

VIRGINIA ACTS OF ASSEMBLY -- 2008 SESSION

CHAPTER 557

An Act to amend and reenact §§ 10.1-1184, 10.1-1185, 10.1-1301, 10.1-1302, 10.1-1304, 10.1-1322, 10.1-1401, 62.1-44.8, 62.1-44.9, and 62.1-44.26 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 10.1-1322.01 and 62.1-44.15:02, relating to the Department of Environmental Quality.

[H 1332]

Approved March 11, 2008

Be it enacted by the General Assembly of Virginia:

1. That §§ 10.1-1184, 10.1-1185, 10.1-1301, 10.1-1302, 10.1-1304, 10.1-1322, 10.1-1401, 62.1-44.8, 62.1-44.9, and 62.1-44.26 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 10.1-1322.01 and 62.1-44.15:02 as follows:

§ 10.1-1184. State Air Pollution Control Board, State Water Control Board, and Virginia Waste Management Board continued.

The State Air Pollution Control Board, State Water Control Board, and Virginia Waste Management Board are continued and shall promote the environmental quality of the Commonwealth. All policies and regulations adopted or promulgated by the State Air Pollution Control Board, State Water Control Board, Virginia Waste Management Board, and the Council on the Environment and in effect on December 31, 1992, shall continue to be in effect until and unless superseded by new policies or regulations. Representatives of the three Boards shall meet jointly at least twice a year to receive public comment and deliberate about environmental issues of concern to the Commonwealth, *including the development and implementation of regulations for multimedia permitting, increased efficiencies for the processing of permit applications and information requests, the enhancement of environmental protection, and opportunities for effective public participation.*

§ 10.1-1185. Appointment of Director; powers and duties of Director.

The Department shall be headed by a Director appointed by the Governor to serve at his pleasure ~~for a term coincident with his own~~. *The Director shall be an experienced administrator with knowledge of environmental protection and government operation and shall have demonstrated expertise in organizational management and environmental science, environmental law, or environmental policy.* The Director of the Department of Environmental Quality shall, under the direction and control of the Governor, exercise such power and perform such duties as are conferred or imposed upon him by law and shall perform such other duties as may be required of him by the Governor and the following Boards: the State Air Pollution Control Board, the State Water Control Board, and the Virginia Waste Management Board. The Director or his designee shall serve as executive officer of the aforementioned Boards.

All powers and duties conferred or imposed upon the Executive Director of the Department of Air Pollution Control, the Executive Director of the State Water Control Board, the Administrator of the Council on the Environment, and the Director of the Department of Waste Management are continued and conferred or imposed upon the Director of the Department of Environmental Quality or his designee. Wherever in this title and in the Code of Virginia reference is made to the head of a division, department or agency hereinafter transferred to this Department, it shall mean the Director of the Department of Environmental Quality.

§ 10.1-1301. State Air Pollution Control Board; membership; terms; vacancies.

The State Air Pollution Control Board shall be composed of ~~five~~ *seven* members appointed by the Governor for four-year terms. Vacancies other than by expiration of term shall be filled by the Governor by appointment for the unexpired term.

§ 10.1-1302. Qualifications of members of Board.

The members of the Board shall be citizens of the Commonwealth and shall be selected from the Commonwealth at large on the basis of merit without regard to political affiliation. ~~At least a majority of members~~ *Members shall, by their education, training, or experience, be knowledgeable of air quality control and regulation, and shall be fairly representative of conservation, public health, business, and agriculture. No person appointed to the Board shall represent the public interest and not derive any be employed by persons subject to permits or enforcement orders of the Board or receive a significant portion of their his income, whether directly or indirectly, from persons subject to permits or enforcement orders of the Board. Income from a vested retirement benefit shall not be considered income for purposes of this section.* Notwithstanding any other provision of this section relating to Board membership, the qualifications for Board membership shall not be more strict than those ~~which may be~~ *that are* required by federal statute or regulations of the United States Environmental Protection Agency. The provisions of this section shall be in addition to the requirements of the State and Local

Government Conflict of Interests Act (§ 2.2-3100 et seq.).

§ 10.1-1304. Meetings of Board; quorum.

The Board shall meet at least ~~once every three months~~ *four times a year*. Special meetings may be held at any time or place to be determined by the Board upon the call of the chairman or upon written request of any two members. All members shall be notified of the time and place of any meeting at least five days in advance of the meeting. ~~Three~~ *A majority of the* members of the Board shall constitute a quorum for the transaction of business.

§ 10.1-1322. Permits.

A. Pursuant to regulations adopted by the Board *and subject to § 10.1-1322.01*, permits may be issued, amended, revoked or terminated and reissued by the Department and may be enforced under the provisions of this chapter in the same manner as regulations and orders. Failure to comply with any condition of a permit shall be considered a violation of this chapter and investigations and enforcement actions may be pursued in the same manner as is done with regulations and orders of the Board under the provisions of this chapter.

B. The Board by regulation may prescribe and provide for the payment and collection of annual permit program fees for air pollution sources. Annual permit program fees shall not be collected until (i) the federal Environmental Protection Agency approves the Board's operating permit program established pursuant to Title V of the federal Clean Air Act or (ii) the Governor determines that such fees are needed earlier to maintain primacy over the program. The annual fees shall be based on the actual emissions (as calculated or estimated) of each regulated pollutant, as defined in § 502 of the federal Clean Air Act, in tons per year, not to exceed 4,000 tons per year of each pollutant for each source. The annual permit program fees shall not exceed a base year amount of \$25 per ton using 1990 as the base year, and shall be adjusted annually by the Consumer Price Index as described in § 502 of the federal Clean Air Act. Permit program fees for air pollution sources who receive state operating permits in lieu of Title V operating permits shall be paid in the first year and thereafter shall be paid biennially. The fees shall approximate the direct and indirect costs of administering and enforcing the permit program, and of administering the small business stationary source technical and environmental compliance assistance program as required by the federal Clean Air Act. The Board shall also collect permit application fee amounts not to exceed \$30,000 from applicants for a permit for a new major stationary source. The permit application fee amount paid shall be credited towards the amount of annual fees owed pursuant to this section during the first two years of the source's operation. The fees shall be exempt from statewide indirect costs charged and collected by the Department of Accounts.

C. When adopting regulations for permit program fees for air pollution sources, the Board shall take into account the permit fees charged in neighboring states and the importance of not placing existing or prospective industry in the Commonwealth at a competitive disadvantage.

D. On or before January 1 of every even-numbered year, the Department shall make an evaluation of the implementation of the permit fee program and provide this evaluation in writing to the Senate Committee on Agriculture, Conservation and Natural Resources, the Senate Committee on Finance, the House Committee on Appropriations, the House Committee on Agriculture, Chesapeake and Natural Resources, and the House Committee on Finance. This evaluation shall include a report on the total fees collected, the amount of general funds allocated to the Department, the Department's use of the fees and the general funds, the number of permit applications received, the number of permits issued, the progress in eliminating permit backlogs, and the timeliness of permit processing.

E. To the extent allowed by federal law and regulations, priority for utilization of permit fees shall be given to cover the costs of processing permit applications in order to more efficiently issue permits.

F. Fees collected pursuant to this section shall not supplant or reduce in any way the general fund appropriation to the Department.

G. The permit fees shall apply to permit programs in existence on July 1, 1992, any additional permit programs that may be required by the federal government and administered by the Board, or any new permit program required by the Code of Virginia.

H. The permit program fee regulations promulgated pursuant to this section shall not become effective until July 1, 1993.

I. [Expired.]

§ 10.1-1322.01. *Permits; procedures for public hearings and permits before the Board.*

A. *During the public comment period on a permit action, interested persons may request a public hearing to contest such action or the terms and conditions thereof. Where public hearings are mandatory under state or federal law or regulation, interested persons may request, during the public comment period on the permit action, that the Board consider the permit action pursuant to the requirements of this section.*

B. *Requests for a public hearing or Board consideration shall contain the following information:*

- 1. The name, mailing address, and telephone number of the requester;*
- 2. The names and addresses of all persons for whom the requester is acting as a representative (for the purposes of this requirement, an unincorporated association is a person);*
- 3. The reason why a public hearing or Board consideration is requested;*

4. A brief, informal statement setting forth the factual nature and the extent of the interest of the requester or of the persons for whom the requester is acting as representative in the application or tentative determination, including an explanation of how and to what extent such interest would be directly and adversely affected by the issuance, denial, modification, or revocation of the permit in question; and

5. Where possible, specific references to the terms and conditions of the permit in question, together with suggested revisions and alterations of those terms and conditions that the requester considers are needed to conform the permit to the intent and provisions of the State Air Pollution Control Law (§ 10.1-1300 et seq.).

C. Upon completion of the public comment period on a permit action, the Director shall review all timely requests for public hearing or Board consideration filed during the public comment period on the permit action and within 30 calendar days following the expiration of the time period for the submission of requests shall grant a public hearing or Board consideration after the public hearing required by state or federal law or regulation, unless the permittee or applicant agrees to a later date, if the Director finds the following:

1. That there is a significant public interest in the issuance, denial, modification, or revocation of the permit in question as evidenced by receipt of a minimum of 25 individual requests for a public hearing or Board consideration;

2. That the requesters raise substantial, disputed issues relevant to the issuance, denial, modification, or revocation of the permit in question; and

3. That the action requested by the interested party is not on its face inconsistent with, or in violation of, the State Air Pollution Control Law (§ 10.1-1300 et seq.), federal law or any regulation promulgated thereunder.

D. Either the Director or a majority of the Board members, acting independently, may request a meeting of the Board to be convened within 20 days of the Director's decision pursuant to subsection C in order to review such decision and determine by a majority vote of the Board whether or not to grant a public hearing or Board consideration, or to delegate the permit to the Director for his decision. For purposes of this subsection, if a Board meeting is held via electronic communication, the Board shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public.

E. The Director shall, forthwith, notify by mail at his last known address (i) each requester and (ii) the applicant or permittee of the decision to grant or deny a public hearing or Board consideration.

F. In addition to subsections C, D, and E, the Director may, in his discretion, convene a public hearing on a permit action or submit a permit action to the Board for its consideration.

G. If a determination is made to hold a public hearing, the Director shall schedule the hearing at a time between 45 and 75 days after mailing of the notice required by subsection E.

H. The Director shall cause, or require the applicant to publish, notice of a public hearing to be published once, in a newspaper of general circulation in the city or county where the facility or operation that is the subject of the permit or permit application is located, at least 30 days before the hearing date.

I. The Director may, on his own motion or at the request of the applicant or permittee, for good cause shown, reschedule the date of the public hearing. In the event the Director reschedules the date for the public hearing after notice has been published, he shall, or require the applicant to, provide reasonable notice of the new date of the public hearing. Such notice shall be published once in the same newspaper where the original notice was published.

J. Public hearings held pursuant to these procedures may be conducted by the Board at a regular or special meeting of the Board and shall be presided over by a member of the Board. Public hearings may be held before less than a quorum of the Board.

K. The presiding Board member shall have the authority to maintain order, preserve the impartiality of the decision process, and conclude the hearing process expeditiously. The presiding Board member, in order to carry out his responsibilities under this subsection, is authorized to exercise the following powers, including but not limited to:

1. Prescribing the methods and procedures to be used in the presentation of factual data, arguments, and proof orally and in writing including the imposition of reasonable limitations on the time permitted for oral testimony;

2. Consolidating the presentation of factual data, arguments, and proof to avoid repetitive presentation of them;

3. Ruling on procedural matters; and

4. Acting as custodian of the record of the public hearing causing all notices and written submittals to be entered in it.

L. The public comment period will remain open for 15 days after the close of the public hearing if required by § 10.1-1307.01.

M. When the public hearing is conducted by less than a quorum of the Board, the Department shall, promptly after the close of the public hearing comment period, make a report to the Board.

N. After the close of the public hearing comment period, the Board shall, at a regular or special meeting, take final action on the permit. Such decision shall be issued within 90 days of the close of the public comment period or from a later date, as agreed to by the permittee or applicant and the Board or the Director. The Board shall not take any action on a permit where a public hearing was convened solely to satisfy the requirements of state or federal law or regulation unless the permit was provided to the Board for its consideration pursuant to the provisions of this section.

O. When the public hearing was conducted by less than a quorum of the Board, persons who commented during the public comment period shall be afforded an opportunity at the Board meeting when final action is scheduled to respond to any summaries of the public comments prepared by the Department for the Board's consideration subject to such reasonable limitations on the time permitted for oral testimony or presentation of repetitive material as are determined by the Board.

P. In making its decision, the Board shall consider (i) the verbal and written comments received during the public comment period made part of the record, (ii) any explanation of comments previously received during the public comment period made at the Board meeting, (iii) the comments and recommendation of the Department, and (iv) the agency files. When the decision of the Board is to adopt the recommendation of the Department, the Board shall provide in writing a clear and concise statement of the legal basis and justification for the decision reached. When the decision of the Board varies from the recommendation of the Department, the Board shall, in consultation with legal counsel, provide a clear and concise statement explaining the reason for the variation and how the Board's decision is in compliance with applicable laws and regulations. The written statement shall be provided contemporaneously with the decision of the Board. Copies of the decision, certified by the Director, shall be mailed by certified mail to the permittee or applicant.

§ 10.1-1401. Virginia Waste Management Board continued.

A. The Virginia Waste Management Board ~~is continued and~~ shall consist of seven Virginia residents appointed by the Governor for terms of four years. The members of the Board shall be citizens of the Commonwealth and shall be selected from the Commonwealth at large on the basis of merit without regard to political affiliation. Members shall, by their education, training, or experience, be knowledgeable of waste management and shall be fairly representative of agriculture, conservation, industry, and public health. Notwithstanding any other provision of this section relating to Board membership, the qualifications for Board membership shall not be more strict than those which may be required by federal statute or regulations of the United States Environmental Protection Agency. Upon initial appointment, three members shall be appointed for four-year terms, two for three-year terms, and two for two-year terms. Thereafter, all members shall be appointed for terms of four years each. Vacancies occurring other than by expiration of a term shall be filled by the Governor for the unexpired portion of the term.

B. The Board shall adopt rules and procedures for the conduct of its business.

C. The Board shall elect a chairman from among its members.

D. A quorum shall consist of four members. The decision of a majority of those present and voting shall constitute a decision of the Board; however, a vote of the majority of the Board membership is required to constitute a final decision on certification of site approval. Meetings may be held at any time or place determined by the Board or upon call of the chairman or upon written request of any two members. All members shall be notified of the time and place of any meeting at least five days in advance of the meeting.

§ 62.1-44.8. Number, appointment and terms of members.

The Board shall consist of seven members appointed by the Governor subject to confirmation by the General Assembly. Members appointed before July 1, 1970, shall continue in office for the terms for which appointed. Effective July 1, 1970, two members shall be appointed for a term of one year, and two members shall be appointed for a term of four years. Thereafter the successors of all members shall be appointed for the terms of four years each. Vacancies other than by expiration of a term shall be filled by the Governor by appointment for the unexpired term.

§ 62.1-44.9. Qualifications of members.

A. Members of the Board shall be citizens of the Commonwealth; shall be selected from the Commonwealth at large for merit without regard to political affiliation; and shall, by character and reputation, reasonably be expected to inspire the highest degree of cooperation and confidence in the work of the Board. *Members shall, by their education, training, or experience, be knowledgeable of water quality control and regulation and shall be fairly representative of conservation, public health, business, and agriculture.* No person shall become a member of the Board who receives, or during the previous two years has received, a significant portion of his income directly or indirectly from certificate or permit holders or applicants for a certificate or permit.

For the purposes of this section, "significant portion of income" means ~~ten~~ 10 percent or more of gross personal income for a calendar year, except that it means ~~fifty~~ 50 percent or more of gross personal income for a calendar year if the recipient is over ~~sixty~~ 60 years of age and is receiving that portion under retirement, pension, or similar arrangement. Income includes retirement benefits, consultant fees, and stock dividends. Income is not received directly or indirectly from certificate or

permit holders or applicants for certificates or permits when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

B. Notwithstanding any other provision of this section relating to Board membership, the qualifications for Board membership shall not be more strict than those ~~which may be~~ that are required by federal statute or regulations of the United States Environmental Protection Agency.

§ 62.1-44.15:02. Permits; procedures for public hearings and permits before the Board.

A. *During the public comment period on a permit action, interested persons may request a public hearing to contest such action or the terms and conditions thereof. Where public hearings are mandatory under state or federal law or regulation, interested persons may request, during the public comment period on the permit action, that the Board consider the permit action pursuant to the requirements of this section.*

B. *Requests for a public hearing or Board consideration shall contain the following information:*

- 1. The name, mailing address, and telephone number of the requester;*
- 2. The names and addresses of all persons for whom the requester is acting as a representative (for the purposes of this requirement, an unincorporated association is a person);*
- 3. The reason why a public hearing or Board consideration is requested;*
- 4. A brief, informal statement setting forth the factual nature and the extent of the interest of the requester or of the persons for whom the requester is acting as representative in the application or tentative determination, including an explanation of how and to what extent such interest would be directly and adversely affected by the issuance, denial, modification, or revocation of the permit in question; and*

5. Where possible, specific references to the terms and conditions of the permit in question, together with suggested revisions and alterations of those terms and conditions that the requester considers are needed to conform the permit to the intent and provisions of the State Water Control Law (§ 62.1-44.2 et seq.).

C. *Upon completion of the public comment period on a permit action, the Director shall review all timely requests for public hearing or Board consideration filed during the public comment period on the permit action and within 30 calendar days following the expiration of the time period for the submission of requests shall grant a public hearing or Board consideration after the public hearing required by state or federal law or regulation, unless the permittee or applicant agrees to a later date, if the Director finds the following:*

- 1. That there is a significant public interest in the issuance, denial, modification, or revocation of the permit in question as evidenced by receipt of a minimum of 25 individual requests for a public hearing or Board consideration;*
- 2. That the requesters raise substantial, disputed issues relevant to the issuance, denial, modification, or revocation of the permit in question; and*
- 3. That the action requested is not on its face inconsistent with, or in violation of, the State Water Control Law (§ 62.1-44.2 et seq.), federal law or any regulation promulgated thereunder.*

D. *Either the Director or a majority of the Board members, acting independently, may request a meeting of the Board to be convened within 20 days of the Director's decision pursuant to subsection C in order to review such decision and determine by a majority vote of the Board whether or not to grant a public hearing or Board consideration, or to delegate the permit to the Director for his decision. For purposes of this subsection, if a Board meeting is held via electronic communication, the Board shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public.*

E. *The Director shall, forthwith, notify by mail at his last known address (i) each requester and (ii) the applicant or permittee of the decision to grant or deny a public hearing or Board consideration.*

F. *In addition to subsections C, D, and E, the Director may, in his discretion, convene a public hearing on a permit action or submit a permit action to the Board for its consideration.*

G. *If a determination is made to hold a public hearing, the Director shall schedule the hearing at a time between 45 and 75 days after mailing of the notice required by subsection E.*

H. *The Director shall cause, or require the applicant to publish, notice of a public hearing to be published once, in a newspaper of general circulation in the city or county where the facility or operation that is the subject of the permit or permit application is located, at least 30 days before the hearing date.*

I. *The Director may, on his own motion or at the request of the applicant or permittee, for good cause shown, reschedule the date of the public hearing. In the event the Director reschedules the date for the public hearing after notice has been published, he shall, or require the applicant to, provide reasonable notice of the new date of the public hearing. Such notice shall be published once in the same newspaper where the original notice was published.*

J. *Public hearings held pursuant to these procedures may be conducted by the Board at a regular or special meeting of the Board and shall be presided over by a member of the Board. Public hearings may be held before less than a quorum of the Board.*

K. The presiding Board member shall have the authority to maintain order, preserve the impartiality of the decision process, and conclude the hearing process expeditiously. The presiding Board member, in order to carry out his responsibilities under this subsection, is authorized to exercise the following powers, including but not limited to:

1. Prescribing the methods and procedures to be used in the presentation of factual data, arguments, and proof orally and in writing including the imposition of reasonable limitations on the time permitted for oral testimony;

2. Consolidating the presentation of factual data, arguments, and proof to avoid repetitive presentation of them;

3. Ruling on procedural matters; and

4. Acting as custodian of the record of the public hearing causing all notices and written submittals to be entered in it.

L. The public comment period will remain open for 15 days after the close of the public hearing if required by § 62.1-44.15:01.

M. When the public hearing is conducted by less than a quorum of the Board, the Department shall, promptly after the close of the public hearing comment period, make a report to the Board.

N. After the close of the public hearing comment period, the Board shall, at a regular or special meeting, take final action on the permit. Such decision shall be issued within 90 days of the close of the public comment period or from a later date, as agreed to by the permittee or applicant and the Board or the Director. The Board shall not take any action on a permit where a public hearing was convened solely to satisfy the requirements of state or federal law or regulation unless the permit was provided to the Board for its consideration pursuant to the provisions of this section.

O. When the public hearing was conducted by less than a quorum of the Board, persons who commented during the public comment period shall be afforded an opportunity at the Board meeting when final action is scheduled to respond to any summaries of the public comments prepared by the Department for the Board's consideration subject to such reasonable limitations on the time permitted for oral testimony or presentation of repetitive material as are determined by the Board.

P. In making its decision, the Board shall consider (i) the verbal and written comments received during the public comment period made part of the record, (ii) any explanation of comments previously received during the public comment period made at the Board meeting, (iii) the comments and recommendation of the Department, and (iv) the agency files. When the decision of the Board is to adopt the recommendation of the Department, the Board shall provide in writing a clear and concise statement of the legal basis and justification for the decision reached. When the decision of the Board varies from the recommendation of the Department, the Board shall, in consultation with legal counsel, provide a clear and concise statement explaining the reason for the variation and how the Board's decision is in compliance with applicable laws and regulations. The written statement shall be provided contemporaneously with the decision of the Board. Copies of the decision, certified by the Director, shall be mailed by certified mail to the permittee or applicant.

§ 62.1-44.26. Hearings.

A. The formal hearings held under this chapter shall be conducted pursuant to § 2.2-4009 or 2.2-4020 and may be conducted by the Board itself at a regular or special meeting of the Board, or by at least one member of the Board designated by the chairman to conduct such hearings on behalf of the Board at any other time and place authorized by the Board.

B. A verbatim record of the proceedings of such hearings shall be taken and filed with the Board. Depositions may be taken and read as in actions at law.

C. The Board shall have power to issue subpoenas and subpoenas duces tecum, and at the request of any party shall issue such subpoenas. The failure of a witness without legal excuse to appear or to testify or to produce documents shall be acted upon by the Board in the manner prescribed in § 2.2-4022. Witnesses who are subpoenaed shall receive the same fees and mileage as in civil actions.

2. That the provisions of this act do not apply to any permit action public noticed prior to July 1, 2008.

3. That regulatory actions necessary to implement the provisions of this act are exempt from Article 2 (§ 2.2-4006 et seq.) of the Administrative Process Act.

4. That State Air Pollution Control Board members appointed before July 1, 2008, shall continue in office for the terms for which appointed. For the two additional members, one member shall be appointed for a term of four years and one member shall be appointed for a term of three years. Thereafter the successors of all members shall be appointed for four-year terms. Prior to July 1, 2010, the two additional members appointed pursuant hereto shall not vote on any action related to a permit for which the State Air Pollution Control Board has exercised its authority for direct consideration as of January 1, 2008.