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## Periodic Review and Small Business Impact Review Report of Findings

Agency name	Air Pollution Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9VAC5-140
VAC Chapter title(s)	Regulation for Emissions Trading Programs; Part I. NO <sub>x</sub> Budget Program for Nonelectric Generating Units; and Part VII. CO <sub>2</sub> Budget Trading Program
Date this document prepared	November 5, 2021

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*.

## Acronyms and Definitions

*Define all acronyms used in this Report, and any technical terms that are not also defined in the "Definitions" section of the regulation.*

CAA – Clean Air Act

CAIR – Clean Air Interstate Rule

CSAPR – Cross-State Air Pollution Rule

CO<sub>2</sub> – Carbon dioxide

CFR – Code of Federal Regulations

DEQ – Department of Environmental Quality (also "the Department")

ED – Executive Directive

GHG – Greenhouse gas or greenhouse gases

NAAQS – National Ambient Air Quality Standard

NO<sub>x</sub> – Nitrogen oxides

RGGI – Regional Greenhouse Gas Initiative

SO<sub>2</sub> – Sulfur dioxide

## 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 or 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.*

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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 Air Pollution Control Board.

### Federal Requirements

For Part I of 9VAC5-140: Section 110(a)(2)(D)(i)(I) of the federal Clean Air Act requires states to prohibit emissions that contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any national ambient air quality standard (NAAQS). This provision is addressed in part by the requirements of 40 CFR Part 96 (NO<sub>x</sub> Budget Trading Program and CAIR NO<sub>x</sub> and SO<sub>2</sub> Trading Programs for State Implementation Plans) and 40 CFR Part 97 (Federal NO<sub>x</sub> Budget Trading Program, CAIR NO<sub>x</sub> and SO<sub>2</sub> Trading Programs, CSAPR NO<sub>x</sub> and SO<sub>2</sub> Trading Programs). Although these programs were eventually superseded, certain provisions remain in place in order to require continuous emissions monitoring for facilities that are not electric generating facilities.

For Part VII of 9VAC5-140: This regulation is needed to meet Virginia-only requirements, not any federal law or regulation.

### State Requirements

Code of Virginia § 10.1-1300 defines 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 of life or property." Excess emissions from permitted sources are harmful to human health and can significantly interfere with the people's enjoyment of life and property.

Code of Virginia § 10.1-1307 A provides that the board may, among other activities, develop a comprehensive program for the study, abatement, and control of all sources of air pollution in the Commonwealth.

Code of Virginia § 10.1-1308 authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling and prohibiting air pollution in order to protect public health and welfare.

For Part I of 9VAC5-140: Code of Virginia § 10.1-1322.3 indicates that the board may promulgate regulations to provide for an emissions trading program to achieve and maintain the NAAQS. The banking and trading program shall result in net air emission reductions, create economic incentive for reducing air emissions and allow for economic growth. The regulations applicable to the electric power industry shall foster competition in the electric power industry, encourage construction of clean, new generating facilities, provide without charge new source set-asides of 5% for the first five plan years and 2% per year thereafter, and provide an initial allocation period of five years. In developing the regulations, the board must consider (i) the definition and use of emissions reduction credits from mobile and stationary sources, (ii) offsets, (iii) interstate or regional trading, (iv) mechanisms needed to facilitate trading and banking, and (v) emissions allocations. However, no regulation may prohibit the direct trading of credits or allowances between private industries provided such trades do not have an adverse impact on air quality in Virginia.

For Part VII of 9VAC5-140: The original authority for this regulation was ED 11 (2017), "Reducing Carbon Dioxide Emissions from the Electric Power Sector and Growing Virginia's Clean Energy Economy." ED11

directs the DEQ Director to develop a proposed regulation to control CO<sub>2</sub> from electric power facilities that includes provisions to allow for the use of market-based mechanisms and the trading of CO<sub>2</sub> allowances through a multi-state trading program; and present the regulation to the board for approval for public comment. Additionally, the Attorney General issued an official advisory opinion that concluded the board is legally authorized to regulate greenhouse gases (GHG): "The Board has the authority to establish a statewide cap on GHG emissions for all new and existing fossil fuel electric generating plants as a means of abating and controlling such emissions." Part VII of 9VAC5-140, Regulation for Emissions Trading, was developed and approved accordingly.

Subsequently, Chapter 1219 of the 2020 Acts of Assembly amended the Air Pollution Control Law to add a new Article 4, the Clean Energy and Community Flood Preparedness Act. Under Code of Virginia § 10.1-1330 A, Clean Energy and Community Flood Preparedness, "[T]he provisions of this article shall be incorporated by the Department, without further action by the Board, into the final regulation adopted by the Board on April 19, 2019, and published in the Virginia Register on May 27, 2019. Such incorporation by the Department shall be exempt from the provisions of the Virginia Administrative Process Act (§ 2.2-4000 et seq.)."

Accordingly, Part VII of 9VAC5-140 was amended so that it comports with the full Regional Greenhouse Gas Initiative (RGGI) CO<sub>2</sub> emissions trading program and associated auction as mandated by Chapter 1219 of the 2020 Acts of Assembly.

### Alternatives to Regulation

*Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.*

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Alternatives to the proposal have been considered by the Department. The Department has determined that the retention of the regulation (the first alternative) is appropriate, as it is the least burdensome and least intrusive alternative that fully meets statutory requirements and the purpose of the regulation. The alternatives considered by the Department, along with the reasoning by which the Department has rejected any of the alternatives considered, are discussed below.

1. Retain the regulation without amendment. This option is being selected because the current regulation provides the least onerous means of complying with the minimum requirements of the legal mandates.
2. Make alternative regulatory changes to those required by the provisions of the legally binding state and federal mandates, and associated regulations and policies. This option was not selected because it could result in the imposition of requirements that place unreasonable hardships on the regulated community without justifiable benefits to public health and welfare.
3. Repeal the regulation or amend it to satisfy the provisions of legally binding state and federal mandates. This option was not selected because the regulation is effective in meeting its goals and already satisfies those mandates.

### Public Comment

*Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.*

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A Notice of Periodic Review concerning this regulation was published in the Virginia Register of Regulations on August 2, 2021. The public comment period closed on August 23, 2021. An informal advisory group was not formed to assist with this periodic review. No comment was received during the periodic review comment period.

### Effectiveness

*Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.*

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This regulation enhances the Department's ability to ensure compliance with all applicable federal requirements under the Clean Air Act and specific requirements of state law.

The regulation has been effective in protecting public health and welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth and is necessary for the protection of public health, safety and welfare.

The Department has determined that the regulation is clearly written and easily understandable by the individuals and entities affected. It is written so as to permit only one reasonable interpretation, is written to adequately identify the affected entity, and, insofar as possible, is written in non-technical language.

### Decision

*Explain the basis for the promulgating agency's decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).*

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This regulation satisfies the provisions of the law and legally binding state and federal requirements, and is effective in meeting its goals; therefore, the regulation is being retained without amendment.

### Small Business Impact

*As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.*

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This regulation continues to be needed. It provides sources with the most cost-effective means of fulfilling ongoing state and federal requirements that protect air quality.

No comments were received from the public during this periodic review.

The regulation's level of complexity is appropriate to ensure that the regulated entities are able to meet their legal mandates as efficiently and cost-effectively as possible.

This regulation does not overlap, duplicate, or conflict with any state law or other state regulation and does not conflict with federal regulation. This regulation implements the requirements of the federal CAA.

Part I of this regulation was last updated in 2017. Part VII of this regulation was last updated in 2020. This regulation continues to contribute to the most efficient and cost-effective means to determine the level and impact of excess emissions and to control those excess emissions through public discussion and direct review of permitting actions by the board.

The Department, through examination of the regulation, has determined that the regulatory requirements currently minimize the economic impact of emission control regulations on small businesses and thereby minimize the impact on existing and potential Virginia employers and their ability to maintain and increase the number of jobs in the Commonwealth.

## Family Impact

*Please assess the potential impact of the regulation's impact on the institution of the family and family stability.*

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

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