



COMMONWEALTH of VIRGINIA
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MEMORANDUM

TO: Mike Rolband, Director
Department of Environmental Quality

FROM: David A. Harrington
Senior Assistant Attorney General

DATE: August 21, 2026

RE: Review of Final Regulation — 9 VAC 5-40 (the “Regulation”)

Please note that this memorandum does not constitute an opinion, formal or informal, of the Attorney General. Rather, this memorandum contains the legal analysis of the staff member providing it.

In response to a request from the Department of Environmental Quality, I have reviewed the above-referenced Regulation, which constituted Tab D of the State Air Pollution Control Board’s August 18, 2026 meeting agenda.

The State Air Pollution Control Board has authority to amend 9 VAC 5-40 pursuant to Va. Code §§ 10.1-1307 and 10.1-1308. After reviewing the Regulation, it is my opinion that the State Water Control Board has the authority to so amend the Regulation. It is also my opinion that the Regulation is exempt from the Administrative Process Act, pursuant to Va. Code § 2.2-4006(A)(4)(a), because the amendment is necessary to conform to changes in Virginia statutory law where no agency discretion is involved.