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Virginia Regulatory Town Hall

Proposed Regulation Agency Background Document

Agency Name:	State Air Pollution Control Board
Regulation Title:	Regulations for the Control and Abatement of Air Pollution
Primary Action:	9 VAC 5-40-10 et seq.
Secondary Action(s):	9 VAC 5-50-10 et seq.
Action Title:	Toxic Pollutants (Rev. G00)
Date:	

This information is required pursuant 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.* Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary *

Please provide a brief summary of the proposed new regulation, amendments to an existing regulation, or the regulation being repealed.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 rules establish emission standards consisting of control technology and other requirements which limit source emissions of toxic pollutants to a level that will not produce ambient air concentrations that may cause or contribute to the endangerment of human health. Unlike other rules, there are no definitive emission limits in the emission standard itself. However, the rules do provide significant ambient air concentration guidelines as a mechanism for the agency to require the owner, on a case-by-case basis, to reduce emissions after analysis and review by the department.

This regulatory action amends the current state toxic pollutant rules to (1) reduce the number of regulated pollutants to those regulated under the federal program, and (2) exempt from applicability those sources which are subject to a federal hazardous air pollutant standard. This action will integrate the state's program more logically with the federal Clean Air Act.

Basis *

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Please identify the section number and provide a brief statement relating the content of the statutory authority to the specific regulation proposed. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed 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 amendments and that (ii) the proposed regulation amendments comport with the applicable state and/or federal law is available upon request.

Purpose *

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

The purpose of the regulations is to require source owners to limit emissions of toxic pollutants to a level that will not produce ambient air concentrations that may cause or contribute to the endangerment of human health. The proposed amendments are being made (i) to reduce the regulatory burden of the state's toxic pollutant program on industry in order to ensure that the state's enforcement resources are used in the manner best suited to protecting public health and welfare; and (ii) to render the state toxic pollutant program consistent with the federal Clean Air Act, according to a determination made pursuant to the review of existing regulations mandated by Executive Order 15(94).

Substance *

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

- 1. The list of toxic air pollutants covered by the regulations is limited to the 188 substances regulated under § 112 of the federal Clean Air Act. This has been Virginia's policy and practice at least since 1991, but that practice has not been clearly articulated in the regulation.
- 2. Those source categories that are subject to an emission standard under § 112 of the federal Clean Air Act or that have been determined by the EPA to require no regulation are exempted from applicability. Under the current rules, sources must comply with both federal and state regulations. If, therefore, the state rules were to require a more stringent

control of emissions than that required by the federal maximum achievable control technology standard (MACT), the source would have to comply with the MACT and perform whatever additional actions were necessary to bring the source into compliance with the state standard. Under the new rules, sources need only comply with one set of regulations, either federal or state, not both.

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Issues *

Please provide a statement identifying the issues associated with the proposed 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 proposed regulatory action will have three primary advantages for the public. First, although the cost of compliance with the amended regulations will initially be the same as the cost of compliance with the current regulations, as more federal MACT standards are promulgated, sources will be eliminated from applicability, thus reducing sources' compliance costs as well as the indirect costs to the taxpayer. Second, because the relationship between the state and federal programs will be clarified and the two programs will no longer overlap, the compliance burden on sources will be reduced. Third, the environmental community will be assured that the state program will provide adequate protection for public health until the federal program is fully implemented. The proposed regulatory action will have no disadvantages for the public.
- 2. Department: The primary advantage to the department and the Commonwealth will be the reduction of enforcement costs. Because the amended regulations will be clearer and easier to comply with than the current regulations, and because the relationship between the state and federal programs will be clarified, sources will comply more readily. Thus, enforcement costs will be reduced, allowing the department to divert scarce resources to other areas. The proposed regulatory action will have no disadvantages for the department or the Commonwealth.

Localities Particularly Affected *

Please provide the identity of any localities particularly affected by the proposed regulation.

There is no locality which will bear any identified disproportionate material air quality impact due to the proposed regulation which would not be experienced by other localities.

Public Participation *

Please indicate the nature of the comments the Department is soliciting pursuant to this notice.

The department is seeking comment on the proposed regulation and the costs and benefits of the proposal. The department is also seeking comment on the impacts of the proposed regulation on farm and forest lands.

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Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus ongoing expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and(e) the projected cost of the regulation for affected individuals, businesses, or other entities. Include a description of the beneficial impact the regulation is designed to produce.

1. Entities Affected

All permitted stationary sources of toxic air pollutants in Virginia, approximately 300 sources, may be affected by this proposal.

2. Fiscal Impact

a. Costs to Affected Entities

Because sources will be required to comply with only one set of regulatory requirements rather than two, many of these sources may experience some reduction in compliance costs.

b. Costs to Localities

The projected cost of the regulation on localities is not expected to be beyond that of other affected entities and is addressed in paragraph 2a above.

c. Costs to Agency

It is not expected that the regulation will result in any cost to the department beyond that currently in the budget. The sources of department funds to carry out this regulation are the general fund. The activities are budgeted under the following program (code)/subprogram (code): Environmental and Resource Management (5120000)/Air Quality Stationary Source Permitting (5122000) and Air Quality Stationary Source Compliance Inspections (5122100). The costs are expected to be ongoing.

d. Benefits

The proposed regulations will benefit the Commonwealth in two primary ways: the regulated community will be assured that the federal and state programs will not

overlap, and the public will be assured that the state program will provide adequate protection for public health while the federal program becomes more fully implemented.

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e. Small Business Impact

The impact upon facilities that meet the definition of small business provided in § 9-199 of the Code of Virginia is addressed in paragraph 2a above.

Legal Requirements

Please identify the state and/or federal source of the legal requirements that necessitate promulgation of the contemplated regulation. The discussion of these requirements should include a description of their scope and the extent to which the requirements are mandatory or discretionary. Full citations for the legal requirements and web site addresses, if available, for locating the text of the cited legal provisions should be provided.

State Requirements

Code of Virginia:

http://leg1.state.va.us/000/cod/codec.htm

Virginia Administrative Code (VAC):

http://leg1.state.va.us/000/reg/toc.htm

These regulations are not required by any specific state or federal mandate. Rather, Virginia's Air Pollution Control Law gives the State Air Pollution Control Board the discretionary authority to promulgate regulations "abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth" (§ 10.1-1308). The law defines such air 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 or life or property" (§ 10.1-1300). The board exercises this authority through the Department of Environmental Quality, whose first statutory purpose is "to assist in the effective implementation of the Constitution of Virginia by carrying out state policies aimed at conserving the Commonwealth's natural resources and protecting its atmosphere, land and waters from pollution" (§ 10.1-1183).

Comparison with Federal Requirements

Please describe the provisions of the proposed regulation which are more restrictive than applicable federal requirements together with the reason why the more restrictive provisions are needed.

There are no applicable federal requirements.

Need

Please provide an explanation of the need for the proposed regulation and potential consequences that may result in the absence of the regulation. Also set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of citizens or would be essential for the efficient and economical performance of an important governmental function. Include a discussion of the problems the regulation's provisions are intended to solve.

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Analysis reveals that the regulations are consistent with applicable state statutory provisions and judicial decisions. However, factors and circumstances (federal statutes, original intent, state air quality program, and air pollution control methodology and technology) which justified the initial issuance of the regulations have changed to a degree that justify a change to the basic requirements of the regulations.

Rules 4-3 and 5-3 were promulgated in 1985 to protect public health by setting significant ambient air concentration guidelines for all existing facilities emitting air toxic substances. At the time, the Clean Air Act authorized EPA to promulgate health-based emission standards for hazardous air pollutants (HAPs). However, due to the long-term nature of the decision-making process for this federal program, only a limited number of National Emissions Standards for Hazardous Air Pollutants (NESHAPs) were promulgated. The process to establish a NESHAP was lengthy, involving a determination of a critical level that triggered significant health effects, followed by a determination of those industry categories that contributed the highest emission level of the HAP under review. Concurrent with the slow progress of the federal assessment of HAPs, a series of significant chemical accidents occurred worldwide, including one in Virginia (the kepone incident in Hopewell). These circumstances led the State Air Pollution Control Board and policy-making groups in many other states to develop state-specific answers to the public health problems of HAPs. The states learned from federal experience that they needed a more expeditious process to assess and regulate HAPs than that used at the federal level. Many states, including Virginia, used occupational standards and extrapolated them for use in the ambient air.

By the late 1980s, the federal government realized that its approach to the evaluation and regulation of HAPs was not addressing the problem quickly enough. Instead of taking the same health effects-based approach, therefore, the 1990 Clean Air Act (the Act) attempted to address the problem more quickly. First, it established a list of 188 critical HAPs. Then, emission standards establishing maximum acceptable control technology (MACT) were developed for source categories that emit these HAPs. After the development of each MACT standard, the federal government will assess what risk to human health remains from sources subject to the MACT standards and will establish further standards for those source categories causing significant public health concerns.

During the development and evaluation of the MACT standards, the state program will remain essential to protect the health of the citizens of the Commonwealth. Depending on the pollutant, health risks even from a small exposure to a HAP can be high. In addition, public concern about HAPs has remained high since multiple accidental releases occurred in the U.S. and abroad in the 1970s and early 1980s. Data reported for certain industries under the requirements established by the Emergency Planning and Community Right to

Know Act, or Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III) has heightened public awareness and concern about public health and exposure to HAPs emissions in Virginia by alerting its citizens to the quantity of these emissions released in the state. The data reported under this program indicates that Virginia has significant air emissions of SARA Title III chemicals. In 1999, for instance, Virginia was ranked 22nd in the nation for total releases of these chemicals; 75% of those releases were into the air.

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This regulatory action replaces a previous regulatory action (Rev. G97), serving essentially the same purpose, which was withdrawn by the board on July 11, 2000.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description of changes implemented by the proposed regulatory action. Where applicable, include cross-referenced citations when the proposed regulation is intended to replace an existing regulation.

- 1. The provision for the establishment of the priority pollutant policy was eliminated (9 VAC 5-40-160 B; 9 VAC 5-50-160 B).
- 2. The exemption of a source that has the potential to emit a toxic pollutant without a TLV® was clarified to originate with the owner's request (9 VAC 5-40-160 D 2; 9 VAC 5-50-160 D 2).
- 3. Source exemptions were updated to conform to § 112 of the federal Clean Air Act and to other regulations of the board (9 VAC 5-40-160 E; 9 VAC 5-50-160 E).
- 4. The exemption of the outdoor application of pesticide was clarified (9 VAC 5-40-160 G; 9 VAC 5-40-160 G).
- 5. The definition of "best available control technology (BACT)" was eliminated from the existing source rule (9 VAC 5-40-170 C).
- 6. A definition of "fugitive emissions" was added as well as a clarification that these emissions shall be included in determining a source's potential to emit (9 VAC 5-40-170 C; 9 VAC 5-50-170 C).
- 7. A definition was added for "source category schedule definition for standards" to update the regulations to conform to § 112 of the federal Clean Air Act (9 VAC 5-40-170 C; 9 VAC 5-50-170 C).
- 8. The definition of "toxic pollutant" was updated to conform to § 112 of the federal Clean Air Act (9 VAC 5-40-170 C; 9 VAC 5-50-170 C).

9. The inclusion of emissions from exempt sources in the calculation of ambient air concentrations was clarified (9 VAC 5-40-210 C; 9 VAC 5-50-210 C).

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10. The compliance options for existing sources were simplified to eliminate the requirement for BACT, to give the owner more flexibility in complying, and to give the board more discretion in its case determination (9 VAC 5-40-220 B).

Alternatives

Please describe the process by which the agency has considered less burdensome and less intrusive alternatives for achieving the need. Also describe, to the extent known, the specific alternatives to the proposal that have been considered to meet the need, and the reasoning by which the agency has rejected any of the alternatives considered.

As provided in the public participation procedures of the State Air Pollution Control Board, the department included, in the Notice of Intended Regulatory Action, a description of the department's alternatives and a request for comments on other alternatives and the costs and benefits of the department's alternatives or any other alternatives that the commenters provided.

Following the above, alternatives to the proposed regulation amendments were considered by the department. The department determined that the first alternative is appropriate, as it is the least burdensome and least intrusive alternative that fully meets 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 being considered, are discussed below.

- 1. Amend the regulations to render the state toxic pollutant program consistent with the federal Clean Air Act. This option was chosen because it reduces the regulatory burden on sources while protecting public health and welfare.
- 2. Repeal the regulations. This option was not selected because the regulations are necessary to protect public health while the federal standards are being developed and evaluated.
- 3. Take no action to amend the regulations. This option was not selected because the current regulations are unnecessarily burdensome to the regulated community and to department staff without any commensurate advantage to the public.

Public Comment

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

1. **SUBJECT:** General

<u>COMMENTER</u>: James R. Hassinger, Executive Director, Richmond Regional Planning District Commission

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TEXT: The Richmond Regional Planning District Commission staff has no comment on this project.

RESPONSE: The commission's attention to the notice of intended regulatory action is appreciated.

2. **SUBJECT:** General

<u>COMMENTER</u>: Mark Feltner, Environmental Scientist, HRSD Technical Services Division

<u>TEXT</u>: In reference to DEQ's November 6, 2000, proposed action on 9 VAC 5-40-160 through -230 and 9 VAC 5-50-160 through -230, HRSD agrees with and supports the department's recommendation of the first alternative of amending the regulations to render the state toxic pollutants program consistent with the federal Clean Air Act. HRSD further agrees that this option will continue to protect the public health and welfare while reducing the regulatory burden of complying with overlapping and/or competing regulatory requirements.

RESPONSE: Support for the intended regulatory action is appreciated.

3. **SUBJECT:** General

<u>COMMENTER</u>: Pamela F. Faggert, Vice President and Chief Environmental Officer, Dominion Generation

TEXT: Dominion Generation (operator of Virginia Power-owned facilities) appreciates this opportunity to comment on DEQ's intention to draft proposed amendments to render the Virginia toxic pollutant program consistent with the federal Clean Air Act (CAA), as set forth in the public notice dated November 6, 2000. We support proposed State Air Pollution Control Board action to codify by regulation the approach it implements. We also agree there is a need for consistency between federal CAA § 112 and Virginia hazardous air pollutant (HAP) programs to prevent regulated HAPs sources from being subject to potentially conflicting and burdensome HAPs regulations. Dominion Generation supports DEQ's proposed action to proceed with development of draft HAP regulation amendments, to publish these drafts in the Virginia Register, and to provide an opportunity for public comments.

RESPONSE: Support for the intended regulatory action is appreciated.

4. **SUBJECT:** General

<u>COMMENTER</u>: Cathy C. Taylor, Vice President, Environmental Affairs, Virginia Manufacturers Association

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TEXT: The Virginia Manufacturers Association (VMA) appreciates the opportunity to submit the following comments on the State Air Pollution Control Board's notice of intended regulatory action to amend the Virginia regulations governing sources of toxic (hazardous) air pollutants, commonly called "the state air toxics rules." The VMA represents over 400 businesses in the Commonwealth of Virginia, many of whom would be directly affected by the amendments to the state air toxics rules. We are submitting these comments on behalf of our members.

In 1998, the board proposed to repeal the current state air toxics rules, rules 4-3 and 5-3, and replace them with significantly revised rules, which would have been designated rules 6-3 and 6-4. The board proposed to change two important aspects of the rules: which pollutants are regulated under the rules and which sources are subject to the rules. In comments submitted to the DEQ on Feb. 5th, 1999, the VMA strongly supported the board's proposed revisions in these two areas. The VMA still believes the board should make these important changes to the rules.

First, with respect to the pollutants regulated under the state air toxics rules, the VMA supports board action to codify by regulation the reasonable approach it has been implementing by policy. For several years, the board's policy has been to focus implementation of the rules on pollutants designated as "hazardous air pollutants" (HAPs) under § 112 of the federal Clean Air Act. These HAPs are clearly the pollutants of greatest concern and should be the focus of Virginia's state air toxics rules.

It is important to note that under rules 6-3 and 6-4 as proposed in 1998, the board would retain the authority to regulate pollutants other than the federally designated HAPs should it determine there is a particular need for such regulation in Virginia. The VMA fully supports this authority provided that in exercising such authority, the board abides by the rulemaking requirements in the Virginia Administrative Process Act. This would assure the public input necessary to ensure that the board makes a well reasoned decision to regulate additional non-HAPs under these rules.

Second, with respect to the sources regulated under the revised rules, the VMA supports the approach the board proposed in 1998 to eliminate unnecessary and unwarranted duplicative regulation of HAP sources under both the federal and state programs. Rules 6-3 and 6-4 as proposed in 1998 would implement a phase-out of the applicability of the state air toxics program to sources as they become regulated under the rapidly maturing federal programs. This would prevent sources from facing duplicative or conflicting regulation under both the federal and state programs. The VMA fully supports this approach.

In general, the VMA strongly advocates the adoption of amended state air toxics rules as proposed by the board in 1998. However, we do have a few minor questions and comments about the wording of some provisions in those proposed regulations. First, we

have received assurances from the department that the exemption provisions set forth in subsections C 3, C 4, and C 5 of the applicability sections of rules 6-3 and 6-4 as proposed in 1998 apply to minor (area) and major sources of hazardous pollutants alike. For example, minor sources in source categories for which the U. S. Environmental Protection Agency has promulgated the Clean Air Act § 112 standard are as eligible as major sources for the exemption from applicability provided by subsection C 4. If this is incorrect, the applicability sections of rules 6-3 and 6-4 as proposed in 1998 should be revised to make it clear that minor (area) sources are eligible for the exemptions. We understand this was clearly the intent of the ad hoc advisory group that assisted the department in drafting proposed rules 6-3 and 6-4.

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We also recommend the department delete the reference to the specific Federal Register citation in subsections C 5 of the applicability sections and in the definition of "source category schedule for standards" in rules 6-3 and 6-4 as proposed in 1998. We are concerned about what would happen if the Federal Register material cited in those proposed rules is superseded because the EPA issues revised source category designations or schedules for standards. We believe that Virginia's state air toxics rules should merely refer to categories and schedules the EPA publishes in the Federal Register without reference to the specific citation that could become outdated and necessitate board action to revise the rules. What would happen to sources affected by such federal changes until the board actually does amend the state air toxics rules? For these reasons, we urge the department and the board to delete the citations to the specific Federal Register notice in rules 6-3 and 6-4 as proposed in 1998.

We are also concerned about the definition of "best available control technology" ("BACT") contained in 9 VAC 5-60-260 C of Rule 6-4 as proposed in 1998. The board has proposed revised regulations pertaining to new source review (NSR) for the construction or reconstruction of "minor" sources and "minor" modifications of sources of air pollutants. As part of those amendments, the board proposed to modify the definition of BACT for minor NSR purposes. See 9 VAC 5-50-250 C, 15 Virginia Register 1558 (Feb. 15th, 1999). The VMA strongly advocates changing the definition of BACT in the state air toxics rules so it is identical to the definition of BACT in 9 VAC 5-50-250 C.

The revised state air toxics rules the board proposed in 1998 were drafted by the department with the assistance of an ad hoc advisory group. We commend the advisory group and the department for a job well done. The VMA urges the board to adopt those revised rules with the minor changes we advocate in these comments.

RESPONSE: Support for the intended regulatory action is appreciated.

No distinction is made between major and minor sources in the applicability sections; therefore, both types of sources are eligible for exemption under the specified provisions. The applicability sections' reference to "stationary sources" is a standard reference throughout the Regulations for the Control and Abatement of Air Pollution, a reference which is generally understood to encompass sources of all sizes.

On the deletion of the specific Federal Register citation, the board has two reasons for preserving the specific citation: (i) the Virginia Registrar of Regulations requires regulatory references to the Federal Register to include specific dates; and (ii) the omission of the specific date would be tantamount to the board's relinquishing its general authority to adopt regulations to another entity.

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On the definition of BACT, the board is considering deviating from its long-standing policy of using one definition of BACT throughout its regulations. Such deviation would make it possible to structure the definition of BACT to meet the needs of each permit regulation. The proposal for minor NSR (and consequently its definition of BACT) is specifically cross-referenced to the minor NSR program. Given the differences in health impacts between the criteria pollutants addressed by the minor NSR program and the toxic air pollutants addressed by the state toxics program, the definition of BACT should not necessarily be the same for both programs.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The department, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The department will initiate a review and re-evaluation of the regulation to determine if it should be continued, amended, or terminated within three years after its effective date.

The specific and measurable goals the regulations are intended to achieve are as follows:

- 1. To protect public health and/or welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth.
- 2. To ensure that owners comply with air pollution emission limits and control technology requirements in order to control levels of hazardous air pollutants being emitted into the ambient air.
- 3. To ensure that the owner will use economically and technologically feasible control measures to reduce or eliminate hazardous air pollutant emissions.

4. To ensure that hazardous air pollutant emissions do not adversely impact air quality to the detriment of public health.

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Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential 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 these regulation amendments will have a direct impact on families. However, there will be positive indirect impacts in that the regulation amendments 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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