter title(s)</b>	Site Suitability
<b>Action title</b>	Develop parameters for implementing site suitability criteria of state law for permits and variances (Rev. G20).
<b>Date this document prepared</b>	September 25, 2020

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

### Brief Summary

*Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).*

Code of Virginia § 10.1-1307 E of the State Air Pollution Control Law provides that the board in making regulations and in approving variances, control programs, or permits shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it. Currently, this criterion is examined on a case-by-case basis, however, it would provide clarity for the regulated community and the public to set forth the parameters the board and the agency will use to implement this criterion in the context of air permitting. The intent of this action is to consider amending the regulations of the board to provide greater detail as to how the requirements of § 10.1-1307 E are to be met, with the goal of greater consistency, clarity, and effectiveness of the site suitability determination process.

### Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

Department - Department of Environmental Quality

### Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Code of Virginia § 10.1-1307 E states:

The Board in making regulations and in approving variances, control programs, or permits, and the courts in granting injunctive relief under the provisions of this chapter, shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it, including: 1. The character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused; 2. The social and economic value of the activity involved; 3. The suitability of the activity to the area in which it is located; and 4. The scientific and economic practicality of reducing or eliminating the discharge resulting from such activity.

As applied to the review of permits, these criteria are very broad and may delve into areas beyond air quality law and science, including areas within the purview of local governments. The Department of Environmental Quality (department), which is responsible for implementing this and other requirements of the Regulations for the Control and Abatement of Air Pollution, believes that more specificity is needed in order to provide clarity for the public and the regulated community and ensure consistent implementation of these provisions.

### Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

#### 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.

### Purpose

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

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The Code of Virginia contains broad requirements that are implemented through the Virginia Administrative Code by its relevant citizen boards and agency departments. § 10.1-1307 E, which has been in place since 1966, directs the board to consider issues pertaining to the protection of public health and welfare with respect to the suitability of a proposed project to the area in which it will be located. These provisions have not changed as other state laws related to local land use and local government authorities have developed and matured.

From 1987 through December of 2008, the board and the agency operated under the board's site suitability policy. Generally, that policy provided that the board would defer to locally elected officials with respect to local issues such as zoning and direct emphasis toward the board's ability to consider air quality related issues. In 2008, the board discussed the policy and how § 10.1-1307 E should be implemented, from an air quality perspective, and in the context of issues directly under local government. No consensus on the policy and how to implement § 10.1-1307 E was reached by the board. The policy was ultimately rescinded and since then, § 10.1-1307 E has been interpreted by the department and the board on a case-by-case basis.

There is a need to clarify how the board and the department will implement these criteria particularly as related to local government authorities. In addition to providing clarity for the public and the regulated community, it will help ensure consistency in the application of these criteria as well as the efficient and effective utilization of limited resources.

In order to properly implement § 10.1-1307 E in the context of the board's regulations, the department believes that specific direction within state regulation is necessary. This will enable consistent, appropriate department and board actions within the context of § 10.1-1307 E, and thus better protect public health and welfare.

### **Substance**

*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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1. 9VAC5-80, Permits for Stationary Sources, may be amended in order to provide greater detail as to how the site suitability requirements of § 10.1-1307 E will be carried out in the permitting process.
2. 9VAC5-170, Regulation for General Administration, may be amended in order to provide greater detail as to how the site suitability requirements of § 10.1-1307 E will be carried out in the permitting process.

### **Alternatives to Regulation**

*Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.*

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Alternatives to the proposal will be considered by the board. It has been 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, along with the reasoning by which any of the alternatives have been rejected, are discussed below.

1. Adopt regulation amendments to be provide greater detail as to how the site suitability requirements of § 10.1-1307 E will be carried out in the permitting process. This option is being selected because it meets the stated purpose of the regulatory action: to develop requirements for meeting § 10.1-1307 E in a consistent, efficient, and effective manner, and such that these requirements do not conflict with any other area of state law.
2. Make alternative regulatory changes. This option is not being selected because it would not meet the stated purpose of the regulatory action.
3. Take no action to adopt the regulation amendments. This option is not being selected because it would not meet the stated purpose of the regulatory action.

**Periodic Review and  
Small Business Impact Review Announcement**

*If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and Executive Order 14 (as amended, July 16, 2018)), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify as necessary for your agency. Otherwise, delete the paragraph below and insert "This NOIRA is not being used to announce a periodic review or a small business impact review."*

This NOIRA is not being used to announce a periodic review or a small business impact review.

**Public Participation**

*Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.*

The board is seeking comments on this regulation, including but not limited to: ideas to be considered in the development of this regulation; the costs and benefits of the alternatives stated in this background document or other alternatives; and potential impacts of the regulation on local government, as well as other potential impacts of the regulation. The department is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: 1) projected reporting, recordkeeping, and other administrative costs; 2) the probable effect of the regulation on affected small businesses; and 3) 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 or email to Karen G. Sabasteanski, Department of Environmental Quality, P.O. Box 1105, Richmond VA 23218, phone 804-698-4426, email karen.sabasteanski@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the [Virginia Regulatory Town Hall website](http://www.townhall.virginia.gov) (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.

A Regulatory Advisory Panel (RAP) is being established for this regulatory action as described in the following section. Please note that the deadline for requesting participation on the RAP will be 30 days after publication of this notice.

A public hearing will be held following the publication of this stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.

### Regulatory Advisory 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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The board is using a panel to develop a proposal. Persons interested in assisting in the development of a proposal should notify the department's contact person no later than 30 days after publication of this notice and provide their name, address, phone number, email address and the organization you represent (if any). The primary function of the panel is to develop recommended regulation amendments for department consideration through the collaborative approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the panel will be sent to all applicants.

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