

## *Virginia Regulatory Town Hall*

### Notice of Intended Regulatory Action Agency Background Document

<b>Agency Name:</b>	Department of Environmental Quality
<b>VAC Chapter Number:</b>	9 VAC 20-70-10 et seq.
<b>Regulation Title:</b>	Virginia Financial Assurance Regulations for Solid Waste Facilities
<b>Action Title:</b>	Amendment 2
<b>Date:</b>	01/10/2000

This information is required prior to the submission to the Registrar of Regulations of a Notice of Intended Regulatory Action (NOIRA) pursuant to the Administrative Process Act § 9-6.14:7.1 (B). Please refer to Executive Order Twenty-Five (98) for more information.

#### Purpose

*Please describe the subject matter and intent of the planned regulation. This description should include a brief explanation of the need for and the goals of a new or amended regulation.*

The regulatory amendments are being proposed to further protect the public from bearing the burden of costs associated with abandoned solid waste treatment and disposal facilities. The Department proposes to accomplish this goal by reviewing and evaluating the existing regulations through the amendment process to determine the most effective methods of strengthening the existing financial assurance requirements.

#### Basis

*Please identify the state and/or federal source of legal authority to promulgate the contemplated regulation. The discussion of this authority should include a description of its scope and the extent to which the authority is mandatory or discretionary. The correlation between the proposed regulatory action and the legal authority identified above should be explained. Full citations of legal authority and web site addresses, if available, for locating the text of the cited authority must be provided.*

### **State Authority**

Section 10.1-1402 of the Virginia Waste Management Act, Chapter 14 (§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, §10.1-1410 of the Act authorizes the Board to promulgate regulations which ensure that if a solid waste treatment 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. The proposed amendments to the existing regulation are not mandated by state law; however, they are necessary to provide an appropriate level of protection for the public against bearing the costs of caring for abandoned solid waste facilities.

### **Federal Authority**

Federal law mandates the promulgation of 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 promulgated 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. Final approval will allow the Department 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, to some extent, in that they are necessary to bring the regulation into conformance with federal law and regulation. However, the amendments are also necessary to provide a suitable level of protection for the public against bearing the costs of caring for abandoned solid waste facilities.

## Substance

*Please detail any changes that would be implemented: this discussion should include a summary of the proposed regulatory action where a new regulation is being promulgated; where existing provisions of a regulation are being amended, the statement should explain how the existing regulation will be changed. The statement should set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of citizens. In addition, a statement delineating any potential issues that may need to be addressed as the regulation is developed shall be supplied.*

### **STATEMENT OF POTENTIAL ISSUES**

The potential issues to be addressed in the proposed amendments are discussed below. The Department has not developed any preliminary language for the proposed amendments at this time. The issues include but are not limited to the following:

1. To amend the existing regulatory provisions, if necessary, to provide the highest level of protection to the public in the event of solid waste facility abandonment;
2. To review the list of available financial assurance mechanisms to consider any potential additions or deletions to the list;
3. To review and amend, if necessary, the reporting requirements for each financial assurance mechanism;
4. To review any findings of the Joint Legislative Subcommittee for possible incorporation into the regulation; and
5. To amend the regulations to incorporate any statutory changes enacted by the 2000 Virginia General Assembly, and
6. To review the existing regulation for any changes required to bring the regulation into conformance with federal regulation.

### **STATEMENT OF REASONS**

Virginia statute requires the Board to promulgate regulations that will ensure that the costs of landfill closure, post-closure and corrective action are borne by the owners and operators of these facilities rather than the public. This directive has become a primary concern in light of the number of solid waste facilities sited in Virginia and the potential costs to the Commonwealth for abandoned landfill remediation. Currently, the Regulation allows an owner or operator to demonstrate financial responsibility using nine specific types of financial mechanisms and one general category of mechanisms.

Although a number of these mechanisms require the owner or operator to set aside the funds in a form accessible to the Department, several mechanisms are, in essence, forms of self-insurance. These self-insurance mechanisms--the financial tests and guarantees--allow the owner or operator to prove to the Department that he is capable of funding landfill closure, post-closure or corrective action by providing a synopsis of his financial status. The owner or operator is not required to set aside funds; rather it is assumed on the basis of the owner's or operator's financial strength that he will be able to provide the funds when the time comes to close the facility and provide post-closure care.

Both the type of financial assurance mechanism used and the owner/operator entity become relevant in the event of a facility abandonment or a failure on the part of the owner or operator to close the facility properly. A number of the available mechanisms described in the existing regulation are guaranteed by a third party such as bank or bonding company. The Department can access the funds to conduct closure, post-closure or corrective action if necessary. In these cases, if the total closure and post-closure care costs, and thus the amount of financial assurance required, has been calculated accurately, the costs are borne by the facility owner or operator. If the type of mechanism used is a self-insurance rather than a third party mechanism, the Department may be forced into the position of attempting to extract the necessary funds from an absent or hostile party. If the Department is unsuccessful in obtaining the funds from the owner or operator, the Commonwealth may be required to bear the cost to care for the landfill. This potential scenario is also impacted by the type of entity, which owns the solid waste facility. If the owner or operator is a locality rather than a private entity, the likelihood of abandonment or financial breakdown is much less. Therefore, the potential costs to the Commonwealth depend on the type of financial responsibility mechanism provided by the owner or operator and the owner/operator entity itself.

The proposed amendment process will evaluate the fundamental protections provided by each type of financial mechanism to determine which of the available mechanisms remain appropriate and effective for use by landfill owners and operators. The specific requirements for each mechanism also will be examined to determine whether each individual financial instrument can be made more effective as a financial assurance mechanism. The resulting proposed amendments will modify the existing financial assurance requirements to provide the highest feasible level of protection for the Commonwealth while allowing facility owners and operators an appropriate choice of demonstration options.

## Alternatives

*Please describe, to the extent known, the specific alternatives to the proposal that have been considered and will be considered to meet the essential purpose of the action.*

Some tentative alternatives being considered by the Department are discussed below:

1. Evaluate the protections provided by the available financial assurance mechanisms with the possibility of modifying the list of available mechanisms as appropriate.
2. Evaluate the specific requirements associated with each available financial assurance mechanism with the possibility of strengthening the requirements an owner or operator must meet in order to demonstrate using each of these mechanisms.
3. Take no action to amend the regulation at this time and continue to allow owners and operators to demonstrate financial assurance using the existing mechanisms.

The Department has not chosen a preferred alternative at this time. The Department will develop and consider additional alternatives to the proposed regulatory amendments through the public participation process.

### **ADDITIONAL INFORMATION TO BE PUBLISHED IN THE REGISTER**

#### **Request for Comments**

The Board requests comments on the intended regulatory action, including ideas to assist the Board in the development of a proposal. In addition, the Board seeks comments on the costs and benefits of any stated alternative or other alternatives.

#### **Public Meeting**

The Department will hold a public meeting to receive comments from the public on Thursday, March 2, 2000, at 9:00 a.m. in the 10<sup>th</sup> Floor Conference Room, Department of Environmental Quality's Office, 629 E. Main Street, in Richmond.

#### **Technical Advisory Committee**

Persons wishing to assist in the development of a proposal by serving on a technical advisory committee should contact Melissa Porterfield at (804) 698-4238.