

**COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD**

**REGULATORY ANALYSIS DOCUMENT FOR
PROPOSED REGULATION REVISION T97
CONCERNING**

**DISPUTE RESOLUTION
(9 VAC 5 CHAPTER 210)**

PROVISIONS AFFECTED

Regulation for Dispute Resolution, 9 VAC 5-210-10 et seq.

STATEMENT OF PURPOSE

The purpose of the regulation is to provide alternatives which reduce the need for formal administrative actions in resolving environmental disputes. The regulation will enhance public health and welfare by expediting the resolution of environmental disputes in a manner that is faster, more accessible to the public, less adversarial, and less costly than are formal administrative methods of resolving such disputes. The regulation is being proposed to comply with the mandate of § 10.1-1186.3 of the Code of Virginia that requires the adoption of regulations for the use of alternative dispute resolution in the development of a regulation or in the issuance of a permit.

STATEMENT OF STATUTORY 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. Written assurance from the Office of the Attorney General that the State Air Pollution Control Board possesses the statutory authority to promulgate the proposed regulation and that the proposed regulation comports with the applicable state law is attached.

STATEMENT OF LEGAL REQUIREMENTS

The identification of (i) the source(s) of the state legal requirements to promulgate the contemplated regulation, (ii) the scope of the requirements provided, and (iii) the extent to which the authorized rulemaking is mandatory or discretionary may be found below. A copy of all cited legal provisions may be found at the internet sites listed below.

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>

If the board wishes to be able to use mediation or other forms of dispute resolution, the contemplated regulation is mandated by state law. Section 10.1-1186.3 A of the Code of Virginia allows the State Air Pollution Control Board to use dispute resolution to resolve underlying issues, to reach a consensus, or to compromise on contested issues related to the development of a regulation or to the issuance of a permit. Section 10.1-1186.3 D specifies that the board shall adopt regulations in accordance with the Administrative Process Act for the implementation of § 10.1-1186.3. These regulations are to include (i) standards and procedures for the conduct of mediation and dispute resolution, (ii) the appointment and function of a neutral; and (iii) procedures to protect the confidentiality of papers, work product, or other materials.

COMPARISON WITH LEGAL REQUIREMENTS

The proposed regulation is not more restrictive than the applicable legal requirements.

DESCRIPTION OF PROPOSED PROVISIONS

The proposed provisions are listed below by their regulatory citations.

Part I. Definitions.

9 VAC 5-210-10. Use of terms.

9 VAC 5-210-20. Terms defined.

Part II. General Provisions.

9 VAC 5-210-30. Applicability.

9 VAC 5-210-40. Purpose and scope.

9 VAC 5-210-50. Costs.

9 VAC 5-210-60. Date, time, and place.

9 VAC 5-210-70. Attendance at the dispute resolution procedure.

9 VAC 5-210-80. Confidentiality.

9 VAC 5-210-90. Public participation.

9 VAC 5-210-100. Appointment and function of neutral.

9 VAC 5-210-110. Resumes of neutrals and descriptions of dispute resolution programs.

9 VAC 5-210-120. Enforcement of written settlement agreement.

9 VAC 5-210-130. Referral of disputes to dispute resolution.

Part III. Mediation Procedures.

9 VAC 5-210-140. Appointment of mediator.

9 VAC 5-210-150. Evaluation session.

9 VAC 5-210-160. Continuation, termination, and resolution of mediation.

STATEMENT OF CONCLUSIONS AND NEED

The proposed regulation is essential (i) to protect the health, safety or welfare of citizens or (ii) for the efficient and economical performance of an important governmental function. The reasoning for this conclusion, along with a discussion of the problems the regulation's provisions are intended to solve, is set forth below.

Beginning in the early 1970s, federal, state, and local governments have increasingly used mediation and other consensus-building tools as an alternative to more traditional means of resolving disputes. These consensus-building tools are intended to supplement, not replace, conventional legislative, judicial, administrative, or regulatory mechanisms. The benefits of dispute resolution are many:

(1) Dispute resolution achieves results satisfactory to all parties. Since each party learns to search for common ground and to recognize similar interests in the other parties, the traditional "hero vs. villain" illusion of adversarial disputes is avoided. Because the eventual solution is beneficial to all parties rather than to only one, the process produces mutual satisfaction in all parties, rather than winners and losers. Studies by the American Arbitration Association show that 80% of participants were satisfied with their dispute resolution programs regardless of process or outcome.

(2) Dispute resolution saves money. For instance, a single mediation undertaken by the New Jersey Center for Public Dispute resolution to settle a dispute with the federal government over the state's emergency transport system avoided a potential loss of twenty million dollars in federal funds.

(3) Dispute resolution accelerates the decision-making process. Because the concerned parties have a vested interest in achieving a speedy settlement, resolutions are generally reached in much less time through dispute resolution than is required for resolutions to be reached through more traditional means.

(4) Dispute resolution decreases the load on the court system. For instance, Cincinnati's Institute of Justice Private Complaint Program has reduced the municipal court's caseload by a third every year since 1974, with nearly half of the referred cases settled out of court and others being referred to non-court agencies. Government decision-makers sometimes perceive litigation as a politically safer option than dispute resolution since the court can be blamed for any undesirable outcome. These decision-

makers, however, have much more control over the outcome through dispute resolution than through litigation. Furthermore, they can still exercise their right to a court settlement if dispute resolution fails.

(5) Dispute resolution is politically advantageous to the involved parties by enhancing their reputation for consensus-building and problem-solving. Because dispute resolution has developed only over the course of the past two decades, some local government officials and other small-group representatives are unaware of its existence or question its legitimacy as a problem-solving tool appropriate to the inherently conservative atmosphere of government. But dispute resolution is not the same as binding arbitration: its use is neither an admission of failure nor an abdication of authority, but a demonstration that the involved parties are sufficiently dedicated to the public good to be willing to compromise in order to reach a solution.

A large number of the issues settled through dispute resolution are environmental ones. Dispute resolution centers in New Jersey, Massachusetts, Minnesota, New York, New Mexico, Georgia, Florida, and many other states have initiated important discussions and facilitated agreements involving complex and controversial issues like the establishment of regional sewage treatment facilities, the siting of solid waste disposal facilities, the disposal of hazardous waste, the clean-up of a Superfund site, the spraying of herbicides, the adoption of environmental standards, and the siting of underground storage tanks. A well-known example of the successful use of mediation to address an environmental problem is the decade-long public battle over the development of Hawaii's first state water code, which pitted developers against environmentalists, large landowners against small ones, and the counties against the state. This battle produced one legislative stalemate after another to the frustration of all parties but was finally resolved through mediation conducted by Hawaii's Program on Alternative Dispute resolution.

An example of what happens without dispute resolution is the case of the Hampton-Roads refinery in Virginia. The refinery was proposed in 1970 and discussed for over a decade but was never built. Contributing to the failure of the project were badly timed changes in the permitting process, understaffing of the State Air Pollution Control Board, statutory vagueness, siting disagreements, lack of communication within the Army Corps of Engineers, angry citizens, gubernatorial dissatisfaction with the progress of the project, the involvement of the federal government through both the Department of the Interior and the military, and the expiration of the initially issued permits. At the end of the failed project, the company's expenses were over six million dollars, with about half of that in legal fees. The Army Corps of Engineers' bill for legal fees was at least that amount. This case is a good example of the many such environmental disputes which die of exhaustion rather than being settled fairly and thoughtfully. Millions of dollars and thousands of labor years were squandered without an equitable settlement.

One way for Virginia to avoid this situation in the future is to adopt regulations that enable it to implement Code of Virginia § 10.1-1186.3.

STATEMENT OF ESTIMATED IMPACT

1. Entities Affected

Permittees and other interested parties to a permit issuance or to a regulation development.

2. Fiscal Impact

a. Costs to Affected Entities

Costs to affected entities should be lower than current costs. This regulation provides for less costly alternatives to the currently available administrative options. The financial advantages of this regulation are articulated in the "Statement of Conclusions and Need" above.

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

No funds have been appropriated for the administration of this regulation. The bulk of the expense of administering the regulation will be borne by the parties to the dispute. The agency's minor administrative costs will be paid from the general fund. With the use of this regulation, the agency's legal fees and other costs related to formal administrative proceedings should decrease.

d. Benefits

The primary benefits of this regulation are as follows: (1) it achieves results satisfactory to all parties; (2) it saves money; (3) it accelerates the decision-making process; (4) it decreases the load on the court system; and (5) it is politically advantageous to the involved parties by enhancing their reputation for consensus-building and problem-solving. See "Statement of Conclusions and Need" above.

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.

STATEMENT OF PROCESS FOR CONSIDERING ALTERNATIVES

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 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. Propose a new regulation to satisfy the provisions of the law. This option was chosen because it meets the stated purpose of the regulatory action: to comply with the mandate of § 10.1-1186.3 of the Code of Virginia that requires the adoption of regulations for the use of dispute resolution in the development of a regulation or in the issuance of a permit.
2. Make alternative regulatory changes to those required by the provisions of the law. This option was not chosen because it does not meet the stated purpose of the regulatory action.
3. Take no action. This option was not chosen because it does not meet the stated purpose of the regulatory action.

ASSURANCE OF CLARITY

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

EVALUATION SCHEDULE AND GOALS

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 proposed regulation is intended to achieve are as follows:

1. To reduce the number of environmental disputes resolved through formal administrative actions.
2. To reduce the amount of time necessary to resolve environmental disputes.
3. To reduce the amount of money necessary to resolve environmental disputes.

SUMMARY AND ANALYSIS OF PUBLIC INPUT

The purpose of the intended regulatory action, a summary of the public participation process, and an analysis of the public input, along with the basis for the decision of the board, are attached.

CONTACT PERSON

Questions on the proposal should be referred to:

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**COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD**

**SUMMARY AND ANALYSIS OF PUBLIC INPUT FOR
REGULATION REVISION T97
CONCERNING**

**DISPUTE RESOLUTION
(9 VAC 5 CHAPTER 120)**

INTRODUCTION

Pursuant to the board's regulatory public participation procedures (9 VAC 5 Chapter 170, Part IV), the Department of Environmental Quality published a notice of intended regulatory action concerning dispute resolution.

A public meeting was advertised accordingly and held by the department in Richmond on August 10, 1998. The purpose of the proposed action may be found below, followed by a summary of the public participation process and an analysis of the public input, along with the basis for the decision of the board.

PURPOSE OF PROPOSED ACTION

The purpose of the proposed action is to comply with the mandate of § 10.1-1186.3 of the Code of Virginia that requires the adoption of regulations for the use of alternative dispute resolution in the development of a regulation or in the issuance of a permit.

SUMMARY OF PUBLIC PARTICIPATION PROCESS

A public meeting was held in Richmond on August 10, 1998. Thirteen people attended the meeting. One of the attendees offered oral testimony supported by a written comment. Two other people filed written statements during the comment period. As provided in the board's public participation guidelines, notice of the meeting was given to the public on July 6, 1998, in the Virginia Register. In addition, individual notice of the meeting and the opportunity to comment were given by mail to the people (about 1000) on the department's list to receive notices of intended regulatory actions. A list of meeting attendees and the complete text or an account of each person's

input is included in the meeting report which is on file at the department.

ANALYSIS OF TESTIMONY

Below is a summary of each person's input and the accompanying analysis. Included is the subject of the comment, the identification of the commenter, the text of the comment, and the board's response. The board's response is based on its consideration of the overall goals and objectives of the air quality program and the intended purpose of the regulation.

1. **SUBJECT:** Administrative authority

COMMENTER: Frank Blechman, Clinical Faculty, Institute for Conflict Analysis and Resolution, George Mason University

TEXT: Although I welcome the effort by DEQ to institute collaborative problem-solving processes, I believe that the agency-by-agency approach has proven inefficient and unsatisfactory in many other states. I encourage another look at the value of state-level capacity. I particularly urge you to look at the experience of Ohio, New Jersey, and Florida.

RESPONSE: The enabling law for the adoption of these regulations applies only to the State Air Pollution Control Board, the State Water Control Board, and the State Waste Management Board. Regulations cannot be developed for statewide dispute resolution services without a legislative change.

2. **SUBJECT:** Scope of regulation

COMMENTER: Frank Blechman, Clinical Faculty, Institute for Conflict Analysis and Resolution, George Mason University

TEXT: I hope you will broaden the potential services included in this regulation from mediation to also include facilitation, training, team-building, process design, and system design.

RESPONSE: The proposed regulation allows for many types of dispute resolution services, including mediation, conciliation, early neutral evaluation, nonjudicial settlement conferences, or any other structured proceeding leading to a voluntary settlement.

3. **SUBJECT:** Applicable situations

COMMENTER: Frank Blechman, Clinical Faculty, Institute for Conflict Analysis and Resolution, George Mason University

TEXT: I propose that the board consider the following positive instances in which cooperative

(non-adversarial) processes could be used:

- a. precedential record is not required;
- b. complex intertwined policies and their interlocking effects must be considered as a whole;
- c. significant controversies exist which will not be resolved, even by the declaration of the most definitive regulation or decision;
- d. cooperation of many public and private parties will be required for the successful implementation of the policy or program;
- e. parties with relevant resources can be brought together in a collaborative environment.

RESPONSE: These situations have been incorporated into the proposed regulation.

4. **SUBJECT:** Terminology

COMMENTER: Frank Blechman, Clinical Faculty, Institute for Conflict Analysis and Resolution, George Mason University

TEXT: I hope that the board will acknowledge that cooperation is only an "alternative" to lawyers. Everybody else cooperates and works things out all the time. Hence, I believe that the term "alternative dispute resolution" should be applied to litigation rather than cooperation.

RESPONSE: The subject of the proposed regulation is articulated as "dispute resolution," not "alternative dispute resolution."

5. **SUBJECT:** Applicable issues

COMMENTER: Hadley Jenner, Program Associate, Institute for Peacebuilding, Eastern Mennonite University

TEXT: Issues of initiation, participation, process, and mediator selection, and accountability will all be important topics needing delineation. Who decides these issues and how will all be part of the regulatory challenge.

RESPONSE: All of these issues have been addressed by the proposed regulation.

6. **SUBJECT:** Scope of regulation

COMMENTER: Hadley Jenner, Program Associate, Institute for Peacebuilding, Eastern Mennonite University

TEXT: I urge a very broad view of what is intended. From the [public] meeting, it seemed as if the task was narrowly drawn for a certain conception of mediation and dispute resolution. While that is what the law says, the law also speaks to reaching consensus. That point was emphasized by Frank Blechman of George Mason University when he referred to the importance of "community-assisted problem solving" in framing these regulations. My sense is that attention there is probably worth more in the end than a focus solely on a narrowly constrained view of mediation.

RESPONSE: Since the public meeting was held, the scope of the proposed regulation has been broadened considerably through the work of the ad hoc advisory group. See response to Comment #2.

7. **SUBJECT:** Qualifications of neutrals

COMMENTER: Elizabeth Scott

TEXT: DEQ should use only mediators certified by the Supreme Court. These mediators have been trained in the process of successful mediation and have learned the ability to establish rapport and to break down barriers in communication between parties. The training also emphasizes effective listening and problem-solving skills. The certification is good for two years, and mediators must take additional training to be recertified. The mediators should be neutral parties, not employees of DEQ. The Supreme Court standards require that the mediators take additional training to be recertified. Mediations should be carried out in accordance with the Virginia Supreme Court's Standards of Ethics and Professional Responsibility for Certified Mediators.

RESPONSE: Although the proposed regulation does not require mediators to be certified by the Supreme Court, it does require that they be neutral parties and that they adhere to the Judicial Council's Standards of Ethics and Professional Responsibility for Certified Mediators.

8. **SUBJECT:** Use of multiple neutrals

COMMENTER: Elizabeth Scott

TEXT: The regulations should be flexible enough to allow the mediators to work in pairs. From my experience, the mediation process is smoother and more effective with a pair of mediators. Each one can, at first, concentrate on establishing a rapport with one of the parties; then once barriers have been broken down and all the issues are on the table, effective compromise can happen.

RESPONSE: The proposed regulation provides for the option of multiple neutrals in any

dispute resolution procedure, at the discretion of the parties.

9. **SUBJECT:** Costs

COMMENTER: Elizabeth Scott

TEXT: Mediation services are not free, but in situations like the [Harrisonburg] Community Mediation Center, the cost is considerably cheaper than with a private, for-profit service. The Community Mediation Center is a United Way agency which uses volunteer mediators. With substantial grant subsidy and use of volunteers, the cost per hour is much less than a private mediation firm would charge. It might be beneficial to survey to mediation providers in the Commonwealth, see who could provide the service to us for a reduced cost, and come up with an approved list to be used in mediations. Another avenue would be to craft the regulation so that the regulated party choosing mediation as an option would bear the cost. Again, with this option DEQ should have a list of approved providers with comparative cost information available. If you compare the cost of protracted litigation to the cost of several hours of mediation, the cost-effectiveness is immediately obvious.

RESPONSE: The proposed regulation allows DEQ to maintain a file of neutrals' resumes and dispute resolution program descriptions which may contain cost information. The proposed regulation also specifies that parties share the decision concerning the costs of dispute resolution just as they share the decision concerning the use of a neutral.

**COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD**

**SUMMARY OF
PROPOSED REGULATION REVISION T97
CONCERNING**

**DISPUTE RESOLUTION
(9 VAC 5 CHAPTER 120)**

The proposed regulation contains provisions covering dispute resolution and are summarized below:

The proposed regulation encourages the fair, expeditious, voluntary, consensual resolution of disputes by providing an alternative to administrative hearings and litigation. The disputes eligible for referral to voluntary dispute resolution are those relating to the issuance of a permit or to the adoption of a regulation. The decision to employ dispute resolution is in the board's sole discretion, and the outcome of any dispute resolution procedure does not bind the board but may be considered by the board in issuing a permit or promulgating a regulation. The proposed regulation contains provisions addressing situations appropriate for the use of dispute resolution, costs, confidentiality of proceedings, public participation, the use of neutral facilitators, and procedures for mediation.

COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD

SUPPORT DOCUMENT FOR
PROPOSED REGULATION REVISION T97
CONCERNING

DISPUTE RESOLUTION
(9 VAC 5 CHAPTER 120)

STATEMENT OF LEGAL 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. Written assurance from the Office of the Attorney General that the State Air Pollution Control Board possesses the statutory authority to promulgate the proposed regulation amendments is attached.

STATEMENT OF PURPOSE, SUBSTANCE, ISSUES, BASIS AND IMPACT

- A. Purpose - The purpose of the regulation is to provide alternatives which reduce the need for formal administrative actions in resolving environmental disputes. The regulation will enhance public health and welfare by expediting the resolution of environmental disputes in a manner that is faster, more accessible to the public, less adversarial, and less costly than are formal administrative methods of resolving such disputes. The regulation is being proposed to comply with the mandate of § 10.1-1186.3 of the Code of Virginia that requires the adoption of regulations for the use of alternative dispute resolution in the development of a regulation or in the issuance of a permit.
- B. Substance - The proposed provisions are detailed below according to citations to the appropriate sections of the regulation.

Part I. Definitions.

9 VAC 5-210-10. Use of terms.

9 VAC 5-210-20. Terms defined.

Part II. General Provisions.

9 VAC 5-210-30. Applicability.

9 VAC 5-210-40. Purpose and scope.

9 VAC 5-210-50. Costs.

9 VAC 5-210-60. Date, time, and place.

9 VAC 5-210-70. Attendance at the dispute resolution procedure.

9 VAC 5-210-80. Confidentiality.

9 VAC 5-210-90. Public participation.

9 VAC 5-210-100. Appointment and function of neutral.

9 VAC 5-210-110. Resumes of neutrals and descriptions of dispute resolution programs.

9 VAC 5-210-120. Enforcement of written settlement agreement.

9 VAC 5-210-130. Referral of disputes to dispute resolution.

Part III. Mediation Procedures.

9 VAC 5-210-140. Appointment of mediator.

9 VAC 5-210-150. Evaluation session.

9 VAC 5-210-160. Continuation, termination, and resolution of mediation.

C. Issues - The primary advantages and disadvantages of implementation and compliance with the regulation by the public and the department are discussed below.

1. Public: The primary advantages to the public are (1) significant savings in state litigation costs and therefore tax dollars, (2) increased access to and opportunities for participation in the decision-making process, (3) an acceleration of the decision-making process, (4) satisfactory results for all parties rather than just one. There are no disadvantages to the public.
2. Department: The primary advantages to the department are the same as advantages (1), (3), and (4) listed for the public. The only disadvantage to the department is the need to assign staff to administer the regulation.

D. Basis - The legal basis for the proposed regulation is the Virginia Air Pollution Control Law (Title 10.1, Chapter 13 of the Code of Virginia), specifically § 10.1-1308 which authorizes the board to promulgate regulations abating, controlling and prohibiting air pollution in order to protect public health and welfare.

E. Economic Impact Analysis - The Department of Planning and Budget prepared an economic impact analysis for the proposal as required by § 9-6.14:7.1 G of the Administrative Process Act. The Department of Environmental Quality takes no issue with the economic impact analysis prepared by the Department of Planning and Budget.

