



Final Regulation Agency Background Document

Agency name	Virginia Waste Management Board
Virginia Administrative Code (VAC) citation	9VAC20-160
Regulation title	Voluntary Remediation Regulations
Action title	Proposed Amendment 2 - Voluntary Remediation Regulations
Date this document prepared	March 2013

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The Voluntary Remediation Regulation was last amended in 2002 and became effective as a final regulation on July 1, 2002. Based on a 4-year periodic/small business impact review conducted as part of this regulatory action, it was determined that the regulations needed to be updated to include current remediation levels; sampling and analysis methods; improved reporting requirements; and clarification of eligibility, termination, and application requirements. Amendment 2 updates the regulation and revises the procedures of the program so that contaminated sites can be processed more efficiently and to reflect changes in technology.

Changes were made to the proposed regulation amendments as follows: (1) to add, clarify, or delete certain defined terms in 9VAC20-160-10; (2) to clarify the proposed eligibility, application, and registration fee requirements in 9VAC20-160-30, 40 and 60; (3) to reorganize and clarify the reporting requirement and various notification requirements in 9VAC20-160-70, 80, 90 and 120; (4) to make termination and certificate revocation requirements more consistent with a voluntary program in 9VAC20-160-100 and 110; and (5) to make various word substitutions and various style, numbering and typographical corrections throughout the regulation.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency or board taking the action, and (3) the title of the regulation.

On May 3, 2013, the Virginia Waste Management Board took final action to adopt amendments to the Voluntary Remediation Regulations (9VAC20-160). The regulatory action is to be effective as provided in the Administrative Process Act.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. The identification should include a reference to the agency/board/person's overall regulatory authority, as well as a specific provision authorizing the promulgating entity to regulate this specific subject or program; and a description of the extent to which the authority is mandatory or discretionary.

The legal basis for the Voluntary Remediation Regulations, 9VAC20-160, is the Brownfield Restoration and Land Renewal Act. Specifically § 10.1-1232 of the Code of Virginia authorizes the Waste Management Board (Board) to promulgate regulations that facilitate voluntary cleanup of contaminated sites where remediation is not clearly mandated by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), the Virginia Waste Management Act, or other applicable authority. There is no corresponding federal mandate, since the regulations apply only where remediation is not otherwise required under state or federal law, or where such jurisdiction has been waived.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The agency performed an internal review of the Voluntary Remediation Regulations and determined that there was a continued need for this regulation. Since 1996 more than 325 applications have been submitted to the Voluntary Remediation Program (VRP). Certificates of completion have been issued to over 200 participants and the current active case load exceeds 125 sites. Without this program there is a likelihood that many of these cleanups may not have occurred.

The regulation is not considered complex.

Virginia Code Section 10.1-1232 of the Brownfield Restoration and Land Renewal Act requires the Waste Management Board to promulgate regulations that facilitate voluntary cleanup of contaminated sites where remediation is not clearly mandated by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), the Virginia Waste Management Act, or other applicable authority. This regulation does not overlap, duplicate, or conflict with federal or state law or regulation.

The Voluntary Remediation Regulation was last amended in 2002 and became effective as a final regulation on July 1, 2002. Based on a 4-year periodic review, it was determined that the regulations needed to be updated to include current remediation levels; sampling and analysis methods; improved reporting requirements; and clarification of eligibility, termination, and application requirements.

Amendment 2 is intended to revise the program procedures so that sites can be processed more efficiently and reflect changes in technology.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The amendments to the Voluntary Remediation Regulations include the following:

1. Section 10: Definitions – Deleted, clarified, or added definitions to remove unnecessary definition or to clarify requirements.
2. Section 20: Purpose, applicability, and compliance with other regulations – Revised to include characterization as part of the purpose of this chapter.
3. Section 30: Eligibility criteria – Added requirements (i) to address both the applicant's and the candidate site's eligibility, (ii) to require that applicants have access to the property until the certificate is issued, and (iii) to clarify when remediation has been clearly mandated.
4. Section 40: Application for participation: Added a requirement for a map and approximate acreage and boundaries of the property and a requirement that the applicant provide documentation of the owner's written consent to submit the application and the owner's agreement with the information contained in the application materials. Added completeness review and notification provisions.
5. Section 60: Registration Fee: Added a requirement that the preliminary registration fee shall be the statutory maximum. Provided conditions for a participant to apply for a refund of a portion of the preliminary registration fee if final remediation costs are lower than \$500,000. Also added criteria for not refunding any portion of the registration fee.
6. Section 70: Work to be performed: Revised and clarified the required components of the Voluntary Remediation Report. Requires the submittal of an assessment of any risks to off-site properties and clarifies the use of land use controls. Clarifies the reporting requirements in the case where the participant determines that no remedial action is necessary. Added a requirement for analysis to be performed by laboratories certified by the Virginia Environmental Laboratory Accreditation Program. Moved reporting requirements for changes in property ownership or agent to this section.
7. Section 80: Review of submittals: Revised to allow the department to request additional information including sampling of potentially affected offsite areas.
8. Section 90: Remediation levels: Clarified the carcinogenic risks, ecological risks, surface water quality standards, soil screening levels, groundwater concerns, and human health considerations. Revised the acceptable closure criteria.
9. Section 100: Termination: Clarified the conditions under which participation in the program may be terminated. Added a requirement that the participant must make reasonable progress towards completion of the program to remain eligible. Also prevented termination for lack of progress until the department notifies the participant and allows the participant the opportunity to respond appropriately. Removed the no-refund requirements for termination that were included in section 60.
10. Section 110: Certification of satisfactory completion of remediation: Revised and clarified regulatory requirements for issuance of a certificate of completion. Removed the notification requirement for a change in ownership that occurs after the certificate is issued.
11. Section 120: Public notice: Expanded the public notice requirement to include notice to additional property owners whose property has been affected by the release. Revised the timing of the

notice; required documentation of the comments received and the department's responses to the comments; and specified the documentation requirements for the public comment period.

12. Documents incorporated by reference: Revised publication dates to update certain references.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please indicate.

This regulation has no negative economic impact on small businesses; and it poses no disadvantages to private citizens, the regulated community of to the Commonwealth. The VRP provides the opportunity for reasonable cleanup goals and protects human health and the environment. These cleanups facilitate the sale and reuse of industrial and commercial properties, provide economic benefits for the buyer and seller, and reduce green space development. Communities benefit when these projects are completed. The cleanup of a site affects surrounding properties by increasing property values, tax revenues, employment opportunities and community pride. The citizens, businesses, and local governments of the Commonwealth all derive benefits from the VRP.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
9VAC20-160 Voluntary Remediation Regulations			
Chapter 160.	Voluntary Remediation Program requirements are specified	Various changes are made to improve consistency in the terms used throughout the chapter, for example the uses or spelling of the terms "Certificate," "onsite," "offsite," "to show," and "clean up;" and to correct style, punctuation and grammar.	Consistency in the use and spelling of terms, style, punctuation, and grammar improves clarity.
160-10.	The term "director" is defined.	Deleted.	The term is no longer used in this chapter.
160-10.	None.	The term "environmental covenant" is defined.	The term is now used in section 10 in the definition of "institutional controls".
160-10.	The term "incremental upper-bound lifetime cancer risk level" is	The definition is revised to refer to "risk" rather than "risk level" and to further qualify the probability of	Necessary to provide consistency with the term as it is used in the

	defined.	developing cancer.	regulation and with federal regulation.
160-10.	The term "institutional controls" is defined.	The definition is revised to include land use restrictions and environmental covenants.	Necessary to include some additional examples of the controls.
160-10.	The term "monitored natural attenuation" is defined.	The definition is revised to remove the word "closely."	The use of the word "closely" in this definition is subjective and not necessary.
160-10.	The term "natural attenuation" is defined.	The definition is revised to more closely resemble the federal definition.	Necessary to be consistent with federal definitions.
160-10.	The term "operator" is defined.	Deleted.	The term is no longer used in this chapter.
160-10.	The term "remediation" is defined.	The definition is revised to correct various grammar, punctuation, and spelling errors.	Necessary to meet standards of style, correctness, and clarity.
160-30 B.	Access requirements are specified.	The access requirements for eligibility are revised to change the beginning and endpoint when access is required.	Necessary to be more specific about when access must be provided. Numbering and taglines are no longer necessary.
160-30 B.	Notification of any change in ownership or agent is required.	These notification requirements are relocated to section 70.	Notifications are not eligibility criteria and need to be moved.
160-30 D 3.	Some conditions are specified under which open dump sites and permitted waste facilities are not eligible for the program.	The conditions are revised to be more specific.	This change is necessary to prevent misinterpretations.
160-30 E.	The director is provided with discretion to determine whether some open dumps or unpermitted facilities may participate under certain conditions.	The discretionary provision is revised to refer to the department instead of the director.	This replacement is made for consistency reasons throughout the entire chapter.
160-40 A.	Application requirements are listed.	Various punctuation and grammar are revised throughout this subsection.	Corrections are made to conform to style, punctuation, and grammar guidelines.
160-40 A 1.	An overview of the project is required in the application.	The overview is revised to allow reasons for an application other than for remediation projects.	This change corrects overly restrictive language in the application requirement.
160-40 A 4.	A plat or map showing boundaries and acreage is required in the application.	The revision allows the approximate boundaries and acreage of the site and property to be used in the application.	This change is necessary to allow the application to proceed before actual acreage and boundaries of the site are known.
160-40 A 7.	A discussion of other applicable programs is required.	The revision clarifies that the applicable programs to be discussed are only those that require cleanup of the release.	This change qualifies the requirement to avoid misinterpretation.
*160-40 A 8.	Signature of the applicant and owner is required on	Signature of the owner on the application is no longer required.	This change is necessary to prevent owners from

	the application.		blocking voluntary remediation over liability concerns regarding the application information.
*160-40 A 9	None.	This new provision requires the applicant to obtain and submit the owner's written consent to the application and written agreement with the application information.	Necessary to ensure that the owner consents to the application, is aware of the information in the application, and if necessary has the opportunity to provide input on the information contained in the application.
160-40 B.	Application review requirements are provided.	The department is required to provide either a positive or negative notifications for both review requirements.	Necessary to ensure that a missed deadline does not imply application completeness or site eligibility.
160-60 B.	The amount of the registration fee is specified and payment is required.	The registration fee to be paid up front is clarified to be the maximum allowed under law for the highest potential cost of remediation (\$5000).	This change ensures that the Department defrays the costs of the program up to the maximum fee allowed.
160-60 C.	Consequences for the participant's failure to remit the registration fee on time are specified.	The flexibility allowed to the department for extending the registration payment period is clarified.	This revision ensures that the provisions for department discretion are sufficiently specific.
160-60 D.	Provisions for a partial refund of any excess fees are specified.	Provisions for calculating the refund amount and what requirements must be fulfilled are clarified. The method of calculating the refund is moved to subdivision D 1.	These changes prevent miscommunication about what the requirements for a refund are.
160-60 D 1.	A requirement to provide the department with the final remediation cost is specified.	The refund is made conditional upon receipt of the final cost summary within 60 days if the certificate issuance date and the refund calculation method is described.	Necessary to clarify the conditional nature of the refund and to specify the procedure for calculating the refund amount.
160-60 D 2.	Refund provisions for failure to submit the final remediation cost summary are specified.	The language is revised to specify how the refund amount is calculated to be zero when no total cost summary is submitted within 60 days of the certificate issuance.	Necessary to conform to other changes in the procedure for calculating the refund amount in this subsection.
160-60 E.	Terms under which no refund will be given are specified.	The exception allowing refunds for termination due to completion of the project is deleted.	This change is necessary because the reasons for termination in 9VAC20-160-100 were revised to remove project completion from the list.
160-70 A.	A separate report is required for each component of the Voluntary Remediation Report	The language is revised to allow flexibility in how the separate components of the report are submitted.	This change is necessary to allow reports to be submitted as it makes best sense for that project.

160-70 A 1.	The information requirements for the Site Characterization Report are specified.	The requirements are clarified to be more specific about the criteria for the extent of contamination and to include a description of previous remediation activities.	This clarification is necessary to limit the extent of contamination to be reported and to include a characterization requirement from another subdivision.
160-70 A 2.	The information requirements for the Risk Assessment Report are specified.	Language, terms, and punctuation are revised.	These revisions are necessary for consistency and to meet guidelines for style, grammar and spelling.
160-70 A 3.	The information requirements for the Remediation Action Plan Report are specified.	Requirements that belong in other sections of the report are removed and the remaining requirements are reorganized.	These changes are necessary to improve the organization and logic of the component reporting requirements.
160-70 A 4.	The information requirements for the Demonstration of Completion Report are specified.	Requirements that belong in other sections of the report are removed and the remaining requirements are reorganized and clarified. Language, terms, and punctuation are also revised.	These changes are necessary to improve the organization and logic of the component reporting requirements and to meet guidelines for style and grammar.
160-70 A 5.	The information requirements for the documentation of public notice are specified.	The requirements are revised to be those documents required in another subsection.	These changes are necessary to improve consistency between two recordkeeping provisions that refer to the same documents.
160-70 C.	Sampling requirements are specified.	Spelling of some terms is revised to conform to a preferred variation.	This change is necessary for consistency and to meet guidelines for style and spelling.
160-70 D.	An annual reporting requirement is described.	The annual reporting requirement is deleted and the property ownership reporting requirement removed from the proposal for 9VAC20-160-30 B 2 is inserted.	This change deletes an unnecessary requirement and relocates a necessary requirement.
160-70 E.	None.	The change in agent reporting requirement from the proposal for 9VAC20-160-30 B 3 is inserted.	This change relocates a necessary requirement.
160-80 A.	Reporting and review requirements are provided.	One example of the additional information that the department may request is clarified.	This change emphasizes the possibility that the department may request sampling data in areas where the extent of contamination is not yet demonstrated.
160-80 B.	Provision is made to allow the department to expedite permits.	Revised to allow the department to waive permits as well as expedite permits, if appropriate.	Necessary to conform to existing statutory language.
*160-100 A 3.	Termination of eligibility is required for failure to make reasonable progress in the	Failure to respond to a notification is added as a criteria that must be met before a participant is	This change is necessary to ensure that a participant knows that the

	program.	terminated for lack of progress.	department is considering termination and has an opportunity to respond to prevent an unnecessary termination.
160-100 A 4.	Requirements for terminating a site's eligibility to participate in the VRP program are provided.	Termination of eligibility is clarified to exclude successful completion of the remediation project by deleting that condition from the requirement list.	This change is necessary to be internally consistent with the definition of "termination" and the deletion of the "no refund" exclusion for successfully completing of all of the VRP program requirements in 9VAC20-160-60 E.
160-100 C.	Refund of the registration fee is prevented in cases of termination other than completion of the project.	This requirement is deleted.	As a result of changes made to 9VAC20-160-60, this requirement is redundant and unnecessary.
160-110 A - I.	Criteria for the issuance of a certificate of completion are provided.	Language, terms and spelling are revised.	These changes are made for consistency and to meet standards for style and grammar.
160-110 F.	Criteria for the immunity provided by the certificate of completion are specified.	Immunity is limited to the releases described in the certificate instead of the site conditions described in the Voluntary Remediation Report.	This revision is necessary to clarify the limits of immunity.
*160-110 H.	Criteria for revoking a certificate are specified.	Provisions are revised to require prior notice and opportunity to respond to a proposed revocation, and to reorganize and restate the conditions for revocation.	This revision is necessary to ensure that owners are aware of a pending revocation and have the opportunity to resolve deficiencies before a revocation is issued.
160-110 I.	Limits upon immunity provided by the certificate of completion are specified	A provision from subsection 110 H that specifies that the department reserves certain rights to pursue specific types of liability claims, is relocated here.	This revision is necessary to keep the limits on immunity consistent.
160-110 J.	Notification requirements for a change in ownership after project completion are specified.	This requirement is deleted.	This requirement is burdensome and unnecessary.
160-120 A.	A requirement for public notice of a proposed remediation is specified.	Revisions are made to conform to other revisions to terms and reporting requirements.	These changes are made for consistency.
160-120 B.	The persons to be notified of a proposed remediation by the participant are specified.	The owners to the notified are clarified to be only those whose property is affected by predicted or known amounts of contamination reported by the participant in the Site Characterization Report.	This change is necessary in order for participants to know who must be notified.
160-120 C.	The length of the public comment period and	The length of time that the comment period may be extended is limited	These changes are necessary to be more

	contents of the notice are specified.	and a reference is corrected.	specific about how long the comment period may be, and to correctly identify the reference.
160-120 E.	Documentation requirements for the public notice are specified.	The requirement is restated and simplified so that it is clear that only one set of documentation has to be provided to the department (in the Voluntary Remediation Report).	This change is necessary to clarify reporting requirements and reduce redundancy.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

A summary and analysis of the public testimony, along with the basis for the decision of the Board, is attached.

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9VAC20-160 Voluntary Remediation Regulation			
Various.		Use of the term "director"	Removed the reference to "director" where it appeared and inserted "department." Necessary for clarification and consistency.
Various.		Use of variations of the same terms such as "on site," "onsite, and "on-site;" "certificate," "Certificate," and "Certification;" and "off site," "offsite," and "off-site.	Standardized throughout the chapter. Necessary for consistency.
10.		The term "director" is defined.	Term is deleted. Remove reference to the "director" and insert reference to the "department" for clarification and consistency.
10.		Definition of "certificate".	Remove reference to the "director" and insert reference to the "department" for clarification and consistency.
10.		Definition of "engineering	Revise definition to include "vapor

		controls".	mitigation systems" to be consistent with current practices.
10.		None.	A new term "environmental covenant" is defined. Necessary to enhance the definition of "institutional controls."
10.		The term "institutional controls" is defined.	Revised to include land use restrictions and environmental covenants. Necessary to include some additional examples of the controls.
10.		None.	Added definition of "monitored natural attenuation" to mean a remediation process which monitors the natural or enhanced attenuation process. Necessary to describe examples of remediation.
10.		None.	Added a definition of "natural attenuation" that resembles the federal definition. Necessary to describe examples of remediation and provide consistency with federal regulations.
10.		None.	Added definition of "post certificate monitoring": Necessary to stipulate one possible condition of issuance of the Certificate.
10.		Definition of "Remediation".	Revised the definition to delete the phrase "including actions to investigate, study or assess any actual or suspected release" to eliminate redundancy.
10.		Provided a definition of "Remediation".	Revised definition to clarify that "remediation may include, when appropriate and approved by the department, land use controls; natural attenuation; as well as monitored natural attenuation" to clarify requirements.
10.		Definition of "report".	Deleted the definition. Requirement is addressed in section 70 of regulations.
20 A.		Purpose, applicability, and compliance with other regulations.	Add term "characterization" to the list of items included in the purpose of this regulation for consistence with current practice and requirements.
30 A.		Eligibility criteria: Candidate sites shall meet eligibility criteria as defined in this section.	Revised to read: Applicants and proposed sites shall meet eligibility criteria as defined in this section. Necessary for consistency within the regulation.
30 B.		Eligibility criteria" Any persons who own, operate, have a security interest in or enter into a contract for the purchase or use of an eligible site who wish to voluntarily remediate that site may	Revised to read: Eligible applicants are any persons who own, operate, have a security interest or enter into a contract for the purchase or use of an eligible site. Those who wish to voluntarily remediate a site may apply to participate in the program. Any person who is an authorized agent of any of

		participate in the program. Any person who is an authorized agent of any of the parties identified in this subsection may participate in the program.	the parties identified in this subsection may apply to participate in the program. Necessary for consistency within the regulation.
	30 B 1.	None.	Added to clarify access requirements Necessary to require that the applicant ensure access is demonstrated throughout the remediation process.
30 C.	30 C 1.	Eligibility criteria – site eligible for participation criteria. A site on which an eligible party has completed remediation of a release is potentially eligible for the program...	Added subsection numbering to clarify requirements. A site on which an eligible party has performed remediation of a release is potentially eligible for the program if actions can be documented in a way that is equivalent to the requirements for this chapter...
30 C.	30 C 2.	Eligibility criteria – petroleum or oil releases.	Added subsection numbering to clarify requirements.
30 C.	30 C 3.	Eligibility criteria – documented evidence.	Added subsection numbering to clarify requirements.
30 C 1.	30 C 3 a.	Eligibility criteria – documented evidence.	Revised subsection numbering to clarify requirements.
30 C 2.	30 C 3 b.	Eligibility criteria – documented evidence.	Revised subsection numbering to clarify requirements.
30 C 3.	30 C 3 c.	Eligibility criteria – documented evidence.	Revised subsection numbering to clarify requirements.
30 D 1.		Eligibility criteria - remediation: Remediation of the release is the subject of a permit issued by the U.S. Environmental Protection Agency or the department, a pending or existing closure plan, a pending or existing administrative order, a pending or existing court order, a pending or existing consent order, or the site is on the National Priorities List;	Deleted the phrase "a pending or existing" from this division for clarification of requirements. Remediation of the release is the subject of a permit issued by the U.S. Environmental Protection Agency or the department, a closure plan, an administrative order, a court order, a consent order, or the site is on the National Priorities List.
30 D 3.		Eligibility criteria – remediation – Virginia Solid Waste Management Regulations requirements: The site at which the release occurred constitutes an open dump or unpermitted solid waste	Revised to replace the term "constitutes" with the phrase "has been determined by the department prior to the application submittal date to be" in order to be more consistent with Amendment 7 of the Virginia Solid Waste Management Regulations. Also added the phrase "...and such conditions still exist that made the site

		management facility...	an open dump or unpermitted solid waste management facility" in order to further clarify the open dump site exclusion to applicability.
30 D 5.		Eligibility criteria – local, state, or federal law or regulation requirements.	Revised to add the phrase “or investigation” to clarify that sites that are under investigation may be subject to other jurisdictions and the issue should be resolved before application to the VRP.
40 A.		Application for participation specifies the minimum information that must be provided.	Revised to delete the "at minimum" language. The application will henceforth just include the items listed. Necessary for clarity.
40 A 1.		Application for participation – requirements: A written notice of intent to participate in the program.	Deleted the requirement for a statement of intent and inserted a requirement for an overview. Necessary to allow for more information to be provided upfront in the process. Allows the department to provide input earlier in the eligibility process and to expedite the process.
40 A 4.		Application for participation - "legal description of the site".	Revised to require a map with approximate acreage of the site and approximate boundaries of the property (or approximate boundaries of the site, if the site is not the entire property. Necessary to accurately describe the project.
40 A 7.		Application for participation – discussion of jurisdiction requirement.	Revised to require that the applicable programs to be discussed are only those that require cleanup of the release. This change clarifies and further qualifies the requirement for information.
40 A 8.		Application for participation – notarized certification requirement.	Deleted the requirement for a notarized certification and revised to just require that the participant sign the application attesting to the best of his knowledge that all of the information in the application is true and accurate. Necessary to simplify application requirements.
	40 A 9.	None.	Added a requirement for the applicant to submit written documentation of the owner's permission to submit the application and agreement with the information in the application. Necessary to insure that the owner consents to the project and has no pertinent information contrary to the information provided in the application.
40 B.		Application for participation – requires a completeness review and	Revised to require the department to review the application for completeness and notify the applicant

		eligibility determination by the department within 60 days of receipt of an application.	within 15 days of the application's receipt and to verify eligibility within 60 days of the department's receipt of a complete application. Necessary to expedite completion of the application review requirements.
40 B.		None.	Language inserted to state that the department reserves the right to conduct eligibility verification inspections of the candidate site during the eligibility verification review. Necessary to ensure that the information in the application is correct.
40 C.		Provides that a tentative rejection of the application by the department becomes final if the applicant fails to respond to notice within 30 days. If within 30 days an applicant submits additional information to correct the inadequacies of an application, the review process begins again.	Revised to specify that the 30 days that the applicant has is a specified period from the date of receipt of the notice, and further requires that the application review process begin again if new information is submitted. Necessary to clarify the rejection process.
60 B.		Registration fee: Specifies that the registration fee shall be at least 1.0% of the estimated cost of the remediation at the site, not to exceed the statutory maximum and specifies the address that the fee shall be mailed to.	Revised to require that the preliminary registration fee amount shall be the statutory maximum amount (\$5000) and that payment be made to the receipts control mailbox. Necessary to ensure that the maximum statutory fee amount is paid up front so that early terminations and inaccurate cost projections do not result in inadequate fees.
60 C.		Applicant determination of the appropriate registration fee by estimating total costs of remediation.	Anticipated cost option is deleted to ensure that the maximum fee amounts are collected. Necessary to conform to the new fee requirement language in section 60 B.
	60 C.	See 60 C above.	Added to provide that failure to remit the required registration fee within 90 days of the date of eligibility verification shall result in the loss of eligibility status of the applicant and the applicant must reestablish his eligibility for participation in the program unless the department agrees to an extension. Necessary to ensure that the fee is submitted before remediation proceeds very far.
60 D.		Applicant determination of the appropriate	Deleted the existing section requirements. Necessary because the

		registration fee by submitting the statutory maximum fee amount.	statutory maximum fee amount option is redundant because new language covering this option is provided in subsection 60 B.
	60 D.	See 60 D above.	Added language to provide refund requirements for projects whose actual costs are less than \$500,000 and to specify that the refund amount will be the difference between the preliminary and final fee amounts calculated in new subdivision 60 D 1.
	60 D 1.	None.	Provisions are made for calculating the refund amount if a final cost summary is submitted within 60 days of issuance of the certificate. Necessary to provide a procedure for calculating the refund.
	60 D 2.	None.	Provisions for the refund amount when no final cost summary is submitted within 60 days are specified. Necessary to provide a procedure for calculating the refund.
	60 D 3.	None.	Disclaimer language for department concurrence is provided. Necessary to ensure that concurrence is not misinterpreted to mean that the department has verified the actual costs of remediation.
60 E.		Refund provisions for the balance of registration fee under the maximum fee option is provided.	Deleted. New language to clarify the requirements has been added to new subsections.
	60 E.	See 60 E above.	Added a refund provision that no portion of the registration fee will be refunded if participation in the program is terminated. Necessary to provide for program costs under circumstances where a refund might otherwise return most or all of the fee.
160-70 A.		Components of the Voluntary Remediation Report (VRR) are specified.	Revised this subsection to clarify that the renamed individual parts are still components of the VRR report and to continue to allow the components to be submitted separately or together. Necessary to clarify the reports and to conform to changes in the names of the components used in other sections of the regulation.
160-70 A 1.		Site characterization requirements are specified.	Revised to rename the report component, clarify requirements, and consolidate requirements applicable to the site characterization. Necessary to provide an understanding of the site conditions including the identification and description of each area of concern (or source); the nature and

			extent of releases to all media, the vertical and horizontal extent of contaminants on the site, including off-site areas as applicable; and a preliminary screening of the risk or risks posed by the release.
160-70 A 2.		Work to be performed - risk assessment requirements are specified.	Revised to clarify requirements, to address off-site risks, and to conform to term corrections. Necessary to properly address site risks.
160-70 A 3.		Work to be performed - remedial action work plan requirements are specified.	Revised to rename the report component, clarify requirements, consolidate requirements, and add provision for when no remediation is necessary. Necessary to clarify the information required in the Remedial Action Plan component of the VRR report.
160-70 A 4.	160-70 A 4 a, b, c, and d.	Work to be performed – demonstration of completion requirements are specified.	Revised to clarify and reorganize the requirements, to relocate some requirements, and to add site restriction requirements for the Demonstration of Completion Report. Necessary to be more specific about the information required in this component of the VRR report.
160-70 A 5.		Work to be performed – the public notice documentation is specified.	Revised to clarify requirements, to delete language listing the documents also required in section 120, and to reference those other requirements instead. Necessary to prevent unnecessary reports and records.
160-70 B.		The participant's responsibility to ensure that activities comply with all applicable regulations is specified.	Revised to clarify that compliance with all applicable federal, state and local laws is also required. Necessary to ensure that full compliance is required as part of the report.
160-70 C.		Provisions that all work shall be performed in accordance with appropriate test methods are provided.	Revise to clarify requirements to ensure proper sampling, updated tests, appropriate quality assurance protocols, and certified labs are used. Necessary to update requirements.
	160-70 D.	None.	Add new subsection to include the change in property ownership requirement relocated from subsection 30 B. Necessary to retain the requirement in a more appropriate subsection.
	160-70 E.	None.	Add new subsection to include the change in agent requirement relocated from subsection 30 B. Necessary to retain the requirement in a more appropriate subsection.
160-80 A.		Review procedures for VRR report submittals are	Revised to update the report description, to include sampling data

		specified.	from potentially affected sites other than the remediation site, and to remove unnecessary language. Necessary to conform to changes made elsewhere in the regulation.
160-80 B.		Review of submittals – the expedited permit option is provided.	Revised to add a permit waiver option, as appropriate. Necessary to conform to statutory language.
160-80 C.		Review of submittals – the determination procedure leading to issuance of a Certificate is provided.	Revised to ensure that the VRR report is both complete and adequate enough for a determination to be made. Necessary for clarification and for consistency with report requirements.
160-90 B, B 1, and B 2.		Requirement for remediation levels to be based upon a risk assessment and requirements for restricted and unrestricted use are specified.	Deleted. Requirements are rearranged and reorganized elsewhere in the section for clarity. Unnecessary language is deleted.
9VAC20-160-90 B 2		Requirement for sites that do not achieve the unrestricted use classification are specified.	Text deleted. Section rearranged and reorganized to clarify requirements.
160-90 C.	160-90 B.	Remediation levels requirements are specified.	Section renumbered and revised to clarify Tier I requirements.
160-90 C 1.	160-90 B 1.	Tier I sample collection requirement is specified.	Revised to clarify that remediation levels are based on media background levels determined from another portion of the property, nearby property, or other areas as approved by the department and to delete subdivision organization. Necessary to simplify and reorganize requirements.
160-90 C 2.	160-90 B 2.	Tier II generic remediation levels are specified using default assumptions.	Section renumbered and revised to clarify Tier II requirements and assumptions.
160-90 C 2 a.	160-90 B 2 a.	Tier II generic groundwater remediation levels are required to be based on federal laws, regulations, and regional EPA guidance.	Revised to clarify requirements and update references. Necessary to keep the regulation in conformance with the latest procedures for determining Tier II remediation levels.
160-90 C 2 b, C 2 b (1), and C 2 b (1) (a) and (b).	160-90 B 2 b, B 2 b (1), and B 2 b (1) (a) and (b).	Tier II soil remediation levels are provided to insure that migration of contaminants does not cause the cleanup levels for groundwater and surface water to be exceeded. Soil remediation levels are	Renumbered and revised to clarify soil remediation level requirements to reflect an upper-bound lifetime cancer risk reference of 1×10^{-6} with a risk reference of 1×10^{-5} for carcinogens and 0.1 of the soil ingestion concentration for noncarcinogens, and to update references. Necessary to keep the regulation in conformance

		determined according to EPA risk guidance.	with the latest procedures for determining Tier II soil remediation levels.
160-90 C 2 b (2), and C 2 b (2) (b).	160-90 B 2 b (2), and B 2 b (2) (b).	Remediation levels – site characterization data – Tier II soil remediation levels for cross-media transfer requirements are specified.	Renumbered and revised to clarify soil screening levels for cross-media transfers from soil to air at 1×10^{-5} for carcinogens, and to update references. Necessary to keep the regulation in conformance with the latest procedures for determining Tier II soil screening levels.
160-90 C 2 b (3).	160-90 B 2 b (2) (c).	For noncarcinogens and for sites where there are fewer than 10 contaminants exceeding 1/10 of the soil screening level, the procedures for determining soil screening levels are provided.	Renumbered, reorganized, and revised to clarify requirements and to correct style errors.
160-90 C 2 b (4).	160-90 C 2 b (3).	Allows values for soil remediation to be adjusted for toxicity.	Renumbered and revised to correct reference style errors.
160-90 C 2 c.		Remediation screening levels for Tier II ecological receptors are provided.	Deleted. Language concerning ecological risk assessment is moved from section discussing human health remediation levels to section 160-90 D. Necessary to clarify requirements.
160-90 C 2 d.	160-90 B 2 c.	For unrestricted future use, where surface water quality standards have been adopted by the State Water Control Board for a specific use, concentrations in other media must be demonstrated not to exceed the WQS in adjacent surface water bodies.	Renumbered and revised to clarify that Tier II remediation levels for surface water shall be based on the Virginia Water Quality Standards (WQS). Necessary to keep the regulation in conformance with the latest procedures for determining Tier II screening levels.
	160-90 B 2 c (1).	None.	Added to clarify Tier II remediation requirements for chronic aquatic life criteria. Necessary to keep the regulation in conformance with the latest procedures for determining Tier II remediation levels.
	160-90 B 2 c (2).	None.	Added to clarify that for contaminants that do not have a Virginia Water Quality Standard (WQS), the federal Water Quality Criteria (WQC) may be used if available. Necessary to keep the regulation in conformance with the latest procedures for determining Tier II remediation levels.
	160-90 B 2 c	None.	Added to clarify that if neither a

	(3).		Virginia WQS nor a federal WQC is available for a particular contaminant, the participant should perform a literature search or evaluate with a site-specific risk assessment. Necessary to keep the regulation in conformance with the latest procedures for determining Tier II remediation levels.
160-90 C 3.	160-90 B 3.		Section renumbered to account for deletion of original 9VAC20-160-90 B.
160-90 C 3.	160-90 B 3.	Criteria for determining Tier III remediation levels based upon a site-specific risk assessment are provided.	Renumbered and reworded to clarify requirements and allow the consideration of land-use controls. Necessary to clarify requirements.
160-90 C 3 b.	160-90 B 3 b.	The remediation goal for individual carcinogenic contaminants for a site with carcinogenic contaminants is specified to be an incremental upper-bound lifetime cancer risk of 1×10^{-6} .	The incremental upper-bound lifetime cancer risk factor of 1×10^{-6} is replaced with 1×10^{-5} . Provides increased efficiency in making site assessments without reducing the acceptable carcinogenic risk.
160-90 C 3 e.	160-90 B 3 e.	Remediation levels – site characterization data – Tier III – groundwater cleanup levels are provided.	Deleted. Requirements moved to 9VAC20-160-90 B 3.
160-90 C 3 f.	160-90 B 3 f.	Remediation levels – site characterization data – Tier III screening level ecological evaluations are provided.	Deleted. Requirements moved to 9VAC20-160-90 C 2 to group “ecological risks” together. Clarifies regulation requirements.
	160-90 C.	None.	Added a requirement for the participant to determine if ecological receptors are present at the site or in the vicinity of the site and if they are impacted by releases from the site. Necessary to provide for use of ecological receptors.
	160-90 C 1.	None.	Added a requirement to perform an evaluation to demonstrate that remediation levels are protective if ecological receptors are of concern. Necessary to provide for the use of ecological receptors.
	160-90 C 2.	None.	Requirements from 9VAC20-160-90 C 3 f are moved to this subdivision to group “ecological risks” in one section of the regulation. Necessary to simplify and clarify the regulation requirements.
160-100 A 2.		Program termination is required upon 30 days	Revised to indicate that the termination is because the participant withdrew

		written notice of termination by either party.	from the program. Necessary to clarify the nature of the termination.
	160-100 A 3		Failure to make reasonable progress is added as a reason for termination, as long as the participant is notified and given opportunity to respond. Necessary to keep projects moving toward completion.
160-100 C.		Refund of registration fee is prohibited for projects that were terminated prior to completion.	Deleted. Necessary to remove a redundant requirement that is now provided in new subsection 160-60 E.
160-110 A 2.		A condition for issuance of the certificate is provided that requires that the participant demonstrate that the site has met remediation levels and will continue to meet them for both on site and off site receptors.	Revised to ensure that the remediation levels met are only those applicable to the site. Necessary to clarify the requirement.
	160-110 A 3.	None.	Added to ensure that all of the provisions of the action plan are completed before a certificate is issued. Necessary to ensure that the project is properly completed.
	160-110 A 4.	None.	Added to ensure that all applicable regulatory requirements are met before a certificate is issued. Necessary to ensure that the project is properly completed.
160-110 A 3.	160-110 A 5.	Certification of satisfactory completion of remediation – department concurrence with the work submitted is required.	Subdivision is renumbered to accommodate the addition of the new subdivisions A 3 & A 4, corrects a reference, and revises the requirement so that the department only has to accept the work submitted instead of concur with it. Necessary to allow the department flexibility in issuing the certificate.
160-110 B		Enforcement action immunity is provided.	Revised to provide immunity only for the release or releases described in the certificate. Necessary to properly limit enforcement immunity.
	160-110 C	None.	Added criteria for a remediated site to meet to achieve an unrestricted use classification. Necessary for issuing an unrestricted use certificate.
	160-110 D.	None.	Added criteria for a remediated site to meet to achieve a restricted use classification. Necessary for issuing a restricted use certificate.
160-110 C.	160-110 E.	Requirements for the legal recording of a	Renumbered and revised to add a time requirement on recording a restricted

		certificate with the deed are provided.	use certificate, to delete a redundant permissive requirement, and to clarify other requirements. Necessary to ensure that the certificate is recorded in a timely manner.
160-110 D.	160-110 F.	Requirements and limits on the enforcement immunity provided by the certificate are specified.	Renumbered and revised to limit the immunity to the releases described in the certificate and dependent upon the contamination as presented in the voluntary remediation report. Necessary to properly limit enforcement immunity.
160-110 E, E 1, E 2, and E 3.	160-110 G, G 1, G 2, and G 3.	A requirement that the certificate specify the conditions for which immunity is being accorded is provided.	Renumbered. Necessary to account for the addition of new sections.
160-110 E 4.	160-110 G 4.	Land use controls are specified as being among the conditions for which immunity may be accorded.	Renumbered and revised to specify that proffered land use controls are among those conditions. Necessary to clarify requirements.
160-110 E 4 a and b.		Two examples of land use controls that may be listed in the certificate as immunity conditions are provided.	Deleted. Examples are unnecessary and possibly confusing. Necessary to simplify and clarify requirements.
	160-110 E 5.	None.	Post-certificate monitoring is added to the list of possible conditions for which immunity is accorded by the certificate. Necessary to clarify requirements.
160-110 F.	160-110 H.	Provision for revocation of a certificate is provided.	Renumbered and revised to provide notice and opportunity for the participant to correct the deficiency prior to revoking the certificate. Necessary to prevent unnecessary revocation actions.
160-110 F.	160-110 H 1, 2, and 3.	Situations under which a certificate may be revoked are specified.	Renumbered, reorganized and reworded for consistency and grammar. Necessary to clarify revocation requirements.
160-110 F.		Rights to pursue claims and are reserved for the department and rights of sovereign immunity are reserved for the department.	Deleted. These requirements are moved to subsection 160-110 J and new subsection K. Necessary to separate rights reserved to the department from conditions of revocation.
160-110 G	160-110 I	The certificate is further characterized by statements concerning what the certificate is not.	Renumbered to account for addition of new sections.
	160-110 J.	None.	Added to provide a revised statement reserving the right for the department to pursue action for failure to complete a program requirement of for liability

			arising from such failure that was removed from subsection 160-110 F. Necessary to preserve and relocate a needed requirement.
	160-110 K.	None.	Added to provide a revised statement preserving rights of sovereign immunity for the Commonwealth that was removed from subsection 160-110 F. Necessary to preserve and relocate a needed requirement.
160-120 A.		Public notice requirements of proposed remediation projects are provided.	Revised to limit notice requirements and to clarify other notice requirements. Necessary to be consistent with other changes to the regulation.
160-120 A, A 1, A 2, and A 3.	160-120 B, B 1 and B 2.		Added subsection and subdivision numbers to better organize public notice requirements. Necessary for clarity.
9VAC20-160-120 A 2	9VAC20-160-120 B 2	Requirement to provide public notice to adjacent property owners is specified.	Revised to add a requirement that other affected property owners be notified also. Necessary to protect all affected owners.
160-120 B, B 1, B 2, B 3, and B 4.	160-120 C, C 1, C 2, C 3, and C 4		Renumbered. Necessary to account for the inclusion of additional subsections.
160-120 B.	160-120 C.	A comment period of at least 30 days is required.	Revised to allow the comment period to be extended to 60 days at the discretion of the department and to correct a reference. Necessary to allow needed flexibility.
160-120 B 2.	160-120 C 2.	The public notice must contain a brief description of the project.	Revised to require a description of any remediation. Necessary for clarity.
	160-120 D.		Added to require the participant to acknowledge receipt of comments, and to provide responses to the comments. Necessary to ensure that the participant is responsive to the commenters.
160-120 C.	160-120 E, E 1, and E 2.	Documentation requirements for the public comment period are specified.	Subsection is renumbered and subdivisions added to better organize the requirements for clarity. Revised to refer to requirements elsewhere in the section instead of duplicating them. Necessary to simplify and clarify requirements.
	160-120 E 3.	None.	Added to complete the documentation requirements previously specified in section 70. Necessary to allow section 70 to be simplified.
160-120 D.		Requirement is provided for the participant to send commenters a letter of acknowledgement.	Deleted subsection. Revised requirement included in new subsection D. Necessary to move and revise subsection for clarity.

160-120 E.		Requirements for public notice documentation are provided.	Delete subsection. Revised requirements are included in new subdivision 160-120 E 3.
DOCUMENTS INCORPORATED BY REFERENCE		DOCUMENTS INCORPORATED BY REFERENCE	Updated the USEPA document referenced in 9VAC20-160-70 C (Test Methods for Evaluating Solid Waste: Physical/ Chemical Methods; EPA Publication SW-846, Third Edition). Necessary to keep regulation current.
DOCUMENTS INCORPORATED BY REFERENCE		DOCUMENTS INCORPORATED BY REFERENCE	Added document referenced in 9VAC20-160-90 C 2 (USEPA Supplemental Guidance for Developing Soil Screening Levels for Superfund Sites – OSWER, December 2002, Document 9355.4-24). Necessary to keep regulation current.
DOCUMENTS INCORPORATED BY REFERENCE		DOCUMENTS INCORPORATED BY REFERENCE	Deleted document: Risk Based Concentration Table, Region III, United States Environmental Protection Agency, April 2, 2002. Not used in regulation.
DOCUMENTS INCORPORATED BY REFERENCE		DOCUMENTS INCORPORATED BY REFERENCE	Added document: Regional Screening Level Table, Region III, VI, and IX, United States Environmental Protection Agency, December 2009. Necessary to keep regulation current.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

This is a voluntary program. There are no known alternative regulatory methods that would achieve the stated purpose of the program in a less burdensome and intrusive manner.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and

one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

This proposed regulatory action has no substantial impact on the institution of the family or on family stability.

**SUMMARY AND ANALYSIS OF PUBLIC COMMENT FOR REGULATION AMENDMENT 2
CONCERNING VOLUNTARY REMEDIATION REGULATION (9VAC20-160)****SUMMARY OF PUBLIC PARTICIPATION PROCESS**

A public hearing was held in Richmond, Virginia on November 6, 2012. Nine persons attended the hearing, and none of those persons offered oral or written comments during the public hearing. Fourteen sets of written comments were received during the public comment period. As required by law, notice of this hearing was given to the public on September 24, 2012 in the Virginia Register. In addition, personal notice of this hearing and the opportunity to comment was given by mail to those persons on the Department's list to receive notices of similar proposed regulation revisions. A list of hearing attendees and the complete text of all comments is included in the hearing report which is on file at the Department.

ANALYSIS OF COMMENT

Below is a summary of each of the comments and the accompanying analysis. Included is a brief statement of the subject, the identification of the commenter, the text of the comment and the Board's response (analysis and action taken). Each issue is discussed in light of all of the comments received that affect that issue. The Board has reviewed the comments and developed a specific response based on its evaluation of the issue raised. The Board's action is based on consideration of the overall goals and objectives of the voluntary remediation program and the intended purpose of the regulation.

1. **SUBJECT**: Definition of "natural attenuation."

COMMENTER: Jason S. Early, Environmental Alliance, Inc.

TEXT: Under 9VAC20-160-10 Definitions, the definition of "Natural attenuation" should be revised to be consistent with EPA's definition (OSWER Directive Number 9200.4-17P, 1999). The definition should be revised to (italicized text):

"Natural attenuation" means the processes by which contaminants break down naturally in the environment. Natural attenuation processes "include a variety of physical, chemical, or biological processes that, under favorable conditions, act without human intervention to reduce the mass, toxicity, mobility, volume, or concentrations of contaminants in soil or groundwater."

The important point of using EPA's definition is that it includes the physical processes of natural attenuation (e.g., dilution, dispersion, sorption, and volatilization) that do NOT result in a breakdown of contaminants, but rather result in reduction of contaminant concentration, reduction of contaminant mobility, or transfer of contaminants from one phase to another (e.g., dissolved in water to air). In our experience, regulatory agencies often emphasize the biological and chemical processes (which result in a breakdown of contaminants to other chemicals) for demonstrating that natural attenuation is occurring at a site while ignoring the equally important physical processes.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

2. **SUBJECT**: Definition of "monitored natural attenuation."

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-10) -The new definition "monitored natural attenuation" is defined as follows: "a remediation process which closely monitors the natural or enhanced attenuation process." It is unclear what "closely" means. Is it weekly, monthly or annually, or is it some other time period? As the Department will be involved in any decisions on the frequency, please consider deleting the word "closely" as it appears to simply add uncertainty in the definition.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

3. **SUBJECT:** Definition of "monitored natural attenuation."

COMMENTER: Pamela F. Faggert, Dominion Resources Services, Inc. (Dominion).

TEXT: In the definition for "Monitored natural attenuation" the proposal utilizes the term "closely" to describe monitoring. The term "closely" could be subjective. As the plan for use of remediation technology will be decided upon in concert with the Department, a frequency and detail for monitoring can be determined in this stage with the property owner. Therefore, we request that the word "closely" be replaced with something similar to "*a frequency and detail determined in conjunction with the Department*".

RESPONSE: See the response to comment 2.

4. **SUBJECT:** Property access requirement.

COMMENTER: James A. Thornhill, McGuireWoods LLP; and Tom Hardy, Environmental Consultants and Contractors. Inc. (ECC Inc.).

TEXT: (9VAC20-160-30 B 1) - The new provision B 1 under the eligibility criteria provides that applicants must demonstrate that they have access beginning at the time of the application. Many VRP applicants are contract purchasers and the owners generally are only willing to consent to the submission of the application. Access to the property is limited to the contractual due diligence period, which may be for a limited period and may not extend through the entire application process. Once deemed eligible the closing generally occurs and the applicant becomes the owner. Except for access for purposes of an inspection by the Department as provided in 9VAC20-160-40 B (which occurs infrequently), the access requirement should begin when the application fee is delivered for entry into the program as that is when the access requirement should commence. There generally is no reason for access during the time the Department is reviewing the application other than the infrequent site inspection by the Department during the application process. Please consider amending proposed 9VAC20-160-30 B 1 as follows:

Access: Applicants who are not the site owner must demonstrate that they have access to the property for purposes of inspections required by the department during the application process as provided in 9VAC20-160-, and at the time of payment of the registration fee in accordance with 9VAC20-160-60, application, and must maintain such access right during the investigation, and throughout the remedial activities until the remediation is completed.

The application section (9VAC20-160-40) should be amended to add a requirement for an applicant who is not the owner to have the consent of the owner to submit the application as suggested in comment 11 below.

RESPONSE: The comment concerning access is appropriate and changes have been made to reflect the intent of this comment. See the response to comment 11 concerning having the owner's consent to submit the application.

5. **SUBJECT:** Placement of change of ownership requirement.

COMMENTER: James A. Thornhill, McGuireWoods LLP; and Channing J. Martin, Williams Mullen.

TEXT: (9VAC20-160-30 B 2 B 3) - The requirement to advise the Department of a change in the ownership of the property or the participant's agent during the time the site is in the VRP are fair, but they do not seem to belong in the eligibility section of the regulations. Please consider placing them in a new section for clarity.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

6. **SUBJECT:** Change of ownership requirement.

COMMENTER: Channing J. Martin, Williams Mullen.

TEXT: Regarding 9VAC20-160-30 B 2 B 3, I am concerned that these owner notification requirements are not specific enough and as to the ownership requirement, could be interpreted to require notice years after the project is completed. I do think, however, that it makes sense to require these notices during the project. Thus, I suggest that B 2 be moved and then revised to say, "Change in ownership: During the project, the department shall be notified by the participant if there is a change in the property ownership." Similarly, B 3 should be moved and revised to say, "Change in agent: During the project, the department shall be notified by the participant if there is a change in the agent for the property owner or the participant."

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

7. **SUBJECT:** Uncertainty surrounding open dump eligibility.

COMMENTER: James A. Thornhill, McGuireWoods LLP; and Tom Hardy, ECC Inc.

TEXT: (9VAC20-160-30 D 3) - The VRP regulations currently provide that a site is not eligible for the VRP pursuant to 9VAC20-160-30 D 3 where:

The site at which the release occurred constitutes an open dump or unpermitted solid waste management facility under 9VAC20-81-45 of the Solid Waste Management Regulations;

For approximately 10 years the Department has been working on guidance for consistent application of the eligibility criteria for open dumps. The regional offices have struggled with how to apply the open dump criteria to a site seeking eligibility not knowing whether it is necessary to require pre-eligibility sampling or what date or dates of disposal matter. One of the areas of the Commonwealth most benefitted by the VRP is the Carlyle area of Alexandria where the United States Patent and Trademark was developed partially on an old landfill. Even after a number of portions of such landfill had been entered into the program, a debate arose due to the "open dump" criteria when the Alexandria Carlyle Centre site applied for eligibility to enter the program.

While ultimately allowed to enter the program, there should have never been a debate and could have been avoided with a clear standard.

Language provided to the Technical Advisory Committee (TAC) during development of this regulatory revision would have finally brought a bright line test as to when a site would not be eligible as an open dump. Instead, the Department has proposed language that is still unclear and leaves open many questions.

The site at which the release occurred ~~constitutes has been determined to be an open dump or unpermitted solid waste management facility under Part IV (9VAC20-80-170 et seq.) of the Virginia Solid Waste Management Regulations.~~

Has been determined when? Before application? Does the Department have to ask for sampling to know whether to determine if the site is an open dump? If the Department desires to follow this path, please consider revising the proposed language as follows for clarification:

The site at which the release occurred ~~constitutes has been determined in writing by the department prior to the date of application with notice to the owner to be an open dump or unpermitted solid waste management facility under Part IV (9VAC20-80-170 et seq.) of the Virginia Solid Waste Management Regulations and such conditions still exist that made the site an open dump or unpermitted solid waste management facility.~~

There should not be a question every time a former solid waste disposal site is proposed for the VRP. The Department should finally put an end to the uncertainty surrounding these sites

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

8. **SUBJECT:** Application requirements.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-40 A 1) - The proposed addition of the language “and an overview of the project” is a fair request for the application, but not every VRP site is an immediately planned redevelopment project nor is that required by the statute for eligibility. Please consider the revising the language as follows:

1. A written notice of intent to participate in the program and an overview of the project, transaction or other reason for application to the program;

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

9. **SUBJECT:** Application requirements.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-40 A 4) - The Department has proposed to change this section to require a map and acreage as well as the boundaries of the VRP site if less than the entire site. This is a good and helpful change from the present legal description requirement. In many instances though the exact acreage and boundaries are not known at the time of application, but are set by the time the certificate is issued. Please consider adding the word “approximate” before “acreage” and “general” before “boundaries.”

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

10. **SUBJECT:** Application requirements.

COMMENTER: Channing J. Martin, Williams Mullen; and Tom Hardy, ECC Inc.

TEXT: Regarding 9VAC20-160-40 A 4, I suggest that it be revised as follows: "A plat of the property that indicates its approximate acreage and, if the site is less than the entire property, shows the approximate boundaries of the site."

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

11. **SUBJECT:** Application requirements.

COMMENTER: James A. Thornhill, McGuireWoods LLP; and Tom Hardy, ECC Inc.

TEXT: (9VAC20-160-40 A 8) - The Department proposes the following change to 9VAC20-160-40 A 8:

~~8. A notarized certification by the applicant that to the best of his knowledge all the information as set forth in this subsection is true and accurate. An application signed by the applicant and the owner of the property attesting that to the best of their knowledge that all of the information as set forth in this subsection is true and accurate.~~

The typical situation where the applicant is not the owner is when the applicant is a contract purchaser. The owner is not performing the work or proposing to take the site into the VRP, so few owners are willing to sign the application attesting to the information. As the owner is not applying there is no reason for the owner to have to attest to the information. The proposed change will prevent numerous sites from coming into the program for no good reason. The owner's consent to submission of the application should be sufficient. The following is proposed as a substitute for 9VAC20-160-40 A 8:

An application signed by the applicant representing to the best of the applicant's knowledge that the information as set forth in the application as required by this subsection is true and accurate. If the applicant is not the owner of the site proposed, the applicant must provide written documentation that the owner of the site consents to the submission of the application.

RESPONSE: The department requires a full and accurate record regarding the past history of the site. The primary purpose of the application is for the establishment of VRP eligibility. The application summarizes the environmental compliance history of the site, and the environmental history/ current conditions are evaluated during the eligibility process. If the current property owner has specific knowledge related to the information requested in the application, this will provide the department with a greater level of understanding of the site as it is evaluated for participation in the VRP.

However, getting the owner's signature on the application may be problematic for the participant for a number of reasons, so changes have been made to the proposal to remove the requirement for the owner to sign the application. Instead, the participant will have to provide documentation

of (i) the owner's written consent to the project and (ii) the owner's agreement in writing that the application information is substantially correct.

12. **SUBJECT:** Payment of application fee.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9 VAC 20-160-60 C) - The new provision on the application fee being paid within 90 days of being deemed eligible appears appropriate. However, the second sentence of the provision is unclear. It states: "The applicant must reestablish his eligibility for participation in the program, unless alternate provisions are proposed and deemed acceptable to the department." Please consider some language other than "alternate provisions" such as the following:

C. Failure to remit the required registration fee within 90 days of the date of eligibility verification shall result in the loss of eligibility status of the applicant. The applicant must reestablish his eligibility for participation in the program, unless ~~alternate provisions are proposed and deemed acceptable to the department~~ the department agrees to extend the period for payment for good cause shown by the applicant.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

13. **SUBJECT:** Payment of application fee.

COMMENTER: Tom Hardy, ECC Inc.

TEXT: (9 VAC 20-160-60 C) - Thornhill proposed the following language: Failure to remit the required registration fee within 90 days of the date of eligibility verification shall result in the loss of eligibility status of the applicant. The applicant must reestablish his eligibility for participation in the program, unless ~~alternate provisions are proposed and deemed acceptable to the department~~ **the department agrees to extend the period for payment for good cause shown by the applicant.**

I agree with the proposed language. My clients rarely blink at the enrollment fee, but I have had clients who failed to submit the enrollment fee in a timely manner, generally due to an oversight, and the department should have the flexibility to recognize that without repeating the eligibility process

RESPONSE: See the response to comment 12.

14. **SUBJECT:** Demonstration of completion.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-60 D) - The current regulations require that the total cost of the remediation be provided as a part of the demonstration of completion. For clarity and consistency with the applicant having the option (but not an obligation) to seek reimbursement of a portion of the application fee, and for consistency with 9 VAC 20-160-70 please consider the following revisions to the Departments proposed to 9VAC20-160-60 D:

D. Upon completion of remediation ~~and issuance of the Certificate of Satisfactory Completion of Remediation~~, the participant is entitled to seek a partial refund of the registration fee as a part of the Demonstration of Completion Report submitted pursuant to 9 VAC 20-160-70 A 4. The refund will be reconciled as 1.0% of the final cost of remediation as compared to the initial registration fee.

1. If the participant wishes to seek a portion of the application fee, tThe participant shall provide the department with a summary of the final cost of remediation within 60 days of issuance of a certificate. The department shall calculate the balance adjustment to be made to the initial registration fee and refund the difference.

RESPONSE: Seeking a refund prior to certificate issuance is premature because there could be additional costs associated with the review of the Demonstration of Completion Report (DOCR) and preparation of the Certificate of Satisfactory Completion that would then not be reflected in the final cost of remediation. The intent of the proposal was to shift the registration fee reconciliation process until after certificate issuance in order to capture all costs associated with the remediation process. No change is made to the proposal in response to this portion of the comment.

However, the department recognizes the value in revising the refund provisions to make it clear that there is no obligation on the part of the participant to seek a partial refund of the registration fee. So changes have been made to the proposal to reflect the intent of this portion of the comment.

15. **SUBJECT:** Demonstration of completion.

COMMENTER: Channing J. Martin, Williams Mullen.

TEXT: Regarding 9 VAC 20-160-60, I agree with Mr. Thornhill's comment on this subject, except I do not agree with his proposed language indicating that one's right to seek a refund is to be conditioned on making the request in the Demonstration of Completion Report (DOCR). My concern in requiring that the request for a refund be in the DOCR is that it may unfairly penalize those who should get money back, but who request it otherwise than in the DOCR. As to Mr. Thornhill's proposed language for 9 VAC 20-160-60 D 1, I suggest that it be modified to say, "If the participant wishes to seek **a refund** of a portion of the application fee...."

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

16. **SUBJECT:** Voluntary Remediation Report requirements.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-70 A) - New language is proposed requiring each component of the Voluntary Remediation Report have to be separate. Why is this necessary? This seems very regulatory for a "voluntary" program. Many times sites come into the program with varying degrees of characterization and at times with the site characterization and risk assessment combined. Also, the descriptions of the various reports likewise point to the need for flexibility in this "voluntary" program. For example, the department sees a need for a preliminary risk discussion in the site characterization report in 9VAC20-160-70 A 1, although there is a separate risk assessment. Additionally, in 9VAC20-160-70 A 3 if remedial activities have occurred prior to enrollment in the program then the remediation is to be discussed in the site characterization. However, the remediation would need to be completed to meet risk levels so the risk assessment

would have to be included as well, although it is supposed to be in a separate report. The department needs to weigh the benefit it receives with separate reports versus the flexibility that should be offered to the voluntary remediation program participants in this "voluntary" program.

RESPONSE: The intent of the proposal was to define a basic format for the information being submitted. There has been a lot of variation in the quality and format of the content in the information reports submitted to the program. As a result, the department has found it necessary to be more specific concerning the format and information requirements contained in these reports. Also, it is more efficient for the program project managers & risk assessors to receive and review submittals that are consistently organized, have a consistent format, and that address all of the regulatory requirements of the VRP in a way that can easily be determined to be complete. Some overlap between the parts is necessary because all of the parts may not necessarily be submitted at the same time and less may be known about the project in earlier stages. Most of the department's other programs have similar information organization and formatting requirements for important reports. Accordingly, no change is made to the proposal in response to this part of the comment.

The department has historically been flexible concerning whether the components of the Voluntary Remediation Report were submitted in separate reports or together as parts of a larger report. However, the department recognizes that the proposed language specified that separate reports were to be made. That proposal was not intended to prevent flexibility in how the components were submitted. Therefore, changes have been made to reflect the intent of this portion of the comment.

17. **SUBJECT:** Voluntary Remediation Report requirements.

COMMENTER: Tom Hardy, ECC Inc.

TEXT: Concerning Mr. Thornhill's comment suggesting new language for 9VAC20-160-70 A: I agree that the participant and its consultant should be able to determine how to best prepare the reports, but I understand that DEQ staff would prefer to receive reports in "familiar" formats in order to decrease the review time. I prefer to have clearly delineated SCRs, Risk Assessment, and RAP reports but combining those studies in one report may make more sense for certain sites – and that is a discussion the consultant and case officer can have, rather than it being mandated in the regulations.

RESPONSE: See the response to comment 16.

18. **SUBJECT:** Voluntary Remediation Report requirements.

COMMENTER: Pamela F. Faggert, Dominion.

TEXT: Section 9VAC20-160-70 A states the following: "*A separate report shall be submitted for each component of the Voluntary Remediation Report listed below:*" While there may be potential merits of having each report component in a modular format for the Department's review, there are times when this particular type of separation is not practical. In some cases, this information may already be produced and in a single document, such as a site characterization and a risk assessment. What is important is that all of the components are received to make a complete Voluntary Remediation Report and that this type of flexibility should be added to this section.

RESPONSE: See the response to comment 16.

19. **SUBJECT**: Annual reporting requirement.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-70 D) - The Department has proposed a new provision as follows:

D. Until certificate issuance, all participants shall submit an annual report to the department containing a brief summary of any actions ongoing or completed as well as any planned future actions for the next reporting period. This report shall be submitted by July 1 using the "VRP Site Status Reporting Form." Failure to submit within 60 days may result in the site's Voluntary Remediation Program eligibility status being terminated.

This is a fairly draconian provision for a "voluntary" program. This provision needs some element of notice before termination instead of having a "gotcha" type effect when a participant may be actively working through the program and simply fails to submit the completed form.

RESPONSE: This comment is appropriate. The annual reporting requirement has been removed from the proposal.

20. **SUBJECT**: Annual reporting requirement.

COMMENTER: Tom Hardy, ECC Inc.

TEXT: (9 VAC 20-160-70 D) - The Department has proposed a new provision as follows:

D. Until certificate issuance, all participants shall submit an annual report to the department containing a brief summary of any actions ongoing or completed as well as any planned future actions for the next reporting period. This report shall be submitted by July 1 using the "VRP Site Status Reporting Form." Failure to submit within 60 days may result in the site's Voluntary Remediation Program eligibility status being terminated.

I agree that the proposed language is not helpful for a voluntary program and should be softened – if a participant feels that eligibility can be terminated simply because a form has not been submitted on time the participant will question whether it is wise to spend money and time to proceed through the program knowing that that risk is out there. The alternative proposed by Thornhill requiring receipt of notice from the department is good.

RESPONSE: See the response to comment 19.

21. **SUBJECT**: Annual reporting period.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-70 D) - The Department needs to clarify what the "reporting period" is. The proposed language is not helpful for a voluntary program and should be softened. Please consider the following revisions to the proposed revision:

D. Until certificate issuance, all participants shall submit an annual report for the July 1st to June 30th time period to the department containing a brief summary of any actions ongoing or completed as well as any planned future actions for the next annual reporting period. This report shall be submitted by July 4 30th following the end of the previous annual reporting period using the "VRP Site Status Reporting Form-" if such form has been developed and made available by the department prior to the end of the applicable

reporting period or, if not, in writing to the department. Failure to submit an annual report within 630 days of receipt of notice from the department that the annual report has not been received may result in the site's Voluntary Remediation Program eligibility status being terminated.

RESPONSE: See the response to comment 19.

22. **SUBJECT:** Annual reporting period.

COMMENTER: Pamela F. Faggert, Dominion.

TEXT: 9VAC20-160-70 D discusses submittal of an annual progress report. It is uncertain what the reporting period is for this report. We recommended adding the reporting period to provide program participants with a context for reporting.

RESPONSE: See the response to comment 19.

23. **SUBJECT:** Eligibility termination for lack of proper reports.

COMMENTER: Pamela F. Faggert, Dominion.

TEXT: 9VAC20- 160-70 states that: *"Failure to submit a reporting form within 60 days may result in the site's Voluntary Remediation Program eligibility status being terminated."* While not stated, we recommend that the Department make notification or reminders to participants prior to a termination determination. It is in the best interest of all parties to keep participants in otherwise good standing active in the program and not terminated.

RESPONSE: See the response to comment 19.

24. **SUBJECT:** VRP Site Status Reporting Form.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: Also, where can one find the "VRP Site Status Reporting Form?" If it has not yet been developed then there cannot be a requirement to submit such a form.

RESPONSE: The annual reporting requirement has been removed from the proposal in response to other comments, so a reporting form is no longer necessary. References to the form have been removed from the proposal.

25. **SUBJECT:** VRP Site Status Reporting Form.

COMMENTER: Pamela F. Faggert, Dominion.

TEXT: 9VAC20- 160-70 refers to the "VRP Site Status Reporting Form." This form was not available for review; therefore it is not possible to comment on this provision at this time. We request that the Department make the form available for public review and comment.

RESPONSE: See the response to comment 24.

26. **SUBJECT**: Reference dates.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-90) - Where referencing outside standards, the dates need to be updated.

RESPONSE: The references in the list of Documents Incorporated by Reference section have been updated to be consistent with their use in other regulations. These references will remain "frozen in time" for regulatory use until the next regulation revision even though updates to those documents are published by their originator. Copies of these dated regulations will be available from the Virginia Register of Regulations as long as they are referenced in any Virginia regulation. No change is made to the proposal in response to this comment.

27. **SUBJECT**: Eligibility termination for lack of reasonable progress.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-100 A 3) - A new proposed termination provision has been added as follows:

3. Upon participant's failure to make reasonable progress towards completion of the program, as determined by the department.

This is a very subjective standard for termination. Presumably, this is to match up with the Department's current practice of issuing a 30-day letter when not having received any submissions for six months to a year. This places quite an element of doubt on those participating as to what is meant by "reasonable progress" and what delays may be acceptable. For example, does it mean that a participant only has three months to complete its site characterization or to obtain off site access before the Department will terminate the involvement in the program. If not, is it six months? Nine months? Again, this is a "voluntary" program and there should not be provisions in the regulations that discourage enrollment. Granted, if there is simply no movement for a year and no response to a 30-day letter then termination appears appropriate, but if a participant advises of its intent to remain in the program there does not appear to be a good reason to terminate them. Please consider the following in lieu of the proposed language:

3. Upon participant's failure to make reasonable progress towards completion of the program, as determined by the department, and subsequently failing to respond within thirty (30) days of receipt of the department's written request expressing in a written response the participant's intent to remain in the program and to fulfill the program requirements.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

28. **SUBJECT**: Eligibility termination for lack of reasonable progress.

COMMENTER: Pamela F. Faggert, Dominion.

TEXT: 9VAC20-160-100 describes the conditions in which program participants may be terminated from the program. Subsection A 3 states that a participant may be terminated for not making "reasonable progress toward completion of the program, as determined by the department." While it is understood that the Department should have the discretion to remove

participants that are in essence inactive, the manner in which this statement is written leaves considerable doubt for any due process for the participant to stay in the program. As an alternative, we suggest this statement be amended as follows:

"Upon participant's lack of reasonable progress towards completion of the program as committed to in their annual VRP Site Status Reporting Form and upon failure to respond to department inquiries within the designated timeframes, as determined by the department.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

29. **SUBJECT:** Project termination.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-100 A 4) - A new proposed termination provision has been added as follows:

4. Upon fulfillment of all program requirements and issuance of the Certification of Satisfactory Completion of Remediation as described in 9VAC20-160-110, notwithstanding any conditions of issuance specified in the Certificate.

The proposed termination may be somewhat premature. What happens if the certificate requires recordation due to the restrictions imposed and it is not recorded within 90 days of issuance? There can be instances where there is a material mistake in the certificate or all of the necessary signatures cannot be obtained and the certificate needs to be reissued. Does the participant have to re-apply for enrollment since the matter is terminated? The participation should end in the case of a certificate that is recorded upon recordation thereof. Please consider the following revisions to the proposed new provision:

4. Upon fulfillment of all program requirements and issuance of the Certification of Satisfactory Completion of Remediation as described in 9VAC20-160-110 C for unrestricted use or recordation of the Certification of Satisfactory Completion of Remediation for a restricted use site in accordance with 9VAC20-160-110 E, notwithstanding any conditions of issuance specified in the Certificate ion of Satisfactory Completion of Remediation.

RESPONSE: This comment is appropriate. The proposed termination requirement in 9VAC20-160-100 A 4 has been deleted in response to this comment.

30. **SUBJECT:** Releases.

COMMENTER: Channing J. Martin, Williams Mullen.

TEXT: At the end of 9VAC20-160-110 B, the department has added "for the release or releases addressed." My concern is that the word "addressed" could be wrongly interpreted by some to mean only those releases that have been subject to some form of active remediation. Since the releases subject to the certificate are always described in the certificate, I propose that the word "addressed" be deleted and that the words "described in the certificate" be substituted in its place. Similarly, it would be appropriate to change subsection F to comport with this language, such that subsection F would read: "The immunity granted by issuance of the certificate shall be limited to releases that are existing at the time of issuance as those releases are described in the Virginia Voluntary Remediation Report."

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

31. **SUBJECT:** Restrictions on the certificate.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-110 E) - At the end of the first sentence the phrase “within 90 days of execution of the certificate by the department, unless specified in the certificate” was added. The language that the TAC saw at one point had the words “a longer duration is” after “unless.” Without these words or using the word “otherwise,” the language does not make sense. Please consider changing the language as follows:

...within 90 days of execution of the certificate by the department, unless a longer duration is specified in the certificate.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

32. **SUBJECT:** Certificate revocation.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9 VAC 20-160-110 H) - The Department proposes the underlined changes below to the certificate revocation language:

H. The certificate may be revoked by the director department at any time in the event that conditions at the site, unknown at the time of issuance of the certificate, pose a risk to human health or the environment or in the event that the certificate was based on information that was false, inaccurate, or misleading. The certificate may also be revoked for the failure to meet or maintain the conditions of the certificate. Any and all claims may be pursued by the Commonwealth for liability for failure to meet a requirement of the program, criminal liability, or liability arising from future activities at the site that may cause contamination by pollutants. By issuance of the certificate the ~~director~~ department does not waive sovereign immunity. Failure to implement and maintain land use controls may result in revocation of the certificate.

The insertion of the two new sentences confuses the original intent of the provision. Additionally, the two new revocation sentences are ones where notice should be given to the current property owner of the issue with a right to cure before revocation after the time and expense that would have been incurred to take the site through the program. Please consider the following changes to the proposed revised provision:

H. The certificate may be revoked by the director department at any time in the event that conditions at the site, unknown at the time of issuance of the certificate, pose a risk to human health or the environment or in the event that the certificate was based on information that was false, inaccurate, or misleading. Additionally, the certificate may also be revoked for the failure to meet or maintain the conditions of the certificate or failure to implement and maintain land use controls specified therein upon written notice to the current owner of the property that is the subject of the certificate and a failure to cure within sixty (60) days or some other longer reasonable period granted by the department . Any and all claims may be pursued by the Commonwealth for liability for

failure to meet a requirement of the program, criminal liability, or liability arising from future activities at the site that may cause contamination by pollutants. By issuance of the certificate the ~~director~~ department does not waive sovereign immunity. ~~Failure to implement and maintain land use controls may result in revocation of the certificate.~~

RESPONSE: This comment is appropriate. Although written notice and the opportunity to fix the problem are required by the Administrative Process Act, a clarifying change has been made to the proposal as a result of this comment.

33. **SUBJECT:** Report of transfer of property.

COMMENTER: James A. Thornhill, McGuireWoods LLP; and Tom Hardy, ECC Inc.

TEXT: (9VAC20-160-110 J) - While it is understandable that the department would like to know of a transfer of the property subject to a VRP certificate upon a transfer as provided in the new 9VAC20-160-110 J, the addition of this provision requiring notice to the department of a change in ownership will cause many issues: (A) With the change in 9VAC20-160-110 H to add as a reason for revocation being the failure to meet a condition of the certificate, the department could revoke the certificate simply because a new owner did not register with the department, although there is no new risk to human health or the environment by a failure to register. (B) The way the provision reads this will impact all sites where certificates were previously issued although there is nothing in those certificates to alert the new owner of the requirement. A new owner may not even know of the issuance of a certificate where there are no restrictions on use as it did not need to be recorded. (C) If the language is modified and only applies to new certificates then it should only be those with restrictions as (i) those will be recorded and (ii) ones without restrictions have no ongoing requirements for the department to monitor. (D) With most tax records on line and the tax parcel numbers on certificates so the department can easily verify ownership without requiring this change of ownership notification that will cause more problems than the benefit received by the Department by the change.

RESPONSE: This comment is appropriate and the reporting requirement for transfers of ownership after issuance of a certificate has been removed from the certification requirements in the proposal.

34. **SUBJECT:** Report of transfer of property.

COMMENTER: Channing J. Martin, Williams Mullen.

TEXT: Regarding 9 VAC 20-160-110 J, I agree wholeheartedly with Mr. Thornhill's comment on this subject. Moreover, what does the word "register" mean? What is the mechanism by which one is supposed to "register" the fact of a transfer of ownership with the department?

RESPONSE: This comment is appropriate and the reporting requirement for transfers of ownership after issuance of a certificate has been removed from the certification requirements in the proposal.

35. **SUBJECT:** Notification of impacted owners.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-120 B 2) - The Department has proposed to revise the group of owners who must receive notice in 9VAC20-160-120 B 2 to include "other owners whose property has

been impacted by the release being addressed under the VRP project." Please consider adding the word "physically" before "impacted" to avoid any confusion where individuals may believe they are entitled to personal notice because they are in the area of the release but not physically impacted.

RESPONSE: This comment is appropriate and changes have been made to the proposal to be more specific about what criteria would have to be met to require a participant to provide notice to an owner of an affected property.

36. **SUBJECT:** Notification of impacted owners.

COMMENTER: Pamela F. Faggert, Dominion.

TEXT: Section 9VAC20-160-120 discusses the process for VRP participants to inform the public of their property's acceptance in and completion of the VRP program. Subsection 8.2 states: *"Provide written notice to all adjacent property owners and other owners whose property has been impacted by the release being addressed under the VRP project."* The idea of being impacted may be interpreted widely to include considerations outside of the intent of the statement. We propose the following alternative for your consideration: *"Provide written notice to all adjacent property owners and, where identified, any other owners whose property has experienced known actual physical impacts directly from the release being addressed under the VRP project"*

RESPONSE: This comment is appropriate and changes have been made in the proposal to be more specific about what criteria would have to be met to require a participant to provide notice to an owner of an affected property.

In order to streamline the process and maintain flexibility for the participants, it is also necessary to assume that such impacts exist where concentrations are predicted, but not verified through actual physical sampling results. No change is made to the proposal in response to the portion of the comment referring to "actual physical impacts."

37. **SUBJECT:** Duration of comment period.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-120 C) - The Department proposes that "the department, at its discretion, may increase the duration of the comment period." There needs to be some limit on how long the department may increase the time period as the participant needs some assurance that there is an end. Has the Department ever needed to allow an affected party more than 60 days? It seems unlikely and that would appear to be a fair limit. Please consider the following change:

A comment period of at least 30 days must follow issuance of the notices pursuant to this section. The department, at its discretion, may increase the duration of the comment period to up to 60 days.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

38. **SUBJECT:** Duration of comment period.

COMMENTER: Pamela F. Faggert, Dominion.

TEXT: In Section 9VAC20-160-120 C the Department proposes the discretion to increase the duration of the public comment period beyond the normal 30 days. While this extension may be acceptable under specific circumstances, the timeframe should not be left open-ended. We request a limit of an additional 30 days for a total of no more than 60 days.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

39. **SUBJECT:** Corrections of grammar.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: In addition to the foregoing comments the following are a couple of "nits":

(9VAC20-160-110 D) - In the last sentence the word "purpose" should be plural as "purposes."

(9VAC20-160-120 E 2) - There is an extra period at end of provision.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

40. **SUBJECT:** Corrections of grammar and usage.

COMMENTER: Channing J. Martin, Williams Mullen.

TEXT: In 9VAC20-160-90 C 1 and 2, use the word "demonstrating" rather than the words "to show." In 9VAC20-160-100 A 3, add the word "the" before the word "participant's."

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

41. **SUBJECT:** Consideration of earlier comments.

COMMENTER: Justin Thompson, Site Location Partnership.

TEXT: I work in corporate site selection and the majority of our projects involve industrial sites, so I've taken some interest in this subject. James Thornhill - your points are very well-taken. I look forward to seeing how these amendments play out.

RESPONSE: The commenter's interest is appreciated. No change is made to the proposal in response to this comment.

42. **SUBJECT:** Consideration of earlier comments.

COMMENTER: Charles L. Williams, Gentry, Locke, Rakes & Moore, LLP

TEXT: In the interest of efficiency, I will not submit extensive additional comments. I have reviewed in detail Mr. Thornhill's submittals and adopt and reaffirm his suggestions in their entirety.

RESPONSE: The commenter's interest is appreciated. No change is made to the proposal in response to this comment.

43. **SUBJECT:** Consideration of earlier comments.

COMMENTER: Thomas R. VanBlaricom, ECC Inc.

TEXT: I concur with the comments provided by Mr. James Thornhill regarding the proposed revisions to the Voluntary Remediation Program. In addition, DEQ should work together with stakeholders to review these proposed revisions, identify and ease additional regulatory burdens that may exist, create a more stable funding source including additional private fund fees, and ultimately create a stronger, sounder, and more predictable Voluntary Remediation Program.

RESPONSE: The commenter's interest is appreciated. Department staff conducted VRP training in June and hosted listening sessions in the fall of 2012 in an outreach effort to get stakeholder feedback. The department will continue to work together with stakeholders to identify needed revisions to the regulations, to create workable solutions to stakeholder issues to enhance the program. No change is made to the proposal in response to this comment.

44. **SUBJECT:** Consideration of earlier comments.

COMMENTER: Channing J. Martin, Williams Mullen.

TEXT: I was a member of the TAC that assisted the Department in 2009. I have reviewed Jim Thornhill's comments and agree with them, except in a few limited instances described herein.

RESPONSE: The commenter's interest is appreciated. No change is made to the proposal in response to this comment.

45. **SUBJECT:** Consideration of earlier comments.

COMMENTER: John Sweeney, ECC Inc.

TEXT: I agree with the comments provided by Jim Thornhill and Channing Martin, and want to emphasize the importance of keeping the VRP attractive to property owners and developers by clearly defining all requirements of the program.

RESPONSE: The commenter's interest is appreciated. No change is made to the proposal in response to this comment.

46. **SUBJECT:** Data collection and analysis.

COMMENTER: Gerry Myers, Stantec Consulting Services, Inc. (Stantec).

TEXT: As currently proposed, the regulations do not provide any requirement for the agency to collect or analyze information on the economic benefits of the program. During the listening session, there was a great deal of discussion about economic benefits, appropriate fee structure and eliminating impediments to economic development through the voluntary remediation program. I respectfully suggest that the agency include a requirement to collect and evaluate information regarding the financial and economic benefits and impacts of the program.

RESPONSE: The department acknowledges the benefit of receiving this data, and the department has begun collecting such information on a trial basis. However, making the collection of data a regulatory requirement isn't necessary for the department to collect the information. No change is made to the proposal in response to this comment.

47. **SUBJECT:** Certification of compliance.

COMMENTER: Gerry Myers, Stantec.

TEXT: I respectfully suggest that the agency include a provision that the consultant conducting the investigations and developing remedial plans certify that they have complied with all guidance provided by the agency. This is especially critical when the consultant has undertaken sophisticated analytical evaluations as part of the risk assessment, calculating remedial goals etc. The owner and the agency should be able to rely on the scientific integrity of the consultant. The consultant should certify that they have complied with all requirements and guidance. Further, the consultant should specify the methods used in conducting his evaluation.

RESPONSE: This requirement is already in the existing regulations as a component of the Demonstration of Completion Report (9VAC120-160-70 A 4). No change is made to the proposal in response to this comment.

48. **SUBJECT:** Presumptive exit for mildly contaminated sites.

COMMENTER: Gerry Myers, Stantec.

TEXT: It is my impression that many "mildly contaminated sites" are being managed under the voluntary program. I respectfully suggest that there be a presumptive exit for sites with contamination below commonly recognized risk-based criteria. For example, it would be beneficial if sites with calculated cancer risk below 10⁻⁵ or below commonly used threshold criteria be able to submit a finding of no further action and be discharged from the program without further regulatory obligations.

RESPONSE: The regulatory changes that would be necessary to provide for a presumptive exit for mildly contaminated sites are significant and are beyond the scope of this amendment. The department acknowledges that this approach might be appropriate in certain situations. However, it will require additional discussion with stakeholders and a new regulatory action to implement such a change. No change is made to the proposal in response to this comment.

49. **SUBJECT:** Need for definition for environmental covenant.

COMMENTER: Amy Edwards, Holland and Knight LLP.

TEXT: We believe that the Department should add the term "environmental covenants" to the definitions section and explain the importance of environmental covenants in the regulations. Environmental covenants are an important type of institutional control and they are available in the state pursuant to the Virginia Environmental Covenants Act that was adopted in 2010. Environmental covenants are more durable than most other types of land use controls, so their availability in the state should be explicitly called out in the regulations.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

50. **SUBJECT**: Application for participation.

COMMENTER: Amy Edwards, Holland and Knight LLP.

TEXT: The proposed changes provide in 9VAC20-160-40 A 8 that both the applicant and the property owner must attest that all of the information contained in the application is true and accurate to the best of their knowledge. The current property owner frequently is not familiar with all of the information contained in the application, as the application is generally based upon what a prospective purchaser has learned during the environmental due diligence process. Accordingly, this provision should be clarified to state that each party is only being required to attest to information within its own knowledge or control.

RESPONSE: See the response to comment 11.

51. **SUBJECT**: Registration fee.

COMMENTER: Amy Edwards, Holland and Knight LLP.

TEXT: We believe that the intent of 9VAC20-160-60 B. is to cap the registration fee at \$5,000, but this intent is not clear because of the use of the term "initial" in this section. A sentence should be added to this section stating that the maximum registration fee will be \$5,000.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

52. **SUBJECT**: Termination.

COMMENTER: Amy Edwards, Holland and Knight LLP.

TEXT: 9VAC20-160-100 A 3 provides that participation in the VRP can be terminated if the participant fails to make reasonable progress toward completion of the program. Frequently, the progress of a site through the VRP is tied to other development considerations, such as the need for zoning revisions, financing approvals, or other items under the control of a third party. The VRP program should be flexible enough to evaluate these types of considerations in determining whether "reasonable progress" is being made. In addition, the participant should be notified and given an opportunity to explain what might be impacting its progress through the VRP if the Department believes that "reasonable progress" is not being made. Accordingly, we recommend that this section be amended to state that the participant will be given written notice and an opportunity to explain any circumstances that may be impeding progress through the VRP before any decision is made about terminating its participation.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

53. **SUBJECT**: Certificate of Satisfactory Completion of Remediation.

COMMENTER: Amy Edwards, Holland and Knight LLP.

TEXT: 9 VAC 20-160-110 H provides that a certificate can be revoked for failure to meet or maintain the conditions of the certificate. This statement should be clarified to explain that any

such revocation would only affect the current property owner, and would not have any impact upon a prior property owner who had adhered to the conditions in the certificate.

RESPONSE: The Certificate runs with the property. Notwithstanding other conditions of sale outside the scope of the VRP, it is the current property owner responsibility to ensure the conditions of the Certificate are upheld and only the property owner at time of revocation would be affected. It's not the department's intention to go back to prior property owners in the event there is a failure to meet or maintain conditions of the Certificate. No change is made to the proposal in response to this comment.

54. **SUBJECT:** Public notice.

COMMENTER: Amy Edwards, Holland and Knight LLP.

TEXT: The proposed changes to 9VAC20-160-120 provide that a participant must provide written notice to all owners whose property may have been impacted by the release being addressed under the VRP project. We are concerned that this very broad public notification provision is likely to have an unintended, negative impact upon parties who would otherwise be willing to participate in the VRP. Most participants did not cause or contribute to the release being addressed through the VRP. If impacted property owners are being notified by the participant, rather than the Responsible Party, they may believe that the participant caused the contamination and is responsible for any damage to them. It may also be difficult and costly to identify all such impacted property owners. We suggest that either the Responsible Party or VADEQ should have this public notification obligation.

RESPONSE: Identification of the horizontal and vertical extent of contamination and identification of affected property owners is the responsibility of the participant. Assigning responsible party status to a release where its remediation is not clearly mandated is outside the scope of this voluntary program. If there are concerns, the participant has the option to address the merits of his voluntary actions and other issues in the notice. Changes have been made to the proposal in response to comments 35 and 36 that should limit the scope of individual notifications that are required under this proposal. No change is made to the proposal in response to this comment.

55. **SUBJECT:** General support for the proposal.

COMMENTER: Pamela F. Faggert, Dominion.

TEXT: In general, Dominion Resources, Inc. supports the proposed changes to the regulations as the addition of acceptable remediation technologies and the update of remediation threshold levels will allow for a proper risk-based approach. However, there are elements of the proposed changes that may benefit from further detail or clarification.

RESPONSE: The commenter's interest and support of the proposal is appreciated. Each of the comments on the proposal have been reviewed and addressed individually. No change is made to the proposal in response to this comment.

56. **SUBJECT:** Consistency of terms.

COMMENTER: Channing J. Martin, Williams Mullen.

TEXT: The department needs to decide how it will refer to the "certificate" throughout the regulations and then stick with it. At present, the regulations refer to a "Certification of

Satisfactory Completion of Remediation," a Certificate of Satisfactory Completion of Remediation," a "Certification of Satisfactory Completion," a "Certificate of Satisfactory Completion," a "Certificate," a "certificate." Please pick one, do a word search, and then use it throughout.

Regarding 9VAC20-160-120 A, the department previously used initial caps on the words "site characterization report." See 9VAC20-160-70 A 1. For the sake of consistency, it should do so here.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

57. **SUBJECT:** Delete an undefined term.

COMMENTER: Channing J. Martin, Williams Mullen.

TEXT: In 9VAC20-160-120 B 2, delete "VRP" before the word "project." Although we all know what "VRP" means, it is not a defined term in the regulations and is not used elsewhere in the regulations. In contrast, the word "project" is used elsewhere in the regulations.

RESPONSE: This comment is appropriate and changes have been made to reflect the intent of this comment.

58. **SUBJECT:** Off-site contamination delineation requirements.

COMMENTER: John Sweeney, P.E., ECC Inc.

TEXT: Delineating off-site contamination can be problematic, and requirements for off-site delineation need to be well defined and consistently applied. However, the regulations should also allow for some discretion by DEQ to ease requirements in cases where site-specific circumstances present significant burdens for off-site delineation efforts.

RESPONSE: The department has determined that 9VAC20-160-70 provides sufficient flexibility so that the department can work with the participant to adapt off-site delineation requirements to each situation. Specifying technical requirements for off-site delineation in the regulation limits, rather than provides, the necessary flexibility. No change is made to the proposal in response to this comment.

59. **SUBJECT:** Enrollment fee.

COMMENTER: John Sweeney, P.E., ECC Inc.

TEXT: Increase the enrollment fee, if necessary, to cover the gap in program funding. The VRP often offers owners or buyers the only opportunity to fund and develop an impacted property, while offering the Commonwealth the only opportunity to remediate the impacted property. The value of VRP as a Win-Win regulatory program cannot be overstated; the cost of VRP (to applicants and to the Commonwealth) is small when measured against the better use of land, increased tax revenues, employment, and other benefits of redeveloping blighted and under-utilized properties.

RESPONSE: Whereas the comment is appreciated, the registration fee is a fixed, not-to-exceed amount specified in statute. Only the Virginia General Assembly can modify the registration fee amounts for this program. No change is made to the proposal in response to this comment.

60. **SUBJECT:** Program implementation.

COMMENTER: Tom Hardy, ECC Inc.

TEXT: The larger issue as I see it is how to continue to keep the VRP program appealing to property and business owners in the Commonwealth. We all know that the program facilitates redevelopment and increased tax revenues. Eliminating uncertainty in how the program is implemented is key. DEQ's positions on site characterization and risk assessment need to be applied as consistently as possible, and DEQ needs to clearly define if, when, and how off-site contamination needs to be assessed. I routinely hear my clients express concern about having to knock on their neighbor's door to request permission to sample on the neighbor's property. Implementing the "kick off" meetings with the VRP staff, the participant, consultants and the risk assessment staff has helped eliminate some uncertainty (on the part of the participant and consultant) and allows for the important issues to be laid on the table from the start.

RESPONSE: See the response to comment 59. The department appreciates the comment on "kick off" meetings. The department is as clear as possible about off-site evaluations during those meetings. However, it should also be recognized that off-site evaluation is sometimes an iterative process and all requirements may not be known at the initial "kick-off" meeting when limited on-site data is available. No change is made to the proposal in response to this comment.

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