



Virginia
Regulatory
Town Hall

**Final Regulation
Agency Background Document**

Agency Name:	Virginia Waste Management Board
VAC Chapter Number:	9 VAC 20-160
Regulation Title:	Voluntary Remediation Regulations
Action Title:	Amendment 1
Date:	April 25, 2002

Please refer to the Administrative Process Act (§ 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* for more information and other materials required to be submitted in the final regulatory action package .

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

The Voluntary Remediation Regulations encourage the remediation of properties not mandated by the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. " 9601 *et seq.* (CERCLA); the Resource Conservation and Recovery Act, 42 U.S.C. " 6901 *et seq.* (RCRA); the Virginia Waste Management Act (" 10.1-1400 *et seq.* of the Code of Virginia); State Water Control Law (" 62.1-44.2 *et seq.* of the Code of Virginia); or other applicable authority. The regulations are being amended to update documents incorporated by reference, and to clarify the regulations.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

The Virginia Waste Management Board adopted the Voluntary Remediation Regulations, Amendment 1 as final regulations on April 25, 2002.

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, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

The Virginia Code in § 10.1- 1429.1 directs the Virginia Waste Management Board (board) to promulgate regulations that facilitate voluntary cleanup of contaminated sites where remediation is not clearly mandated by CERCLA, RCRA, the Virginia Waste Management Act, State Water Control Law or other applicable authority. Section 10.1-1402(11) of the Virginia Code authorizes the board to promulgate and enforce regulations necessary to carry out its powers and duties, the intent of the Virginia Waste Management Act and the federal acts. There is no corresponding federal mandate since the regulations apply only where remediation is not otherwise required under state or federal law, or where such jurisdiction has been waived.

The web site addresses for the full text of sections cited above are:

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+10.1-1429.1> for " 10.1-1429.1; and
<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+10.1-1402> for " 10.1-1402(11).

The Office of the Attorney General has certified that the agency has the authority to promulgate the final regulations and that it comports with applicable state and 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 final 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.

The final regulations are necessary to update documents incorporated by reference, and to clarify the regulations. Test methods and risk assessment guidance documents referenced in the proposed regulations have been reviewed to ensure that the most recent versions of the documents are referenced. By referencing the most recent versions of these documents, human health and the welfare of citizens are better protected.

The goals of the final regulations are to clarify the regulations and to make the regulations easier to understand. The remediation level section has been re-organized to clarify the Tier I, Tier II and Tier III standards for remediation. Also, the regulations have been reviewed to assure that terminology used in the regulations is consistent. Throughout the final regulations, the term “remedial action” has been replaced with the term “remediation” and the term “remediation cost estimate” has been replaced with the term “cost of remediation.”

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 of the regulatory action’s detail.

The regulations now clarify that land use controls approved for use at the site are considered remediation.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term “issues” means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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 general public, localities and Commonwealth will benefit from the remediation of contaminated sites and the economic benefits of returning a site to productive use. There are no disadvantages to the general public, local governments or the Commonwealth.

All participants in the Voluntary Remediation Program benefit from the clarifications contained in the proposed regulations. The clarifications should eliminate confusion concerning the requirements associated with receiving a certificate of satisfactory completion.

Statement of Changes Made Since the Proposed Stage

Please highlight any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication.

During the 2002 General Assembly session, HB 463 was introduced to create the Brownfield Restoration and Land Renewal Act by adding Chapter 12.1 to Title 10.1 of the Code of Virginia. In part, HB 463 relocated the provisions previously located at " 10.1-1429.1 to " 10.1-1232 of the Code of Virginia. Changes set out in this Act will become effective July 1, 2002. Statutory references in sections 10 and 60 of the regulations have been changed to reflect the new statutory references. The effective date of the Voluntary Remediation Regulations will be July 1, 2002 in order to coincide with the effective date of the Act. The full text of Chapter 378, 2002 Acts of Assembly can be found at: <http://leg1.state.va.us/cgi-bin/legp504.exe?021+ful+CHAP0378>

9 VAC 20-160-10. Definitions

The definition of the word "act" has been removed since the term is not used in the regulations.

9 VAC 20-160-70. Work to be performed.

Language has been added to this section to clarify that the risk assessment will include an assessment of risk to surrounding properties.

9 VAC 20-160-80. Review of submittals.

Language has been added to this section to state that the department may request sampling data from the site or surrounding areas to verify the extent of the contamination. The department currently requests additional information if there is a question concerning the characterization of the release.

9 VAC 20-160-110. Certification of satisfactory completion of remediation.

Changes have been made to emphasize that the participant must demonstrate that the site meets remediation levels and that the site will continue to meet remediation levels in the future for both on-site and off-site receptors.

The Risk-Based Concentration Table to be incorporated into the regulations is the US EPA Region III Risk Based Concentration Table dated April 2, 2002.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

In general, commenters were concerned with the impact, both environmentally, and economically, contaminated sites have on adjacent property when migration of contamination occurs.

One commenter requested the department to require participants to field verify plumes. The department realizes that field verification of contaminant plumes is not practicable and feasible in all cases. Therefore, the regulations do not require field verification of contamination plumes at all sites but the department strongly encourages the use of field verification of contaminant plumes. In response to this comment, additional language has been added to the regulations clarifying the department may request sampling data from the site and surrounding areas to verify the extent of the contamination.

Other comments received expressed concern of liability issues associated with being adjacent to a site enrolled in the program. This year, Virginia House Bill 463 (HB 463) proposes to add section 10.1-1234 D to state statute to protect contiguous property owners of contaminated parcels from the liability associated with the contamination. Furthermore HB 463 requires the department to investigate sources of insurance against third party claims arising out of environmental contamination from brownfield sites. The Federal Brownfields Act also grants immunity to properties adjacent to contaminated properties. If an adjacent property owner believes they have suffered damages from a site participating in the Voluntary Remediation Program, nothing prohibits the adjacent property owner from taking independent legal action against the third party.

Other comments were received concerning the risk assessment performed on sites. Prior to issuance of a certificate, the department evaluates the risk a voluntary remediation program site poses to human health and the environment. The risk assessment completed for the site includes risks associated with the release of contaminants, and the migration of the contaminants, including the migration of contaminants off site. The department will not issue a certificate to a site that serves as a potential or continuing source of off site contamination at unacceptable risk. In response to comments additional language has been added to the regulations clarifying the risk assessment includes an evaluation of the risk to surrounding properties. Additionally, the regulations have been changed to clarify that sites must meet and continue to meet remediation levels in the future for on-site and off-site receptors.

Some comments were received concerning the property values of adjacent parcels of land to program sites or costs expended by adjacent property owners. The department is tasked with ensuring that sites completing the Voluntary Remediation Program do not pose an unacceptable risk to human health and the environment. If a person alleges they have been damaged by a site participating in the program, nothing prohibits the adjacent property owner from taking independent legal action against the third party

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 crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

During the 2002 General Assembly session, HB 463 was introduced to create the Brownfield Restoration and Land Renewal Act by adding Chapter 12.1 to Title 10.1 of the Code of Virginia. In part, HB 463 relocated the provisions previously located at " 10.1-1429.1 to " 10.1-1232 of the Code of Virginia. Changes set out in this Act will become effective July 1, 2002. Statutory references in sections 10 and 60 of the regulations have been changed to reflect the new statutory references. The effective date of the Voluntary Remediation Regulations will be July 1, 2002 in order to coincide with the effective date of the Act. The full text of Chapter 378, 2002 Acts of Assembly can be found at: <http://leg1.state.va.us/cgi-bin/legp504.exe?021+ful+CHAP0378>

9 VAC 20-160-10 Definitions

This section has been amended to include additional definitions to clarify the regulations. The definition for "agreement" has been removed since agreements are no longer established between participants in the program and the department. Definitions for "certificate," "land use controls," and "report" have been added. Definitions for "cost of remediation," "engineering controls," "institutional controls," "owner," "remediation level," and "termination" have been modified. The definition of "upper-bound lifetime cancer risk level" has been removed, and a definition for "incremental upper-bound lifetime cancer risk level" has been added. The definition of the word "act" has been removed since the term is not used in the regulations.

9 VAC 20-160-40 Application for participation

The timeframe for departmental review has been changed from 45 working days to 60 days. This change gives the regulations a consistent timeframe for applications to be reviewed. In the past, the regulated community has been confused with the term working days. By converting to calendar days, the timeframe is clarified. The department is proposing 60 days since 45 working days is approximately 60 calendar days.

9 VAC 20-160-50 Agreement

This section has been repealed. This section is no longer relevant to the regulations since the timeframe for electing to remain under an agreement to perform voluntary remediation of a release has passed.

9 VAC 20-160-60 Registration Fee

This section has been revised to consistently use terminology defined in 9 VAC 20-160-10.

9 VAC 20-160-70 Work to be performed

This section has been changed to clarify the necessary components of the Voluntary Remediation Report. The section now describes the five elements of the report and the information to be included in each element. By revising this section to include more detail, the department anticipates participants will be able to submit complete reports that will minimize delays in obtaining a certificate. Also, the reference to Test Methods for Evaluating Solid Waste has been updated to incorporate the most recent test methods.

9 VAC 20-160-80 Review of submittals

The reference to working days has been deleted from this section. If appropriate, the director shall, within 120 days of a complete submittal, expedite issuance of such permits required to

initiate and complete a voluntary remediation. Language has been added to this section to state that the department may request sampling data from the site or surrounding areas to verify the extent of the contamination. The department currently requests additional information if there is a question concerning the characterization of the release.

9 VAC 20-160-90 Remediation levels

This section has been re-organized to aid program participants in understanding the remediation levels. Additionally, the regulations clarify that land use controls approved by the department for use at the site are considered remediation.

9 VAC 20-160-100 Termination

The meaning of the term termination has been revised. Termination now means the discontinuation of participation in the program prior to receiving a certification of satisfactory completion of remediation.

9 VAC 20-160-110 Certification of satisfactory completion of remediation

Additional language has been added to this section that states that the site has and will continue to attain remediation levels for both on-site and off-site receptors. Participants must also demonstrate that migration of contamination has stabilized. This section also requires the certificate to contain information on land use controls on surrounding properties that were taken into account when the certificate was issued. Language now contained in the certificate which the department issues has been included in the regulations.

9 VAC 20-160-120 Public participation

The section has been re-titled "Public notice." Program participants are now required to acknowledge any comments received during the public comment period and also provide copies of any responses made to comments.

9 VAC 20-160-130 Regulatory Evaluation

This section is obsolete and has been removed. The periodic review of these regulations is now required under Executive Order Twenty-Five (98) and will be performed as required under the executive order.

Documents incorporated by reference have been updated to reference the most recent versions.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the 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.

There will be no direct impact on the institution of the family. A family may benefit indirectly from the remediation of properties located in their communities. This program was designed to

further the enhancement of the public health, safety and welfare of citizens residing in the vicinity of a contaminated property.