



Fast Track Proposed Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9VAC25-650
Regulation title	Closure Plans and Demonstration of Financial Capability
Action title	Fast Track revisions to add the corporate financial test and corporate guarantee to the regulation as additional mechanisms for providing financial assurance.
Date this document prepared	August 28, 2014

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes.

The regulation is being amended to include the corporate financial test and the corporate guarantee as additional mechanisms that may be used to demonstrate financial assurance. Additional changes are being made to the regulation to make it consistent with other water board regulations.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

On September 29, 2014, the State Water Control Board promulgated the proposal for public comment using the fast-track process with the understanding that the authorization constitutes board adoption of

the amendments provided (i) the proposal completes the fast-track process as provided in § 2.2-4012.1 of the APA and (ii) DEQ does not find it necessary to make any changes to the proposal; and set an effective date 15 days after close of the 30-day public comment.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. The identification should include a reference to the agency/board/person's overall regulatory authority, as well as a specific provision authorizing the promulgating entity to regulate this specific subject or program; and a description of the extent to which the authority is mandatory or discretionary

The State Water Control Board is directed by § 62.1-44.18:3 of the Code of Virginia to adopt regulations that require privately owned sewerage systems and sewerage treatment works that discharge more than 1,000 gallons per day and less than 40,000 gallons per day to develop closure plans and provide financial assurance for closure of the sewerage systems or sewage treatment works. The State Water Control Board previously adopted this regulation in 2001.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the regulation is to ensure that owners or operators of privately owned sewerage systems and sewerage treatment works that discharge between 1,000 gallons and 40,000 gallons per day are capable of continuing to treat sewage and are capable of properly closing facilities. These smaller sewage systems and sewage treatment works are private companies providing a service to paying customers. The financial stability of the business to continue to properly operate a sewage system or sewage treatment works directly relates to the business's ability to properly treat sewage before it is discharged into state waters.

State statute requires plans to be developed by the owner of these smaller sewage systems or sewage treatment works to abate, control, prevent, remove, or contain any substantial or imminent threat to public health or the environment that is reasonably likely to occur if such facility ceases operations and to demonstrate their financial capability to implement the plan. Statute specifies that a trust fund, bond, corporate guarantee, or other mechanism deemed appropriate by the board may be used to demonstrate financial assurance.

When the regulation was originally adopted, smaller sewage systems or sewage treatment works were owned by smaller entities that had limited financial resources. For that reason, the corporate guarantee specified in the statute was not included in the regulation as a financial assurance option. Over the years, some of the smaller sewage systems or sewage treatment works have been purchased by or have become operated by larger companies that have additional financial resources available to them. The larger companies have more financial resources and would potentially be able to demonstrate financial assurance through the use of a corporate financial test and corporate guarantee. Many other agency regulations allow the use of the corporate financial test and corporate guarantee to demonstrate financial

assurance and the regulation is being amended to include this option for those entities that qualify to use the financial test and corporate guarantee.

The regulation is being updated to be consistent with state statute and other water regulations. Definitions in the regulation are being amended to be consistent with terms defined in other water regulations. Citations within the regulation are also being updated with current citations.

Rationale for using fast track process

Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

Please note: If either an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, or any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules; or the Department finds it necessary, based on public comments or for any other reason, to make any changes to the proposal, the Department shall (i) file notice of the objection/reason with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

This regulatory amendment is anticipated to be noncontroversial since it adds additional financial assurance mechanisms to the regulation, thereby providing the regulated community with additional options for meeting the requirement to provide financial assurance. The corporate financial test and corporate guarantee are financial assurance mechanisms that are used in other agency regulations to demonstrate financial assurance; therefore, it is believed that the addition of these additional mechanisms will be noncontroversial.

The other changes being made to the regulation will make the regulation consistent with other regulations, either through making the defined terms consistent with other water regulations, or by updating outdated citations with current regulatory citations.

Substance

Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. Note, more detail about all provisions or changes is provided in the “Detail of changes” section.

The regulation is being amended to include the corporate financial test and the corporate guarantee. The amendment includes the addition of new sections with details concerning the requirements of the corporate financial test and the corporate guarantee. Definitions pertaining to the corporate financial test and corporate guarantee have also been added to the regulation.

Issues

Please identify the issues associated with the proposed regulatory action, including:
 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 indicate.

The primary advantage to the regulated community is the additional methods the regulated community will have to choose from concerning how they demonstrate financial assurance. There is no disadvantage to the regulated community since the financial mechanisms that are currently in the regulation to demonstrate financial assurance will continue to be available to demonstrate financial assurance.

The Commonwealth and the agency will not receive any advantages from the regulatory changes. The agency will be required to periodically monitor the financial stability of the operators using the corporate financial test and the corporate guarantee. The agency is already monitoring the financial stability of companies using the corporate guarantee and corporate guarantee when this mechanism is used in other regulatory programs.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements. State statute requires the development of these regulations to address the abandonment of smaller sewage systems or sewage treatment works. The abandonment of these facilities would lead to potential untreated sewage entering into state waters, resulting in a substantial and imminent threat to public health and the environment.

Localities 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.

Public Participation

Please include a statement that in addition to any other comments on the regulation, the agency is seeking comments on the costs and benefits of the proposal, the potential impacts on the regulated community and the impacts of the regulation on farm or forest land preservation.

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal, the potential impacts on the regulated community and on any impacts of the regulation on farm and forest land preservation. Also, the Board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reported, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small

businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Melissa Porterfield, Office of Regulatory Affairs, P.O. BOX 1105, Richmond, VA 23218, phone: 804-698-4238, FAX: 804-698-4019, email: melissa.porterfield@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: www.townhall.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</p>	<p>This regulatory amendment adds the corporate financial test and corporate guarantee to the options available to the regulated community for demonstrating financial assurance. The state will not incur any additional costs by allowing the use of these additional financial assurance mechanisms.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>It is not anticipated that these changes will increase any localities' costs of compliance with this regulation. The revisions to the regulation add more options to the regulated community to use to demonstrate financial assurance.</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>Owners or operators of privately owned sewerage systems and sewerage treatment works that discharge more than 1,000 gallons per day and less than 40,000 gallons per day will have more flexibility concerning the financial assurance mechanism they choose to use to demonstrate financial assurance to comply with this regulation.</p>
<p>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>The agency estimates that this regulation impacts 40 entities. Due to the small capacity of the sewage systems and sewage treatment works, it is likely that most businesses regulated by this regulation are small businesses.</p>

<p>All projected costs of the <i>new regulations or changes to existing regulations</i> for affected individuals, businesses, or other entities. Please be specific and include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>The regulatory changes provide additional flexibility to owners and operators of sewerage systems and sewerage treatment works that discharge more than 1,000 gallons per day and less than 40,000 gallons per day to comply with the regulatory requirements. Depending on the financial resources available to individual owners and operators of sewerage systems and sewerage treatment works, it may be more cost effective for them to retain their current financial assurance mechanism, or it may be more cost effective for them to demonstrate financial assurance through the use of the corporate financial test and the corporate guarantee. The regulated community would likely demonstrate financial assurance with the mechanism that is the most cost effective for them.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>The regulatory amendment is expected to provide more flexibility to the regulated community. The regulated community would potentially be able to use the corporate financial test and corporate guarantee to demonstrate financial assurance which may be a cheaper way for them to demonstrate financial assurance.</p>

Alternatives

Please describe any viable 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. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation

One alternative would be to only update the regulation to be consistent with current water regulation citations and definitions, and not include the corporate financial test and corporate guarantee. This alternative was rejected. During a recent periodic review of the regulation, a member of the regulated community requested the agency to consider adding the corporate financial test and corporate guarantee to the regulation to provide them with more flexibility concerning how they demonstrate financial assurance. The Board believes that the additional mechanisms to demonstrate financial assurance will provide more flexibility to the regulated community while continuing to be protective of the environment.

Small businesses, as defined by 2.2-4007.1 of the Code of Virginia, may be able to use the corporate financial test since they may have a tangible net worth of over \$10 million. If a small business has a substantial business relationship with another business, they may be able to use the corporate financial test and corporate guarantee. The financial assurance mechanism used to demonstrate financial assurance is dependent upon the financial resources of the privately owned sewage system or sewage treatment plant. Small businesses may continue to comply with the regulation by demonstrating financial assurance using their current mechanism and are not negatively impacted by this regulatory amendment.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while

minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The agency considered alternative regulatory methods that would accomplish the objectives of the law while minimizing the impact on small business. The regulatory amendments provide more choices to the regulated community, much of which are likely small businesses, concerning how they may demonstrate financial assurance. Depending on the financial strength and business relationships, financial assurance may be demonstrated through the use of the corporate financial test or corporate guarantee.

The regulation will retain the annual financial assurance demonstration. Annual reporting coincides with the recordkeeping of businesses regulated by this regulation, therefore it is appropriate to retain the annual reporting requirement. Since the requirements of this regulation are mainly related to the financial stability of the company, it would not be protective of the environment to lengthen the reporting requirements to longer than a year. The deadlines for notifying the agency concerning changes and cancellations of mechanisms by third parties need to be retained in order to prevent the Commonwealth from the risk associated with having smaller sewage systems or sewage treatment works from operating without financial assurance mechanisms in place.

This regulation is applicable to smaller sewage systems or sewage treatment works. State statute requires financial assurance to be provided by these owners and operators; therefore the board is unable to exempt small businesses from all or part of these requirements.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent 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 regulation will not have any impact on the institution of the family or family stability.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
10		Definitions	Definitions of the following terms are being added to the regulation: current annual inflation factor; signature; substantial business relationship; and tangible net worth. These terms need to be added to the regulation as a result of adding the corporate financial test and corporate guarantee as options for demonstrating financial assurance. Other definitions are being updated to be consistent with defined terms in statute and other State Water Control Board regulations
30		Regulation references Virginia Pollution Discharge Elimination System Regulation.	Regulation updated to reference Virginia Pollutant Discharge Elimination System Regulation.
50		Existing permitted facilities as of December 5, 2001 are to submit financial assurance mechanisms within 30 days of board approval of the closure plan and cost estimate.	This requirement is being removed since it is no longer needed. This language was previously included in the regulation to address permitted facilities in existence prior to the effective date of the regulation. The regulatory text is also being amended to be consistent with statutory language.
60 C.		Closure Plan requirements	The regulation has been updated to remove references to the Virginia Department of Health which is no longer involved with closure plans for sewage treatment plants. This section now references the requirements for closure plans in 9VAC25-790-120 E3.
100 B		Surety Bond Documentation	Regulation being clarified to state that the financial mechanism must be provided on surety company letterhead.
110 B, 120 B		Letter of Credit and Certificate of Deposit Documentation	Regulation being clarified to state that the financial mechanism must be provided on financial institution letterhead.
110 B		Agency address for submitting letter of credit.	Correction being made to the agency address.
	124		A new section describing the criteria for using the corporate financial test has been added to the regulation. This includes the conditions that must be met, the reporting requirements, and the wording of the letter from the chief financial officer.
	127		A new section describing the requirements of corporate guarantee has been added to the regulation. The section describes the reporting requirements, the terms of the guarantee, and provides the wording of the corporate guarantee.

170		Cancellation or renewal by a provider of financial assurance	Typographical correction made to the section.
190		Incremental funding	This section is being removed from the regulation since it is no longer applicable. All mechanisms are to be funded for the full amount of the closure cost estimate.

Minor editorial corrections have been made throughout the regulation.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

The Agency Background Document does not contain any acronyms.