

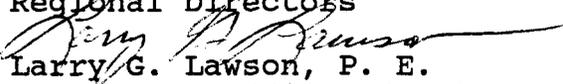
M E M O R A N D U M

VIRGINIA WATER CONTROL BOARD

OFFICE OF WATER RESOURCES MANAGEMENT

SUBJECT: OWRM PROGRAM GUIDANCE NO. 92 - 006
Authorization to Issue Certifications for Tax Exemptions

TO: Regional Directors

FROM: 
Larry G. Lawson, P. E.
Director - Office of Water Resources Management

DATE: March 9, 1992

COPIES: Bob Burnley, Regional Office Water Resource Managers,
Martin Ferguson, Ron Gregory, Fred Cunningham, David Ormes

Enclosure No. 1 is a memorandum that the Executive Director signed which authorizes the Office of Water Resources Management Director and the Regional Directors to issue for the Executive Director the Certifications for Tax Exemptions.

Enclosure No. 2 provides guidance on the recommended procedures for processing the tax exemptions.

With this authorization the Regional Office is responsible for tracking tax exemption requests and for maintaining the tax exemption files for all those certifications that the Regional Director is authorized to issue. You do not need to copy OWRM on any of the correspondence that you receive or send on tax exemptions.

If you have any questions on the enclosures or on the tax exemption certifications or if the guidance provided needs to be modified/updated please feel free to contact me.



COMMONWEALTH of VIRGINIA
STATE WATER CONTROL BOARD

Richard N. Burton
Executive Director

P. O. Box III43
Richmond, Virginia 23230-1143
(804) 527-5000
TDD (804) 527-4261

March 9, 1992

SUBJECT: AUTHORIZATION TO ISSUE CERTIFICATIONS FOR TAX
EXEMPTIONS

TO: REGIONAL DIRECTORS and OFFICE OF WATER RESOURCES
MANAGEMENT DIRECTOR

FROM: EXECUTIVE DIRECTOR

A handwritten signature in black ink, appearing to read "Richard N. Burton", written over the "FROM:" line of the memorandum.

The Office of Water Resources Management (OWRM) Director is hereby authorized to issue tax exemption certifications for the Executive Director for requests that involve multi-regions, and for requests that the Regional Director and the OWRM Director concur are sensitive and would be more appropriately issued by the OWRM Director.

In those cases when the OWRM Director's absence may result in an unusual hardship upon the person requesting the tax exemption then the OWRM Permit Program Manager is authorized to issue the tax exemptions.

The Regional Director is hereby authorized to issue tax exemption certifications for the Executive Director for all requests except those that the OWRM Director is authorized to issue.

In those cases when the Regional Director's absence may result in an unusual hardship upon the person requesting the tax exemption then the Regional Office Water Resources Manager is authorized to issue the tax exemptions.

This authorization is conditioned upon the certifications being in accordance with guidance provided by the Office of Water Resources Management.

GUIDANCE ON PROCESSING TAX EXEMPTIONS

I. Introduction

Section 58.1-3660 of the Code of Virginia (**Attachment No. 1**) provides that pollution control equipment and facilities are exempt from taxes. However, to receive this exemption, a facility must submit a request for exemption and the equipment and facilities must be certified that it will be used primarily for pollution control or abatement. The State Water Control Board is designated as the certifying authority for water pollution control equipment and facilities. The Board does not grant the exemption itself; the Department of Taxation does. However, the Board certification is a necessary condition for this tax exemption.

II. Procedures

Attachment No. 2 is a recommended response to inquiries about what information is necessary for the Board to review in order to make a certification to the Department of Taxation. As you can see, it is recommended you obtain at least a project name and number, project completion date and a moderately detailed description of the equipment or facilities. Also provided are two inserts that may be used if the inquiry involves pretreatment facilities or sewage facilities.

The request for a tax exemption should contain all the information needed by the Board in order for the request to be processed to the Department of Taxation. If information is missing, the Regional Office should contact the applicant to obtain the additional information needed. This contact may be by letter, telephone, or a meeting with the applicant, depending on the nature and amount of information needed. After the information is obtained it should be reviewed by the Regional Office. During, and as a part of the review process, the Tax Exemption Check Sheet (**Attachment No. 3**) should be completed.

If the proposal is determined to be for the purpose of water pollution control or abatement, a letter to the Department of Taxation, using the format recommended in **Attachment No. 4** should be prepared and sent.

If the proposal is determined not to be for the purpose of water pollution control or abatement then the applicant should be so notified.

III. Guidance for Certifying Tax Exemptions

The following section provides some suggestions on pollution control equipment and facilities which should, or should not be considered as certifiable.

A. Program or Requirement of Board

One of the first decisions that must be made involves the request being in conformity with the Board's program or requirements. If the request involves pollution control equipment and facilities which have been constructed, reconstructed, erected, or acquired in conformity with the Board's program or requirements for abatement or control of water contamination then it should be certified. However, if the request is not in conformity with a Board program or requirement then it should not be certified. For example, if the request is to certify facilities that will abate non-point sources of water pollution which is not a program of the Board then it is recommended that the request not be certified because it is not a program or requirement of the Board.

I want to emphasize that the certification the Board makes is that the equipment or facilities is in conformity with the Board's program. For us to make the certification does not mean that we have to require or to approve the equipment/facilities.

This guidance differs from that provided previously. In some previous instances when the request involved facilities for which the Board was not the primary regulatory agency (such as landfills) then we recommended you contact the other state agency and receive their recommendation. If they felt it was consistent with their requirements then we certified the request. In discussing this with our attorney, he recommended that we should follow the Code and only certify the equipment and facilities for which we have a program or responsibility.

B. Permanently installed equipment

Generally, in order to obtain tax exemption, equipment to be used in a pollution control facility should be permanently installed. There may be exceptions to this guidance, but they should be considered on a case by case basis and, if questionable, should be justified by the applicant in his request.

C. Project Certification

The Board's responsibility is to certify that a project is primarily for the purpose of abating or preventing pollution of state waters. If it is determined that a project is certifiable then all equipment and materials needed to complete the project are considered exempt. Therefore, since such materials as paint, sidewalks, pavement, windows, etc. are all a necessary part of the project, they are certifiable, even though as separate items, apart from a pollution control project, the items may not be considered certifiable.

Often requests are made for only one or two pieces of equipment. The items should be evaluated from the standpoint of what their ultimate purpose is. In order to qualify for exemption, the items should be primarily for the purpose of pollution control or abatement (See Section K. below).

D. Projects Need Only One Certification

Only one certification is necessary for each project. A contractor or subcontractor may request an exemption for a project which has already been certified to the owner, an engineering firm, or a general contractor. In such cases, the applicant should be contacted and informed that the project has already been certified by the Board and that he should contact the Department of Taxation directly to request that they issue a tax exemption to him. The applicant should submit the same information to the Department of Taxation that he would have submitted to the Board.

E. Storm Drains

Storm water drains are generally not considered as being used primarily for pollution control. Unless some treatment is provided, they are generally considered as being used only for the purpose to transport storm water and not for pollution abatement. The fact that a storm water drain could prevent erosion and sedimentation is not normally sufficient to classify this type of project as pollution control. An exception to this is for the separation of combined sewers. These can be classified as pollution control facilities since they eliminate a source of pollution, by keeping storm water separate and because they reduce the volume and concentrate the wastewaters to be treated.

F. Water Treatment Plants

Water treatment plants are considered an industry with the treated water as its finished product. Therefore, facilities which control the intake, processing and distribution of the treated water are not considered as pollution control equipment. Even though a water treatment plant may remove material which was in the stream, the primary purpose of the facility is not to remove pollutants but to provide a municipal water supply. The wastewater treatment portion of the water treatment plant may be certified as pollution control using the same criteria that would be used with any other industrial waste treatment facility.

G. Chemicals Used in Pollution Control Facilities

Chemicals used for the control or abatement of pollution in certified pollution control facilities are considered eligible for tax exemption.

H. Pretreatment

Pretreatment pollution control equipment/facilities are eligible for tax exemption. The guidance provided herein should be utilized in making a determination to certify pretreatment equipment/facilities to the Department of Taxation. In addition to the other guidance, in the case of an industrial user that is requesting the tax exemption I recommend the industrial user provide you with a letter from the municipality stating that the pollution control equipment/facilities are in conformance with the municipalities pretreatment program.

I. Retroactive Certification

The Regional Office may receive requests for projects that have already been completed and the applicant is requesting tax exemption retroactively. The decision that the Board is making concerns whether or not the equipment/facilities are for the primary purpose of pollution control or abatement and not if the facilities have been completed. Thus, I recommend you process these requests the same as the other requests that you receive.

J. Underground Storage Tanks

For underground storage tanks I recommend you consider the following in your certification:

1. All leak detection, spill, overfill and corrosion devices may be exempt since they are required under the state UST regulation.
2. All leak detection methods that do not involve equipment purchases such as inventory control or tank tightness testing via contracts with third parties would obviously not enjoy the exemption.
3. New USTs would only be exempt for the portion of the tank and piping cost that is pollution control related such as corrosion protection (cladding/sacrificial anodes), spill/overfill devices, and secondary containment.

K. General Comments

At present the Regional Offices must use their best professional judgement when considering whether or not a facility will be used primarily for the purpose of pollution control or abatement or for some other purpose (i.e. process control, increase in production, etc.). As a part of your review process, you should take into consideration the possibility that the facility may have some function other than that for pollution control. If you have some reservations about what the purpose of a project or a specific piece of equipment is, it may be necessary to get more detailed information from the applicant in order to make this determination. The final decision should be based on the percentage of use of the equipment which can be attributed to pollution control or abatement. If this percentage is greater than 50%, the facility or equipment should be considered primarily for pollution control and certified as such.

Attached for your information are two opinions from the 1989 Report of the Attorney General addressing the tax exempt status of property pursuant to Section 58.1-3660 of the Code.

§ 58.1-3660

CODE OF VIRGINIA

§ 58.1-3661

City of Charlottesville, (1984, c. 405); 58.1-3650.165. Greater Washington Educational Telecommunications Association, Inc., County of Arlington, (1984, c. 423); 58.1-3650.166. Arlington Hospital Properties, Inc., (1984, c. 432.); 58.1-3650.167. Eastern Shore Community Development Group, Accomack County, (1984, c. 529.); 58.1-3650.168. Virginia Mennonite Home, Inc., City of Harrisonburg, (1984, c. 529.); 58.1-3650.169. F O R E, Inc., Fauquier County, (1984, c. 529.); 58.1-3650.170. The Corporation for Jefferson's Poplar Forest, Bedford County, (1984, c. 546.); 58.1-3650.171. Little Theatre of Norfolk, (1984, c. 546.); 58.1-3650.172. Meadow Outdoors Foundation, Inc., Fauquier County, (1984, c. 546.).

These organizations have been specifically designated by the General Assembly as a benevolent, charitable, historical or patriotic organization or public park or playground

within the context of Article X, § 6 (a) (6) of the Constitution of Virginia. In furtherance of the general policy of the Commission to include in the Code only provisions having general and permanent application, these sections, which are limited in their purpose and scope, are not set out here, but attention is called to them by this reference. For detailed information regarding any limitation of the exemption, reference should be made to the Acts of Assembly.

Editor's note. — The numbers of §§ 58.1-3650.152 through 58.1-3650.172, described in the Code Commission note above, have been assigned by the Virginia Code Commission. These sections were originally enacted during the 1984 Session as part of former Title 58, but have been renumbered and incorporated in Title 58.1, pursuant to § 9-77.11 and Acts 1984, c. 675, cl. 5.

ARTICLE 5.

Other Exempt Property.

§ 58.1-3660. Certified pollution control equipment and facilities. — A. Certified pollution control equipment and facilities, as defined herein, are hereby declared to be a separate class of property and shall constitute a classification for local taxation separate from other such classification of real or personal property and such property. The governing body of any county, city or town may, by ordinance, exempt or partially exempt such property from local taxation.

B. As used in this section:

"Certified pollution control equipment and facilities" shall mean any property, including real or personal property, equipment, facilities, or devices, used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth and which the state certifying authority having jurisdiction with respect to such property has certified to the Department of Taxation as having been constructed, reconstructed, erected, or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution or contamination.

"State certifying authority" shall mean the State Water Control Board, for water pollution, and the State Air Pollution Control Board, for air pollution, and shall include any interstate agency authorized to act in place of a certifying authority of the State. (Code 1950, § 58-16.3; 1972, c. 694; 1984, c. 675.)

Law Review. — For survey of Virginia law on taxation for the year 1971-1972, see 58 Va. L. Rev. 1338 (1972).

§ 58.1-3661. Certified solar energy equipment, facilities or devices. — A. Certified solar energy equipment, facilities or devices, as defined herein, are hereby declared to be a separate class of property and shall constitute a classification for local taxation separate from other classifications of real or personal property. The governing body of any county, city or town may, by ordinance, exempt or partially exempt such property from local taxation in the manner provided by subsection D.

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ATTACHMENT NO. 2

SUGGESTED LETTER TO INQUIRIES CONCERNING TAX EXEMPTION
CERTIFICATION

Dear:

I am responding to your inquiry concerning the procedures to follow when requesting a State tax exemption for pollution control facilities under Article 5, Section 58.1-3660, Code of Virginia. We need a letter from you requesting that we certify to the Department of Taxation that your equipment/facilities are for the purpose of abatement or control of water pollution or contamination.

In your request you should provide the following information:

1. Owner
2. Project Name
3. Project Number
4. Project Completion Date
5. Moderately Detailed Description of the Equipment or Facilities

(THE FOLLOWING MAY BE USED IF THE INQUIRY IS FROM AN INDUSTRIAL USER THAT INVOLVES PRETREATMENT EQUIPMENT OR FACILITIES)

If your request involves facilities or equipment to pretreat industrial wastewaters prior to a discharge to a municipal sewage treatment plant you should include in item No. 5 the following information:

- a. Location of equipment or facilities
- b. Brief description of the manufacturing process
- c. Brief description of the nature, sources and quantities of wastewater
- d. Diagrammatic sketch of the wastewater handling/treatment facilities

In addition, tax exemption requests for pretreatment facilities should also include a letter from the sewage treatment plant owner stating that the equipment/facilities are in conformance with the municipalities pretreatment program.

(THE FOLLOWING MAY BE USED IF THE INQUIRY INVOLVES SEWAGE EQUIPMENT OR FACILITIES)

If your request involves certification of sewage treatment equipment/facilities indicate the following:

1. Whether or not plans and specifications have been approved for the project. If the project has been approved provide the date of approval and the State Water Control Board Memorandum approval number. If the project did not require approval an explanation of why not.
2. In the case of projects such as pump stations, force mains, gravity sewer lines, and pretreatment systems, provide the name of the receiving sewage treatment plant.

Please submit the information in duplicate.

Upon receipt of your request, we will evaluate it and, if appropriate, make the certification to the Department of Taxation. The Department of Taxation will then send the tax exemption directly to you.

If you have any questions please feel free to contact me.

Sincerely,

Regional Office

ATTACHMENT NO. 4

Mr. W. A. Edmonds
Taxpayers Assistance Section
Post Office Box 6-L
Richmond, Virginia 23282

RE: Project Name(s):
Owner:
Construction Co.:

Dear Mr. Edmonds:

In accordance with Article 5, Section 58.1-3660, Code of Virginia, the Board certifies that the facilities described in the enclosed letter(s) dated _____ from the above referenced contractor, should be classified as pollution equipment and/or facilities. These facilities will abate or control potential water pollution or contamination. The anticipated completion date for the project(s) is _____.

If we may be of further assistance, do not hesitate to contact our office. Any further action or decision regarding this project is a matter for your office.

Sincerely,

Regional Director

Enclosures

cc: Construction Co.

ATTACHMENT NO.3

M E M O R A N D U M

STATE WATER CONTROL BOARD - REGIONAL OFFICE

SUBJECT: Tax Exemption Check Sheet

TO: Regional Director

FROM: Regional Office Water Resources Manager

DATE:

1. Proposal Identification:

2. Owner:

3. Has this proposal been submitted to the Board/Executive Director for approval? Yes ___ No ___

4. If the answer to (3) is yes, has approval been received? Yes ___ No ___

If yes:
Approval Memo No. _____ Date: _____

If the answer to (3) is no:
Explanation:

5. Do you believe you have sufficient information on the proposal to judge whether it is "pollution control equipment and facilities"? Yes ___ No ___

6. In your opinion, does the proposal consist of "pollution control equipment and facilities" in its entirety? Yes ___ No ___

If the answer to (6) is no:
Explanation:

7. Did you receive a letter from the municipal STP saying that the equipment/facilities are consistent with their pretreatment program? Yes ___ No ___
Not App. ___

A prior Opinion of this Office concludes that demonstrator automobiles used by salesmen to drive to and from work, but which also are test driven by prospective customers, remain merchants' capital for local tax purposes, despite their temporary use by the salesmen. See 1984-1985 Att'y Gen. Ann. Rep. 369. The key factor in this conclusion was that these demonstrator automobiles were available for sale to customers at all times. In such cases, the demonstrator automobiles regularly are kept on the premises of the dealership and, therefore, are available for immediate sale or customer demonstration use. This prior Opinion also considered whether the user essentially had permanent use of the automobile by (a) controlling when and how it was used, or (b) using the automobile for an extended period of time, such as for an entire model year. *Id.* See also 1977-1978 Att'y Gen. Ann. Rep. 429 (dealer's automobile lost its status as inventory and became taxable as tangible personal property when the daughter of the dealer continuously used the vehicle throughout a nine-month school year in an out-of-town location). The conclusion reached in the prior Opinion was based, in part, upon a finding by the assessing officer that, even though the automobile eventually would be sold, it was physically removed from the showroom for general use on the streets and highways.

V. Determination Whether Demonstrator Automobile Is Taxable as Merchants' Capital or Tangible Personal Property Is Factual Determination for Commissioner of Revenue

In the facts you present, the removal of the automobile from the lot for personal use on the streets and highways suggests the automobile in question is no longer inventory and would be taxable as tangible personal property. The short duration of the use and the ability of the dealership to recall the automobile at any time for sale to a customer, however, mitigate against that conclusion. The determination of the merchants' capital or tangible personal property status of a particular automobile owned by an automobile dealership is a factual one to be made based upon the factors discussed above. Prior Opinions of this Office consistently conclude that any decision concerning the classification of personal property for tax purposes "is a factual one to be made by the commissioner of the revenue." 1987-1988 Att'y Gen. Ann. Rep. 590, 591. See also *id.* 532, 533; *id.* 534, 536. It is my opinion, therefore, that the determination whether the demonstrator automobile in the facts you present should be classified as "tangible personal property" or as "merchants' capital" for local tax purposes should be made by the local commissioner of the revenue based on the factors discussed in this Opinion.

TAXATION: TAX EXEMPT PROPERTY.

Determination of tax exempt status of property on which sanitary landfill facility constructed must be made by state certifying authority and by local commissioner of revenue.

June 14, 1989

The Honorable Clifton A. Woodrum
Member, House of Delegates

You ask whether certain property on which a contractor is constructing a sanitary landfill facility for the New River Resources Authority qualifies for the tax exemption authorized by § 58.1-3660 of the Code of Virginia. You state that the sanitary landfill facility is being constructed in a manner that is designed to protect the ground water in the area and to prevent trash or undesirable gases from escaping into the atmosphere.

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I. Applicable Statutes

Section 58.1-3660 authorizes the governing body of a county, city or town to enact an ordinance exempting or partially exempting from taxation "certified pollution control equipment and facilities." Section 58.1-3660(B) defines "certified pollution control equipment and facilities" as

any property, including real or personal property, equipment, facilities, or devices, used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth and which the state certifying authority having jurisdiction with respect to such property has certified to the Department of Taxation as having been constructed, reconstructed, erected, or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution or contamination.

The "state certifying authority" is defined as "the State Water Control Board, for water pollution, and the State Air Pollution Control Board, for air pollution, and shall include any interstate agency authorized to act in place of a certifying authority . . ." *Id.*

II. Determination of Tax Exempt Status of Facility Must Be Made by State Certifying Authority and by Commissioner of Revenue

In addition to the adoption of an ordinance by the local governing body, two requirements must be satisfied before property is exempt from local taxation pursuant to § 58.1-3660: (1) the property must be constructed, reconstructed, erected, or acquired for pollution abatement purposes; and (2) the property must be used primarily for pollution abatement or prevention purposes.

The first requirement is satisfied by the appropriate authority certifying to the Department of Taxation that the property was constructed, reconstructed, erected, or acquired in conformity with the applicable state program or requirements. This determination is to be made by the certifying authority, as defined in § 58.1-3660(B).

A prior Opinion of this Office further recognizes that eligibility for tax exemption pursuant to § 58.1-3660 requires, not only that property be certified at the state level, but also that property be "used primarily" for pollution abatement purposes. Opinion to Hon. Gerald H. Gwaltney, Comm'r of Revenue, Isle of Wight County (Mar. 30, 1989) (the "Gwaltney Opinion").

The availability of the exemption is expressly contingent on the actual use of the property for pollution abatement purposes. A one-time certification by a state agency obviously is a poor vehicle by which to make a use determination based on the actual use of property that may change over time. In analogous circumstances, the question of whether potentially tax exempt property actually is being used for tax exempt purposes is treated as a question of fact to be determined by the local assessing official.

Id. (emphasis in original). Based on the above, the Gwaltney Opinion concludes that the local commissioner of the revenue is the official authorized to determine the factual question whether certified property actually is being used primarily for pollution abatement or prevention purposes. See also 1987-1988 Att'y Gen. Ann. Rep. 69, 72 (Opinion from Attorney General not appropriate when interpretation or determination reserved to another entity).

Whether the property in question will qualify for a tax exemption pursuant to § 58.1-3660, therefore, is a decision to be made by the appropriate certifying authority and by the local commissioner of the revenue, based on a review of all relevant facts.

TAXATION: TAX EXEMPT PROPERTY.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE - EXEMPT PROPERTY.

Exclusive use for charitable purposes required for Ruritan National, Inc. property tax exemption; portions used for exempt and nonexempt activities taxable.

March 21, 1989

Mr. Russell O. Slayton, Jr.
County Attorney for Greensville County

You ask several questions concerning certain real property located in Greensville County and owned by the Ruritan-Greensville County Agricultural Fair Association (the "Association" or the "Property"). You first ask whether the tax exemption in § 58.1-3650.16 of the Code of Virginia for property owned by the Ruritan National, Incorporated, and "local affiliates thereof" applies to the Property.

You also state that a portion of the Property is used continuously for nonexempt activities and that another portion of the Property is used for exempt activities on some occasions and, at other times, for nonexempt activities. You ask whether any of these portions of the Property is exempt from taxation.

I. Applicable Statutes

Property tax exemptions are provided by Article X, § 6 of the Constitution of Virginia (1971). Article X, § 6(a)(6) authorizes the General Assembly to provide exemptions for

[p]roperty used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by a three-fourths vote of the members elected to each house of the General Assembly and subject to such restrictions and conditions as may be prescribed.

The specific language of the exemption granted by the General Assembly pursuant to Article X, § 6(a)(6) that is relevant to the facts you present provides that "[t]he Ruritan National, Incorporated, and local affiliates thereof are hereby determined to be benevolent within the meaning of Article X, § 6(a)(6) of the Constitution of Virginia. Property owned by such organizations and used exclusively for charitable purposes is hereby determined to be exempt from taxation." Chapter 675, 1984 Va. Acts 1178, 1411.¹

II. "Affiliate" Must Have Close Connection with National Organization to Qualify for Exemption

In order for the Association to be a local affiliate of the Ruritan National, Incorporated, and to satisfy the exemption in § 58.1-3650.16, there must be "a condition of being united; being in close connection, allied, associated, or attached as a member or branch." *Black's Law Dictionary* 54 (5th ed. 1979) (definition of term "affiliate"). Whether the relationship between The Ruritan National, Incorporated, and the Association meets this

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critterion is a factual matter to be determined by the commissioner of the revenue. See 1974-1975 Att'y Gen. Ann. Rep. 491, 492.

III. Exemptions from Property Taxation Also Must Satisfy Use Requirement

Article X, § 6(a)(6) authorizes the General Assembly to exempt property by designation when the property is used by its owner for charitable purposes, and subject to such restrictions and conditions as the legislature may prescribe. In § 58.1-3650.16, the General Assembly has conditioned the exemption for Ruritan National, Incorporated, and its affiliates on the Property being "used exclusively for charitable purposes." See 1982-1983 Att'y Gen. Ann. Rep. 534 (discussing criteria for determination of exclusive educational or charitable use). Based on the above, it is my opinion that both the portion of the Property used continuously for nonexempt purposes and the portion of the Property used for both exempt and nonexempt activities are clearly subject to taxation. See 1984-1985 Att'y Gen. Ann. Rep. 324 (church property not necessarily exempt from taxation).

IV. Summary

In summary, it is my opinion that the question whether the Property is owned by an "affiliate" of Ruritan National, Incorporated, is a factual one to be determined by the commissioner of the revenue. If the commissioner determines that such affiliate status does, in fact, exist, the portions of the Property used partially or continuously for nonexempt activities are taxable because they fail to meet the requirements in § 58.1-3650.16 that the property be "used exclusively for charitable purposes."

¹The text of this exemption in § 58.1-3650.16 is not set out in the Code.

TAXATION: TAX EXEMPT PROPERTY — LOCAL TAXES — TANGIBLE PERSONAL PROPERTY, MACHINERY, TOOLS.

COMMISSIONS, BOARDS, ETC., GENERALLY: ADMINISTRATIVE PROCESS ACT.

RULES OF VIRGINIA SUPREME COURT: APPEALS PURSUANT TO ADMINISTRATIVE PROCESS ACT.

County may not appeal decision of State Water Control Board concerning certification of property because timely notice of appeal not filed. Authority of commissioner of revenue to determine whether certified property used primarily for pollution abatement purposes. Separate tax rates for certified real property prohibited, for certain personal property permitted.

March 30, 1989

The Honorable Gerald H. Gwaltney
Commissioner of the Revenue for Isle of Wight County

You ask several questions concerning the property tax exemption for certified pollution control equipment and facilities in § 58.1-3660 of the Code of Virginia.

I. Facts

Isle of Wight County (the "County") has adopted an ordinance exempting certified pollution control equipment and facilities from local taxation pursuant to § 58.1-3660.

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See Isle of Wight County, Va., Code § 15-5 (1986). A commercial agricultural enterprise has constructed hog farms in the County to raise hogs from the breeding stage to the finishing stage. The State Water Control Board (the "Board") has certified to the Department of Taxation¹ that certain specific facilities should be classified as pollution control equipment or facilities.

II. Applicable Statutes

Section 58.1-3008 authorizes different rates of levy on different classes of property and provides:

The governing body of any county, city or town . . . may impose different rates of levy on real estate, merchants' capital, tangible personal property or any separate class thereof authorized under Chapter 35 (§ 58.1-3500 et seq.), and machinery and tools . . .

Section 58.1-3660 further provides, in part:

A. Certified pollution control equipment and facilities, as defined herein, are hereby declared to be a separate class of property and shall constitute a classification for local taxation separate from other such classification of real or personal property and such property. The governing body of any county, city or town may, by ordinance, exempt or partially exempt such property from local taxation.

B. As used in this section:

'Certified pollution control equipment and facilities' shall mean any property, including real or personal property, equipment, facilities, or devices, used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth and which the state certifying authority having jurisdiction with respect to such property has certified to the Department of Taxation as having been constructed, reconstructed, erected, or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution or contamination.

III. County May Not Appeal Board's Decision Concerning Property in Question Because Timely Notice of Appeal Not Filed

You first ask whether the County may appeal the Board's decision concerning the certification of the property in question.

The certification of property as "certified pollution control equipment and facilities" ("certified property") constitutes a "case decision" within the meaning of § 9-6.14:4(D), a portion of the Administrative Process Act, §§ 9-6.14:1 through 9-6.14:25 (the "APA").² The judicial review of agency case decisions is governed by Article 4 of the APA, §§ 9-6.14:15 through 9-6.14:19, and Part Two A of the Rules of the Supreme Court of Virginia. A "party aggrieved"³ seeking the review of an agency case decision must file a notice of appeal within 30 days of the final order in the decision with the agency secretary. See § 9-6.14:16; Va. Sup. Ct. R. 2A:2.

In this instance, the Board certification letter is dated November 4, 1988.⁴ The County has not noted an appeal to the Board's action. As a result, the County has not filed a notice of appeal within 30 days of the Board's action, as required by § 9-6.14:16 and Rule 2A:2. It is my opinion, therefore, that the County may not now appeal the Board's decision concerning the certification of the property in question.

IV. County May Not Appeal Board's Decision Concerning Property in Question Because Timely Notice of Appeal Not Filed

You next ask whether the County may appeal the Board's decision concerning the certification of the property in question.

Section 58.1-3660 provides that a separate class of property may be certified as having been constructed, reconstructed, or erected for the purpose of abating or preventing pollution. Section 58.1-3660 is to be construed to mean that the state certifying authority has certified to the Department of Taxation that certain specific facilities should be classified as pollution control equipment or facilities.

Eligibility for certification of property as "certified property" for pollution control purposes is contingent on the time certification is made. The determination as to whether the property is being used for the purpose of abatement or control of water or atmospheric pollution or contamination is a local assessment issue. (charitable and educational uses); id.

Based on the authority to determine whether the property is being used for the purpose of abatement or control of water or atmospheric pollution or contamination.

V. County May Not Appeal Board's Decision Concerning Property in Question Because Timely Notice of Appeal Not Filed

Your third question is whether the County may appeal the Board's decision concerning the certification of the property in question.

Section 58.1-3660 provides that a separate class of property may be certified as having been constructed, reconstructed, or erected for the purpose of abating or preventing pollution. Section 58.1-3660 is to be construed to mean that the state certifying authority has certified to the Department of Taxation that certain specific facilities should be classified as pollution control equipment or facilities.

Based on the authority to determine whether the property is being used for the purpose of abatement or control of water or atmospheric pollution or contamination.

IV. Commissioner of the Revenue Has Authority to Determine Whether Certified Property Is Used Primarily for Pollution Abatement Purposes

You next ask whether the commissioner of the revenue has the authority to classify as exempt property only those items that are used primarily for the purpose of abating or preventing pollution.

Section 58.1-3660(A) provides that certified property is declared to be a separate class of property. The definition in § 58.1-3660(B), quoted above, requires that certified property both (1) be "used primarily" for pollution abatement purposes and (2) be certified as having been constructed, reconstructed, erected, or acquired in conformity with state pollution abatement programs or requirements. The manifest purpose of § 58.1-3660 is to authorize and implement a local tax incentive program for pollution control equipment or facilities. The definition in § 58.1-3660(B), however, indicates that the state certification procedure is directed at whether property has been "constructed, reconstructed, erected, or acquired in conformity with the state program or requirements" for pollution abatement.

Eligibility for tax exemption pursuant to § 58.1-3660, therefore, requires not only that property be certified at the state level, but also that the property be "used primarily" for pollution abatement purposes. Items of property eligible for certification in many instances lend themselves to multiple uses. The availability of the exemption is expressly contingent on the actual use of the property for pollution abatement purposes. A one-time certification by a state agency obviously is a poor vehicle by which to make a use determination based on the actual use of property that may change over time. In analogous circumstances, the question of whether potentially tax exempt property actually is being used for tax exempt purposes is treated as a question of fact to be determined by the local assessing official. See, e.g., Att'y Gen. Ann. Rep.: 1985-1986 at 276 (educational uses); *id.* 282 (local business license); *id.* 299 (forestry use); 1984-1985 at 320, 324 (charitable and educational uses).

Based on the above, it is my opinion that the commissioner of the revenue has the authority to determine whether certified property actually is being used primarily for pollution abatement purposes.

V. Section 58.1-3008 Prohibits Separate Tax Rates for Certified Real Property; Separate Rates for Certain Personal Property Permitted

Your third question is whether the board of supervisors may set a separate rate of taxation on property classified as certified property. Certified property may include both real and personal property. See § 58.1-3660.

Section 58.1-3008, quoted above, details when different rates of levy may be imposed upon different classes of property and requires that only one rate of levy be imposed upon real estate. See Att'y Gen. Ann. Rep.: 1977-1978 at 437 (no different real estate tax rate permitted for different types of real estate); 1971-1972 at 421 (no different tax rate for improved and unimproved real estate permitted). Section 58.1-3008, however, does authorize a local governing body to impose a different tax rate upon classes of tangible personal property as authorized in §§ 58.1-3500 through 58.1-3521,³ and upon machinery and tools. Section 58.1-3660 does not expressly authorize the imposition of a different tax rate upon personal property certified pursuant to this statute.

Based on the above, it is my opinion that the board of supervisors is not authorized to set a separate rate of taxation on real property classified as certified property. Different rates on personal property so classified may apply, provided such property falls within the categories authorized by § 58.1-3008 to be taxed at different rates and a local ordinance adopting such rate differentials exists.

VI. Exemption from Taxation for Certified Property Not Available
 Until January 1 Following Year in Which Ordinance Adopted

Your final question is whether the exemption of certified property is effective on the next assessment date.

With certain exceptions not applicable to your jurisdiction, §§ 58.1-3103, 58.1-3281 and 58.1-3515 provide that real and tangible personal property taxes are assessed as of January 1. The status of the owner, as well as the property, is fixed for the entire year on that day. It is my opinion, therefore, that any exemption from local taxation for certified property will not be effective until January 1 of the year following the year in which an ordinance providing the exemption is passed. *Accord* 1982-1983 Att'y Gen. Ann. Rep. 529. In this instance, the County already has adopted an ordinance exempting certified property from local taxation. The Board's certification of the property in question was accomplished by letter dated November 4, 1988.⁶ It is also my opinion, therefore, that the exemption from local taxation of the certified property in question was effective on the next assessment date following the Board's certification decision.

¹See ltr. from Donald B. Richwine to Ronald L. Holt (Nov. 4, 1988).

²The term "case decision" is defined in § 9-6.14:4(D) as "any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit."

³I assume, for the purposes of this Opinion, that the County is a "party aggrieved" within the meaning of § 9-6.14:16 and Va. Sup. Ct. R. 2A:1(b). *See generally* *Va. Beach Beautification Comm. v. Bd. of Zoning*, 231 Va. 415, 344 S.E.2d 899 (1986) (discussing whether nonstock corporation is a "person" who is "aggrieved" within meaning of § 15.1-497); *VEC v. City of Virginia Beach*, 222 Va. 728, 284 S.E.2d 595 (1981) (holding that state agency not "party aggrieved"); *Insurance Association v. Commonwealth*, 201 Va. 249, 110 S.E.2d 223 (1959) (discussing whether association of insurance agents is "party in interest" or "party aggrieved" within meaning of § 12-63); *D'Alessio v. Lukhard*, 5 Va. App. 404, 363 S.E.2d 715 (1988) (holding that father of allegedly sexually abused child is not "party aggrieved" within meaning of § 9-6.14:16 in agency ruling to expunge name of suspected abuser from central register for child abuse or neglect); *Blue Cross v. Kenley*, 7 Va. Cir. 477 (1977) (holding that health insurer is not "party aggrieved" within meaning of § 9-6.14:16 in certificate of public need proceeding).

⁴Ltr., *supra* note 1.

⁵*See, e.g.*, § 58.1-3505(B) (authorizing localities to provide different rate of taxation upon certain named categories of tangible personal property).

⁶Ltr., *supra* note 1.

TAXATION: TAX EXEMPT PROPERTY — REAL PROPERTY TAX.

Property that generates substantial net profits from lessor loses tax exempt status.

November 7, 1989

The Honorable David L. Berry
 Commissioner of the Revenue for Rockingham County

You ask several questions concerning exemption from real property taxation for three organizations claiming religious or charitable exemptions.

Section 58.1-3
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