



## Fast Track Proposed Regulation Agency Background Document

<b>Agency name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) citation</b>	9 VAC 25-640
<b>Regulation title</b>	Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements
<b>Action title</b>	This amendment will add a certificate of deposit as an acceptable mechanism to demonstrate financial responsibility.
<b>Date this document prepared</b>	November 14, 2012

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.*

This regulatory action will amend the Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements under 9VAC25-640. The amendment will add a certificate of deposit (CD) as an acceptable mechanism to demonstrate financial responsibility for operators of aboveground storage tanks (AST) and pipelines.

The rationale for the addition of the CD to 9VAC25-640 is to provide more flexibility in the choice of financial mechanisms for operators to meet their financial responsibility requirements under the regulation. Currently, many owners and operators who use a letter of credit (LOC) are required by the bank to collateralize the LOC with a CD. Additionally, banks charge a fee to establish the LOC and an annual maintenance fee to carry it. This can be burdensome to individuals and businesses having funds tied up as collateral and not available for business needs. The CD will also increase in value over time.

### 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.*

At their meeting of March 14, 2013, the State Water Control Board approved the following:

1. The Board authorizes the Department to promulgate the proposed amendment to 9 VAC 25-640 for public comment using the fast-track process established in § 2.2-4012.1 of the Administrative Process Act for regulations expected to be non-controversial.
2. The Board's authorization also constitutes its adoption of the regulation at the end of the public comment period provided that (i) no objection to use of the fast-track process is received from 10 or more members of the public, or any member of the applicable standing committee of either house of the General Assembly or the Joint Commission on Administrative Rules, and (ii) the Department does not find it necessary, based on public comments or for any other reason, to make any changes to the proposal.
3. The Board authorizes the Department to set an effective date 15 days after close of the 30-day public comment period provided (i) the proposal completes the fast-track rulemaking process as provided in § 2.2-4012.1 of the Administrative Process Act and (ii) the Department does not find it necessary to make any changes to the proposal.

**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 legal basis for the regulations for Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements, 9 VAC 25-640, is the State Water Control Law (Chapter 3.1, Title 62.1, Section 44.34, Articles 10 and 11 of the Code of Virginia). Specifically, §62.1-44.34:16D authorizes the State Water Control Board to promulgate regulations requiring operators of facilities to demonstrate financial responsibility based on the total storage capacity of all facilities operated within the Commonwealth and operators of pipelines to demonstrate financial responsibility for any pipelines operated within the Commonwealth.

**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 rationale for the addition of the certificate of deposit to 9VAC25-640 is to provide additional flexibility for the operators of ASTs and pipelines when meeting their financial responsibility requirements. This amendment will provide another mechanism for them to use. Currently, many operators who use a letter of credit are required by the bank to collateralize the letter of credit with a certificate of deposit and these banks charge a fee to establish the letter of credit and an annual maintenance fee to carry it. This can be burdensome to individuals and businesses having funds tied up as collateral and not available for business needs. Additionally, the value of the certificate of deposit will also increase over time providing more funds for business needs.

**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.*

The proposed amendments are expected to be non-controversial, and therefore justify using the fast-track process. The amendments to this regulation will allow operators to use certificates of deposits to meet their financial responsibility requirements under 9VAC25-640.

**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.*

New sections under 9VAC25-640-115 and 9VAC25-640-250:10 have been added to this regulation to provide requirements necessary for operators that choose to use a CD for their financial responsibility requirements. Other sections within the regulation were amended to add CDs to the list of mechanisms which may be used for financial responsibility.

**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 public will benefit, as these amendments will ensure that operators have more options for establishing their financial responsibility for taking corrective action and for compensating third parties for injury or property damage by accidental releases arising from the operation of ASTs and pipelines. There is no disadvantage to the agency or the Commonwealth that will result from the adoption of these amendments to 9VAC25-640.

**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.*

The amendment does not include any requirements more restrictive than applicable federal requirements.

**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.*

The impact of this regulation is statewide; therefore, the Department anticipates that all localities will be equally 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 agency/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 Debra Harris, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218; phone (804)698-4209; FAX (804) 698-4234; email to [Debra.Harris@deq.virginia.gov](mailto:Debra.Harris@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](http://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.*

<b>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</b>	No net increase in cost from the costs associated with implementing and enforcing the existing regulation.
<b>Projected cost of the new regulations or changes to existing regulations on localities.</b>	No net increase in costs to localities is anticipated based on the historical costs associated with this regulation.
<b>Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.</b>	The proposed change of adding the certificate of deposit (CD) option to the list of allowable financial responsibility mechanisms under this regulation may encourage operators of AST facilities in Virginia to change mechanisms because the costs of establishing and maintaining a CD may be substantially less than their current costs to

	<p>maintain a financial responsibility mechanism under this regulation. Facility operators have been requesting the CD option for years as a more cost effective financial responsibility mechanism for their businesses.</p>
<p><b>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.</b></p>	<p>The Department of Environmental Quality (DEQ) reports there are 661 AST facilities in the Commonwealth of Virginia. The actual number of small businesses is unknown because our program does not require facility operators to report their total number of employees or gross annual sales.</p>
<p><b>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.</b></p>	<p>According to DEQ’s 2012 survey of banks in Virginia that currently issue letters of credit to facility operators, the cost to set up and maintain a new CD will be \$0 or a very low fee compared to what banks currently charge for setting up and maintaining letters of credit. Facility operators who can afford to put up the full amount of cash required to fund their financial responsibility requirement may not have to pay any origination or annual fees to the bank; they would actually earn interest on the CD. Many banks currently charge application fees of 1 to 1.5% of the total letter of credit amount with a minimum fee of \$450 to \$500. Additionally, banks charge operators an annual fee of \$450 to \$500 on the anniversary date of the letter of credit. Banks may also charge a modification fee to operators who want to switch from a letter of credit to a CD. Again this fee may depend on whether the CD will be wholly funded in cash. Letters of credit that are secured with real estate also have additional costs associated with the loan. If facility operators switch to a certificate of deposit mechanism, the total cost savings to operators will be substantial.</p>
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>The addition of the certificate of deposit mechanism will make the operator’s financial responsibility mechanism less costly to maintain than it is now, and will likely encourage some operators that currently use other mechanisms to switch to the certificate of deposit. Increased use of the certificate of deposit as a financial assurance mechanism will benefit the public with an increased level of protection because this mechanism is backed by a third party such as a bank to ensure funds are available for containment and cleanup.</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*

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The regulation provides financial responsibility requirements and different types of financial mechanisms which may be used to cover these responsibilities. In the past, operators have asked to use CDs and a regulatory amendment is the only way to allow the option of using a CD. No other alternatives were viable and this action is not intrusive or costly for small businesses as the use of a CD is now an additional option.

### 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.*

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No flexibility analysis is necessary as this action provides more flexibility for the regulated community by adding another type of financial mechanism for operators to choose from when complying with this regulation.

### 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.*

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The Department does not anticipate that the proposed changes to these financial responsibility regulations will erode the authority and rights of parents in the education, nurturing and supervision of their children; 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; strengthen or erode the marital commitment; or increase/decrease disposable family income.

### 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.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all differences between the pre-emergency regulation and this proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

For changes to existing regulation(s), use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
10		Definitions.	Added CD to the definition of provider of financial assurance.
	115	Certificate of deposit.	This new section contains the applicable requirements for operators that choose to use a CD to meet their financial responsibility requirements.
170		Recordkeeping.	Added CD to the list of financial mechanisms in subsection B.5.
180		Drawing on financial assurance mechanism.	Added CD to the list of financial mechanisms in subsection A.
200		Bankruptcy or other incapacity of operator provider of financial assurance.	Add CD to the list of mechanisms in subsection C.
210		Replenishment of guarantees, letters of credit, certificates of deposit or surety bonds.	Add CD to the catchline and to the list of mechanisms in subsection A.
250:9		APPENDIX IX	Added CD to the list of mechanisms.
	250:10	APPENDIX X	This new appendix provides the language to be used when establishing a CD to use as a financial mechanism for 9VAC25-640.

**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.*

- AST – aboveground storage tank.
- CD – Certificate of Deposit
- DEQ – Department of Environmental Quality.
- EPA – Environmental Protection Agency.
- LOC – Letter of Credit.