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Final Regulation Agency Background Document

Agency name	Department of Historic Resources
Virginia Administrative Code (VAC) citation(s)	17 VAC5-20-60
Regulation title(s)	Regulations Governing Permits for the Archaeological Removal of Human Remains
Action title	Revision to §30: General Provisions; §40: Permit application; §50: Public comments; and §60: Issuance or denial of permit
Date this document prepared	February 11, 2016

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

Pursuant to Code of Virginia § 10.1-2305, the Virginia Department of Historic Resources is responsible for issuing permits for the conduct of archaeological field investigations involving the removal of buried human remains and associated artifacts from unmarked burials, and for archaeological recovery undertaken pursuant to a circuit court-approved removal of a cemetery. Both archaeological and court ordered processes require public notification and a good faith effort to consult with descendants and interested parties. Recently, public concerns about the inadequacy of existing notification and consultation requirements associated with the court-ordered process (specifically § 57-36 and § 58-38.1) resulted in significant revisions to the sections of Virginia Code governing these actions, which revisions were signed into law in 2014.

In accordance with § 10.1-2305(D), the Virginia Board of Historic Resources is required to promulgate implementing regulations to “provide for appropriate public notice prior to issuance of a permit, provide for

appropriate treatment of excavated remains, the scientific quality of the research conducted on the remains, and the appropriate disposition of the remains upon completion of the research,” which regulations are codified at 17VAC5-20 through 17VAC5-80. The Department and the Board propose several revisions to 17VAC5-20 *et seq* in order to reflect the recent revisions to the court-ordered process, to require confirmation that the permit holder is able to complete the recovery process, and to generally update and simplify its regulatory language. Through these revisions, the Department and the Board intend to render the application process more transparent to the general public, to ensure the careful and respectful treatment of all recovered human remains and associated artifacts, and to fully modernize the language of the regulations themselves.

During the 60-day public comment period following the Notice of Intent (NOIRA) publication, the Department received one comment from a professional archaeologist concerned that the proposed revisions to the public notification requirements were excessive and that this aspect of the permitting process was best addressed during the application period. The Department also convened an advisory committee of professionals and interested parties from multiple local and state government agencies, nonprofit historical foundations, and other organizations for intensive discussion and amendment of our implementing regulations. The proposed revisions, formally approved by the Virginia Board of Historic Resources on June 13, reflect these consultations.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

No acronyms are used in the Agency Background Document. All technical terms are defined in the “Definitions” section of the regulations (17VAC5-20-10).

Statement of final agency action

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

The Board of Historic Resources took final action on Regulations Governing Permits for the Archaeological Removal of Human Remains on February 11, 2016.

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. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.

§ 10.1-2305 authorizes the Department to issue permits for the archaeological removal of human remains and associated artifacts, whether alone or in concert with a court-approved removal permit. § 10.1-2305(D) calls on the Virginia Board of Historic Resources to promulgate regulations to “provide for appropriate public notice prior to issuance of a permit, provide for appropriate treatment of excavated remains, the scientific quality of the research conducted on the remains, and the appropriate disposition of the remains upon completion of the research.”

Purpose

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

Public concerns about local governments and private property owners seeking court orders or other permits for the removal of “abandoned” cemeteries without sufficient public notification resulted in the passage of new Code requirements for these processes. In order to be consistent with the new court order process, and because of past occurrences where an applicant removed graves and then claimed they did not have the funds to reburial those remains with due respect and consideration, the Department of Historic Resources, Board of Historic Resources has revised its implementing regulations (17VAC5-20 *et seq*) as follows: to enhance public notification requirements, rendering the application process more transparent and responsive to community interests; to ensure that the applicant has the resources (financial and otherwise) to complete the proposed work and the respectful disposition of the recovered remains; and to incorporate other technical changes, including removal of gender-specific references, in order to modernize the language of the regulations.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both.

17VAC5-20-30(11): revised to render original paragraph 11 into two separate paragraphs. As revised, paragraph 11 will consist of the first sentence of the original paragraph 11, which will remain as written. Revised paragraph 11 will specifically address the consequences of failure to complete the conditions of an issued permit. The second and third sentences of the original paragraph 11 will be a separate paragraph 12, but will otherwise remain as written. New paragraph 12 will specifically address the applicant’s option to apply for changes or extension to an issued permit.

17VAC5-20-40(A): revised to specifically require 1) proof of ownership of the archaeological site or property upon which the recovery will take place, and 2) a signed statement confirming adequate resources to complete the research design as well as final disposition of the recovered remains. These revisions are necessary in order to document that the permit holder has the permission of the landowner and is capable, financially and otherwise, of ensuring the respectful disposition of all recovered remains.

17VAC5-20-50(B): revised to require publication of notices of intent using relevant electronic and social media and other public outlets as well as print newspapers, notice posted at the recovery site, direct consultation with local preservation/historical/genealogical organizations, and a public hearing. This section is further revised to require that the notice include the following information: a statement regarding the reason for the proposed recovery, additional contact information for the applicant, the street address of one or more locations where the general public may view a copy or copies of the application, and a statement regarding the proposed disposition of any recovered human remains and associated artifacts. These revisions recognize the prevalence of electronic and social media in modern communication, and the need for greater flexibility in use of signage and other means of passive public notification as well as the importance of thorough and open documentation of intent.

17VAC5-20-50(C): revised to clarify instances in which the above referenced public notice may be

waived. These revisions are necessary in order to fully inform both applicants and the interested public of this option, which is rarely exercised.

17VAC5-20-60(C): revised to remove gender-specific references to the directorship of the Department. In pursuing these revisions, the Department intends to render the permit application and consideration process more transparent to the interested public, to further ensure the respectful treatment of recovered human remains, and to more fully modernize the language of these implementing regulations.

Issues

Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

As development pressure increases the need for land, historically significant cemeteries and unmarked burials will be moved to make way for new construction. While most such removals are conducted by professionals in the funeral/cemetery industry, occasionally the responsible party will engage archaeologists to conduct the work. In these cases (roughly 4-6 per year) the Department of Historic Resources is charged with ensuring the respectful treatment of both buried human remains and the living community that has an interest in these remains. Recent cases in which interested parties felt they had not been given enough notice or consideration by the property owners has prompted the Department to re-evaluate existing requirements and revise those requirements to go beyond the traditional public notices in local newspapers which seldom reach the interested community.

The primary advantages for the general public are greatly increased access to information during the application review process, as well as greater clarity with regard both to project parameters and permit requirements. Permit applicants will be required to provide a considerably greater amount of information as a result of these revisions, which may be perceived by some as a disadvantage. However, the Department's proposed regulatory revisions regarding public notification and consultation are entirely in line with those already made to §§ 57-36 and 57-38.1, the laws governing the court-approved recovery process. The remaining revisions are for documentary and clarification purposes and should pose no disadvantage to permit applicants or the general public.

The Department views these proposed revisions as entirely advantageous with regard to its review and management of future archaeological recovery permits. Although review and oversight of the amplified requirements will necessitate a greater investment in time and effort by Department staff, encouraging more open and comprehensive public involvement during the review process will assist the Department in *addressing citizen concerns and render the entire process more transparent.*

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements or requirements that exceed applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

These revisions are intended to be specific to permit applications and the application process, and should not disproportionately affect any individual locality.

Family impact

Please assess the impact of this 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.

No impact to the institution of the family or family stability is anticipated.

Changes made since the proposed stage

*Please list all changes that made to the text of the proposed regulation and the rationale for the changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. *Please put an asterisk next to any substantive changes.*

No changes have been made since the proposed stage.

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. Please distinguish between comments received on Town Hall versus those made in a public hearing or submitted directly to the agency or board.

No public comment was received.

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. Explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
17VAC5-20-30			Division of existing Paragraph 10 into two paragraphs. Revised in order to emphasize the consequences of a failure to complete the terms of a permit in a timely manner. Expected to reduce the incidence of such failures.
17VAC5-20-40(A)(1)		Name, address, phone number and institutional affiliation of the applicant	Revised to require that the applicant also provide a current <u>email address</u> . Revision intended to acknowledge the prevalence of electronic communication. Expected to facilitate direct communication with applicant, improve timeliness, and reduce costs for both agency and applicant.
17VAC5-20-40(A)	17VAC5-20-40(A)(3)	None	Paragraph added – requirement for proof of ownership of the property of archaeological site upon which the field investigation will be conducted. Necessary for legal sufficiency.
17VAC5-20-40(A)(3)	17VAC5-20-40(A)(4)	Written statement of landowner permission for research as well as for access to the property by Department staff	Revised to remove gender specificity and to reflect addition of new paragraph 17VAC5-20-40(A)(3). Intended to modernize and clarify language of regulations.
17VAC5-20-40(A)(4)	17VAC5-20-40(A)(5)	Applicant to provide evidence of adequate resources to carry out the research design	Revised to require a signed statement confirming both financial and other resources, requirement for approval of research design, and requirement for reburial in an appropriate location. Also revised to reflect addition of new paragraph 17VAC5-20-40(A)(3). Intended to clarify and strengthen affirmative responsibilities of applicant.
17VAC5-20-40(A)(5)	17VAC5-20-40(A)(6)	Applicant required to indicate whether the permit is requested as part of a federal, state, or local government undertaking	Revised to reflect addition of new paragraph 17VAC5-20-40(A)(3).
17VAC5-20-50(B)		Applicant required to publish a notice of intent in a local newspaper in the area of the proposed field investigation	Revised to require additional posting of notice at the investigation site, notice to and consultation with local historical and genealogical commissions/societies, and at least one public hearing. Revisions a direct reflection of those already made to §§ 57- 36 and 57-38.1. Expected to result in increased public participation.

17VAC5-20-50(B)	17VAC5-20-50(B)(3)	None	Paragraph added – requirement for a statement regarding the reason for the proposed relocation. Intended to provide additional information to interested parties.
17VAC5-20-50(B)(3)	17VAC5-20-50(B)(4)	Requires that the notice include a statement informing the public that they may request a public meeting	Revised to reflect addition of new paragraph 17VAC5-20-50(B)(3) as well as to replace “public” with “readers”. Intended to clarify/streamline regulations.
17VAC5-20-50(B)(4)	17VAC5-20-50(B)(5)	Requires that the notice provide the applicant’s contact information and a location where the application itself may be viewed	Revised to reflect addition of new paragraph 17VAC5-20-50(B)(3), as well as to include a requirement for the applicant’s email address. The requirement for location information was moved into a separate paragraph. Revision intended to reflect increasing reliance on electronic communication.
17VAC5-20-50(B)(4)	17VAC5-20-50(B)(6)	Originally part of 17VAC5-20-50(B)(4)	Revised to render information about locations for public viewing of application a separate requirement. Further revised to require a street address and clarify that the application must be available during normal business hours. Intended to increase and facilitate public participation.
17VAC5-20-50(B)(6)	17VAC5-20-50(B)(7)	Requires that the notice include a statement that a complete copy of the application may also be viewed/copied at the Department	Revised to reflect paragraph numbering changes, as well as to include notification that the application will be posted on the Department’s website. Intended to facilitate public participation.
17VAC5-20-50(B)(7)	17VAC5-20-50(B)(8)	Requires that the notice include a statement regarding	Revised to reflect paragraph numbering changes, as well as to clarify that the
		the proposed disposition of the remains and a request for public comment	Statement should encompass both human remains and associated funerary artifacts, and that if any disposition other than reburial is proposed this information be provided and public comment on this aspect of the permit must be specifically requested. Revised to ensure that the public is aware of the intended outcome of any permitted recovery.
17VAC5-20-50(C)		Introduces section regarding potential waiver of public notice	Revised to replace “Such” with “The public” and adding the word “requirement”. Intended to further clarify the regulation.
17VAC5-20-50(C)(1)		Indicates that a waiver may be granted if the family of the deceased is in agreement	Paragraph removed in its entirety. Revision reflects the difficulty in identifying descendants of individuals buried prior to mid-20th century or determining which individuals may legally be considered “family”.

17VAC5-20-50(C)(2)	17VAC5-20-50(C)(1)	Indicates that a waiver may be granted if the burial may be looted as a result of public notification	Paragraph renumbered to reflect deletion of previous paragraph. Revised to replace “there is a likelihood” with “it is likely”, and to add the statement “or other damage to the burial or surrounding site”. Intended to further clarify this exemption and avoid placing burial sites in danger.
17VAC5-20-50(C)(3)	17VAC5-20-50(C)(2)	Indicates that a waiver may be granted at the director’s discretion and in recognition of a demonstrated emergency, with public notice to be provided as determined by the director	Revised to reflect paragraph numbering changes, to replace “If” with “In an emergency situation”, and to add “vandalism, looting, or”. The statement “or that the publication of such notice may substantially increase the threat of such loss through vandalism” was removed. The clause “In such cases” was removed from the third sentence and added to the second. Intended to further clarify this exemption.
17VAC5-20-50(D)		Indicates that, when permits sought pursuant to a court order, applicant must provide evidence of a reasonable effort to contact next of kin	Revised to add “subject to § 57.38.1 or 57.36” to reflect recent legislative changes.
17VAC5-20-50(E)		Indicates that any permit application for recovery of prehistoric or historic Native American burials requires that the Department notify the Virginia Council on Indians and appropriate tribal leaders	Revised to remove “the Virginia Council on Indians and”, reflecting the fact that this organization no longer exists. Further revised to add “of state- and federally- recognized tribes”. Intended to encompass all interested tribes and reinforce requirement for direct consultation.
17VAC5-20-60(C)		Introducing the process by which the director may consider issuing a permit	Revised to remove gender-specific pronoun (“his”) and replace with “a”.