

US EPA ARCHIVE DOCUMENT



COMMONWEALTH of VIRGINIA

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June 26, 1984

Mr. Thomas P. Eichler
Regional Administrator, Region III
United States Environmental Protection Agency
Curtis Building
Sixth and Walnut Streets
Philadelphia, Pennsylvania 19106

Re: Virginia Application for Final Authorization:
Statement of the Attorney General

Dear Mr. Eichler:

I hereby certify, pursuant to my authority as Attorney General and in accordance with Section 3006(b) of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act, as amended (42 USC § 6901, et seq.), and 40 CFR 271 that in my opinion the laws of the Commonwealth of Virginia provide adequate authority to carry out the program set forth in the "Program Description" submitted by the Virginia Commissioner of Health. The specific authorities provided, which are contained in statutes or regulations lawfully adopted at the time this Statement is signed and which shall be fully effective by the time the program is approved, include those identified below.

Prefatory Statement Regarding Authority To Promulgate and Adopt Regulations

Many of the sections below contain an analysis of the legal authority which enables the Commonwealth of Virginia to promulgate and adopt regulations as a means of complying with relevant federal program requirements. Much of Virginia's authority to promulgate and adopt such regulations stems from the general enabling language contained in Virginia Code §§ 32.1-178(A)(1) and (10). These general enabling provisions, along with others noted below, provide adequate statutory authority for Virginia to carry out a hazardous waste management program which is equivalent to the federal program.

The standard of sufficiency for such enabling legislation was articulated by the United States Supreme Court in Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973) where the Court stated that:

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"[w]here the empowering provision of a statute states simply that the agency may 'make...such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purpose of the enabling legislation.'" 411 U.S. at 369 (quoting Thorpe v. Housing Auth. of the City of Durham, 393 U.S. 268, 280-81 (1969)). Cf. Va. Code § 32.1-178(A)(10).

This same standard was quoted with approval by the Virginia Supreme Court in Beneficial Discount Co. v. Johnson, 215 Va. 582, 587-88, 211 S.E.2d 571, 575-76 (1975). See also Director, Office of Workers Compensation Programs v. National Mines Corp., 554 F.2d 1267, 1275 (4th Cir. 1977); Talley v. Mathews, 550 F.2d 911, 919 (4th Cir. 1977). Given the fact that one of the purposes of the Virginia hazardous waste management (HWM) laws and regulations is to carry out the intent of federal legislation governing hazardous wastes (see Va. § 32.1-178(A)(10)), the Virginia HWM regulations are "reasonably related to the purposes of the enabling legislation." Accordingly, the broad enabling language contained in Va. § 32.1-178(A) provides adequate authority for the promulgation and adoption of the Virginia HWM regulations.

ATTORNEY GENERAL'S CERTIFICATION OF MEMORANDUM OF AGREEMENT

The State Board of Health is authorized to enter into and carry out the provisions of a Memorandum of Agreement (MOA) between the Board and EPA by § 32.1-178(A)(8). That section provides that the Board of Health is authorized to:

Consult and coordinate with the heads of any other appropriate state and federal agencies, any appropriate independent regulatory agencies and any other appropriate governmental instrumentalities for the purpose of achieving maximum effectiveness and enforcement of this article while imposing the least burden of duplicative requirements on those persons subject to the provisions of this article.

The MOA is not an agency action or regulation under the Virginia Administrative Process Act (§ 9-6.14:1 et seq.) and accordingly, there is no requirement that the MOA be promulgated as a rule in order to be binding.

A review of the provisions of the MOA indicates that there is no direct conflict with State laws and regulations.

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I. IDENTIFICATION AND LISTING

A. State statutes and regulations define hazardous waste so as to provide control over a universe of hazardous waste which is equivalent to that which would be controlled by the federal program under 40 CFR Part 261 as indicated in checklist I A.

Citations; Date of Enactment and Adoption

Va. Code § 32.1-177, 178(A)(7), 178(A)(10), (July 1, 1979);
Va. HWM Reg. §§ 2.01 through 2.183; 3.01 through 3.13.02 (May 21, 1981)

Analysis of Legal Authority

The universe of hazardous waste covered by the state statutes and regulations is taken substantially verbatim from the federal regulations and is equivalent to the federal requirements. The definitions, lists, and characteristics contained within the statutes and regulations are identical to those provided in the federal regulation. Virginia Code § 32.1-178(A)(7) authorizes the State Board of Health to designate types or lists of wastes which it deems to be hazardous in accordance with criteria and listings identified under federal statutes or regulations. Virginia Code § 32.1-178(A)(10) provides that the Board has the authority to "[p]romulgate such regulations as may be necessary to carry out its powers and duties...."

Code §§ 32.1-3(4) and 32.1-177(8) provide a definition of the term "person" which is as extensive as the federal definition by virtue of the inclusive language of § 32.1-3(4), *i.e.*, "any other legal entity." It should be noted that Regulation § 2.112 defines "person" in a manner which is equivalent to the federal definition.

B. State statutes and regulations contain a list of hazardous wastes and characteristics for identifying hazardous waste which encompass all wastes controlled under 40 CFR Part 261 as indicated in checklists I B and I C.

Citations; Date of Enactment and Adoption

Va. Code § 32.1-178(A)(7), 178(A)(10), (July 1, 1979); Va. HWM Reg. §§ 3.01 through 3.13 (May 21, 1981)

Analysis of Legal Authority

The universe of hazardous waste covered by the state

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statutes and regulations is taken substantially verbatim from the federal regulations and is equivalent to the federal requirements. The lists and characteristics contained within the statutes and regulations are identical to those provided in the federal regulations. Virginia Code § 32.1-178(A)(7) authorizes the State Board of Health to designate types or lists of wastes which it deems to be hazardous in accordance with criteria and listings identified under federal statutes or regulations. Virginia Code § 32.1-178(A)(10) provides that the Board has the authority to "[p]romulgate such regulations as may be necessary to carry out its powers and duties...."

II. STANDARDS FOR GENERATORS

State statutes and regulations provide equivalent coverage of all the generators covered by 40 CFR Part 262 as indicated in Checklist II.

Citations; Date of Enactment and Adoption

Section 32.1-178(A)(1), (10), 180(C) (July 1, 1979); Va. HWM Reg. §§ 5.01 through 5.06, 6.01 through app. 6.1, 7.06.01(a), 7.07.02, 7.07.04 (May 21, 1981)

Analysis of Legal Authority

As indicated in Checklist II, the above referenced legal authority provides an equivalent and almost verbatim restatement of the standards for generators contained in 40 CFR Part 262.

The enabling legislation contained in Code § 32.1-178(A)(1), (3), and (10) provides ample authority for the Board to promulgate regulations covering the standards for generators, transporters, and facilities. The directive contained in § 32.1-178(A) provides that "[t]he Board is responsible for carrying out the purposes and provisions of this article and compatible provisions of federal acts...." (Emphasis added.) Additionally, § 32.1-178(A)(10) provides that the Board is authorized to "[p]romulgate such regulations as may be necessary to carry out its powers and duties and the intent of this article and the federal acts." Given the clear legislative intent that the Virginia program should meet federal standards and the authority of the Board to promulgate regulations to that end, § 32.1-178(A) provides sufficient authority to support the promulgated standards for generators, transporters, and facilities.

Authority to regulate short-term accumulation of hazardous wastes by generators is found in § 32.1-180(A)(2), which requires a permit before a person shall store a hazardous waste. On this

statutory authority, the Commissioner might have required any generator to obtain a permit for any storage or accumulation of hazardous waste on his site. Instead, recognizing the logistics of handling such wastes and following the lead of the federal Act and regulations, the Commissioner drafted the state regulations to authorize short-term storage or accumulation of wastes on site, if they are appropriately containerized and labelled. As the greater power, i.e., to require a permit for storage, includes the lesser power, i.e., to authorize short-term accumulation under certain circumstances by regulation, the Commissioner has authority to regulate short-term accumulation.

III. STANDARDS FOR TRANSPORTERS

State statutes and regulations provide equivalent coverage of all the transporters covered by 40 CFR Part 263 as indicated in Checklist III.

Citations; Date of Enactment and Adoption

Section 32.1-178(A) (1), (5), (6), (10), 180 (July 1, 1979); Va. HWM Reg. §§ 5.00 et seq., 7.01.01 through app. 7.4 (May 21, 1981)

Analysis of Legal Authority

As indicated in Checklist III, the above referenced legal authority provides an equivalent and almost verbatim restatement of the standards for transporters contained in 40 CFR Part 263.

IV. STANDARDS FOR FACILITIES

A. State statutes and regulations provide equivalent permit standards for hazardous waste management facilities covered by 40 CFR Part 264 as indicated in Checklist IVA.

Citations; Date of Enactment and Adoption

Section 32.1-178(A) (1), (6), (10), (12), 32.1-180(E) (July 1, 1979), 32.1-182 (July 1, 1984); Va. HWM Reg. §§ 2.01 through app. 2.1-02, 5.00, 8.00 and app. 8.1 through 8.10, 10.00 and app. 10.1 through 10.5 (May 21, 1981)

Analysis of Legal Authority

As indicated in Checklist IV A, the above referenced legal authority provides an equivalent and almost verbatim restatement of the standards for facilities contained in 40 CFR Part 264.

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State law prohibits the operation of facilities not in compliance with such standards.

Additionally, § 32.1-182 authorizes regulations which insure coverage of costs to protect public health and safety from the hazards of an abandoned facility. Although the term "abandoned facility" is not defined, it cannot be construed solely to refer to an orphan site in existence prior to enactment of the statute. Otherwise, subsection (B) providing for alternative methods of financing the restoration of an abandoned facility would be rendered meaningless. Additionally, § 2.01 of the regulations defines abandoned facility to mean "[a]ny inactive solid waste disposal facility," a definition so broad that it could not be construed as limited to sites that had been abandoned prior to the effective date of the regulations. Code § 32.1-182(D) requires local or other governmental agencies to comply with the financial responsibility regulations "as they apply to hazardous waste treatment, storage and disposal facilities."

The authority for § 10.08 of the regulation derives directly from § 32.1-182 and § 32.1-178(A)(10); the authority for § 10.07, establishing requirements for closure and post-closure care, derives from §§ 32.1-178(A)(10) and 32.1-180(E). Section 32.1-178(A)(10) provides the Board of Health broad authority to promulgate regulations as necessary to carry out the intent of the federal acts and § 32.1-180(E) gives the Commissioner authority to prescribe conditions or requirements in a permit to protect human health or environment. The requirements for closure and post-closure plans are a part of the permitting process and are designed to protect human health and the environment.

B. State statutes and regulations provide for interim status and include interim status standards for hazardous waste management facilities covered by 40 CFR Part 265 as indicated in Checklist IV B.

1. State statutes and regulations authorize owners and operators of hazardous waste management facilities which would qualify for interim status under the federal program to remain in operation until a final decision is made on the permit application. See Va. HWM Reg. §§ 8.01.01, 11.03.01, and 11.03.03.

2. State law and regulations authorize continued operation of hazardous waste management facilities provided that owners and operators of such facilities comply with standards at least as stringent as EPA's interim status standards at 40 CFR Part 265. See Va. HWM Reg. §§ 9.01, 11.03.01, 11.03.04(a).

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3. State law and regulations assure that any facility qualifying for state interim status continues to qualify for federal interim status. See Va. HWM Reg. §§ 8.01.01, 11.03.04.

Citations; Date of Enactment and Adoption

Section 32.1-178(A)(1), (6), (10), (12), 180 (July 1, 1982); Va. HWM Reg. §§ 2.01 through app. 2.1-02, 5.06.03 through 5.07.02, 8.01.01, 9.01 through app. 9.4, 11.03.01, 11.03.04 (May 21, 1981)

Analysis of Legal Authority

As indicated in Checklist IV B, the above referenced legal authority provides an equivalent and almost verbatim restatement of the interim status standards for facilities contained in 40 CFR Part 265. Specifically, the authority for § 9.08 derives from §§ 32.1-178(A)(10) and 32.1-182 of the Code and the authority for § 9.07 derives from §§ 32.1-178(A)(10) and 32.1-180(E). The interim status standards are self-executing.

V. REQUIREMENTS FOR PERMITS

A. State statutes and regulations provide requirements for permits covered by 40 CFR Parts 124 and 270 as indicated in Checklist V.

Citations; Date of Enactment and Adoption

Sections 2.1-340 through 346.1, 32.1-178(A)(1), (6), (10), (12), 180, 181 (July 1, 1979); Va. HWM Reg. §§ 11.01.01 through 11.28.02 (May 21, 1981)

Analysis of Legal Authority

As indicated in Checklist V, the above referenced legal authority provides an equivalent and almost verbatim restatement of the requirements for permits contained in 40 CFR Parts 124 and 270. Virginia HWM Reg. §§ 11.01 and 11.01.01 establish that permits are required for owners and operators of all hazardous waste management facilities unless properly excluded pursuant to Va. HWM Reg. § 11.01.02. According to Va. HWM Reg. § 11.10.01, permittees are fully bound by all terms of the permit; noncompliance is a violation of the regulations and Title 32.1.

Section 32.1-181(A)(1) provides that the Commissioner may revoke a permit if the holder violates a regulation so as to pose a substantial present or potential hazard to human health or the

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environment. Section 32.1-181(A)(6) provides that the Commissioner may revoke a permit if the facility poses a substantial present or potential hazard to human health or the environment. Given the fact that the purpose of Virginia's Hazardous Waste Management program is to achieve "cradle to grave" control over hazardous wastes, any non-compliance with a permit condition or any lack of full disclosure or any misrepresentation could affect the control over hazardous waste so as to pose a substantial potential hazard to health or the environment. Accordingly, the Commissioner has authority to terminate a permit for non-compliance with any permit condition, lack of full disclosure, or misrepresentation. In addition, Va. HWM Reg. § 11.20.01 provides that the Commissioner may terminate a permit during its term for (a) non-compliance with permit conditions, or (b) misrepresentation or failure to disclose, or (c) hazards to health or the environment notwithstanding compliance with the permit if permit termination is the only acceptable means of abating the hazard.

The Commissioner may modify permits for cause in a manner equivalent to 40 CFR Part 270.41. This authority is reflected in Va. HWM Reg. §§ 11.19 through 11.19.02. Amendment 4 to the HWM regulations, which became effective July 1, 1983, amended Va. HWM Reg. § 11.19.01 to make the provisions for causes for modification equivalent to the federal requirements in 40 CFR Part 270.41.

Virginia Code § 32.1-181(B) specifies circumstances under which the Commissioner may amend a permit. Amendment is allowed when:

§ 32.1-181(B)(1) There has been a "significant change in the manner and scope of operation" so that permit changes are needed to protect public health and the environment. This is reflected in Va. HWM Reg. § 11.19.01(a).

§ 32.1-181(B)(2) A possibility of pollution causing "significant adverse effects" exists.

§ 32.1-181(B)(3) Investigation has shown the need for additional provisions in order to protect public health and the environment. This is the basis for Va. HWM Reg. § 11.19.01(b).

The investigation may result in a change in the regulation. Since the Commissioner has the power to revoke a permit for violation of any regulation under Virginia Code § 32.1-181(A)(2), he has the lesser power to amend a permit when its terms are not in accordance with the regulations. This and/or Code § 32.1-

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178(A)(10) provide the basis for the remaining provision for modification of permits.

The definition of solid waste contained in § 32.1-177(14) exempts "sources subject to a permit from the State Water Control Board." Because the State Water Control Board's function is to regulate point source discharges, the Virginia exemption is the equivalent of the analogous language contained in RCRA: "point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended."

The prohibition contained in § 32.1-180(A)(2) provides that no one shall "[t]ransport, store, provide treatment for, or dispose of a hazardous waste without a permit therefor from the Commissioner." Virginia HWM Reg. § 11.02.02 provides that "[w]hen a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit; however, the owner shall sign the permit application." These two provisions, when read together, indicate that both the owner and the operator of a facility are required to apply for a single permit.

Given the prohibition contained in § 32.1-180(A)(2), the waiver provision of § 32.1-180(B) would not apply to facilities requiring a treatment, storage, or disposal (TSD) permit from the Commissioner. Rather, the waiver provision contained in § 32.1-180(B) should be read as being applicable to facilities accepting solid wastes other than hazardous wastes.

Virginia's authority for interim status operation of facilities is contained in § 32.1-178(A)(10) which provides that the Board has the authority to "[p]romulgate such regulations as may be necessary to carry out its powers and duties and the intent of this article and the federal act." In my opinion, that broad grant of authority is a statement by the legislature that the Board of Health may adopt such regulations as are necessary to bring Virginia's hazardous waste management program into compliance with the requirements of federal law. Additionally, § 32.1-178(A)(8) requires the Board to consult and coordinate with other state and federal agencies in order to achieve maximum effectiveness and enforcement of the hazardous waste laws "while imposing the least burden of duplicative requirements" on those persons subject to regulation. Had the Board of Health not provided for interim status and permits by rule, much of the regulated community would have been subjected to duplicate regulations. Those persons in interim status would have been regulated by both EPA and the Board of Health, publicly-owned treatment works entitled to permit by rule would have been regulated by the State Water Control Board and the Board of Health, and operators of barges

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and vessels for the ocean disposal of hazardous waste would have been subject to regulation by EPA and the Board of Health. In my opinion, the Virginia General Assembly expressly instructed the Board of Health to avoid such duplication.

I would also call your attention to § 32.1-12 of the Code which authorizes the Board to adopt, promulgate and enforce regulations "and provide for reasonable variances and exemptions therefrom as may be necessary to carry out the provisions of this title and other laws of the Commonwealth." In my opinion, this particular statute specifically authorizes the Board to provide for permits by rule and interim status which are both in the nature of a variance or an exemption. Finally, § 32.1-180(B) specifically authorizes the Commissioner to waive the requirement of a permit for the disposal of solid wastes when the Commissioner determines that the facility is subject to regulation by the State Water Control Board. The permit by rule for publicly-owned treatment works falls squarely within this particular provision.

Public notice of permitting actions is required under Reg. § 11.24.01. Specifically, Reg. § 11.24.04(a)(2) requires the public notice to include the "[n]ame and address of the permittee or permit applicant and, if different, of the facility." Although no statute specifies what constitutes legal notice to the public, the state regulation exceeds the statutory requirement for service of process to a party to a proceeding. Virginia Code § 8.01-317 calls for service of process to be made by publication "once each week for four successive weeks" in a newspaper. Va. HWM Reg. § 11.24 requires notice in a daily or weekly newspaper over 30 days before a hearing, as well as broadcasts over local radio stations. Therefore, the regulatory requirement of notice exceeds the notice required to be given by publication to alert one with a direct legal interest in the proceeding and, as such, constitutes legal notice to the public. Additionally, Reg. § 1.06.06 provides that "[a]ll reports and related materials received from hazardous waste generators, transporters, and facilities, as required by these regulations, shall be open to the public for review."

Furthermore, all official records are open to inspection and copying by any citizen of the State under the Virginia Freedom of Information Act, Code §§ 2.1-340 through 346.1. Although certain listed records are excluded from this requirement in Code § 2.1-342(b), no exception includes names and addresses of permittees or permit applicants or reports received under the regulations. Code § 2.1-340.1 declares that the Act is to be liberally construed to favor accessibility and the exceptions are to be narrowly construed.

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The Memorandum of Agreement between the Commonwealth and EPA provides:

The Commonwealth agrees that it will not exercise its authority provided in Section 32.1-12, Title 32.1, Code of Virginia (1950), as amended, to grant variances from the provisions of the Virginia Hazardous Waste Management Regulations unless such variances are specifically provided for in these regulations and the result of such variance will not conflict with the requirement that the program remain equivalent to the Federal program, be consistent with the programs applicable in other States, and that it provide adequate enforcement of compliance with the requirements of RCRA. Should such variances be granted, the Commonwealth agrees to notify EPA of the variances.

Given the language of § 32.1-12, it is apparent that the waiver provision is of such a nature that it can be invoked only at the discretion of the Board. Section 32.1-178(A)(8) provides authority for the Board to limit its use of the waiver provision in this fashion.

B. The State may adopt existing federal permits.

Citations; Date of Enactment

Va. Code § 32.1-178(A)(8), (10) (July 1, 1979); Va. HWM Reg. § 11.01.04 (May 21, 1981)

Analysis of Legal Authority

The authority to adopt federal permits is found in § 32.1-178(A)(8) which admonishes the Board to consult and coordinate with other agencies, whether state, federal, or independent, "for the purpose of achieving maximum effectiveness and enforcement of this article while imposing the least burden of duplicative requirements on those persons subject to the provisions of this article." Additionally, § 32.1-178(A)(10) authorizes the Board to promulgate regulations to carry out the powers and duties of the Board, as well as the intent of the article. Section 11.01.04 provides for State adoption of valid federal HWM permits provided the operator submits a request for adoption along with a copy of the federal permit to the Commissioner and the facility "remains in compliance with all the conditions specified in the federal permit and the requirements of these regulations." Thus the State scheme requires owner and operator compliance with both state and federal regulations, and relieves the owner and operator of the burden of applying for a

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state permit until the expiration of his state-adopted federal permit.

VI. INSPECTIONS

State law provides authority for officers engaged in compliance evaluation activities to enter any conveyance, vehicle, facility or premises subject to regulation or in which records relevant to program operation are kept in order to inspect, monitor, or otherwise investigate compliance with the state program including compliance with permit terms and conditions and other program requirements.

Citations; Date of Enactment and Adoption

Sections 19.2-393 to 396, 32.1-25 (July 1, 1979); Va. Code Reg. §§ 1.07.02, 11.10.09 (May 21, 1981)

Analysis of Legal Authority

Virginia Code § 32.1-25 provides that the Commissioner or his designee may enter any property to inspect, investigate, evaluate, conduct tests or take samples for testing after appropriate credentials have been presented and consent has been granted by the owner or custodian. The term "any property" given its plain meaning, so that the Commissioner's right of entry is not limited to the site of a permitted facility and includes authority to inspect places where records are kept to copy records. If consent is refused, officials may make application to a circuit court for the issuance of an inspection warrant pursuant to Code §§ 19.2-393 through 19.2-397. Such warrants may be obtained to enter and conduct inspections and collect samples in connection with the manufacture, emission or presence of a toxic substance. The term "toxic substance" defined in § 19.2-393 includes "any raw material, intermediate product, catalyst, final product and by-product of any operation conducted in a commercial establishment...." This definition is very broad, and includes any material that exhibits the characteristics of ignitability, corrosivity, reactivity, and explosivity, as defined in Reg. §§ 3.07 through 3.10, and encompasses the universe of hazardous wastes defined by the Virginia and federal regulations. Virginia HWM Reg. § 11.10.09 provides that the Commissioner or his authorized representative may have to and copy at reasonable times any records which are kept under the conditions of the permit. The term "property" as used in the context of Code §§ 32.1-25 and 19.2-393 includes realty as well as personalty such as vehicles.

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VII. ENFORCEMENT REMEDIES

State statutes and regulations provide the following:

A. Authority to restrain immediately by order or by suit in State court any person from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment.

Citations; Date of Enactment

Va. Code §§ 8.01-620 to 634, 32.1-2, 32.1-13, 32.1-26, 32.1-27(B) (July 1, 1979)

Analysis of Legal Authority

Section 32.1-2 provides that the State Health Commissioner shall take steps to "abate hazards and nuisances to the health and to the environment, both emergency or otherwise...." Use of the terms "emergency and otherwise" in the statute convinces me that the General Assembly intended the Commissioner to be able to abate not only actual hazards and nuisances but also those conditions which threaten the health and environment. Moreover, nuisance has been defined as "anything that endangers life or health or obstructs the reasonable and comfortable use of property." National Energy Corp. v. O'Quinn, 223 Va. 83, 85, 286 S.E.2d 181, 182 (1982). Furthermore, § 32.1-13 authorizes the Board (§ 32.1-20 vests the Commissioner with the authority of the Board when it is not in session) to issue orders to meet any emergency not provided for by general regulations, and in the past the Commissioner has exercised that authority. Code § 32.1-26 authorizes the Board to issue orders requiring compliance with laws, regulations, and case decisions. These orders may be issued after notice to the affected persons and a hearing on the matter. By its terms, this section does not affect the emergency powers of the Board provided in § 32.1-13. Finally, § 32.1-27(B) provides that the Commissioner may bring suit for injunctive relief against any person who fails to obey any lawful regulation or order of the Board or Commissioner. Any court with the power to issue injunction decrees is also empowered to grant temporary injunctions, with or without notice to the adverse party. See §§ 8.01-620 to 634. Thus there is authority for immediate restraint of any person from engaging in any unauthorized activity. The Virginia Supreme Court has addressed the question of whether the statutes authorizing injunctions apply to threatened or continuing violations. The court has held that:

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[The purpose] to be served by injunctions, whether mandatory or prohibitory, has been the prevention of future wrongs. The function of the mandatory injunction is to undo an existing wrongful condition, but its use is justified only when it appears that, if it is not applied, the wrongful condition is likely to continue. The function of the prohibitory injunction is, not to repair or penalize a wrong previously consummated, but either to maintain the status quo, to restrain the continued commission of an on-going wrong, or to prevent the future commission of an anticipated wrong.

WTAR Radio-TV Corp. v. City Council of Virginia Beach, 216 Va. 892, 894-5, 223 S.E.2d 895, 898 (1976).

Therefore, the power of the Board, or Commissioner on its behalf, to seek injunctions is and must be directed to threatened and continuing violations.

B. Authority to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit.

Citations; Date of Enactment

Va. Code §§ 32.1-2, 32.1-27 (July 1, 1979)

Analysis of Legal Authority

The express authority to bring suit for injunctive relief against violations of program requirements is contained in Code § 32.1-27(B). That section imposes no condition precedent upon the Commissioner's ability to seek injunctive relief.

C. Authority to sue to recover in court civil penalties in an amount up to \$10,000 per day for any program violation.

Citations; Date of Enactment

Va. Code §§ 32.1-27(C), 32.1-186(A) (July 1, 1979)

Analysis of Legal Authority

Section 32.1-186 provides for civil penalties for violations of "any provision of this article or any regulation or order of the Board adopted pursuant to this article." This section is in addition to the provisions of § 32.1-27(C), which calls for civil penalties for "violating or failing, neglecting or refusing to obey any injunction, mandamus or other remedy" obtained pursuant

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to a court proceeding brought by the Board or Commission seeking compliance with the laws, regulations, and orders of the program. Civil penalties, therefore, may be recovered for any program violation.

D. Authority to obtain criminal penalties up to the amount of \$10,000 per day for each violation and imprisonment up to twelve months against any person who knowingly transports any hazardous waste to an unpermitted facility; who knowingly treats, stores, or disposes of hazardous waste without a permit; or who knowingly makes any false statement or misrepresentation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of hazardous waste program compliance.

Citations; Date of Enactment

Va. Code § 32.1-186(B) (July 1, 1982)

Analysis of Legal Authority

Under § 32.1-186, the burden of proof and degree of knowledge or intent are virtually identical to the requirement of 40 CFR § 271.16(b)(2). It should be noted that § 32.1-186(A) does not include mental state as an element of proof for civil violations.

VIII. PUBLIC PARTICIPATION IN THE STATE ENFORCEMENT PROCESS

State laws and regulations provide for public participation in the State enforcement process by providing that the Department of Health will:

(a) Investigate and provide written responses to all citizen complaints addressed to the Department;

(b) Not oppose timely intervention by any citizen in a suit brought before a court by the Department as a result of the enforcement action where permissive intervention is authorized by statute, rule, or regulation; and

(c) Publish a notice in major daily or weekly newspaper of general circulation in the area and broadcast over local radio stations; and provide at least 30 days of public comment on proposed settlements of civil enforcement actions except where the settlement requires some immediate action, and in accordance with the Memorandum of Agreement, this exception is limited to situations "which if otherwise

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delayed could result in substantial damage to either public health or the environment."

Citations; Date of Enactment

Va. Rules of Court 2:15 (Nov. 22, 1972); Va. Code § 32.1-178(A)(10) (July 1, 1979), Va. HWM Reg. § 1.06.07 (May 21, 1981)

Analysis of Legal Authority

The authority to provide for public participation is vested in the Board by § 32.1-178(A)(10). The state public participation guidelines, set forth above, are largely identical to those at 40 CFR § 271.16(d)(2). Although Va. HWM Reg. § 1.06.07(b) does not employ the exact language of 40 CFR § 271.16(d)(2)(ii), the differences in language do not create a different result. The federal regulation forbids the state agency opposing intervention by any citizen "where permissive intervention may be authorized by statute, rule, or regulation...." 40 CFR § 271.16(d)(2)(ii). The federal regulation is directed specifically to protecting public participation in the enforcement process, and all actions contemplated thereunder are necessarily brought by the state agency. The state rules regarding intervention limit intervention to suits before the court. See Virginia Rules of Court 2:15. In recognition of this, Va. HWM Reg. 1.06.07(b) contains language to that effect. The state regulation, then, incorporates in its language the state-specific intent of 40 CFR § 271.16(d)(2)(ii). Under similar enabling legislation contained at Va. § 62.1-44.15(10), the State Water Control Board has adopted its regulation 6.80(b)(3) which provides for public participation in the settlement of any civil enforcement action. Accordingly, the Virginia HWM regulations which provide for public participation in the enforcement process are consistent with past state actions.

The language from the MOA quoted in VIII(C) above, can be agreed to and carried out without rule-making in order to be binding.

A. State authorities require that the State make available for public comment prior to permit issuance information substantially equivalent to that required at 40 C.F.R. 124.6 and 124.8. That information may be contained in a draft permit.

Citations; Dates of Enactment and Adoption. Section 32.1-178(A)(1), (10), (12) (July 1, 1980); Reg. §§ 11.22.01-11.22.03, 11.23.01-11.23.02 (July 21, 1982).

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Analysis of Legal Authority. Sections 11.22 and 11.23 are almost verbatim restatements of 40 C.F.R. §§ 124.6 and 124.8. Use of the phrase "significant public interest" to describe when a fact sheet shall be prepared is even more inclusive than the phrase "widespread public interest" used in 40 C.F.R. 124.8.

B. State authorities require that the public notice contain information substantially equivalent to that in 40 C.F.R. 124.10.

Citations; Dates of Enactment and Adoption.

Section 32.1-178(A)(1), (10), (12) (July 1, 1980); Reg. §§ 11.24.04-11.24.05 (July 21, 1982)

Analysis of Legal Authority. Sections 11.24.04 and 11.24.05 provide that the public notice contain all the information required by the federal regulations. Although the phrase "any additional information considered necessary or proper" is omitted, such a phrase is redundant when the regulations establish the minimum information to be included in the notice. The Commissioner has the discretion to determine what additional information may be necessary or proper without such a statement in the regulations.

IX. AUTHORITY TO SHARE INFORMATION WITH EPA

State statutes and regulations provide authority for any information obtained or used in the administration of the state program to be available to EPA upon request without restriction.

Citations; Date of Enactment

Va. Code §§ 2.1-342, 32.1-178(A)(8) (July 1, 1979)

Analysis of Legal Authority

Section 32.1-178(A)(8) provides that the Board of Health is authorized to "[c]onsult and coordinate with the heads of any other appropriate state and federal agencies...for the purpose of achieving maximum effectiveness and enforcement of this article...." There is no statute limiting the authority of the Commonwealth to provide information to EPA. Claims of confidentiality are not currently provided for.

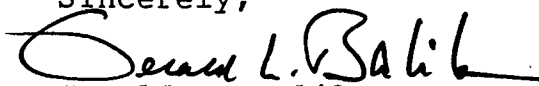
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X. AUTHORITY OVER INDIAN LANDS

Virginia's jurisdiction over less than 600 acres of Indian lands stems from its historic trustee status. Since there are no plans for hazardous waste management on such lands, Virginia does not seek authority from EPA to regulate hazardous waste management activities on such lands.

With kindest regards, I am

Sincerely,


Gerald L. Baliles
Attorney General

6:12/173-C9