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# PROPOSED REGULATIONS

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For information concerning Proposed Regulations, see Information Page.

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## Symbol Key

Roman type indicates existing text of regulations. *Italic type* indicates proposed new text.  
Language which has been stricken indicates proposed text for deletion.

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## STATE WATER CONTROL BOARD

**Title of Regulation:** 9 VAC 25-650-10 et seq. **Closure Plans and Demonstration of Financial Capability.**

**Statutory Authority:** §§ 62.1-44.15 and 62.1-44.18:3 of the Code of Virginia.

**Public Hearing Date:** August 16, 2001 - 2 p.m.

Public comments may be submitted until September 14, 2001.

(See Calendar of Events section for additional information)

**Agency Contact:** Jon van Soestbergen, Department of Environmental Quality, P.O. Box 10009, Richmond, VA 23240, telephone (804) 698-4117, FAX (804) 698-4032 or (804) 698-4021/TTY.

**Basis:** The basis for the proposed regulation is § 62.1-44.18:3 of the Code of Virginia. The regulation is to require a Virginia Pollution Discharge Elimination System (VPDES) permit, closure plan and demonstration of financial capability to implement the plan for privately owned sewerage treatment systems and sewerage treatment works that discharge more than 1,000 gallons per day and less than 40,000 gallons per day.

**Purpose:** The unanticipated abandonment of a sewage treatment facility by its owner or operator creates a substantial and imminent threat to public health or the environment because of the facility ceasing operations while still receiving sewage. The State Water Control Board has, therefore, determined that a closure plan and demonstration of financial capability to implement the plan are appropriate for privately owned sewerage systems and sewerage treatment works in order to reduce the potential for such abandonment, or the continued operation of abandoned facilities using public funds.

The proposed regulation will require closure plans and demonstration of financial capability for privately owned sewerage systems and sewerage treatment works that treat domestic sewage generated by privately owned residences. The proposed regulation will ensure that a plan to close or to provide continued service, and sufficient funds to implement that plan, are in place in the event an owner or operator of a privately owned sewerage system or sewerage treatment works abandons the facility. The regulation will also minimize the potential for the expenditure of public funds to close or continue to operate a privately owned facility in the event of abandonment.

**Substance:** There are two substantive changes from the emergency regulation. The number of years of contract operation required under 9 VAC 25-650-60 has been decreased from five years to two years. Additionally, a waiver provision has been added pursuant to a legislative amendment to §62.1-44.18:3 of the Code of Virginia. The

waiver provisions allows the State Water Control Board to waive the closure plan and financial assurance requirements of the regulation for affected facilities that discharge less than 5,000 gallons per day, provided agreement from the local government is obtained.

**Issues:** The primary advantage to the public is that those individuals served by privately owned sewerage systems will be ensured, at least temporarily, continued service in the event the owner or operator abandons the facility. Additionally, a plan will be in place to protect public health and the environment in the event of facility abandonment. The primary disadvantage to the public is that there will be an increased cost to the owner or operator of a privately owned sewerage system or sewerage treatment works for providing service to its customers. The owner or operator will be required to develop the closure plan and will be required to obtain a financial assurance mechanism to demonstrate financial capability to implement the plan. It is anticipated that this cost may be passed through to the customers through increased fees, property rents, or other methods.

The primary advantage to the Department of Environmental Quality (the Agency) and to the Commonwealth is that there will be a plan in place to protect human health and the environment that outlines the steps to be taken in the event of abandonment of a privately owned sewerage system or sewerage treatment works. Additionally, funding will be available so that the expenditure of public funds will be minimized in the event such a facility is abandoned. The primary disadvantage to the Agency and to the Commonwealth is that there will be an increased staff workload associated with the review of closure plans and financial assurance documentation submitted by affected facilities.

**Locality Particularly Affected:** There is no locality particularly affected by the proposed regulation. The Department of Environmental Quality has identified 65 facilities in 44 counties throughout the Commonwealth that will be affected by the regulation. Any new facility meeting the criteria of the regulation, will be subject to the requirements of the regulation regardless of its location within the Commonwealth.

**Public Participation:** In addition to any other comments, the board is seeking comments on the costs and benefits of the proposal and the impacts of the regulation 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. In order to be considered the comments must be received by the close of the comment period. Oral comments may be submitted at the public hearing.

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Department of Planning and Budget's Economic Impact Analysis: The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 9-6.14:7.1 G of the Administrative Process Act and Executive Order Number 25 (98). Section 9-6.14:7.1 G requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. The analysis presented below represents DPB's best estimate of these economic impacts.

Summary of the proposed regulation. State Water Control Law (§ 62.1-44.18:3) requires that owners of a private sewerage system or sewerage treatment works file a closure plan and demonstrate financial capability 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 a facility ceases operations. In accordance with the State Water Control Law, the proposed regulation requires a closure plan and demonstration of financial capability to implement the plan for privately owned sewerage systems or sewerage treatment works that discharge between 1,000 and 40,000 gallons per day. The proposed regulation has been in effect as an emergency regulation since December of 2000.

Estimated economic impact. Prior to the emergency regulations, owners/operators of a private sewerage facility were not required to demonstrate their financial capability to implement a closure plan in the event that the facility is abandoned. The proposed regulation requires that the owners/operators of these facilities submit a closure plan and demonstrate financial capability to implement the plan should the facility cease operations. The closure plan must be approved by DEQ. Regulated facilities include mobile home parks, residential subdivisions, and apartment complexes. Ceasing operations at these facilities is likely to create a public health hazard, as the discharge of pollutants is likely to continue and reach the state waters untreated. To reduce potential health hazards, the owner/operator of the facility is required to submit a closure plan to DEQ. A closure plan identifies the course of action that will be implemented if the facility is abandoned. A closure plan may consist of cessation of the discharge, connection to an alternative facility, transfer of the facility to the local government, contract operation of the abandoned facility by some other entity, or an alternative plan that may be proposed.

The owner/operator of the facility will be required to provide financial assurance to cover the estimated costs of implementing the closure plan. Financial capability may be demonstrated in several ways. First, the owner/operator may choose to establish a fully funded trust. The trustee usually requires a fee to manage the fund that depends on the amount in the fund. The management fee is usually less than one percent. The securities in the fund can earn returns. However, there are opportunity costs involved, as the owner/operator is not free to invest the dollars in other

projects that may provide a better return. Thus, the net cost of this method is the fee paid to the trustee and the difference between the potential return that could be earned from an alternative investment and the actual return earned on the fund. Second, the owner/operator may demonstrate financial capability by providing a surety bond. The cost of this method is about one to three percent of the face value of the bond that must cover the estimated cost of the closure plan.<sup>1</sup> For less risky owners/operators, the premium paid to the surety is likely to be lower. The bonding company may require collateral if the owner/operator is very risky. Finally, the owner/operator may fulfill the financial assurance requirements by providing a letter of credit that may be cashed if needed. The cost of the letter of credit depends on the length and the quality of the relationship between the issuing institution and the owner/operator. Letter of credit maintenance fees vary from about 0.75% to 2% of the face amount indicated in the letter.

The proposed regulations will require 65 private sewerage facilities to demonstrate financial capability. The cost of financial assurance to the owners/operators of all of these facilities will depend on the estimated closure costs. Implementation of the closure plan is likely to vary significantly among alternatives based on the facility type, facility condition, and the amount of flow. Closure costs are expected to vary between ten thousand to one hundred thousand dollars.<sup>2</sup> A ballpark figure for the total financial assurance costs can be estimated under a specific set of assumptions. For example, if a closure plan costs \$40,000 on average to implement and the mean financial assurance cost is 1.5% of that amount, the total cost of 65 facilities to demonstrate financial assurance is expected to be \$39,000 per year. However, this estimate is subject to uncertainty since neither actual closure plan costs nor financial assurance costs are known at this time.

The owner/operator of a private sewerage facility may be able pass some of the financial assurance costs to their tenants. The degree, the owner/operator can pass additional costs depends on the local market conditions for residential real estate. In areas where vacant residential spaces are relatively abundant, the owner/operator is likely to incur most of the burden. Conversely, in areas where the housing market is tight, tenants are likely to incur most of the burden.

Some staff time will be devoted to analyze the plans and financial documents of 65 facilities submitted for approval. DEQ does not have an estimate on the amount of staff time that will be required but expects it to be small. One time staffing needs at the beginning of the program are likely to be relatively more than the ongoing staffing needs.

In cases where the ownership of the facility is transferred, the old and new owners are likely to incur some additional burden. This is because the proposed regulation requires the old owner to notify DEQ at least 120 days prior to the sale of the facility. This requirement has the potential to effectively delay the transfer of ownership for at least four months. The

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<sup>1</sup> Source: DEQ

<sup>2</sup> Source: DEQ

mandatory delay of ownership is likely to interfere with the timely business plans the old and new owners may have. The justification for required notification is to inform the new owner that financial assurance will be required when the facility is bought so that he is aware of the additional costs. It appears that the choice of 120-day notification is arbitrary and could be reduced to the benefit of both the old and the new owner of the facility. Reducing the required number of days prior to sale for notification and still achieving the intended goal of the regulation seems feasible.

The benefits of the proposed regulation include ensuring that the funds will be available to implement the closure plan if a private sewerage facility is abandoned. Prior to the emergency regulations, if an owner/operator abandons the facility, state funds may have been used to pay for the closure costs. Additionally, under the proposal, some financially unstable owners/operators may be forced to sell their facilities to more financially secure entities due to their higher assurance costs. Some other financially weak entities will be discouraged from buying these facilities because of additional costs. Thus, by ensuring that the funds will be available to implement closure plans and by decreasing the number of owners/operators incapable of paying their share of closure costs, the proposed regulation decreases the likelihood that state funds will be used for that purpose. The case of Queen Annes Court sewage treatment plant may provide an example to illustrate the potential benefits of the proposed regulation. In 1999, the treatment plant was abandoned. Consequently, DEQ paid \$32,018 to Hampton Roads Sanitary District to operate the plant for about 10 to 11 months and deactivate the plant after completing a pump station to divert the flow to a public sewer.<sup>3</sup> If financial assurance had been required, state funds would not have been spent.

Ensuring the availability of funds for closure and reducing the number of owners/operators that are not financially strong would likely also reduce delays in facility closure and prevent discharge of untreated pollutants to the state waters. Thus, the proposed regulation has the potential to reduce the facility closure failures and delays which would be beneficial for the environment as well as for third parties that may be subject to potential health risks.

In summary, the benefits of the proposed regulation include the assurance that funds will be ready for the timely closure of an abandoned privately owned sewerage facility. State expenditures on the abandoned facility closure, damage to the environment, and risks to the third parties could potentially be reduced. Demonstration of financial capability will involve net costs for owners/operators. Though it seems likely that the potential benefits exceed the potential costs, there is not enough information to support that conclusively.

Businesses and entities affected. The proposed regulation will affect the owners/operators of 65 privately owned mobile home parks, residential subdivisions, and apartment complexes. If the owner/operator is able to pass financial assurance costs to the tenants, tenants living in these

facilities will also be affected in terms of slightly higher rental costs.

Localities particularly affected. The proposed regulation will affect localities throughout the Commonwealth.

Projected impact on employment. Due to higher costs of operating a residential facility with an independent sewerage system, a few owners/operators may be forced to shut down their businesses. This may have a small negative impact on employment; perhaps, a few positions in property management will be eliminated.

Effects on the use and value of private property. The value of the 65 residential facilities that are subject to the proposed regulation may decrease by a small margin due to additional costs.

Some businesses that provide financial assurance for profit may enjoy a small increase in value as their business volume is expected to increase. Private properties where immediate health risks may accrue due to facilities discharging untreated pollutants to adjacent waters may experience a small positive impact on their values. This is because potential buyers are likely to add the discounted value of reduced health risks in the future to property's present value.

Agency's Response to the Department of Planning and Budget's Economic Impact Analysis: The department has reviewed the economic impact analysis prepared by the Department of Planning and Budget and has no comment.

## Summary:

*The proposed regulation will replace an existing emergency regulation which requires closure plans and demonstration of financial capability for privately owned sewerage systems and sewerage treatment works that treat domestic waste generated by privately owned residences.*

*Six alternatives were considered in the development of the permanent regulation. Alternative Two was chosen as the basis for the permanent regulation. This alternative limits the regulation to the category of facilities identified in § 62.1-44.18:3 of the Code of Virginia. The permanent regulation will be essentially identical to the existing emergency regulation with the exception of two substantive changes from the emergency regulation: (i) the number of years of contract operation required under 9 VAC 25-650-60 has been decreased from five years to two years and (ii) a waiver provision (9 VAC 25-650-150) has been added pursuant to a legislative amendment to § 62.1-44.18:3 of the Code of Virginia.*

## CHAPTER 650.

### CLOSURE PLANS AND DEMONSTRATION OF FINANCIAL CAPABILITY.

#### PART I. DEFINITIONS.

#### **9 VAC 25-650-10. Definitions.**

*The following words and terms when used in this regulation shall have the following meanings unless the context clearly indicates otherwise:*

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<sup>3</sup> Source: DEQ

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*“Active life” means the length of time a facility discharges to state waters or is subject to regulation under the Virginia Pollution Discharge Elimination System (VPDES) Regulation (9 VAC 25-31-10 et seq.).*

*“Anniversary date” means the date of issuance of a financial mechanism.*

*“Assets” means all existing and all probable future economic benefits obtained or controlled by a particular entity.*

*“Board” means the State Water Control Board.*

*“Ceases operations” means to cease conducting the normal operation of a facility under circumstances in which it is reasonable to expect that such operation will not be resumed by the owner at the facility. The term shall not include the sale or transfer of a facility in the ordinary course of business or a permit transfer in accordance with board regulations. Ceases operations shall include, but not be limited to, the following:*

- 1. Bankruptcy or insolvency of the owner or operator or suspension or revocation of a charter or license to operate the facility or to furnish sewer services;*
- 2. Failure to operate and maintain a facility in accordance with the Operations and Maintenance Manual for the facility, such that a substantial or imminent threat to public health or the environment is created;*
- 3. Failure to comply with the requirements of the VPDES permit for the facility, such that a substantial or imminent threat to public health or the environment is created;*
- 4. Notification of termination of service by a utility providing electricity or other resource essential to the normal operation of the facility.*

*“Closure plan” means a plan to abate, control, remove, or contain any substantial or imminent threat to public health or the environment that is reasonably likely to occur if a facility ceases operations.*

*“Current closure cost estimate” means the most recent of the estimates prepared in accordance with the requirements of this chapter.*

*“Current dollars” means the figure represented by the total of the cost estimate multiplied by the current annual inflation factor.*

*“CWA” means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Public Law 92-500, as amended by Public Law 95-217, Public Law 95-576, Public Law 96-483, and Public Law 97-117, 33 USC 1251 et seq.*

*“Department” means the Virginia Department of Environmental Quality.*

*“Director” means the Director of the Department of Environmental Quality, or an authorized representative.*

*“Discharge” when used without qualification means the discharge of a pollutant.*

*“Facility” means any VPDES point source or treatment works treating domestic sewage or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the VPDES program.*

*“Facility closure plan” means a facility closure plan prepared in accordance with 9 VAC 5-585-140.*

*“Local government” means a municipality, county, city, town, authority, commission, school board, political subdivision of a state, or other special purpose local government which provides essential services.*

*“Owner or operator” means the owner or operator of any facility or activity subject to regulation under the VPDES program.*

*“Parent corporation” means a corporation that directly owns at least 50% of the voting stock of the corporation that is the facility owner or operator; the latter corporation is deemed a “subsidiary” of the parent corporation.*

*“Permit” means an authorization, certificate, license, or equivalent control document issued by the board to implement the requirements of this chapter. For the purposes of this chapter, permit includes coverage issued under a VPDES general permit. Permit does not include any permit which has not yet been the subject of final board action, such as a draft permit or proposed permit.*

*“Person” means an individual, corporation, partnership, association, a governmental body, a municipal corporation, or any other legal entity.*

*“Point source” means any discernable, defined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft, from which pollutants may be discharged. This term does not include return flows from irrigated agricultural or agricultural storm water run off.*

*“Pollutant” means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC §2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:*

- 1. Sewage from vessels; or*
- 2. Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well if the well used either to facilitate production or for disposal purposes is approved by the board, and if the board determines that the injection or disposal will not result in the degradation of ground or surface water resources.*

*“Pollution” means such alteration of the physical, chemical or biological properties of any state waters as will, or is likely to, create a nuisance or render such waters (i) harmful or*

detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or for other reasonable uses; provided that: (i) an alteration of the physical, chemical, or biological property of state waters, or a discharge or a deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of, or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the board, are "pollution" for the terms and purposes of this chapter.

"Private residence" means any building, buildings, or part of a building owned by a private entity which serves as a permanent residence where sewage is generated. Private residences include, but are not limited to, single family homes, town houses, duplexes, condominiums, mobile homes, and apartments. Private residences do not include hotels, motels, seasonal camps, and industrial facilities that do not also serve as residences.

"Privately owned sewerage system" means any device or system that is:

1. Used in the treatment (including recycling and reclamation) of sewage. This definition includes sewers, pipes, pump stations or other conveyances only if they convey wastewater to a privately owned sewerage system; and
2. Not owned by the United States, a state, or a local government.

"Publicly owned treatment works (POTW)" means any device or system used in the treatment (including recycling and reclamation) of sewage which is owned by a state or municipality. This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

"Sewage" means the water-carried human wastes from residences, buildings, industrial establishments or other places together with such industrial wastes, underground, surface, storm, or other water, as may be present.

"Special order" means an order of the board issued under the provisions of § 62.1-44.15:1.1 of the Code of Virginia, which require that an owner file with the board a plan to abate, control, prevent, remove, or contain a substantial and imminent threat to public health or the environment that is likely to occur if the facility ceases operations.

"State waters" means all water, on the surface and under the ground, wholly, or partially within, or bordering the Commonwealth, or within its jurisdiction, including wetlands.

"Treatment works" means any devices and systems used in the storage, treatment, or reclamation of sewage or combinations of sewage and industrial wastes, including pumping, power, and other equipment, and their appurtenances, and any works, including land that will be an

integral part of the treatment process, or is used for an integral part of the treatment process, or is used for ultimate disposal of residues resulting from such treatment.

"Virginia Pollution Discharge Elimination System (VPDES) Permit" means a document issued by the board pursuant to 9 VAC 25-31-10 et seq., authorizing, under prescribed conditions, the potential or actual discharge of pollutants from a point source to surface waters and the use or disposal of sewage sludge. Under the approved state program, a VPDES permit is equivalent to an NPDES permit.

## PART II.

### GENERAL INFORMATION AND LEGISLATIVE AUTHORITY.

#### 9 VAC 25-650-20. Purpose.

The purpose of this regulation is to require owners or operators of certain privately owned sewerage systems that treat sewage from private residences to file with the board a plan to abate, control, remove, or contain any substantial or imminent threat to public health or the environment that is reasonably likely to occur if the facility ceases operations. For the purposes of this regulation, such a plan shall be termed a closure plan. Such plan shall also include the demonstration of financial assurance required in 9 VAC 25-650-30 to implement the plan.

#### 9 VAC 25-650-30. Applicability.

A. This regulation applies to all persons who own or operate permitted or unpermitted privately owned sewerage systems subject to the Virginia Pollution Discharge Elimination System (VPDES) Regulation (9 VAC 25-31-10 et seq.) that treat sewage generated by private residences and discharge more than 1,000 gallons per day and less than 40,000 gallons per day to state waters.

B. Owners or operators of privately owned sewerage systems must demonstrate annually financial assurance in accordance with the requirements of this chapter.

#### 9 VAC 25-650-40. Suspensions and revocations.

Failure to submit a closure plan or to provide or maintain adequate financial assurance in accordance with this regulation shall be a basis for termination of a VPDES permit. Termination of a VPDES permit shall be in accordance with 9 VAC 25-31-410.

## PART III.

### CLOSURE PLANS AND FINANCIAL ASSURANCE CRITERIA.

#### 9 VAC 25-650-50. General purpose and scope.

A. Any owner or operator of a privately owned sewerage system subject to this regulation shall file with the board a plan to abate, control, prevent, remove, or contain any substantial threat to public health or the environment that is reasonably likely to occur if such facility ceases operations. Such plan shall be referred to as a closure plan. The closure plan shall include a detailed written estimate of the cost to implement the plan. The owner or operator shall file a closure plan and associated cost estimate for the facility with the board concurrently with the owner's or operator's first VPDES permit application for issuance or reissuance for the facility

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submitted subsequent to [the effective date of this regulation]. Closure plans and cost estimates filed with the board shall be reviewed by the owner or operator and updated as necessary at the end of each VPDES permit term. Revised and updated closure plans shall be filed with the board concurrently with each subsequent VPDES permit application.

B. Closure plans and cost estimates shall be subject to review by the board. The owner or operator shall be notified in writing within 60 days of receipt of the closure plan and cost estimate of the board's decision to approve or disapprove the proposed closure plan and cost estimate. If the board disapproves the closure plan or cost estimate, the board shall notify the owner or operator as to what measures, if any, the owner or operator may take to secure approval. If the owner or operator submits a closure plan that is not approvable by the board, the board may, at its sole discretion, promulgate a closure plan and cost estimate for the facility, subject to appeal by the owner or operator only as to content under the Virginia Administrative Process Act (§ 9-6.14:1 et seq. of the Code of Virginia).

C. Closure plans shall be implemented when the board has determined, at its sole discretion, that the facility has ceased operations. The owner or operator of a privately owned facility shall notify the board within 24 hours of the facility ceasing operations as defined in this chapter.

D. In order to assure that the costs associated with protecting public health and the environment are to be recovered from the owner or operator in the event that a facility subject to this regulation ceases operation, the owner or operator of such facility shall submit to the board one or a combination of the financial assurance mechanisms described in this chapter. Financial assurance mechanisms shall be in amounts calculated as the inflation-adjusted cost estimate using the procedures set forth in this chapter.

E. In the case of new facilities or increased discharges from existing facilities, the selected financial assurance mechanism or mechanisms shall be filed with the board no less than 90 days prior to the discharge or increased discharge to state waters. In the case of existing facilities with a valid VPDES permit on [the effective date of this regulation], the financial assurance mechanism or mechanisms shall be filed with the board within 10 days of the date of board approval of the closure plan and cost estimate.

F. The board may disapprove the proposed evidence of financial assurance if the mechanism or mechanisms submitted do not adequately assure that funds will be available for implementation of the closure plan. The owner or operator shall be notified in writing of the board's decision to approve or disapprove the proposed mechanism. If the board disapproves the financial assurance mechanism, the board shall notify the owner or operator as to what measures, if any, the owner or operator may take to secure approval.

G. Closure plans, cost estimates, and financial assurance mechanisms shall remain in place for the active life of the facility and for the time required to complete the activities specified in the closure plan.

### 9 VAC 25-650-60. Closure plans.

A. The owner or operator of a privately owned sewerage system subject to this chapter shall provide a closure plan which abates, controls, prevents, removes, or contains any substantial threat to public health or the environment that is reasonably likely to occur if the facility ceases operations.

B. Closure plans shall be submitted to the board by the owner or operator concurrently with its application for a VPDES permit for the facility or as otherwise required by special order. Existing closure plans filed with the board shall be reviewed by the owner or operator, modified as necessary, and resubmitted to the board concurrently with an owner's or operator's application for a reissued VPDES permit. The submittal shall include a written summary of the results of the review and any modifications to the closure plan.

C. Closure plans shall consist of one or more of the following:

1. The cessation of the discharge of pollutants to state waters, followed by closure of the facility in accordance with the facility closure plan prepared in accordance with 9 VAC 5-585-140 and approved by the Virginia Department of Health. Where no Virginia Department of Health approved facility closure plan exists, one shall be prepared in accordance with the requirements of 9 VAC 5-585-140 and submitted as part of the closure plan.

2. Connection to an alternative treatment works, such as a POTW, including rerouting of all influent flow, followed by closure of the VPDES permitted facility in accordance with the facility closure plan prepared in accordance with 9 VAC 5-585-140 and approved by the Virginia Department of Health. Where no Virginia Department of Health approved facility closure plan exists, one shall be prepared in accordance with the requirements of 9 VAC 5-585-140 and submitted as part of the closure plan.

3. Transfer of the facility to a local government, provided that written agreement of the receiving local government to obtain a VPDES permit and operate and maintain the facility in accordance with the VPDES permit and all other applicable laws and regulations, is obtained and included as part of the closure plan.

4. Contract operation of the facility for a period of two years after initial implementation of the closure plan, regardless of the date of initial implementation. Contract operation shall be by a named private company or other entity licensed to operate wastewater treatment facilities in the Commonwealth of Virginia and licensed to operate the specific facility to which the closure plan applies. A closure plan consisting of or including contract operation shall include a written, signed contract executed by the contract operator, contingent only upon approval of the closure plan by the board. The contract shall specify that the contract operator shall operate the facility for the term of the contract in accordance with the terms and conditions of the owner's or operator's VPDES permit for the facility. The contract shall also specify that the contract operator shall assume, without exception, all responsibilities and liabilities associated with the facility's discharge to state waters and with the owner's or operator's VPDES permit in the event the closure plan is implemented. The owner or operator of

the facility and the owner of the private company or entity contracted to operate the facility under the closure plan shall not be the same person.

5. An alternative plan which will abate, control, prevent, remove, or contain any substantial or imminent threat to public health or the environment that is reasonably likely to occur if the facility ceases operations.

D. Closure plans shall designate and authorize a named third party who, upon notification by the board, will implement the closure plan. The closure plan shall include written agreement by the named third party, bearing that person's signature, to implement the closure plan in accordance with the requirements of the closure plan for the duration of the VPDES permit term. Where the closure plan includes contract operation of the facility, the named third party may be the contract operator.

E. Closure plans may not consist of the transfer or sale of the facility to another private entity which also would be subject to this regulation.

**9 VAC 25-650-70. Transfer of ownership or permit.**

A. If a privately owned sewerage system subject to this regulation is to be sold or if ownership is to be transferred in the normal course of business, the owner or operator shall notify the board, in written form through certified mail, of such intended sale or transfer at least 120 days prior to such sale or transfer. The notification shall provide the full name, address, and telephone number of the person to whom the facility is to be sold or transferred.

B. Changes in the ownership or operational control of a facility may be made as a minor modification with prior written approval of the board in accordance with 9 VAC 25-31-380, except as otherwise provided in this section. The new owner or operator shall submit a revised permit application no later than 90 days prior to the scheduled change. A written agreement containing a specific date for transfer of permit responsibility between the current and new permittees shall also be submitted to the board. When a transfer of ownership or operational control occurs, the old owner or operator shall comply with the requirements of this chapter until the new owner or operator has demonstrated that he is complying with the requirements of this chapter. The new owner or operator shall demonstrate compliance with this chapter within six months of the date of the change of ownership or operational control of the facility. Upon demonstration to the board by the new owner or operator of compliance with this chapter, the board shall notify the old owner or operator that he or she no longer needs to comply with this chapter as of the date of demonstration.

**9 VAC 25-650-80. Cost estimate for facility closure.**

A. The owner or operator shall prepare for approval by the board, a detailed written estimate of the cost of implementing the closure plan. The written cost estimate shall be submitted concurrently with the closure plan.

1. The closure plan cost estimate shall equal the full cost of implementation of the closure plan in current dollars.

2. The closure cost estimate shall be based on and include the costs to the owner or operator of hiring a third party to implement the closure plan. The third party may not be either a parent corporation or subsidiary of the owner or operator.

3. The closure cost estimate may not incorporate any salvage value that may be realized by the sale of wastes, facility structures or equipment, land or other facility assets at the time of implementation of the closure plan.

B. During the term of the VPDES permit, the owner or operator shall adjust the implementation cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial assurance mechanism used to comply with this chapter. The adjustment may be made by recalculating the implementation cost in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business, as specified below. The inflation factor is the result of dividing the latest published annual deflator by the deflator for the previous year.

1. The first adjustment is made by multiplying the implementation cost estimate by the latest inflation factor. The result is the adjusted implementation cost estimate.

2. Subsequent adjustments are made by multiplying the latest adjusted cost estimate by the latest inflation factor.

C. During the term of the VPDES permit, the owner or operator shall revise the implementation cost estimate concurrently with any revision made to the closure plan which increases the implementation cost. The revised implementation cost estimate shall be adjusted for inflation as specified in subdivisions B 1 and B 2 of this section.

D. The owner or operator may reduce the implementation cost estimate and the amount of financial assurance provided under this section, if it can be demonstrated that the cost estimate exceeds the cost of implementation of the closure plan. The owner or operator shall obtain the approval of the board prior to reducing the amount of financial assurance.

E. The owner or operator shall provide continuous coverage to implement the closure plan until released from financial assurance requirements by the board.

**9 VAC 25-650-90. Trust Agreement.**

A. An owner or operator of a privately owned sewerage system may satisfy the requirements of this chapter by establishing an irrevocable trust fund that conforms to the requirements of this section and by submitting an originally signed duplicate of the trust agreement to the board. The trustee shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or the State Corporation Commission (Commonwealth of Virginia).

B. The trust agreement shall be irrevocable and shall continue until terminated at the written direction of the grantor, the trustee, and the board, or by the trustee and the board if the grantor ceases to exist. Upon termination of the trust, all remaining trust property, less final administration expenses,

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shall be delivered to the grantor. The wording of the trust agreement shall be identical to the wording as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted. The trust agreement shall be accompanied by a formal letter of certification of acknowledgement as specified in this chapter.

## TRUST AGREEMENT

Trust agreement, the "Agreement," entered into as of [date] by and between [name of the owner or operator], a [name of state] [insert "corporation," "partnership," "association," "proprietorship," or appropriate identification of type of entity], the "Grantor," and [name of corporate trustee], [insert "Incorporated in the state of \_\_\_\_\_" or "a national bank"], the "Trustee."

Whereas, the State Water Control Board of the Commonwealth of Virginia has established certain regulations applicable to the Grantor, requiring that an owner or operator of a private sewage treatment facility shall provide assurance that funds will be available when needed for implementation of a closure plan. The attached Schedule A contains the name and address of the facility covered by this [trust agreement or standby trust agreement];

Whereas, the Grantor has elected to establish a [insert either "surety bond," or "letter of credit"] to provide all or part of such financial assurance for implementation of the closure plan for the privately owned sewage treatment facility identified herein and is required to establish a standby trust fund able to accept payments from the instrument (This paragraph is only applicable to the standby trust agreement.);

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee;

Now, therefore, the Grantor and the Trustee agree as follows:

### Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

### Section 2. Identification of the Financial Assurance Mechanism.

This Agreement pertains to the [identify the financial assurance mechanism, either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments (This paragraph is only applicable to the standby trust agreement.)].

### Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of the Department of Environmental Quality of the Commonwealth of Virginia. The Grantor and the Trustee intend that no third party have access to the Fund. [The Fund is established initially as a standby to receive payments and shall not consist of any property.] Payments made by the provider of financial assurance pursuant to the

Director of the Department of Environmental Quality's instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the State Water Control Board.

### Section 4. Payment for Implementation of the Closure Plan.

The Trustee shall make payments from the Fund as the Director, Department of Environmental Quality shall direct, in writing, to provide for the payment of the costs of implementation of the closure plan for the facility covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

(a) Any obligation of owner or operator under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of owner or operator arising from, and in the course of, employment by the owner or operator;

(c) Bodily injury or property damage arising from the operation, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by owner or operator that is not the direct result of a privately owned sewage treatment facility ceasing operations;

(e) Bodily injury or property damage for which owner or operator is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of § 62.1-44.18:3 of the Code of Virginia.

The Trustee shall reimburse the Grantor, or other persons as specified by the State Water Control Board, from the Fund for implementation of the closure plan in such amounts as the Director of the Department of Environmental Quality shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the Director of the Department of Environmental Quality specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

### Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

### Section 6. Trustee Management.

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in



accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (i) Securities or other obligations of the Grantor, or any other operator of the facility, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 USC §80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;
- (ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and
- (iii) Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

#### Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 USC § 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

#### Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;
- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same

issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

#### Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

#### Section 10. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

#### Section 11. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

#### Section 12. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor and the present Trustee by

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certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

## Section 13. Instructions to the Trustee.

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule B or such other designees as the Grantor may designate by amendment to Schedule B. The trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests and instructions by the State Water Control Board to the Trustee shall be in writing, signed by the Director of the Department of Environmental Quality, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the State Water Control Board hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the State Water Control Board, except as provided for herein.

## Section 14. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement as provided in Section 17, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the Director of the Department of Environmental Quality, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

## Section 15. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the State Water Control Board issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

## Section 16. Choice of Law.

This Agreement shall be administered, construed, and enforced according to the laws of the Commonwealth of Virginia.

## Section 17. Amendment of Agreement.

This Agreement may be amended by an instrument executed in writing executed by the Grantor, the Trustee, and the Director of the Department of Environmental Quality, Commonwealth of Virginia, or by the Trustee and the Director of the Department of Environmental Quality, Commonwealth of Virginia, if the Grantor ceases to exist.

## Section 18. Annual Valuation.

The Trustee will annually, at the end of the month coincident with or preceding the anniversary date of establishment of the Fund, furnish the Grantor and to the Director of the Department of Environmental Quality, Commonwealth of Virginia, a statement confirming the value of the Trust. Any securities in the Fund will be valued at market value as of no more than 30 days prior to the date of the statement. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the Director of the Department of Environmental Quality, Commonwealth of Virginia will constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

## Section 19. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in 9 VAC 25-650-90 B as such regulations were constituted on the date written above.

[Signature of Grantor]

[Name of the Grantor]

[Title]

Attest:

[Signature of Trustee]

[Name of the Trustee]

[Title]

[Seal]

[Signature of Witness]

[Name of Witness]

[Title]

[Seal]

## SCHEDULE A

Name of Facility

Address of facility

Closure Cost Estimate

VPDES Permit Number

C. The irrevocable trust fund, when established, shall be funded for the full required amount of coverage, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining required coverage. Schedule A of the trust agreement shall be updated within 60 days after a change in the amount of the approved cost estimate covered by the agreement.

D. If the value of the trust fund is greater than the required amount of coverage, the owner or operator may submit a written request to the board for release of the excess.

E. If other financial assurance as specified in this chapter is substituted for all or part of the trust fund, the owner or operator may submit a written request to the Director for release of the excess.

F. Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection D or E of this section, the board will instruct the trustee to release to the owner or operator such funds, if any, that the board determines to be eligible for release and specifies in writing.

G. Whenever the cost estimate changes, the owner or operator shall compare the new estimate with the trustee's most recent annual valuation of the trust agreement. If the value of the agreement is less than the amount of the new cost estimate, the owner or operator shall, within 10 days of the change in the approved cost estimate, deposit a sufficient amount into the trust so that its value after payment at least equals the amount of the new estimate, or obtain other financial assurance as specified in this article to cover the difference. If the value of the trust fund is greater than the total amount of the cost estimate, the owner or operator may submit a written request to the board for release of the amount that is in excess of the cost estimate.

H. After beginning implementation of the closure plan, an owner or operator or any other person authorized to implement the closure plan, may request reimbursement for implementation expenditures by submitting itemized bills to the board. Within 60 after receiving bills for plan implementation activities, the board shall instruct the trustee to make reimbursements in those amounts as the board determines are in accordance with the closure plan or are otherwise justified.

- I. The board shall agree to terminate the trust when:
  1. The owner or operator substitutes alternate financial assurance as specified in this article; or
  2. The board notifies the owner or operator that he is no longer required to maintain financial assurance for the implementation of the closure plan.

**9 VAC 25-650-100. Surety Bond.**

A. An owner or operator may satisfy the requirements of this chapter by obtaining a surety bond that conforms to the requirements of this section and by submitting an originally signed duplicate of the bond to the board. The surety company issuing the bond shall be licensed to operate as a surety in the Commonwealth of Virginia and be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the U.S. Department of the Treasury.

B. The surety bond shall be worded as follows, except that instructions in brackets shall be replaced with the relevant information and the brackets deleted.

**PERFORMANCE BOND**

Date bond executed: \_\_\_\_\_

Period of coverage: \_\_\_\_\_

Effective date: \_\_\_\_\_

Principal: [legal name and address of owner or operator] \_\_\_\_\_

Type of organization: [insert "individual" "joint venture," "partnership," "corporation," or appropriate identification of type of organization] \_\_\_\_\_

State of incorporation (if applicable): \_\_\_\_\_

Surety: [name(s) and business address] \_\_\_\_\_

Scope of Coverage:  
[List the name of and the address where the private sewage treatment facility assured by this mechanism is located. List the coverage guaranteed by the bond: operation, maintenance, and closure of the privately owned sewage treatment facility]

Penal sum of bond: \$ \_\_\_\_\_

Surety's bond number: \_\_\_\_\_

Know All Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to the Department of Environmental Quality, Commonwealth of Virginia, ("DEQ") in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal is required under § 62.1-44.18:3 of the State Water Control Law of the Code of Virginia to provide financial assurance to implement a plan 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 (closure plan), and Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully implement the closure plan in accordance with the Director of the DEQ's instructions to implement the plan for the facility described above, or if the Principal shall provide alternate financial assurance, acceptable to DEQ and obtain the Director's written approval of such assurance, within 60 days after the date the notice of cancellation is received by the Director of the DEQ from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

Such obligation does not apply to any of the following:

- (a) Any obligation of owner or operator under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

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(b) Bodily injury to an employee of owner or operator arising from, and in the course of, employment by owner or operator;

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by owner or operator that is not the direct result of a privately owned sewage treatment facility ceasing operations;

(e) Bodily injury of property damage for which owner or operator of facility is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of § 62.1-44.18:3 of the Code of Virginia.

The Surety(ies) shall become liable on this bond when the Principal has failed to fulfill the conditions described above. Upon notification by the Director of the DEQ that the owner or operator has failed to fulfill the conditions above, the Surety(ies) shall either implement the closure plan or place funds in an amount up to the penal sum into the standby trust fund as directed by the Director of the DEQ under 9 VAC 25-650-140.

Upon notification by the Director of the DEQ that the Principal has failed to provide alternate financial assurance within 60 days after the date the notice of cancellation is received by the Principal from the Surety(ies) or that the DEQ has determined or suspects that the facility has ceased operations, the Surety(ies) shall place funds in an amount not exceeding the aggregate penal sum into the standby trust fund as directed by the Director of DEQ.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the Director of the DEQ, Commonwealth of Virginia, 629 East Main Street, Richmond, Virginia 23219 provided, however, that cancellation shall not occur (1) during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal and Director of the DEQ as shown on the signed return receipt; or (2) while a compliance procedure is pending.

In Witness Whereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 9 VAC 25-650-100.B as such regulations were constituted on the date this bond was executed.

PRINCIPAL

[Signature(s)]  
[Name(s)]  
[Title(s)]  
[Corporate seal]

## CORPORATE SURETY(IES)

[Name and address]  
State of Incorporation:  
Liability limit: \$ \_\_\_\_\_

[Signature(s)]  
[Name(s) and title(s)]  
[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: \$ \_\_\_\_\_

C. Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

D. The owner or operator who uses a surety bond to satisfy the requirements of this chapter shall establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the board under 9 VAC 25-650-140. This standby trust fund shall meet the requirements specified in 9 VAC 25-650-120.

E. The bond shall guarantee that the owner or operator or any other authorized person will:

1. Implement the closure plan in accordance with the approved closure plan and other requirements in any permit for the facility;
2. Implement the closure plan following an order to do so issued by the board or by a court.

F. The surety bond shall guarantee that the owner or operator shall provide alternate financial assurance as specified in this article within 60 days after receipt by the board of a notice of cancellation of the bond from the surety.

G. If the approved cost estimate increases to an amount greater than the amount of the penal sum of the bond, the owner or operator shall, within 60 days after the increase, cause the penal sum of the bond to be increased to an amount at least equal to the new estimate or obtain other financial assurance, as specified in this article to cover the increase. Whenever the cost estimate decreases, the penal sum may be reduced to the amount of the cost estimate following written approval by the board. Notice of an increase or decrease in the penal sum shall be sent to the board by certified mail within 60 days after the change.

H. The bond shall remain in force for its term unless the surety sends written notice of cancellation by certified mail to the owner or operator and to the board. Cancellation cannot occur, however:

1. During the 120 days beginning on the date of receipt of the notice of cancellation by the board as shown on the signed return receipt; or
2. While an enforcement procedure is pending.

I. The surety shall provide written notification to the board by certified mail no less than 120 days prior to the expiration date of the bond, that the bond will expire and the date the bond will expire.

J. In regard to implementation of a closure plan either by the owner or operator, by an authorized third party, or by the surety, proper implementation of a closure plan shall be deemed to have occurred when the board determines that the closure plan has been completed. Such implementation shall be deemed to have been completed when the provisions of the facility's approved closure plan have been executed and the provisions of any other permit requirements or enforcement orders relative to the closure plan have been complied with.

**9 VAC 25-650-110. Letter of Credit.**

A. An owner or operator may satisfy the requirements of this chapter by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section and by submitting an originally signed duplicate of the letter of credit to the board. The issuing institution shall be an entity that has the authority to issue letters of credit in the Commonwealth of Virginia and whose letter-of-credit operations are regulated and examined by a federal agency or the State Corporation Commission.

B. The letter of credit shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

**IRREVOCABLE STANDBY LETTER OF CREDIT**

[Name and address of issuing institution]

Beneficiary:

Director

Department of Environmental Quality (DEQ)

P. O. Box 10009

629 E. Main Street

Richmond, Virginia 23240-0009

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. \_\_\_\_\_ in your favor, at the request and for the account of [owner or operator name] of [address] up to the aggregate amount of [in words] U.S. dollars, (\$[insert dollar amount]), available upon presentation of

(1) your sight draft, bearing reference to this letter of credit, No. \_\_\_\_\_ and

(2) your signed statement reading as follows:

"I certify that the amount of the draft is payable pursuant to regulations issued under authority of § 62.1- 44.18:3 of the Code of Virginia."

This letter of credit may be drawn on to implement the closure plan for the facility identified below in the amount of [in words] \$ [insert dollar amount]. [Name of facility and address of the facility assured by this mechanism, and number of hookups served by the system.]

The letter of credit may not be drawn on to cover any of the following:

(a) Any obligation of owner or operator under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of owner or operator arising from, and in the course of, employment by the owner or operator;

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by owner or operator that is not the direct result of a privately owned sewage treatment facility ceasing operations;

(e) Bodily injury or property damage for which owner or operator of facility is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of § 62.1-44.18:3 of the Code of Virginia.

This letter of credit is effective as of [date] and shall expire on [date], but such expiration date shall be automatically extended for a period of [at least the length of the original term] on [expiration date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify the Director of the DEQ and the owner or operator by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event that the owner or operator is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by the Director of the DEQ and the owner or operator, as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of owner or operator in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording required in 9 VAC 25-650-110 B as such regulations were constituted on the date shown immediately below.

Attest:

[Signature(s) and title(s) of official(s) of issuing institution]

[Date]

This credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code"].

C. An owner or operator who uses a letter of credit to satisfy the requirements of this chapter also shall establish a standby trust fund when the letter of credit is acquired. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the board will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the board under 9 VAC 25-650-140. This standby trust fund shall meet the requirements specified in 9 VAC 25-650-120.

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D. The letter of credit shall be irrevocable and issued for a period of at least one year in an amount at least equal to the current cost estimate for implementation of the closure plan. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one year. If the issuing institution decides not to extend the letter of credit beyond the current expiration date it shall, at least 120 days before the expiration date, notify both the owner or operator and the board by certified mail of that decision. The 120-day period will begin on the date of receipt by the board as shown on the signed return receipt. Expiration cannot occur, however, while an enforcement procedure is pending. If the letter of credit is canceled by the issuing institution, the owner or operator shall obtain alternate financial assurance to be in effect prior to the expiration date of the letter of credit.

E. Whenever the approved cost estimate increases to an amount greater than the amount of credit, the owner or operator shall, within 60 days of the increase, cause the amount of credit to be increased to an amount at least equal to the new estimate or obtain other financial assurance as specified in this article to cover the increase. Whenever the cost estimate decreases, the letter of credit may be reduced to the amount of the new estimate following written approval by the board. The issuing institution shall send the notice of an increase or decrease in the amount of the credit to the board by certified mail within 60 days of the change.

F. Following a determination by the board that the owner or operator has ceased operations at the facility or has failed to implement the closure plan in accordance with the approved plan or other permit or special order requirements, the board will draw on the letter of credit.

G. The owner or operator may cancel the letter of credit only if alternate financial assurance acceptable to the board is substituted as specified in this article or if the owner or operator is released by the board from the requirements of this chapter.

H. The board shall return the original letter of credit to the issuing institution for termination when:

1. The owner or operator substitutes acceptable alternate financial assurance for implementation of the closure plan as specified in this article; or
2. The board notifies the owner or operator that he is no longer required by this article to maintain financial assurance for implementation of the closure plan for the facility.

### **9 VAC 25-650-120. Standby Trust Agreement.**

A. An owner or operator using any one of the mechanisms authorized by 9 VAC 25-650-100 or 9 VAC 25-650-110 shall establish a standby trust fund when the mechanism is acquired. The trustee of the standby trust fund shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or the State Corporation Commission.

B. The standby trust agreement shall be worded identically as specified in 9 VAC 25-650-90 B, except that instructions in brackets are to be replaced with the relevant information and

the brackets deleted, and accompanied by a formal certification of acknowledgment as follows.

### **CERTIFICATE OF ACKNOWLEDGMENT**

State of \_\_\_\_\_  
County of \_\_\_\_\_

On this [date], before me personally came [owner's or operator's representative] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that is was so affixed by order of the Board of Directors of said corporation; and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

[Name of Notary Public]

My Commission expires: \_\_\_\_\_

C. The board will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the board determines that no additional closure plan implementation costs will occur.

D. An owner or operator may establish one trust fund as the depository mechanism for all funds assured in compliance with this chapter.

### **9 VAC 25-650-130. Multiple financial mechanisms.**

An owner or operator may satisfy the requirements of this chapter by establishing more than one financial mechanism per facility, except that mechanisms guaranteeing performance, rather than payment, may not be combined with other mechanisms.

### **9 VAC 25-650-140. Drawing on financial assurance mechanism.**

A. The board shall require the surety or institution issuing a letter of credit to place up to the limit of funds provided by the financial assurance mechanism, into the standby trust if:

1. The owner or operator fails to establish alternate financial assurance within 60 days after receiving notice of cancellation of the surety bond or letter of credit; or
2. The conditions of subsection B of this section are satisfied.

B. The board may draw on a standby trust fund when the board makes a final determination that a privately owned sewerage system has ceased operation.

### **9 VAC 25-650-150. Waiver of requirements.**

A. The board may waive the filing of the closure plan required pursuant to this chapter for any person who operates a privately owned sewerage system or treatment works subject to this regulation that was permitted prior to January 1, 2001, and discharges less than 5,000 gallons per day upon a finding that such person has not violated any regulation or order of the board, any condition of a permit to operate the facility, or any provision of the State Water Control Law, § 62.1-44.2 et

seq. of the Code of Virginia for a period of not less than five years.

B. No waiver shall be approved by the board until after the governing body of the locality in which the facility is located approves the waiver after a public hearing.

C. The board may revoke a waiver at any time for good cause.

**9 VAC 25-650-160. Release of the owner or operator from the financial assurance requirements.**

A. Where the closure plan results in the termination of discharge to state waters and a VPDES permit for the discharge is no longer required, the board shall verify, within 60 days after receiving certification from the owner or operator that the closure plan has been completed in accordance with the requirements of the approved closure plan, permit or other order, whether the closure plan has been completed. Unless the board has reason to believe that the closure plan has not been implemented in accordance with the appropriate plan or other requirements, he shall notify the owner or operator in writing that he is no longer required to maintain financial assurance for the particular facility. Such notice shall release the owner or operator only from the requirements for financial assurance for the facility; it does not release him from legal responsibility for meeting the facility closure standards. If no written notice of termination of financial assurance requirements or of failure to properly implement the closure plan is received by the owner or operator within 60 days after certifying proper implementation of the closure plan, the owner or operator may request the board for an immediate decision in which case the board shall respond within 10 days after receipt of such request.

B. Where a VDPES permit for the facility is no longer required under State Water Control Law, the board shall notify the owner or operator in writing that he is no longer required to maintain financial assurance for the facility. Such notice shall release the owner or operator only from the requirements for financial assurance for the facility.

**9 VAC 25-650-170. Cancellation or renewal by a provider of financial assurance.**

A. Except as otherwise provided, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail to the owner or operator. Termination of a surety bond or a letter of credit may not occur until 120 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

B. If a provider of financial assurance cancels or fails to renew for reasons other than incapacity of the provider as specified in 9 VAC 25-650-180, the owner or operator shall obtain alternate coverage as specified in this section and shall submit to the board the appropriate original forms listed in 9 VAC 25-650-90, 9 VAC 25-650-100, or 9 VAC 25-650-110 documenting the alternate coverage within 60 days after receipt of the notice of termination. If the owner or operator fails to obtain alternate coverage within 60 days after receipt of the notice of termination, the owner or operator shall immediately notify the board of such failure and submit:

1. The name and address of the provider of financial assurance;

2. The effective date of termination; and

3. A copy of the financial assurance mechanism subject to the termination maintained in accordance with this chapter.

**9 VAC 25-650-180. Replenishment of letters of credit or surety bonds.**

A. If at any time after a standby trust is funded upon the instruction of the board with funds drawn from a letter of credit or surety bond, and the amount in the standby trust is reduced below the full amount of coverage required, the owner or operator shall by the anniversary date of the financial mechanism from which the funds were drawn:

1. Replenish the value of financial assurance to equal the full amount of coverage required, or

2. Acquire another financial assurance mechanism for the amount by which funds in the standby trust have been reduced.

B. For purposes of the section, the full amount of coverage required is the amount of coverage to be provided by this chapter. If a combination of mechanisms was used to provide the assurance funds which were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms.

**9 VAC 25-650-190. Incapacity of owners or operators, or financial institution.**

A. An owner or operator shall notify the board by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within 10 days after commencement of the proceeding.

B. An owner or operator who fulfills the requirements of 9 VAC 25-650-50 D by obtaining a trust fund, a letter of credit, or a surety bond, will be deemed to be without the required financial assurance in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing a surety bond, or letter of credit to issue such mechanisms. The owner or operator shall establish other financial assurance within 60 days of such event.

**9 VAC 25-650-200. Incremental funding.**

A. Incremental funding of the amount of financial assurance required may be allowed at the sole discretion of the board for existing facilities discharging in compliance with a current VPDES permit on [the effective date of this regulation]. Incremental funding of the amount of financial assurance required shall not be allowed for new or expanded discharges. Incremental funding of the amount of financial assurance shall not be allowed where a mechanism is already in place. Incremental funding of the amount of financial assurance required shall be considered only upon written request by the owner or operator. The board may allow incremental funding of closure cost estimates under the following conditions:

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## Proposed Regulations

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1. The board determines that closure plan implementation cost estimates are complete and accurate and the owner or operator has submitted a statement from a registered professional engineer so stating; and
2. The facility has been in operation, discharging to state waters, for a period of at least five years prior to [the effective date of this regulation], in accordance with a VPDES permit issued by the board; and
3. The board finds the facility is substantially in compliance with its VPDES permit conditions, and has been substantially in compliance with its VPDES permit conditions for a period of at least one permit term (five years) prior to the effective date of the owner's or operator's current VPDES permit; and
4. The board determines that the facility is not within five years of the expected facility life and there are no foreseeable factors that will shorten the estimate of facility life (to include facility upgrade or expansion); and
5. A schedule for funding the total amount of the approved cost estimate through the financial assurance mechanism within five years of the initial date required under this regulation is provided by the owner or operator and approved by the board. This period is hereafter referred to as the "pay-in period."

**B. Incremental funding shall be, at a minimum, in accordance with the approved schedule as follows:**

1. Payments into the financial assurance mechanism shall be made annually during the pay-in period by the owner or operator until the amount of financial assurance equals the total amount of the approved cost estimate, adjusted for inflation.

2. Annual payments into the financial assurance mechanism shall not be less than 20% of the approved inflation-adjusted cost estimate, and shall continue until the amount of financial assurance equals the amount of the total approved cost estimate.

3. In no case shall the pay-in period exceed five years.

4. Incremental funding cost estimates must be adjusted annually to reflect inflation and any change in the cost estimate.

**C. The owner or operator shall submit a request for incremental funding of the amount of financial assurance, including documentation justifying the request in accordance with the requirements of this section, to the board in conjunction with the cost estimate submitted in accordance with the requirements of this chapter. The board shall review such requests by the owner or operator and inform the owner or operator of approval or disapproval of the request for incremental funding in conjunction with approval or disapproval of the cost estimate.**

**9 VAC 25-650-210. Notices to the State Water Control Board.**

All requirements of this chapter for notification to the State Water Control Board shall be addressed as follows:

Director  
Department of  
Environmental Quality  
P.O. Box 10009  
Richmond, Virginia 23240-0009

Director  
Department of  
Environmental Quality  
629 East Main Street  
Richmond, Virginia 23219

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