



# COMMONWEALTH of VIRGINIA

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June 26, 2007

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The Honorable Frederick M. Quayle  
Member, Senate of Virginia  
P.O. Box 368  
Suffolk, Virginia 23439

Dear Senator Quayle:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You ask whether the Southeastern Public Service Authority of Virginia may refuse to submit to the Department of Environmental Quality a proposed amendment that it determines is not necessary or does not conform to the Regional Solid Waste Management Plan for Southeastern Virginia. You also ask whether the Authority is entitled to charge a fee for services relating to processing and reviewing a proposed Regional Solid Waste Management Plan amendment or whether the Authority may obtain reimbursement from the Department for costs and time devoted to the review as part of the process for the associated environmental permit.

## Response

It is my opinion that the Southeastern Public Service Authority of Virginia may elect not to submit to the Department of Environmental Quality a proposed amendment that it determines is not necessary or does not conform to the Regional Solid Waste Management Plan for Southeastern Virginia. It is further my opinion that the Authority is not entitled to charge a fee for services related to processing and reviewing a proposed Regional Plan amendment. The Authority also cannot obtain reimbursement from the Department for costs and time devoted to the review as part of the process for the associated environmental permit.

## Background

You relate that the Southeastern Public Service Authority of Virginia ("SPSA") is an authority created pursuant to the Virginia Water and Waste Authorities Act.<sup>1</sup> As a public authority, SPSA serves as the regional solid waste management organization for eight communities in southeastern Virginia.<sup>2</sup> In

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<sup>1</sup>VA. CODE ANN. §§ 15.2-5100 to 15.2-5158 (2003 & Supp. 2006).

<sup>2</sup>The members of SPSA are the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk, and Virginia Beach, and the counties of Isle of Wight and Southampton. See 2000 Va. Acts ch. 580 at 1047, 1047-48.

addition, SPSA has been designated as the solid waste planning agency for the region<sup>3</sup> (“Regional Planning Agency”), pursuant to the Regulations for the Development of Solid Waste Management Plans<sup>4</sup> (“Regulations”). You also note that SPSA is authorized to develop, adopt, and promulgate the solid waste management plan required by § 10.1-1411. As the Regional Planning Agency, SPSA conducts solid waste management planning activities on behalf of the jurisdictions under the Regional Solid Waste Management Plan for Southeastern Virginia (“Plan”).<sup>5</sup> You state that SPSA’s role as Regional Planning Agency is unclear regarding the process of amending the Plan.

### Applicable Law and Discussion

Section 10.1-1411(A) authorizes the Virginia Waste Management Board<sup>6</sup> (“Board”) “to promulgate regulations specifying requirements for local and regional solid waste management plans.” Accordingly, the Board promulgated the Regulations.<sup>7</sup>

The purpose of these regulations is to:

1. Establish minimum solid waste management standards and planning requirements for protection of the public health, public safety, the environment, and natural resources throughout the Commonwealth; promote local and regional planning that provides for environmentally sound and compatible solid waste management with the most effective and efficient use of available resources; [and]

....

3. Establish ... regional ... responsibility for meeting and maintaining the minimum recycling rates[.]<sup>[8]</sup>

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<sup>3</sup>See 9 VA. ADMIN. CODE § 20-130-210 (2004) (establishing criteria for developing regional planning agency); see also SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA, REGIONAL SOLID WASTE MANAGEMENT PLAN FOR SOUTHEASTERN VIRGINIA, at \*14, available at <http://www.spsa.com/PDFs/publications/Reg.%20Solid%20Waste%20Mgmt%20Plan%20June%2006.pdf> (June 2006) (noting that SPSA is regional solid waste management organization for certain southeastern Virginia communities) [hereinafter “MANAGEMENT PLAN”]; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, THE VIRGINIA ANNUAL RECYCLING RATE REPORT, CALENDAR YEAR 2005 SUMMARY (Oct. 2006), at \*6, \*10, available at [http://www.deq.state.va.us/recycle/documents/AnnualReportRRR2005\\_FINAL\\_000.pdf](http://www.deq.state.va.us/recycle/documents/AnnualReportRRR2005_FINAL_000.pdf) (listing reports of solid waste planning units). I also note that § 10.1-1411(A) provides that each regional or locality designated by the Governor as a regional boundary “shall constitute a solid waste planning unit.”

<sup>4</sup>VA. ADMIN. CODE tit. 9, ch. 130 (2004) (codified in scattered sections from § 20-130-10 to § 20-130-230).

<sup>5</sup>Created pursuant to § 10.1-1411(A), the Regional Solid Waste Management Plan for Southeastern Virginia is comprised of SPSA member localities of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk, and Virginia Beach, the counties of Isle of Wight and Southampton, including the towns of Boykins, Branchville, Capron, Courtland, Ivor, Newsoms, Smithfield, and Windsor. See MANAGEMENT PLAN, *supra* note 3, at \*14.

<sup>6</sup>See VA. CODE ANN. § 10.1-1401(A) (2006) (continuing Board, which consists of seven members appointed by Governor).

<sup>7</sup>See *supra* note 4.

<sup>8</sup>9 VA. ADMIN. CODE § 20-130-40.

The Governor is authorized to designate regional boundaries to implement regional solid waste management plans.<sup>9</sup> “The governing bodies of the counties, cities and towns within any region ... shall be responsible for the development and implementation of a comprehensive regional solid waste management plan[.]”<sup>10</sup> To that end, SPSA was designated as the Regional Planning Agency for the Plan.<sup>11</sup>

The Regulations required that a complete revised solid waste management plan be submitted to the Department of Environmental Quality by July 1, 2004.<sup>12</sup> In its capacity as the Regional Planning Agency, SPSA submitted the Plan to the Department in October 2004. Among other things, the Plan was required to: address the waste management hierarchy;<sup>13</sup> include the mandatory plan contents;<sup>14</sup> consider the mandatory objectives;<sup>15</sup> include incorporated data;<sup>16</sup> and provide for public participation.<sup>17</sup>

The Department of Environmental Quality reviews each solid waste management plan for content to determine whether the submitter has addressed all the elements required by the Regulations.<sup>18</sup> It is the responsibility of the Regional Planning Agency to conduct all required evaluations and analyses to ensure that the Plan adequately represents the Unit’s vision for solid waste management for the next twenty years.<sup>19</sup> In fact, 9 VAC 20-130-70(B) provides that “[a]fter July 1, 2000, no permit for a solid waste management facility shall be issued unless the local or regional applicant has a plan approved in accordance” with the Regulations and “the permit complies with” §§ 10.1-1411 and 10.1-1408(D)(1)(iv) of the Virginia Waste Management Act.<sup>20</sup>

Likewise, it is the responsibility of the Regional Planning Agency to evaluate any proposed amendment to the Plan although the Regulations do not contain any specific requirement that the

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<sup>9</sup> Section 10.1-1411(A) (2006).

<sup>10</sup> *Id.*

<sup>11</sup> *See supra* note 3 and accompanying text.

<sup>12</sup> 9 VA. ADMIN. CODE § 20-130-110(B).

<sup>13</sup> 9 VA. ADMIN. CODE § 20-130-30 (requiring plans to consider and address source reduction, reuse, recycle, resource recovery, incineration, and landfilling).

<sup>14</sup> 9 VA. ADMIN. CODE § 20-130-120 (requiring that plans include an integrated waste management strategy, implementation objectives for solid waste management, progress towards objectives and an implementation schedule, funding strategy, public education strategy, public-private partnerships, and how to meet mandatory recycling rates).

<sup>15</sup> 9 VA. ADMIN. CODE § 20-130-140 (requiring that plans include consideration of waste management hierarchy and demonstrate manner in which mandatory objectives will be met).

<sup>16</sup> 9 VA. ADMIN. CODE § 20-130-150 (requiring that plans contain data and analyses for multiple factors, including twenty-year population projections, urban concentrations, geographic conditions, economic growth and development, reuse and recycling markets, transportation conditions, estimates of solid waste generated by households, procedures for evaluating solid waste collection, and assessment of current and predicted solid waste management needs for twenty years and actions to be taken to meet such needs).

<sup>17</sup> 9 VA. ADMIN. CODE § 20-130-130.

<sup>18</sup> 9 VA. ADMIN. CODE § 20-130-110(C).

<sup>19</sup> 9 VA. ADMIN. CODE § 20-130-150.

<sup>20</sup> VA. CODE ANN. tit. 10.1, ch. 14 (2006) (codified in scattered sections from § 10.1-1400 to § 10.1-1457).

Regional Planning Agency send each proposed amendment to the Department of Environmental Quality. The Department is authorized to review and approve an amendment or to return comment on the deficiencies in each amendment.<sup>21</sup> The Regulations are silent regarding other roles for the Department, yet unambiguously describe in great detail the information and analyses required of the Regional Planning Agency.<sup>22</sup> The Regulations classify amendments as major<sup>23</sup> or minor.<sup>24</sup> As with the approval of a plan, the Department reviews the amendment for content and consistency with the Regulations.<sup>25</sup> Insofar as the Regulations do not confer decision-making authority for plan contents on the Department, it is the responsibility of the Regional Planning Agency to evaluate proposals and determine whether a proposed facility or activity fits with its existing Plan. Once the Regional Planning Agency determines that the proposed facility or activity cannot be integrated with the existing Plan, review by the Department is not required.

You also ask what remedy or right of appeal would the proponent of a new solid waste management facility have in the event that the Regional Planning Agency declines to submit a Plan amendment to the Department of Environmental Quality. Where the Regional Planning Agency, not the Department, makes a decision not to amend the Plan, private parties are left to seek an appropriate judicial or political remedy against the Regional Planning Agency.<sup>26</sup>

You ask whether SPSA is entitled to charge a fee for services related to processing and reviewing a Plan amendment. Finally, you ask whether SPSA could seek reimbursement from the Department of Environmental Quality for costs associated with reviewing the Plan amendment. I find nothing in the Regulations regarding the collection of fees by the Department or the Regional Planning Agency for reviewing solid waste management plans or amendments. However, 9 VAC 20-130-120, which addresses mandatory plan contents, provides that a solid waste management plan must include a description of the funding and resources necessary to implement the plan, including consideration of fees dedicated to future facility development. Therefore, the Regional Planning Agency could elect to establish procedures to impose a fee for reviewing a Plan amendment. However, such fee should be dedicated to future facility development and not collected as reimbursement for costs associated with review of amendments.<sup>27</sup> In addition, I find no provision in the Regulations or the *Virginia Code* governing reimbursement of SPSA

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<sup>21</sup>9 VA. ADMIN. CODE § 20-130-175(E).

<sup>22</sup>See *supra* notes 13-17, 19 and accompanying text.

<sup>23</sup>“Major amendments shall include any addition, deletion, or cessation of operation of any solid waste facility; any increase in landfill capacity; any change that moves toward implementation of a waste management strategy that is lower in the waste management hierarchy; and any change to membership in the approved area.” 9 VA. ADMIN. CODE § 20-130-175(A)(1).

<sup>24</sup>“Minor amendments shall include any change that moves toward implementation of a waste management strategy that is higher in the waste management hierarchy and any nonsubstantive administrative change such as a change in name.” 9 VA. ADMIN. CODE § 20-130-175(A)(2).

<sup>25</sup>See 9 VA. ADMIN. CODE § 20-130-175(G).

<sup>26</sup>See § 15.2-5114(5) (Supp. 2006) (granting public service authorities, including SPSA, power to sue and be sued).

<sup>27</sup>See Op. Va. Att’y Gen. 233, 238-39 (noting that agency may impose fees only as specifically authorized by General Assembly).

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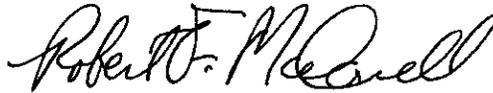
expenses. Therefore, it is my opinion that SPSA may not seek reimbursement for costs associate with review of the Plan.

### **Conclusion**

Accordingly, it is my opinion that the Southeastern Public Service Authority of Virginia may elect not to submit to the Department of Environmental Quality a proposed amendment that it determines is not necessary or does not conform to the Regional Solid Waste Management Plan for Southeastern Virginia. It is further my opinion that the Authority is not entitled to charge a fee for services related to processing and reviewing a proposed Regional Plan amendment. The Authority also cannot obtain reimbursement from the Department for costs and time devoted to the review as part of the process for the associated environmental permit.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. McDonnell". The signature is written in a cursive style with a large, prominent "R" and "M".

Robert F. McDonnell