



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Department of Environmental Quality
VAC Chapter Number:	9 VAC 20-70
Regulation Title:	Financial Assurance Regulations for Solid Waste Facilities
Action Title:	Amendment 2
Date:	8/1/2000

This information is required pursuant to the Administrative Process Act (Section 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary*

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

This regulatory amendment is being proposed to better protect the Commonwealth and local governments from the burden of costs associated with abandoned solid waste disposal, transfer, and treatment facilities. The amendment requires submission of documentation that enables the Department to verify that mechanisms are funded to the required amounts. Also the amendment incorporates statutory changes that have been enacted since the regulations were last amended. The regulations are also being updated to maintain consistency with federal regulations.

Basis*

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

State Authority

Section 10.1-1402 of the Virginia Waste Management Act, Chapter 14 (Section 10.1-1400 *et seq.*) of Title 10.1 of the Code of Virginia, authorizes the Virginia Waste Management Board to promulgate and enforce regulations necessary to carry out its powers and duties and the intent of the chapter and federal law. Specifically, Section 10.1-1410 of the Act authorizes the Board to promulgate regulations which ensure that, if a solid waste treatment, transfer or disposal facility is abandoned, the costs associated with protecting the public health and safety from the consequences of such abandonment may be recovered from the person abandoning the facility.

During the 2000 General Assembly session, Section 10.1-1410 was amended to include transfer facilities in the universe of facilities required to provide financial assurance. The code was also amended to require insurance to be written by an insurer licensed pursuant to Chapter 10 (Section 38.2-1000 *et seq.*) of Title 38.2. This amendment incorporates the changes that were made to the code during the 2000 General Assembly. The web site addresses for the full text of sections cited above are:

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+10.1-1402> for Section 10.1-1402;
<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+10.1-1410> for Section 10.1-1410;
<http://leg1.state.va.us/cgi-bin/legp504.exe?001+ful+CHAP0137>; and
<http://leg1.state.va.us/cgi-bin/legp504.exe?001+ful+CHAP0138> for the amendments to the Code of Virginia.

Any amended details of the regulation not expressly mandated by state law are designed to set adequate levels of funding and otherwise insure that funding for closure and post-closure care is effective in securing the mandated financial assurance. Virginia regulations require all landfills, material recovery facilities, medical waste treatment facilities, incinerators, and composting facilities to provide financial assurance. This amendment adds requirements for transfer stations, including barge receiving facilities, to provide financial assurance with the Department. The regulations are also being amended to change the local government financial test to require local governments that have total environmental liabilities between 20% to 43% of their total annual revenues to establish a restricted sinking fund or escrow account to fund the closure and post-closure care of the facility. Facilities required to monitor groundwater will also be required to provide \$1 million in financial assurance with the Department if they exceed groundwater protection standards.

Federal Authority

Federal law mandates federal criteria for solid waste landfill management as a guide for the states. In general, §6912(a) of Subtitle D of the Resource Recovery and Conservation Act (42 U.S.C. 6901 *et seq.*) authorizes the Administrator to prescribe such regulations as are necessary to carry out his functions with regards to solid waste. Specifically, §6907(a)(3) authorizes the Administrator to provide minimum criteria to be used by the States to define those solid waste management practices which constitute the open dumping of solid waste. The guidelines also must include minimum information for use in deciding the adequate location, design, and construction of solid waste management facilities. Section 6944(a) requires the Administrator to promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps. Section 6949a (c) provides for the promulgation of revisions to existing criteria and additional criteria for municipal solid waste facilities. Pursuant to this authority the federal government adopted multiple criteria for solid waste landfills, including groundwater monitoring and financial assurance criteria. 40 CFR Part 258 provides the federal criteria applicable to sanitary landfills, including subpart G which specifically provides the financial assurance criteria. This part contemplates that states will use the federal criteria to design their own programs.

Federal law requires states to use the federal criteria as a guide in developing and implementing their own solid waste permit programs. 40 CFR Part 239 contains the requirements for state solid waste permit programs to obtain final approval from EPA. The Department intends to apply for final program approval from EPA. By obtaining final approval, the Department will be able to act as the primary enforcement and implementation authority for this program.

Federal law and regulation mandates that states develop criteria for sanitary landfills; therefore, the existing financial assurance regulation was promulgated pursuant to a federal mandate. Federal law mandates the proposed amendments, in that they are necessary to bring the regulation into conformance with federal law and regulation. However, the amendments are also necessary to provide an appropriate level of protection for the public against bearing the costs of caring for abandoned solid waste facilities. The website for 40 CFR 258 Subpart G is: <http://www.epa.gov/epahome/rules.html#codified>

The Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

Purpose*

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

This regulation must be amended to incorporate statutory changes, and to be more protective of the health, safety and welfare of the citizens of the Commonwealth.

The goals of this amendment are to structure and enhance the Department's ability to monitor the financial assurance being provided for solid waste management facilities and to ensure funding is available for closure, post-closure, and corrective action costs. Cost estimates and financial mechanism information are to be submitted to the Department for approval. Submission of this information assists the Department in monitoring compliance with the regulations and, therefore, protects local governments and the Commonwealth from the burden of paying for closure of an abandoned facility.

Facilities that have statistically exceeded groundwater protection standards are also being required to provide \$1 million using any of the available financial mechanisms. This money will be available to the Department for additional financial assurance in the case of facility abandonment during the process of selecting a corrective action remedy and this money will be returned to the facility after it is determined that a facility is no longer statistically exceeding groundwater protection standards.

Substance*

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

These regulations must be amended to incorporate statutory changes that have taken place since the regulations were last amended. The regulations are being amended to be more reliably protective of the Commonwealth in the cases of facility abandonment.

This amendment includes submission of documentation that enables DEQ to verify that mechanisms are funded to the required amounts. This amendment provides more reliable protection to the Commonwealth, that in the case of facility abandonment, the funding provided by the facility will be available for DEQ to conduct closure, post-closure or corrective action at the facility.

The local government financial test mechanism has been revised to require facilities that have total environmental liabilities between 20% to 43% of the local government's total annual revenues establish a fund for the purpose of saving for the closure care of the facility. This change strengthens the financial test by requiring cash to be placed in a fund where it is readily available for closure of the facility. Previously there was no requirement for funds to be set aside for the closure costs of the facility if a locality was using the local government financial test.

Facilities that have statistically exceeded groundwater protection standards must provide \$1 million using any of the available financial mechanisms. This money will be available to the Department for additional financial assurance in the case of facility abandonment during the selection of a corrective action remedy or prior to entry into the corrective action program. This money will be returned to the facility after it has been determined that a facility is no longer statistically exceeding groundwater protection standards.

In addition, the Department has proposed an amendment to the regulation which would allow the Department 120 days to notify an owner or operator of the tentative decision to accept or reject a proposed evidence of financial responsibility. Currently the Department is required to notify owners or operators of the tentative decision within 45 days of receipt of the evidence.

Issues*

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary advantage to the public and local government is the protection from having to pay for the closure and post-closure care of abandoned solid waste management facilities. There is no disadvantage to the public. By amending the regulations, the Board is continuing to protect human health and the environment.

The primary advantage to the Commonwealth is that the Commonwealth will be better protected from having to pay for the closure and post-closure costs associated with an abandoned solid waste management facility. The requirement to provide \$1 million financial assurance with the Department upon exceeding groundwater protection standards further protects the Department from the expense of paying for facility closure.

The primary disadvantage to the regulated community will be that they will be required to provide financial assurance for more facilities, including transfer stations and barge receiving facilities. These facilities are required by statute to provide financial assurance.

In addition, the Department is concerned about the proposed amendment to the regulation that allows the Department 120 days instead of 45 days to notify an owner or operator of the tentative decision to accept or reject the proposed evidence of financial responsibility and is seeking public comment on the proposed amendment.

Locality Particularly Affected*

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

No locality is particularly affected by this proposed regulation.

Public Participation*

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal.

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal. The Board is also seeking comments on (1) the revised financial test and the requirement of establishing a restricted sinking fund or escrow account, (2) the impact of (1) on a local government's budget and (3) the revised timeframe for Department action on a proposed evidence of financial responsibility.

Anyone wishing to submit written comments for the public comment file may do so at the public meeting or by mail. Written comments must include the name, address and phone number of the commenter and must be received by the close of the comment period.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; (e) the projected cost of the regulation for affected individuals, businesses, or other entities; and (f) an estimate of the impact of the proposed regulation upon small businesses as defined in Section 9-199 of the Code of Virginia or organizations in Virginia.

The Department is currently monitoring the financial assurance provided by facilities involved in the disposal and treatment of solid waste. At this time 256 permitted solid waste management facilities are being monitored by the Department for compliance with these regulations. The changes to the regulations will add additional facilities for the Department to monitor compliance with the financial assurance regulations. At this time it appears that the additional time required to manage financial assurance for facilities regulated under the proposed regulation will be absorbed by current Departmental staff.

This amendment will affect locally owned solid waste facilities and privately owned solid waste facilities. An owner or operator of the following types of facilities are required to provide financial assurance: sanitary landfills, industrial landfills, construction, demolition, debris landfills, incinerators, composting facilities, medical waste treatment facilities, transfer stations and barge receiving facilities. Currently facilities are providing between \$3,570 and \$45,460,000 financial assurance, depending upon facility type, closure requirements and post closure care requirements. A statutory change enacted by the 2000 General Assembly now requires facilities involved in the transfer of solid waste to provide financial assurance. This statutory change adds an additional 61 facilities (including local and private) to the number of solid waste management facilities required to provide financial assurance. The Department estimates that transfer stations

will be required to provide between \$2,800 and \$140,000 financial assurance. This number will vary, depending on the maximum amount of waste a transfer facility is permitted to have on site at a given time. The financial assurance regulations have also been revised to require facilities that have statistically exceeded groundwater protection standards to provide the Department with an additional \$1 million in financial assurance. These requirements may raise the amount of financial assurance that some facilities are required to provide.

Localities may need to revise their annual budgets to include costs associated with closing their solid waste management facilities. If a facility chooses to use the local government financial test and has 20 to 43% of their annual total revenue dedicated to environmental liabilities insured through financial tests, the local government must fund a designated sinking fund or escrow account on an annual basis. Currently 78% of local governments are using the financial test to provide financial assurance for their facilities.

The Department is not aware of any negative affect this regulation will have on small businesses.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

9 VAC 20-70-10 Definitions

This section has been amended to include additional definitions to clarify the regulations. The definition for a shadow bond has been removed since these bond ratings are no longer available. Definitions for additional facilities that will be required to provide financial assurance have been added.

9 VAC 20-70-41 Analysis of this Chapter

This section is obsolete. The periodic review of these regulations is now required under Executive Order No. 25 (98) and will be performed as required under the executive order.

9 VAC 20-70-50 Applicability of Chapter

This section was amended to include additional facilities required to provide financial assurance due to a statutory change. This amendment will add transfer stations and barge receiving facilities to the universe of facilities required to provide financial assurance.

9 VAC 20-70-60 Enforcement and appeal procedures; offenses and penalties

The Department's enforcement manual has been updated since the financial assurance regulations were last updated. Changes were made to this section to make the regulation consistent with the current enforcement manual's procedures.

9 VAC 20-70-70 Suspensions and Revocations

References to the Regulated Medical Waste Regulations, Vegetative and Yard Waste Composting Regulations and the Transportation of Solid and Medical Wastes on State Waters regulations were added.

9 VAC 20-70-75 Forfeitures

References to the Vegetative and Yard Waste Composting Regulations and the Transportation of Solid and Medical Wastes on State Waters regulations were added.

9 VAC 20-70-90 Closure, post-closure and corrective action requirements

During any appeal of a determination of the amount of financial assurance required, the owner or operator of a landfill facility not closed shall demonstrate financial assurance. The amount of financial assurance shall be the lesser of the Department's estimate or the following default amounts: \$200,000 per acre of fill for Sanitary Landfills or \$150,000 per acre of fill for Construction Demolition Debris Landfills and Industrial Landfills. This change will further protect the Commonwealth from the burden of having to pay for facility closure in the case of abandonment during the appeal process.

9 VAC 20-70-111 Cost estimate for facility closure

This section is being amended to state cost estimates must be submitted to the director for approval. The director may also request an updated closure cost estimate at any time. Requests for reduction of the closure cost estimate shall be approved by the director.

9 VAC 20-70-112 Cost estimate for facility post-closure

This section is being amended to state post-closure cost estimates must be submitted to the director for approval. Requests for reduction of the post-closure cost estimate shall be approved by the director.

9 VAC 20-70-113 Financial assurance for corrective action

A new requirement is being added to this section. Upon statistically exceeding groundwater protection standards, the facility must provide \$1 million financial assurance with the Department using any of the mechanisms listed in article 4. This money will be available to the Department for additional financial assurance in the case of facility abandonment during the selection of a corrective action remedy. The facility will be released from this requirement after it is determined that a facility is no longer statistically exceeding groundwater protection standards. By requiring this additional financial assurance, the Commonwealth is being further protected in case of facility abandonment prior to entry into the corrective action program. This section is also being amended to state corrective action cost estimates must be submitted to the director for approval. Requests for reduction of the corrective action cost estimate shall be approved by the director.

9 VAC 20-70-150 Trust Fund

This section has been changed to clarify the formulas used to determine payments to be made into the trust fund. Documentation must be submitted to the Department to verify that the correct amounts have been deposited into the trust fund. Owners and operators of solid waste management facilities other than landfills must deposit the full amount of the cost estimate into the trust fund at the time it is established.

9 VAC 20-70-160 Surety bond guaranteeing payment or performance

A statutory change now requires surety companies to be licensed pursuant to Chapter 10 of Title 38.2. This requirement has been added to this section. The section has also been amended to state that if the bond is not replaced 30 days prior to expiration, the director will call or cash the bond.

9 VAC 20-70-170 Letter of Credit

The section is being amended to require establishment of a standby trust. If the Department cashes the letter of credit, the funds will be deposited into the standby trust.

9 VAC 20-70-180 Deposit of acceptable collateral

This section has been revised and re-titled Certificate of Deposit. The Department, through using this regulation, has determined that the certificate of deposit is an acceptable mechanism for facilities other than sanitary landfills. The federal regulations established financial assurance mechanisms for sanitary landfills. The Code of Virginia requires financial assurance for treatment, transfer and disposal facilities. To be consistent with federal regulations, the certificate of deposit mechanism will not be available for use by sanitary landfills. Since the certificate of deposit is a cash mechanism, the Department is adding this section and eliminating other acceptable collateral.

9 VAC 20-70-190 Insurance

A statutory change now requires insurance companies to be licensed pursuant to Chapter 10 of Title 38.2. This requirement has been added to this section.

9 VAC 20-70-200 Corporate financial test

In order to use the corporate financial test the Department is requiring the submission of documentation demonstrating the current bond rating for the corporation. The corporation must also submit a copy of the audited financial statements and a certification stating the current method for funding closure and post-closure of the facility.

9 VAC 20-70-210 Local government financial test

The financial test mechanism has been revised to require localities that have total environmental liabilities between 20% to 43% of the local government's total annual revenues to establish a fund for the purpose of saving for the closure care of the facility. This change to the financial test will make localities that have environmental liabilities between 20% to 43% of their total annual revenues start funding a restricted sinking fund or escrow account for closure of the landfill. This change strengthens the financial test by requiring cash to be placed in a fund for the purpose of closure of the facility. Previously there was no requirement for funds to be set aside for the closure costs of the facility if a locality was using a financial test. The local government must also submit documentation demonstrating the current bond rating if available and a certification stating the current method for funding closure and post-closure of the facility.

9 VAC 20-70-220 Corporate guarantee

The corporation must submit a certification stating the current method for funding closure and post-closure of the facility.

9 VAC 20-70-230 Local government guarantee

The local government must submit a certification stating the current method for funding closure and post-closure of the facility.

9 VAC 20-70-240 Other mechanisms

This section was removed. Since the addition of this section, the Department has not approved use of an alternate mechanism. The current mechanisms are thought to provide facilities with a variety of mechanisms to use to provide financial assurance that are protective of the Commonwealth.

9 VAC 20-70-280 Discounting

This section has been removed from the regulation. Removal of discounting is believed to be more protective of the Commonwealth.

9 VAC 20-70-290 Wording of financial mechanisms

This section has been added to the regulation to list the wording of documents that must be submitted to the Department. This section has been added to clarify the documentation associated with the financial mechanisms.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

With the assistance of the technical advisory committee, the Department discussed alternatives to the proposed regulations. The subject of requiring third party liability coverage for third party damages for all solid waste management facilities was discussed at length. The Department has determined that because of the limits and conditions of the insurance policy, along with the statutory requirement for insurers to be licensed pursuant to Chapter 10 of Title 38.2, that this type of insurance was not readily available or economically feasible. The alternative would be to require facilities to provide financial assurance for third party liability by using the other available mechanisms. This method was viewed as burdensome on the regulated community. Independent legal action may be taken by citizens against a facility to gain compensation for damages caused by the facility.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

The following is a summary of the comments that were received during the NOIRA comment period.

Commenters stated that they believe that the Board should view local governments and private corporations differently. The Department needs to consider that localities have a tax base that they can draw from to provide funds for closure. Many commenters stated that the risk is higher for private corporations to default on their financial obligations. Other commenters were concerned about legislation introduced in the general assembly that was continued until next year. Some commenters stated that the means by which cost estimates are calculated should be reviewed.

DEQ, with the assistance of the technical advisory committee, has reviewed the financial mechanisms that local governments and private companies use to provide financial assurance with the Department. The mechanisms available for use by publicly owned facilities and private corporations were examined to determine if the mechanisms are adequate to protect the Commonwealth from paying the costs of closure and post-closure for abandoned facilities.

During the technical advisory committee meetings, legislation that was continued until the next general assembly session was discussed. The committee assisted the Department in revising the regulations to address some of the issues raised during the general assembly session. As a result, the local government financial test was revised and additional certifications were added to the regulations.

Another area reviewed and discussed was the determination of cost estimates. The current regulations allow for facilities to adjust the closure cost estimate. The Department agrees that it is cost effective and financially sound to address closure as you go, and adjust financial assurance to represent the area of the facility that is not closed. Currently cost estimates are determined using a guidance document. The Department will periodically review the guidance document for consistency with the regulations.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The Department, thorough the use of the technical advisory committee, has reviewed the proposed regulation and has determined that the proposed changes clarify the regulation.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The periodic review of these regulations is required under Executive Order No. 25 (98) and will be performed as required under the executive order. The regulation will be evaluated to determine if the regulation is consistent with the federal regulations on financial assurance requirements and the Code of Virginia. It is anticipated that the periodic review will take place in 2003. The goals of the review will be:

- To protect public health and/or welfare with the least possible costs and intrusiveness to the citizens of the Commonwealth; and
- To establish simple and effective standards and procedures for owners and operators of solid waste management facilities to obtain financial assurance for closure, post-closure care and corrective action in the case of their insolvency so that the costs of the actions necessary to prevent damages to the public health, safety and welfare of the citizens affected by the abandoned facility are borne by the owners and operators and the users of their services.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

This regulatory amendment will have an indirect impact on the institution of the family by better protecting human health and the environment.