



COMMONWEALTH of VIRGINIA

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The Honorable Ghazala F. Hashmi
Member, Senate of Virginia
Post Office Box 396
Richmond, Virginia 23218

Dear Senator Hashmi:

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

Issue Presented

You ask whether the policy established by the Virginia Environmental Justice Act (§§ 2.2-234 through -235) (the EJA) is a factor that must be considered by the Director of the Department of Environmental Quality (the "Director") in making his determination about whether the site for a potential landfill is suitable under § 10.1-1408.4 of the Virginia Waste Management Act (the VWMA).

Statutory Background

Your question requires analysis of two separate statutory schemes: the VWMA and the EJA. Each is briefly summarized below.

Enacted in 1986, the VWMA authorizes the Virginia Waste Management Board and the Director to supervise and control waste management activities in the Commonwealth.¹ The purpose of the VWMA is to "protect the Commonwealth's environment, thereby promoting the health and well-being of her citizens."² Article 2 of the VWMA, Code §§ 10.1-1408.1 through -1413.1, governs solid waste landfills. Section 10.1-1408.1(A) prohibits the operation of a landfill without a permit: "[n]o person shall operate a sanitary landfill or other facility for the disposal, treatment or storage of nonhazardous solid waste without a permit from the Director."³ Subsection (B) of that section lists the information required for a

¹ VA. CODE ANN. §§ 10.1-1402(1), -1405(B); *see also* Campbell County v. Royal, 283 Va. 4, 15 (2012) (describing the history and purpose of the VWMA). All citations to the Code of Virginia herein are from the electronic version of the Code on LexisNexis and are current through the 2021 Regular Session and Special Sessions I and II of the General Assembly.

² Browning-Ferris Indus. v. Residents Involved in Saving the Env't, 254 Va. 278, 284 (1997) (citing VA. CODE ANN. § 10.1-1183).

³ VA. CODE ANN. § 10.1-1408.1(A).

complete application for a landfill permit.⁴ Subsection (C)(2) of that section requires an applicant to make a disclosure statement.⁵

Based on the information in the permit application, the Director is required under § 10.1-1408.1(D) to undertake an investigation and to make a threshold determination about the landfill application.

[N]o permit for a new solid waste management facility . . . shall be issued *until the Director has determined*, after an investigation and analysis of the potential human health, environmental, transportation infrastructure, and transportation safety impacts and needs and an evaluation of comments by the host government, other local governments *and interested persons*, that (i) the proposed facility . . . protects present and future human health and safety and the environment; (ii) that there is a need for the additional capacity; (iii) sufficient infrastructure will exist to safely handle the waste flow; (iv) the increase is consistent with locality-imposed or state-imposed daily disposal limits; (v) *the public interest will be served by the proposed facility's operation . . .*, and (vi) the proposed solid waste management facility is consistent with regional and local solid waste management plans developed pursuant to § 10.1-1411. The Department shall hold a *public hearing* within the said county, city or town prior to the issuance of any such permit for the management of nonhazardous solid waste.^[6]

Only after the Director has made a determination under § 10.1-1408.1(D) is the question of site suitability reached under the statutory provision you asked about, § 10.1-1408.4. That section provides that, whenever a person applies to the Director for a permit to create a new solid waste landfill, the Director shall:

[D]etermine, in writing that the site on which the landfill is to be constructed is suitable for the construction and operation of such a landfill. In making his determination, the Director shall consider and address, *in addition to such others as he deems appropriate*, the following factors:

1. Based on a written site-specific report prepared by the Virginia Department of Transportation, the adequacy of transportation facilities that will be available to serve the landfill, including the impact of the landfill on local traffic volume, road congestion, and highway safety;
2. The potential impact of the proposed landfill on parks and recreational areas, public water supplies, marine resources, wetlands, historic sites, fish and wildlife, water quality, and tourism; and
3. The geological suitability of the proposed site, including proximity to areas of seismic activity and karst topography.^[7]

Thus, before a new landfill may be built, the operator must obtain a permit from the Department of Environmental Quality (DEQ). Before the permit can issue, the Director must make two determinations based on factors set out in §§ 10.1-1408.1(D) and -1408.4. Included as factors in both of those

⁴ VA. CODE ANN. § 10.1-1408.1(B)(1)-(9).

⁵ VA. CODE ANN. § 10.1-1408.1(C)(2); *see also* § 10.1-1400 (defining “disclosure statement”).

⁶ VA. CODE ANN. § 10.1-1408.1(D)(1) (emphases added).

⁷ VA. CODE ANN. § 10.1-1408.4(A) (emphasis added).

determinations are not only issues specific to infrastructure and protection of human health, safety and the environment but also more generally to the public interest or other factors the Director deems pertinent. Moreover, before these determinations are made DEQ is required to investigate and receive comments from, among others, “interested persons.”

These provisions of the VWMA have been in place since 1999. The EJA is a much more recent feature of Virginia law. Passed in 2020, it provides that “[i]t is the policy of the Commonwealth to promote environmental justice and to ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities.”⁸

Under the EJA, “environmental justice” means “the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, income, faith, or disability, regarding the development, implementation, or enforcement of any environmental law, regulation or policy.”⁹ The phrase “meaningful involvement” is defined as:

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 activity 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.^[10]

The EJA defines “fair treatment” as “the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative environmental consequence resulting from an industrial, governmental, or commercial operation, program, or policy.”¹¹

There is currently no case law in Virginia that provides guidance on the application of the EJA.

Applicable Law and Discussion

In determining whether the EJA applies when the Director makes determinations under §§ 10.1-1408.1(D) and -1408.4, the question of whether the policy contained within the EJA is enforceable or not is instructive.

Broad statements of policy in the Code are not, by themselves, self-executing and enforceable.¹² If, however, a statute contains a statement of policy that is accompanied by language establishing the means of carrying out the policy, the statute may be deemed self-executing in certain instances. If the

⁸ VA. CODE ANN. § 2.2-235.

⁹ VA. CODE ANN. § 2.2-234.

¹⁰ *Id.*

¹¹ *Id.*

¹² A statute is self-executing if it is “effective immediately without the need of any type of implementing action.” See BLACK’S LAW DICTIONARY (Bryan A. Garner et al. eds., 11th ed. 2019, Westlaw) (defining the term “self-executing”); *United States v. Paul*, 23 F.3d 365, 367 (11th Cir. 1994) (self-executing statute needs no regulatory implementation to make it effective); *Terry v. Mazon*, 234 Va. 442, 456 (1987) (finding that § 58.1-2425(A) “is self-executing -- [where] no further legislation is needed to effect the will of the General Assembly”).

statute provides sufficiently clear and detailed standards for enforcing a duty that is imposed, or protecting a right conferred, it is generally deemed self-executing.¹³

The EJA states that it is the policy of the Commonwealth to “promote environmental justice and ensure that it is carried out throughout the Commonwealth.”¹⁴ By definition, “environmental justice” means “the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, income, faith, or disability”¹⁵ Environmental justice requires that affected and vulnerable community residents have opportunities to participate in the decision making process about any proposed activity that will affect their environment or health, and, moreover, that their participation shall be sought.¹⁶ Environmental justice further requires that the Commonwealth must engage in the equitable consideration of all people, whereby no group of people bears a disproportionate share of negative environmental consequences.¹⁷

The EJA does not merely indicate a broad policy goal without setting forth the means by which that policy may be carried out. Instead, the EJA imposes specific duties on the Commonwealth and confers certain rights to individuals, which are set forth in terms that provide sufficiently clear and detailed standards for judicial enforcement.¹⁸ Accordingly, the EJA is self-executing and requires that the Director provide environmental justice through the fair treatment and meaningful involvement of all affected people in environmental justice communities and fenceline communities when making the threshold determination under § 10.1-1408.1(D) or the site suitability determination under § 10.1-1408.4. Even if the EJA were not self-executing, however, a proper reading of these provisions requires the public engagement and consideration of environmental justice considerations under the pertinent provisions of the VWMA. Section 10.1-1408.1(D) requires consideration of public comment on the factors, including the overall “public interest” listed in that section.¹⁹

Although there is no case law interpreting the interplay of the VWMA and the EJA, there is precedent arising from the interplay of Virginia’s air pollution control law and environmental justice provisions of the Virginia Energy Policy. In *Friends of Buckingham v. State Air Pollution Control Board*,²⁰ the petitioners challenged an air permit approved by DEQ and approved by the Air Pollution

¹³ See BLACK’S LAW DICTIONARY, *supra* note 12 (defining the term “self-executing”); *see also* Robb v. Shockoe Slip Found., 228 Va. 678, 682 (1985) (stating that “[a] constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.”) (quoting 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 167-68 (8th ed. 1927)); *United States v. Merchant Mariner License*, 2010 USCG LEXIS 2, *18 (U.S. Coast Guard Dec. 22, 2010) (“[S]elf-executing statutes may be analogized to self-executing constitutional provisions.”).

¹⁴ VA. CODE ANN. § 2.2-235.

¹⁵ VA. CODE ANN. § 2.2-234 (defining “environmental justice”).

¹⁶ *Id.* (defining “meaningful involvement”).

¹⁷ *Id.* (defining “fair treatment”).

¹⁸ It is also significant to note that statutes aimed at protecting health, safety, or welfare are typically deemed mandatory upon public officers. *See, e.g.*, 3 SUTHERLAND’S STATUTORY CONSTRUCTION § 57:15 (8th ed.) (“A grant of power to public officers usually is mandatory where individuals or the public have a right that it be exercised for their benefit.”). Although it is not solely dispositive of the question of whether the statute is immediately enforceable, the EJA’s function in protecting health, safety, and welfare provides further support of its operation as a self-executing statute.

¹⁹ VA. CODE ANN. § 10.1-1408.1(D)(1).

²⁰ 947 F.3d 68 (4th Cir. 2020).

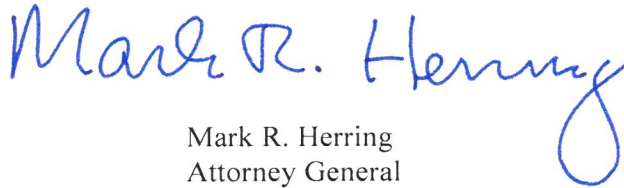
Control Board for failure, among other things, to consider sufficiently and make specific findings regarding environmental justice. As with the VWMA for landfills, no source of potential air pollution may be constructed and operated without a permit.²¹ Before issuing a permit, DEQ and the Board must consider the factors listed in § 10.1-1307(E),²² including site suitability and public safety and health, just as the Director needs to do for a landfill permit under §§ 10.1-1408.1(D) and -1408.4. Although the Environmental Justice Act had not yet been enacted, the Virginia Energy Policy required all agencies, including the Air Board, “to ensure that development of new’ energy facilities ‘does not have a disproportionate adverse impact on economically disadvantaged or minority communities.’”²³ The Fourth Circuit vacated the permit, holding that the Air Board had not adequately “performed its statutory duty to determine whether *this facility* is suitable for *this site*, in light of [environmental justice] and potential health risks for the people of [the community].”²⁴ As the Court observed, “environmental justice is not merely a box to be checked, and the Board’s failure to consider the disproportionate impact on those closest to the [facility] resulted in a flawed analysis.”²⁵

Conclusion

Accordingly, it is my opinion that the Environmental Justice Act not only sets forth a policy of the Commonwealth, but also imposes specific, enforceable duties on the Commonwealth to ensure that the policy is carried out. Therefore, the Director must ensure that environmental justice, as defined in the Act, “is carried out” when making his determinations about a landfill permit under the Virginia Waste Management Act.

With kindest regards, I am,

Very truly yours,


Mark R. Herring
Attorney General

²¹ See VA. CODE ANN. § 10.1-1322(A); 9 VA. ADMIN. CODE § 5-80-1120(A); see also *Friends of Buckingham*, 947 F.3d at 74–75 (describing Virginia’s state implementation of the federal Clean Air Act).

²² *Friends of Buckingham*, 947 F.3d at 87.

²³ *Id.* (citing VA. CODE ANN. § 67-102).

²⁴ *Id.* at 93.

²⁵ *Id.* at 92.