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Melisa Porterfield
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Richmond, VA 23218

Via email to: melissa.porterfield@deq.virginia.gov

Re: Public Comments on the Department of Environmental Quality (9 VAC 15-11), Air Pollution Control Board (9 VAC 5-5), State Water Control Board (9 VAC 20-11), and Virginia Waste Management Board (9 VAC 20-11) Public Participation Guidelines.

Dear Ms. Porterfield,

The Virginia Environmental Justice Collaborative respectfully submits the following comments regarding the Public Participation Guidelines for the Department of Environmental Quality's (DEQ), the Air Pollution Control Board (APCB), the State Water Control Board (SWCB), and the Virginia Waste Management Board (VWMB) (collectively, "the Four Agencies").¹ We appreciate the opportunity to provide feedback on these guidelines and we welcome the opportunity to discuss our recommendations in more depth with the Department, regulatory board members, and related staff.

The Virginia Environmental Justice Collaborative (VEJC)² was created in 2015 to fill the need for statewide coordination to support Virginia organizations addressing environmental justice issues. The VEJC has adopted the following definition of *environmental justice*:

The whole of community must be taken into account when defining "environment" in "environmental justice." Therefore, "environmental" refers to the *natural, cultural, social, economic and political* components of a community.²

The VEJC was founded by the Southeast CARE Coalition, Appalachian Voices, the Federal Policy Office of WE ACT for Environmental Justice, and New Virginia Majority, and we continue to grow, currently with forty members strong. Our members come from diverse backgrounds including

¹Since the Public Participation Guidelines of the Four Agencies have identical language and Section numbers, we are submitting one comment letter to cover all four Public Participation Guidelines. In making specific language changes, we refer to the last two digits of the Virginia Administrative Code citations since those two numbers are the same in all of the four Public Participation Guidelines for which public comment is sought.

² Va. Envntl. Justice Collaborative, About, <https://www.vaejc.com/about> (last visited Aug 20, 2021).



community organizing, academia, policy, and faith-based activism. It is our commitment to consciously remain *governed by* and *deeply rooted in* the environmental justice communities that we serve and represent.

Accordingly, it is our sincere hope that the DEQ, APCB, SWCB, and the VWMB's will incorporate the following recommendations in their respective periodic reviews of Public Participation Guidelines under Va code § [2.2-4007.02](#).

Background

Overburdened, vulnerable communities in Virginia continue to be at an increased risk for climate change impacts, siting of toxic fossil fuel facilities, and other forms of environmental pollution exposure. Residents of these communities are often disproportionately people of color, low-income, and members of tribal communities in both rural and urban localities in Virginia. These communities, especially, must be meaningfully involved in state agency decision-making and thoroughly protected from adverse environmental risks and hazards given the legacy and continued effects of environmental injustices and racism.

Moreover, since these regulations were last reviewed in 2017, the General Assembly passed, and the Governor signed three pieces of legislation in 2020 that affect the Four Agencies' Public Participation Guidelines. As such, this current review period of these Guidelines provides an excellent opportunity for the Four Agencies to amend their respective Guidelines to incorporate these new laws.

First, DEQ's Statement of Policy (which also applies to APCB, SWCB and VWMB) contained in DEQ's enabling statute, Virginia Code Section 10.1-1183(B), was amended by two pieces of legislation, Ch. 454 and Ch. 492 of the 2020 Acts of Assembly, to include the following two purposes:

“To **further environmental justice** and **enhance public participation** in the regulatory and permitting processes.”

“To ensure the **fair treatment and meaningful involvement** of all people **regardless of race, color, national origin, faith, disability, or income** with respect to the administration of environmental laws, regulations, and policies.”³

Furthermore, Ch. 454 added a definition of the term “environmental justice,” which reads as follows:

"Environmental justice" means the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, faith, disability, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies.

³ Va. Code Ann § 10.1-1183.



The third piece of legislation was the Virginia Environmental Justice Act (“VEJA”), Virginia Code Section 2.2-234 *et seq.* This legislation establishes “the policy of the Commonwealth to promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities.”⁴ Further, VEJA adds several definitions to the Virginia Code, including, but not limited to, the terms “community of color,” “environmental justice community,” “low income community,” and “meaningful involvement,” which should be added to the Public Participation Guidelines as stated below.

Before describing the specific changes we recommend in the Four Agencies’ Public Participation Guidelines, we note that there are ways to improve public participation in the development of regulations that cannot be addressed merely by changing the Four Agencies’ Public Participation Guidelines. Specifically, the Four Agencies must have robust community engagement and outreach measures in place and the requisite infrastructure needed to carry out those measures. DEQ is in the process of onboarding staff devoted to environmental justice and community outreach, and VEJC stands ready to work with those staff persons to develop effective community engagement and outreach strategies.

The changes we seek in the Four Agencies’ Public Participation Guidelines broadly do the following:

1. **Ensure meaningful involvement** in their regulatory activities by:

- Notifying the public how the Four Agencies will accept oral public comments during the public comment period;
- Always providing a remote option for attending the Four Agencies’ public hearings;
- Holding public hearings at locations convenient via rail and public transit, in order for community members to be able to participate;
- Holding public hearings at times that community members can attend, namely, after 5:00 pm, in order for those who work during normal hours to be able to participate. This may necessitate multiple meetings;
- Providing translation at meetings and providing opportunities for feedback in languages other than English, in all media forms. This should at least include providing technical materials in languages other than English upon request, flyers in multiple languages, posting information in local non-English newspapers, live translation of public hearings, etc.;
- Clearly and uniformly communicate the steps needed to request extensions of the public comment period and to request a public hearing; and
- Providing more advanced notice of meetings and public comment opportunities, allowing the public more time to provide thoughtful feedback; the notices for a public hearing should be posted on the Regulatory Town Hall, Commonwealth Calendar and DEQ’s website at least 15 days prior; there should be a minimum of 60 calendar days following the publication of final adopted regulation, notice of periodic review, and petition for rulemaking.

⁴ Va. Code Ann §2.2-235.



2. **Promote environmental justice statewide** in their regulatory activities by:
 - Maintaining a list of organizations in environmental justice communities and fenceline communities and notify those organizations of upcoming regulatory actions; to determine what areas constitute an environmental justice community and fenceline community, use the definitions in VEJA.
3. **Ensure adequate community outreach** in their regulatory activities by:
 - Posting regulatory notices in various media forms in addition to publication on the Virginia's Regulatory Town Hall Website (i.e. social media posts, DEQ's website) and sending those notices to organizations in environmental justice communities and fenceline communities.
4. **Ensure broad participation in Regulatory Advisory Panels and Negotiated Rulemaking Panels:**
 - Regarding the appointment of a Regulatory Advisory Panel (RAP) and Negotiated Rulemaking Panel (NRP), there should be both broad and balanced representation on the RAP/NRP that includes residents of environmental justice communities and fenceline communities and other stakeholders (industry, government, academia and advocacy organizations); no group should have a majority.

Comments

Our specific, technical recommendations are as follows:⁵

1. Part I. Purpose and Definitions

Purpose - Section 10

The purpose of this chapter is to promote *meaningful* public involvement *by the public* in the development, amendment or repeal of the regulations of the [DEQ, APCB, SWCB and VWMB, respectively]. This chapter does not apply to regulations, guidelines, or other documents exempted or excluded from the provisions of the Administrative Process Act (Va. code § 2.2-4000 et seq. of the Code of Virginia).

Definitions - Section 20

[.]

"Community of color" means any geographically distinct area where the population of color, expressed as a percentage of the total population of such area, is higher than the population of color in the Commonwealth expressed as a percentage of the total population of the Commonwealth. However, if a community of color is composed primarily of one of the groups listed in the definition of "population of color," the percentage population of such group in the

⁵The changes we propose are in *bold italics*. When deletions are proposed we use strikethroughs in the existing language which is displayed using a normal font.



Commonwealth shall be used instead of the percentage population of color in the Commonwealth.

"Department" means the Department of Environmental Quality.

"Environmental justice community" means any low-income community or community of color.

"Fenceline community" means an area that contains all or part of a low-income community or community of color and that presents an increased health risk to its residents due to its proximity to a major source of pollution.

"Low income" means having an annual household income equal to or less than the greater of (i) an amount equal to 80 percent of the median income of the area in which the household is located, as reported by the Department of Housing and Urban Development, and (ii) 200 percent of the Federal Poverty Level.

"Low-income community" means any census block group in which 30 percent or more of the population is composed of people with low income.

"Meaningful involvement" means the requirements that (i) affected and vulnerable community residents have access and opportunities to participate in the full cycle of the decision-making process about a proposed regulation that will affect their environment or health and (ii) decision-makers will seek out and consider such participation, allowing the views and perspectives of community residents to shape and influence the decision.

"Population of color" means a population of individuals who identify as belonging to one or more of the following groups: Black, African American, Asian, Pacific Islander, Native American, other non-white race, mixed race, Hispanic, Latino, or linguistically isolated.

2. Part II. Notification of Interested Persons

Notification List - Section 30

A. The agency shall maintain a list of persons who have requested to be notified of regulatory actions being pursued by the agency *and shall include on the list names and contact information of organizations in environmental justice communities and fenceline communities regardless of whether the organization requested to be notified of regulatory actions.*

[.]

Add new paragraph (G):



G. In addition to using the list of persons and organizations established pursuant to subdivision (A) of this section, the agency shall utilize the department's website and social media accounts to notify the public of regulatory actions being pursued by the agency.

Information to be sent to persons on the notification list - Section 40

A. To persons *or organizations on the list described in subdivision (A) of Section 30 and on the department's website and social media accounts* ~~electing to receive electronic notification or notification through a postal carrier as described in 9VAC25-11-30~~, the agency shall send *or post* the following information:

1. A notice of intended regulatory action (NOIRA).
2. A notice of the comment period on a proposed, a repropoed, or a fast-track regulation *that states: and*
 - (a) the length of the public comment period;*
 - (b) hyperlinks to, or instructions on how to obtain, a copy of the regulation and any supporting documents;*
 - (c) ~~and~~ instructions on how members of the public can request an extension of the comment period and a public hearing;*
 - (d) the name and contact information of an agency employee who can answer questions from the public about the proposed, repropoed or fast track regulation; and*
 - (e) the name and contact information of an agency employee who will receive oral comments during the public comment period.*
3. A notice soliciting comment on a final regulation when the regulatory process has been extended pursuant to § 2.2-4007.06 or 2.2-4013 C of the Code of Virginia.

3. Part III. Public Participation Procedures

Public comment - Section 50

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person *or organization described in subdivision (A) of section 30*, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.



2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments *either orally or* in writing after the publication of a regulatory action in the Virginia Register *and, simultaneously, on the department's website and in newspapers serving non-English speaking communities written in the appropriate language other than English* as follows:

1. For a minimum of ~~30~~ **45** calendar days following the publication of the notice of intended regulatory action (NOIRA).
2. For a minimum of 60 calendar days following the publication of a proposed regulation.
3. For a minimum of 30 calendar days following the publication of a repropoed regulation.
4. For a minimum of ~~30~~ **60** calendar days following the publication of a final adopted regulation.
5. For a minimum of 30 calendar days following the publication of a fast-track regulation.
6. For a minimum of ~~21~~ **60** calendar days following the publication of a notice of periodic review.
7. Not later than ~~21~~ **60** calendar days following the publication of a petition for rulemaking.

[.]

E. The agency shall send a draft of the agency's summary description of public comment *together with the agency's responses to the public comments received* to all public commenters on the proposed regulation *and shall post the summary on the department's website* at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

Petition for rulemaking - Section 60

No changes proposed

Appointment of regulatory advisory panel - Section 70

[.]

B. Any person may request the appointment of a RAP and request to participate in its activities. The agency shall determine when a RAP shall be appointed and the composition of the RAP, *provided that the agency shall ensure the composition of the RAP is both fairly balanced and reflects a broad range of stakeholders, including government, industry, academia, representatives of grassroots or non-profit advocacy organizations, and residents of environmental justice communities and/or fenceline communities.*

Appointment of negotiated rulemaking panel - Section 80



A. The agency may appoint a negotiated rulemaking panel (NRP) if a regulatory action is expected to be controversial, ***provided that the agency shall ensure the composition of the NRP is both fairly balanced and reflects a broad range of stakeholders, including government, industry, academia, representatives of grassroots or non-profit advocacy organizations, and residents of environmental justice communities and/or fenceline communities.***

Meetings - Section 90

Notice of any open meeting, including meetings of a RAP or NRP, shall be posted on the Virginia Regulatory Town Hall and Commonwealth Calendar ***and the department's website*** at least ~~seven~~ **fifteen** working days prior to the date of the meeting. ***The notice shall include instructions on how to observe the meeting from a remote location using the Internet or telephone.*** The exception to this requirement is any meeting held in accordance with § 2.2-3707 D of the Code of Virginia allowing for contemporaneous notice to be provided to participants and the public.

Public hearings on regulations - Section 100

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C. An agency is required to hold a public hearing following the publication of the proposed regulatory action when:

1. The agency's basic law requires the agency to hold a public hearing;
2. The Governor directs the agency to hold a public hearing; ~~or~~
3. The agency receives requests for a public hearing from at least ~~25~~ **15** persons during the public comment period following the publication of the notice of intended regulatory action;
or
4. ***The agency determines a public hearing is needed to further identify how environmental justice communities and/or fenceline communities may be affected by the agency's proposed regulatory action.***

D. Notice of any public hearing ***and availability of foreign language translation (including sign language) at the hearing*** shall be posted on the Town Hall, ~~and~~ Commonwealth Calendar ***and the Department's website*** at least ~~seven~~ **fifteen** working days prior to the date of the hearing. The agency shall also notify those persons who requested a hearing under subdivision C 3 of this section.

E. Any public hearing scheduled pursuant to this Section shall occur at a location that is accessible by public transportation and shall start no earlier than 5PM; and members of the public shall be afforded the opportunity to participate in the hearing from a remote location using the Internet or telephone.



F. Foreign language interpretation (including sign language) shall be supplied by the agency at the public hearing to any person who requests an interpreter within 5 days of the public hearing.

Periodic review of regulations - Section 110

C. Notice of a periodic review shall be posted on the Town Hall *and the Department's website* and published in the Virginia Register.

Conclusion

The VEJC strongly recommends that the Four Agencies adopt these recommendations in their review and update of their public participation guidelines, and appreciates the opportunity to provide this feedback on the Four Agencies' Public Participation Guidelines. We, and look forward to the Four Agencies' written response to our enclosed comments.

Sincerely,

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The following organizations that are not members of VEJC endorse the comments made in this letter:

Katlyn Schmitt, Center for Progressive Reform
Lauren Landis, Chesapeake Climate Action Network
Grace Tuttle, Protect Our Water Heritage Rights