



Virginia Breaking Blue: Spotlight on Air Issues

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In November, Democrats won control of the House of Delegates and kept control over the Commonwealth's Senate. Now, Democrats control both the Executive and Legislative branches of government in the Commonwealth of Virginia. Prior to the election, Virginia diverged from federal environmental positions under the Trump Administration, largely due to the influence of the Democrat Governor Northam and his Administration. In addition, Virginia's State Air Pollution Control Board, the body that approves regulations and air permitting actions, has been largely appointed by governors who are Democrats.

EPA sought public comments on a number of proposed Clean Air Act rules in 2019. The Virginia Department of Environmental Quality (DEQ) chose to file comments or otherwise take a position contrary to EPA and the Trump Administration on the following rulemaking efforts:

- **Once In, Always in Permit Policy Rescission for Hazardous Air Pollutants.** The Trump Administration decided to rescind the policy that EPA has had in place since the 1990s. The policy provided that, once a source emits hazardous air pollutants (HAP) in excess of thresholds that require the source to obtain a Title V air permit, the source cannot later leave the Title V program by reducing its HAP emissions. The Trump Administration published a policy memorandum and then a proposed rule to rescind the policy. Virginia commented in the federal docket on September 24, 2019, opposing EPA's rescission of the policy. Federal law allows Virginia to maintain stricter permitting requirements than required on the federal level. Therefore, the Once In, Always In policy is still in effect in Virginia.
- **New Source Review (NSR) Project Emissions Accounting.** EPA revised the emissions calculation approach to allow consideration of emission decreases from a proposed project in Step One of the major NSR applicability determination. Previously, contemporaneous decreases from a project would be taken into consideration during the project netting step. Virginia filed comments opposing this methodology in the federal docket by the due date of October 8, 2019. Therefore, this policy is not in effect in the Commonwealth.
- **EPA NSR Enforcement Policy.** In a 2017 guidance memorandum, EPA stated that it would evaluate whether projects need a Prevention of Significant Deterioration (PSD) permit by reviewing

post-project actual emissions as long as the source performed an actual-to-projected-actual emissions analysis before the project commenced that generally adhered to the PSD emissions analysis regulations. This policy departed from EPA enforcement practices under the Obama Administration that used pre-project emissions estimates as the basis for enforcement. On August 19, 2019, the Virginia Secretary of Natural Resources issued a report that reviewed past federal environmental activities since President Trump took office. The report identifies as a concern: "Allowing polluters, instead of the U.S. Environmental Protection Agency (EPA), to decide when major modifications to pollution sources would trigger the more environmentally protective 'New Source Review' permitting process." Although the report did not address specifics, it appears to oppose this NSR enforcement policy.

Virginia's rulemaking scorecard from 2019 demonstrates that Virginia diverged from federal positions even prior to the shift in legislative power in the General Assembly. We expect to see even more air-related changes in 2020 now that Democrats are fully in charge. Moreover, Governor Northam announced that his proposed budget includes more than \$25 million to help DEQ increase efficiency and responsiveness, enhance environmental protection, and improve public engagement.

Several emerging areas to watch in Virginia are:

- **Carbon Regulation.** The Air Board passed the Virginia Cap and Trade Rule, which became effective on June 26, 2019. The Rule provided for Virginia to link to the Regional Greenhouse Gas Initiative (RGGI). However, the General Assembly last year passed a budget restriction that currently prohibits Virginia from working to join or link to RGGI. Governor Northam's 2020 proposed budget lifts this restriction, and we anticipate this restriction will be lifted in the upcoming General Assembly session. The Governor has proposed separate legislation whereby Virginia will become the newest member of RGGI. The General Assembly may also pass legislation to control carbon emissions from other sources and address methane emissions.
- **Executive Order 43 – Expanding Access To Clean Energy And Growing The Clean Energy Jobs Of The Future.** In September, Governor Northam issued an order directing the Director of the Department of Mines, Minerals and Energy (DMME), in consultation with the Secretary of Commerce and Trade, the Secretary of Natural Resources, and the Director of the Department of Environmental Quality, to develop a plan of action to produce thirty percent of Virginia's electricity from renewable energy sources by 2030 and one hundred percent of Virginia's electricity from carbon-free sources by 2050. DMME's final plan is due to the Governor by July 1, 2020. This Executive Order is likely to have significant future air emission impacts.
- **Air Pollution Control Board Public Participation Initiative.** The Air Board created a Public Participation Committee to examine public engagement in air regulatory rulemakings and air permitting. The Committee is evaluating how to change the air permitting and rulemaking process to allow for more public participation. This initiative could result in considerable changes in the logistics and timing of rule and permit development.

In summary, now that Democrats control the Executive and Legislative branches in Virginia, look for significant changes to state air regulations and policies in 2020. Green agendas are more likely to have traction in the 2020 General Assembly, and we expect to see efforts from both the Executive and Legislative branches to promote carbon reductions, renewable energy, and additional public participation in air rulemakings and permitting.

Once In, Always in Policy Rescission, 84 Fed. Reg. 36304 (July 26, 2019).

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 84 Fed. Reg. 39244 (August 9, 2019).

E. Scott Pruitt, EPA Administrator, Memorandum on New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability, Dec. 7, 2017.

Executive Order 6 Report, Matthew Strickler, Virginia Secretary of Natural Resources, August 19, 2019.

Virginia General Assembly 2019 Session, House Bill 1700, Item 4-5.11 #1c.

Regulation for Emissions Trading Programs, 9 VAC 5-140-6010 *et seq.*

Executive Order 43 – Expanding Access To Clean Energy And Growing The Clean Energy Jobs Of The Future, September 16, 2019.

Governor Northam to Protect Virginia’s Environment, Fight Climate Change, and Grow the Clean Energy Economy, 2019, <https://www.governor.virginia.gov/newsroom/all-releases/2019/december/headline-849847-en.html> (last visited on December 11, 2019).

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