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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)	9VAC5-60
VAC Chapter title(s)	Hazardous Air Pollutant Sources
Date this document prepared	September 17, 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.

CFR – Code of Federal Regulations
HAP – Hazardous Air Pollutant
MACT – Maximum Achievable Control Technology
NESHAP – National Emission Standards for Hazardous Air Pollutants

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.

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

9VAC5-60, Article 1 (Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants), Article 2 (Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants for Source Categories), and Article 3 (Control Technology Determinations for Major Sources of Hazardous Air Pollutants) are based upon federal requirements in the Clean Air Act (CAA) §112.

Hazardous air pollutants (HAPs) are pollutants for which no ambient air quality standard is applicable, yet pose the risk of serious health problems. EPA's program for dealing with HAPs was first established in § 112 of the Clean Air Act Amendments of 1977. This section requires that EPA develop and maintain a list of hazardous air pollutants (HAPs), and develop National Emission Standards for Hazardous Air Pollutants (NESHAPs) for these pollutants.

Section 112(b)(1)(A) requires EPA to develop the list of HAPs; under § 112(b)(1)(B), emission standards for each HAP on the list must be established. States may be delegated the authority to implement and enforce the NESHAPs; § 112(d)(1) states, "Each State may develop and submit to [EPA] a procedure for implementing and enforcing emission standards for [HAPs] for stationary sources located in such State. If [EPA] finds the State procedure is adequate, [it] shall delegate to such State any authority . . . to implement and enforce such standards."

Section 112 of the Clean Air Act Amendments of 1990 continues to require that EPA maintain a list of and develop emission standards for HAPs. Unlike the Act of 1977, the current Act includes a list of 189 HAPs in § 112(b). Under § 112(d)(1), EPA is required to promulgate regulations establishing emission standards for each category or subcategory of major and area sources of these HAPs listed according to the requirements of §§ 112(b) and (c). In contrast to the previous Act, the Act of 1990 requires that the standards be technology-based, rather than health-based, which is why the new standards are called National Emission Standards for Hazardous Air Pollutants for Source Categories, more commonly known as Maximum Achievable Control Technology Standards (MACTs). These emission standards are enforced by the state through delegation of authority from EPA as allowed in § 112(l), State programs.

The 1990 version of § 112(l)(1) continues to allow states to take authority for NESHAPs, stating, "Each State may develop and submit to [EPA] for approval a program for the implementation and enforcement . . . of emission standards and other requirements for air pollutants subject to this section . . ." However, the criteria for state plans is more specific than had been required in the Act of 1977. Criteria that EPA is to use in approving or disapproving state programs are set forth in Section 112(l)(5)(A) through (D): the authorities contained in the program must be adequate to ensure compliance; there must be authority to implement the program; the schedule for implementing the program must be expeditious; and the program must comply with EPA guidance issued in order to meet Act objectives. Virginia has met these criteria and have been granted delegation of the program by EPA.

Section 112 of the Clean Air Act is implemented through 40 CFR Part 61 for the original NESHAP pollutants, and 40 CFR Part 63 for MACTs.

There are no federal requirements underlying 9VAC5-60, Articles 4 (Emission Standards for Toxic Pollutants from Existing Sources) and Article 5 (Emission Standards for Toxic Pollutants from New and Modified Sources). These regulations were developed at the behest of the board and are considered to be state-only requirements.

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 provides that the board shall have the power to promulgate regulations abating, controlling, and prohibiting air pollution throughout or in any part of the Commonwealth in accordance with the provisions of the Administrative Process Act. The board exercised this discretion in the adoption of Articles 4 and 5 of 9VAC-60 in order to address Virginia-specific public health and welfare issues not addressed by federal requirements.

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.

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 would not necessarily protect 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.

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.

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).

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.

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.

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.

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