



## Exempt Action Final Regulation Agency Background Document

<b>Agency name</b>	State Air Pollution Control Board
<b>Virginia Administrative Code (VAC) citation</b>	Primary action: 9VAC5-80, Article 2, Article 10, and Article 11
<b>Regulation title</b>	Regulations for the Control and Abatement of Air Pollution
<b>Action title</b>	Title V Fees (Rev. D12)
<b>Document preparation date</b>	June 11, 2012

When a regulatory action is exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 A of the Administrative Process Act (APA), the agency is encouraged to provide information to the public on the Regulatory Town Hall using this form.

Note: While posting this form on the Town Hall is optional, the agency must comply with requirements of the Virginia Register Act, the *Virginia Register Form, Style, and Procedure Manual*, and Executive Orders 14 (2010) and 58 (99).

### Summary

*Please provide a brief summary of all regulatory changes, including the rationale behind such changes. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

This regulatory action amends the fee requirements for funding the Title V permit program. Specifically:

1. Article 2 (9VAC5-80-310 et seq.) of 9VAC5-80 (Permits for Stationary Sources) requires that permit program fees be paid by sources subject to Title V of the federal Clean Air Act on the basis of air pollutant emissions. The name of the annual permit program fee in Article 2 is changed to clarify that these fees are emissions fees and not application fees or maintenance fees. The base amount for calculating annual permit program emission fees is increased from \$25 per ton of emissions to \$31.22 per ton, resulting in an initial emission fee rate increase of less than 30% over current rates. Various other changes are made to Article 2: (i) to remove outdated provisions; (ii) to correct the minimum threshold for payment, (iii) to correct references and format; (iv) to allow other modes of payment; and (v) to clarify certain actions under the regulation.

2. Article 10 (9VAC5-80-2250 et seq.) of 9VAC5-80 (Permits for Stationary Sources) requires that application fees be assessed for certain types of air permit applications. Permit application

fees are expanded to include fees for all types of permits that make a stationary source subject to permit requirements under Title V and all types of permits that would remove a stationary source that is otherwise subject to Title V permit requirements from applicability under Title V. A method of making annual adjustments to the application fees for changes in the Consumer Price Index (CPI) is added, and the annual permit program emission fee credit for the cost of the permit application fees is removed. The types of permits to which permit application fees apply and the process for paying the fees has been clarified.

3. Annual permit maintenance fees are established in a new Article 11 (9VAC5-80-2310 et seq.) of 9VAC5-80 (Permits for Stationary Sources) for (i) all stationary sources operating under either permit requirements or a permit application shield issued pursuant to Title V, or (ii) all sources operating under federally enforceable permits issued to keep a stationary source from applicability under permit requirements of Title V. The method of determining and adjusting the permit maintenance fee amounts annually for changes in the CPI is specified. The process for assessing, billing, and paying the fees is also specified.

**Statement of final agency action**

*Please provide a statement of the final action taken by the agency, including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.*

On June 8, 2012, the State Air Pollution Control Board took final action to adopt amendments to regulations entitled "Regulations for the Control and Abatement of Air Pollution," specifically Article 2 (Permit Program Fees for Stationary Sources), Article 10 (Permit Application Fees for Stationary Sources, and new Article 11 (Annual Permit Maintenance Fees for Stationary Sources) of 9VAC5-80 (Permits for Stationary Sources) based upon the language in Item 365 B of House Bill 1301 (budget bill) of the 2012 General Assembly. The board further directed the Department to take such action as necessary to make the amendments effective once the Governor has acted on the 2012 budget bill, provided that the language of Item 365 B of the 2012 Appropriation Act has not changed, The regulatory action is to be effective on July 1, 2012.

The regulation amendments are exempt from the state administrative procedures for adoption of regulations contained in Title 2.2, Chapter 40 of the Code of Virginia (Administrative Process Act) by provision of Item 365, subdivision B 2 of the 2012 Appropriation Act.

**Public comment**

*Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.*

Although this regulatory action was specifically exempt from public participation requirements of the APA by the 2012 Appropriation Act, an informal public comment period was advertised by a General Notice published on the Virginia Regulatory Town Hall on May 16, 2012, email notices sent out by the Town Hall to registered users, and posting to the Department website. In addition, personal notice of this hearing and the opportunity to comment was emailed by the

Department to individual stakeholders who participated in a stakeholder group to discuss Title V fees in 2010 and others who have expressed interest in the issue. Eight sets of written comments were received during the public comment period prior to its close on May 25, 2012. The complete text of each person's comments is on file at the Department.

### **ANALYSIS OF COMMENTS**

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, a summary of the comment and the Board's response (analysis and action taken). Each issue is discussed in light of all of the comments received that affect that issue. The Department has reviewed the comments and developed a specific response based on its evaluation of the issue raised. The Board's action is based on consideration of the overall goals and objectives of the air quality program and the intended purpose of the regulation.

1. **SUBJECT**: Support for the proposed regulation amendments.

**COMMENTERS**: Dominion Resources Services, Old Dominion Electric Cooperative (ODEC), Virginia Independent Power Producers (VIPP), Virginia Manufacturers Association (VMA), Hampton Roads Sanitary District (HRSD), Appalachian Power (APCo).

**COMMENTS**: Dominion supports the DEQ's recommended revisions to the Title V permit fees – in particular the new "fees for service" or permit application fees. Although we would prefer not to incur additional fee increases, the proposed fee structure represents a balanced consolidation of the various approaches deliberated by the Stakeholder Group.

ODEC and the VMDAEC offer our support for the proposed regulation as it is presented to the Board for approval. ODEC believes that this is a realistic approach to adjustments in the overall fee structure. The proposed changes to the appropriate sections of 9VAC5 Chapter 80 are consistent with the recommendations from the Stakeholders Workgroup in 2010 and additional meetings in 2011. We appreciate the DEQ's effort to move from a fee structure based almost entirely on emissions to one which incorporates the 3-prong approach of emissions fees, application fees, and annual maintenance fees.

On behalf of its membership the VMA supports the adoption of these new regulations.

VIPP largely agrees with the proposed changes to 9VAC5 Chapter 80, with one important exception, identified in comment 5 below. VIPP agrees with the recommendation that the new permit application fees be imposed. Permit applicants should be required to pay fees proportionate to the effort required to evaluate and process permit applications. VIPP also agrees with the recommendation that new annual maintenance fees be imposed. The maintenance fees proposed appear to be proportionate to the effort required to maintain existing permits.

HRSD thinks the premise for and structure of the fees is appropriate.

APCo believes the new fee structure has been developed through a collaborative process that attempts to address the concerns of the regulated community while at the same time achieving the funding needs for the program. The new fee structure adapts to the reductions in emission levels that have been achieved, and provides for a more sustainable means of providing adequate funding for the program in the future. DEQ should be commended for its facilitation of stakeholder meetings on this issue, and the efforts that it made to find a workable solution to address the deficit in funding for the Title V Permit Program.

**RESPONSE:** Support for the proposal is appreciated. No changes are made to the proposal in response to these comments.

- 2. **SUBJECT:** Use of Title V fees.

**COMMENTER:** Titan America LLC (Titan).

**COMMENT:** The proposed regulations indicate that emission fees collected shall not be used for any purpose other than is provided in Title V of the CAA and associated regulations and policies. The proposed regulatory sections for permit application fees and annual permit maintenance fees do not ensure similar restrictions on the use of fees collected under this program. All fees collected under this proposed fee structure should be restricted for use in the appropriate program.

**RESPONSE:** In 9VAC5-80 Article 10 (Permit Application Fees for Stationary Sources), the proposed subsection 9VAC5-80-2270 B restricts the use of application fees to Title V program purposes. Similarly, in Article 11 (Annual Permit Maintenance Fees for Stationary Sources), the proposed subsection 9VAC5-80-2330 B restricts the use of permit maintenance fees to Title V program purposes. No changes are made to the proposal in response to this comment.

- 3. **SUBJECT:** Use of excess fees.

**COMMENTERS:** Titan, ODEC.

**COMMENTS:** Titan believes that any excess collected fees beyond actual program costs should be applied to the following year and the annual CPI factor applied to fees should be reduced accordingly.

ODEC would like to stress that the program administration recognize the fact that if there is more revenue generated in a particular area than initially anticipated, there should be a reduction reflected in fees elsewhere within the program. The regulations as drafted can and do provide for that type of adjustment. DEQ should be doing ongoing evaluation of program funding with active comparison of actual revenue versus these estimates.

**RESPONSE:** The statutory language in Item 365 B of the 2012 Appropriation Act does not provide for modification of the CPI adjustment based upon a prior

year's fee revenue. Because revenue from permit application fees and permit maintenance fees is predicted to be small in relation to emissions fees, adjustment of emission fees is a better way to balance excess revenue and this adjustment is already provided for in Article 2 of 9VAC5-80. No changes are made to the proposal in response to these comments.

4. **SUBJECT**: Emission fees from major sources should cover all program costs.

**COMMENTER**: Titan.

**COMMENT**: The emission fees should be set to cover the cost of the Title V major source program.

**RESPONSE**: All costs of the Title V program are required to be covered by fees, including emission fees. The Virginia General Assembly has directed that these costs be covered by permit application fees and permit maintenance fees as well as emission fees. As noted in the response to Comment 5 below, sources subject to the emissions fees will pay for their emissions up to 4,000 tons for each pollutant consistent with state law. Under this proposal, major emitters also will likely pay higher fees for permit applications and will generally pay higher permit maintenance fees because of their complexity. No changes are made to the proposal in response to this comment.

5. **SUBJECT**: Raise the 4,000 ton emission fee cap.

**COMMENTERS**: Titan, VIPP.

**COMMENTS**: The cap on 4,000 tons per year for the emissions fee should be removed. These additional fees for the emissions over 4,000 tons per year should offset the per-ton fee rate and/or the annual permit maintenance fees. The cap excuses and excludes emissions in excess of 4,000 tons, which confers a significant financial benefit on the largest emitters and penalizes smaller emission sources. Eliminating or raising the cap would provide an economic benefit for larger sources to minimize emissions, would lower the per ton assessments, would inject fairness into an emission fee assessment scheme that has penalized smaller emitters for years, and would comply with the federal Clean Air Act and the legislature's budget directive.

The current 4,000 ton "cap" on emissions fee assessments should be eliminated or raised. In addition to being inherently unfair, the 4,000 ton cap sends a perverse economic signal favoring larger emitters at the expense of smaller sources. Removing or raising the cap on assessments would fully comply with the legislature's directive to the Board contained in budget language.

**RESPONSE**: The stakeholder group that met during 2010 discussed changing the cap at length and was unable to reach consensus on this issue. The language in item 365 B of the 2012 Appropriation Act is specific about the changes it allows to the statutory requirements in § 10.1-1322 of the Code of Virginia. The Department believes that the budgetary language does not authorize a change to, or the removal of, the 4000 ton cap on emissions charged

set forth in § 10.1-1322 of the Virginia Code. No changes are made to the proposal in response to these comments.

6. **SUBJECT**: Don't shift major source permit costs to minor sources.

**COMMENTER**: Titan.

**COMMENT**: The proposed fee structure should ensure that the fees collected from Title V major source programs cover the full cost associated with managing those major facility permits. Fees on minor sources should not be used to subsidize major permit costs.

**RESPONSE**: See the response to comment 4. No change is made to the proposal in response to this comment.

7. **SUBJECT**: No application fees for like-for-like equipment replacements.

**COMMENTER**: Titan.

**COMMENT**: Regulatory language should be included to treat like-for-like equipment replacements as administrative amendments not subject to permit amendment or permit modification application fees. Like-for-like equipment replacements would not increase emissions and would not change permit monitoring or reporting conditions.

**RESPONSE**: Like-for-like replacements are normally exempt from minor new source review (NSR) permit requirements in Article 6 of 9VAC5-80, and if so, are not subject to those permit application fees if any changes to the permit that are necessary can be made as an administrative amendment. If like-for-like replacements become subject to major NSR program permit requirements (under Articles 7, 8 or 9 of 9VAC5-80) or are subject to permit requirements under the Title V federal operating permit program (Articles 1 or 3 of 9VAC5-80) for that replacement, they may be subject to permit application fees. No change is made to the proposal in response to this comment.

8. **SUBJECT**: Don't levy application fee increases on sources operating under a Title V permit shield.

**COMMENTER**: Titan.

**COMMENT**: The regulations for application fees indicate that facilities that submitted a permit application prior to the date of the regulations would not be subject to the new fee schedule, except if an amendment to the permit application is requested after the date of the regulations. The DEQ should defer this fee increase for facilities that submitted timely Title V renewal applications prior to the date of the regulation and have been operating under a permit shield, in some cases for several years, because the DEQ has prioritized resources on other permit issues.

**RESPONSE**: The permit application fee for a Title V permit renewal submitted

prior to the effective date of the regulation will not be charged an application fee. However, changes to that application made by the owner will require additional work by the Department, so changes made to that application after the effective date of the regulation should normally result in the application becoming subject to the new renewal application fee. The amount of time the Department spends processing the original renewal application would not normally make the application subject to new fees. However, in order to provide some flexibility for the Department to defer the increased fee, a change has been made to the proposal to reflect the intent of this comment.

9. **SUBJECT**: Program monitoring and program changes may be needed in the future.

**COMMENTERS**: ODEC, VMA.

**COMMENT**: DEQ should continue to be forthcoming with information regarding the various revenue streams and the specific level of effort by DEQ staff to administer the programs. This is not likely a long term solution to the issue of funding DEQ's permit programs. Constant improvement and streamlining is always possible within large organizations or programs.

The regulations represent a temporary fee adjustment and will require further adjustment on a regular basis. It may be necessary to review all air fees that are associated loosely with the Title V fee program for equity. This will require the Department of Environmental Quality to continue to develop a cost of service for all of their activities related to the title V program. Additionally a stakeholder group must be established to work with the Department of Environmental Quality to develop process improvements that are mutually beneficial.

**RESPONSE**: The Department continuously reviews this program as well as its other programs for opportunities for implementing further efficiencies and welcomes input from stakeholders toward this effort. This is an ongoing process. Should the proposed fees prove insufficient for funding the Title V permit program in the future, the Department will, as it has in the past, utilize stakeholder processes to help inform any needed reconfiguration of the fee structure consistent with the law. No changes are made to the proposal in response to these comments.

10. **SUBJECT**: Implementing the new fees in August 2012 is inappropriate.

**COMMENTER**: HRSD.

**COMMENT**: Requiring the new and/or increased fees on such short notice creates an undue hardship. Neither HRSD nor any regulated source has budgeted for the new fees. Additionally, the new annual fee will catch the SM-80 sources entirely by surprise because the SM-80 sources will be paying Title V permit program fees for the first time ever. These sources may also very well be small businesses that can ill afford any unplanned expense. That will require us, and possibly others, to take funds from other budgets to pay the difference. The new fees should be implemented as of August 1, 2013.

**RESPONSE:** Federal law and regulation, as well as state law, require that the costs of the Title V programs be fully funded through fees. In the absence of these proposed fee adjustments, the program will no longer fully fund itself during the 2013 fiscal year. Item 365 C of the 2012 Appropriation Act specifically requires that the new program funding requirements be implemented and effective no later than July 1, 2012. While the new fee structure will create some hardships, some provisions have been included to mitigate those hardships on the smallest companies. First, only the larger synthetic minor sources will be assessed permit maintenance fees. Second, the 10 ton minimum for emission fees has been retained. Third, the maintenance and application fee structure has been designed to reflect the actual costs of processing and maintaining permits, which favors smaller sources with simpler permits. Given the statutory requirements, this proposal is the best option for apportioning the costs of the Title V program. No changes are made to the proposal in response to this comment.

11. **SUBJECT:** Concern about future changes to the Title V permit program.

**COMMENTER:** APCo.

**COMMENT:** APCo also has concerns that as the scope of regulatory programs expands to greenhouse gas emissions, the current situation could be reversed, with emission fees significantly increasing and potentially exceeding the cost of the program. The draft final regulation does include protections to guard against this potential, but this will be an issue that APCo will closely watch under the new fee structure.

**RESPONSE:** The current regulation contains provisions for reducing emission fees to ensure that program emission fees do not become excessive. Item 365 C of the 2012 Appropriation Act requires adoption of regulations to ensure that revenues generated from fees cover the full costs of the program. At this time, emissions of greenhouse gases are not subject to emissions fees. It is unclear at this time whether greenhouse gas emissions will become subject to emissions fees under federal law in the future or, if so, to what extent. It would be premature at this time to adjust fee requirements based on future, uncertain Federal requirements associated with greenhouse gas emissions. The current regulation contains provisions for reducing emission fees to ensure that program emission fees do not become excessive relative to the costs of the program. No changes are made to the proposal in response to this comment.

12. **SUBJECT:** The higher costs associated with the new fees creates a hardship for customers.

**COMMENTER:** APCo.

**COMMENT:** The new Title V fee structure will increase costs to APCo, which causes us great concern as our customers continue to struggle with higher energy cost.

**RESPONSE:** Federal law and regulation, as well as state law, require that the costs of the Title V programs be fully funded by fees. In the absence of these proposed fee adjustments, the program will no longer fully fund itself during the 2013 fiscal year. The Department appreciates the concerns expressed by this comment and continuously reviews this program, as well as its other programs, for opportunities for implementing further efficiencies. No changes are made to the proposal in response to this comment.

13. **SUBJECT:** Higher costs creates a hardship for businesses.

**COMMENTER:** MASCO Cabinetry LLC.

**COMMENT:** These large, sudden, and previously unbudgeted Title V permit program fee increases, as proposed, would severely injure wooden cabinetry manufacturers that are struggling in a weak market. In addition, the prospect of such fee increases raises a question about whether new business ventures might hesitate to locate in Virginia, thus leaving established industries with excessive regulatory costs. We hope that more suitable alternatives can be developed.

**RESPONSE:** See the response to comment 10. No changes are made to the proposal in response to this comment.

**All changes made in this regulatory action**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9VAC5-80 (Permits for Stationary Sources), Part II (Permit Procedures)			
Article 2 (Permit Program Fees for Stationary Sources)			
Article 2 (Title)		Permit Program Fees for Stationary Sources.	Adds "emissions" to title and to the name of the permit program fee throughout the article. Necessary to differentiate the fee type from application fees and the new maintenance fees.
310		Applicability. Specifies the types of stationary sources subject to emissions fees.	Corrects various references and removes outdated requirements. Necessary to conform to latest requirements, format, and references.
320		Definitions. Specifies meanings for words and terms used in this article.	Revises language in subsections A and B for consistency with other similar articles and sections. Necessary for regulatory consistency.
330		General. Specifies general requirements for	Updates the authority that specifies how revenue is to be used and corrects

		applicable stationary sources.	minimum threshold for assessing fees. Necessary to correct the threshold language to conform to current software abilities.
340		Annual permit program fee calculation. Specifies the calculation method required by federal and state statute using minimum fee values.	Increases the minimum fee calculation values of X in the calculation method by 25%. Necessary to raise sufficient fee revenue to support the permit program, as required by federal regulation and statute and by state statute.
350		Annual permit program fee payment. Specifies the fee payment methods available.	Updates the language to remove outdated requirements; and to correct name, format, and style errors. Necessary to conform to current regulatory processing requirements. Also adds an additional method of payment necessary to be consistent with other fee types.
<b>Article 10 (Permit Application Fees for Stationary Sources)</b>			
2250		Applicability. Specifies the types of permits subject to applications fees.	Adds additional permit types sufficient to address all air permit types that affect a source's status concerning applicability under Title V of the federal Clean Air Act and excludes applications from certain sources (and certain permit changes) that do not. Necessary to fund the programs supporting Title V of the federal Clean Air Act.
2260		Definitions. Specifies meanings for words and terms used in this article.	Adds definitions for categories of permits and stationary sources that are referred to in the revised article. Necessary to clearly indicate which applications are subject to which permit application fees and to clearly exclude those sources that are not subject to permit application fees.
2270		General. Specifies general requirements for applicable stationary sources.	Adds a requirement that permit application fees be used to fund the Title V program. Necessary to meet the statutory requirement of the 2012 Appropriations Act.
2280		Permit application fee calculation. Specifies the method for determining the permit application fee amount.	Changes the fee amounts, adds fees for operating permits, and provides that fees be adjusted annually for changes in the Consumer Price Index. Necessary to fund the programs supporting Title V of the federal Clean Air Act and to meet the statutory requirements of the 2012 Appropriations Act.
2290		Permit application fee payment. Specifies the	Clarifies that the applications are sent to the appropriate regional office and not to

		fee payment method.	the receipts control address. Necessary to avoid delays in paying fees. Also generalizes the mailing address for the fees. Necessary to be consistent with other Title V fee regulations.
2300		Annual permit program fee credit. Specifies that the amount of permit application fees paid may be deducted from future annual permit program (emission) fees.	Repealed. Necessary to conform to statutory requirements in the 2012 Appropriations Act.
Article 11 (Annual Permit Maintenance Fees for Stationary Sources)			
	2310	None.	Applicability. Specifies the stationary sources that are subject to permit maintenance fees. Necessary to sufficiently fund the programs supporting Title V of the federal Clean Air Act and to specify which sources are subject to permit maintenance fees and which sources are not.
	2320	None.	Definitions. Specifies meanings for words and terms used in this article. Necessary to clearly indicate which sources are subject to which permit maintenance fee amounts and to clearly exclude those sources that are not subject to permit maintenance fees.
	2330	None.	General. Specifies general requirements for applicable stationary sources. Necessary to meet the statutory requirement of the 2012 Appropriations Act.
	2340	None.	Annual permit maintenance fee calculation. Specifies the method for determining the permit application fee amount, including provision for annually adjusting the fee amounts for changes in the Consumer Price Index. Necessary to sufficiently fund the programs supporting Title V of the federal Clean Air Act and to meet the statutory requirements of the 2012 Appropriations Act.
	2350	None.	Annual permit maintenance fee payment. Specifies the fee payment method. Necessary to meet the statutory requirements of the 2012 Appropriations Act, and to provide appropriate options for payment.

### Regulatory flexibility analysis

*Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: (1) the establishment of less stringent compliance or reporting requirements; (2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; (3) the consolidation or simplification of compliance or reporting requirements; (4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and (5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

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An analysis of the proposal was completed for alternative regulatory methods that will minimize the adverse impact on small businesses without compromising health, safety, environmental and economic welfare.

This revision meets the minimum requirements of Title V of the federal Clean Air Act and 40 CFR 70.9, and this regulation meets the specific requirements of the 2012 Acts of Assembly in item 365 subsection B of the 2012 Appropriation Act. There are no reporting requirements in this regulation. Each of the three articles contains exemptions for certain small businesses. Alternative regulatory methods that lower fees, delay collecting the fees, or exempt small businesses as a class from these fee requirements would make funding the Title V program more expensive for the remaining sources, would make revenue collection less reliable, and may not adequately fund the Title V permit program as required by state and federal laws.

### Family impact

*Assess the impact of this regulatory action on the institution of the family and family stability.*

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It is not anticipated that these regulation amendments will have a direct impact on families.