



Virginia  
Regulatory  
Town Hall

Proposed Regulation  
Agency Background Document

<b>Agency Name:</b>	Virginia Waste Management Board
<b>VAC Chapter Number:</b>	9 VAC 20-160
<b>Regulation Title:</b>	Voluntary Remediation Regulations
<b>Action Title:</b>	Amendment 1
<b>Date:</b>	4/25/01

This information is required pursuant 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*. 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summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed.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.*

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.

**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.*

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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 proposed 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 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.*

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The proposed 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, the regulations ensure that human health and the welfare of citizens are being protected.

The goals of the proposed 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 proposed 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 providing detail of the regulatory action’s changes.*

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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 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.*

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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.

**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.*

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No locality would be particularly affected by the proposed regulations.

**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.*

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In addition to any other comments, the board is seeking comments on the costs and benefits of the proposal and the impacts of the regulations on farm or forest lands.

Anyone wishing to submit written comments for the public comment file may do so at the public hearing or by mail. Written comments should be signed by the commenter and include the name and address of the commenter. Comments must be received by the close of the comment period. Oral comments may be submitted at the public hearing.

### 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 § 9-199 of the Code of Virginia or organizations in Virginia.*

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Since participation in the program is voluntary, there are no fiscal impacts on parties unless they choose to participate in the program.

Individuals, businesses or other entities likely effected by the proposed regulations include sites “where remediation has not been clearly mandated by the United States EPA, the Department or a court pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, The Resource Conservation and Recovery Act, the Virginia Waste Management Act, the State Water Control Law, or applicable statutory or common law or where jurisdiction of those statutes has been waived.” Since this is a *voluntary* program and no parties are required to participate in the program, the department is unable to determine how many parties would be affected by the regulations.

Individuals, businesses and other entities may choose to apply for eligibility in the program if interested in performing remediation at a site. The department is not aware of any difference in the impact of the proposed regulations on small or large businesses, nor is the department aware of any negative affect the regulations 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.*

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#### 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.

#### 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.

#### 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. 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.

**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.*

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There are no known alternatives that would achieve the stated purpose of the program in a less burdensome and intrusive manner. The Voluntary Remediation Program is for *voluntary* clean up of contaminated sites where remediation is not clearly mandated by CERCLA, RCRA, Virginia Waste Management Act, State Water Control Law or other authority. It provides a stream-lined approach for remediation projects by establishing minimum standards and procedures pertaining to eligibility, enrollment, reporting, remediation and termination criteria. The legislation mandates the promulgation of the regulations for the program, so there is no alternative to their promulgation.

**Public Comment**

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

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

Commenters requested the board to use a Technical Advisory Committee to assist with revising the regulations. In response to the requests, the board formed a Technical Advisory Committee to assist with the development of the proposed regulations.

One commenter questioned how jurisdiction under EPA, DEQ or a court pursuant to CERCLA, RCRA, the Virginia Waste Management Act, the State Water Control Law or any other applicable law could be waived to allow a site to participate in the Voluntary Remediation Program. The commenter noted that they had attempted to assist sites under enforcement enter the Voluntary Remediation Program without success. There is no guidance on when this waiver of jurisdiction can be granted, and the commenter requested that this rule-making consider including guidance for the regulated community as to when and how waivers of jurisdiction from these statutes can be granted.

By nature, waivers of jurisdiction from environmental statutes must be issued by the board, program or agency with jurisdiction over the statute. Waivers are issued on all of the facts and circumstances of each case. While the board can and has developed guidance on eligibility of sites (including those seeking waivers), it is not within the purview of the board to address waivers for other boards, programs or agencies. Additionally, this program is a *voluntary* cleanup program and if a site is under an enforcement order, then the cleanup may be mandatory.

Another commenter was concerned with the average amount of time it takes to complete the program. The commenter cited a report to the Senate Finance Committee that it takes on average 22 months to complete the program and they requested that ways to expedite the process be considered.

In response, the proposed regulations clarify the components of the Voluntary Remediation Report and the remediation levels to be used when assessing the site. These changes should assist the participant with preparing a complete Voluntary Remediation Report that will require minimal revisions, if any. Improved submissions should shorten the delay in receiving a certificate of satisfactory completion.

One commenter encouraged consideration of appropriate industrial based scenarios for risk assessment. Industrial based risk assessments are currently used.

### 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.*

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The department, thorough the use of a Technical Advisory Committee, has reviewed the proposed regulations and has determined that the proposed changes clarify the regulations.



### 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.*

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The periodic review of these regulations is required under Executive Order Twenty-Five (98) and will be performed as required under the executive order. The regulations will be evaluated to determine if the regulations are consistent with applicable federal regulations and the Code of Virginia. It is anticipated that the periodic review will take place in 2004. Two goals of the review will be:

- To examine the program to determine if the regulations provide for adequate protection of human health and the environment.
- To review the regulations for consistency with federal risk assessment guidance.

### 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.*

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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.