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Periodic Review and Small Business Impact Review Report of Findings

Agency name	Virginia Waste Management Board
Virginia Administrative Code (VAC) Chapter citation(s)	9 VAC 20-70
VAC Chapter title(s)	Financial Assurance Regulations for Solid Waste Disposal, Transfer and Treatment Facilities
Date this document prepared	July 22, 2022

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the **Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code**.

Acronyms and Definitions

Define all acronyms used in this Report, and any technical terms that are not also defined in the "Definitions" section of the regulation.

There are no acronyms or technical terms used in this report that are not also defined in the "Definitions" section of the regulation.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Federal regulations (40 CFR Part 258) require owners and operators of Municipal Solid Waste Landfill units to provide financial assurance.

Section 10.1-1402 of the Code of Virginia, authorizes the Virginia Waste Management Board to promulgate and enforce regulations necessary to carry out its powers and duties and the intent of the chapter and federal law. Specifically, § 10.1-1410 authorizes the Board to promulgate regulations which ensure that, if a solid waste treatment, transfer or disposal facility is abandoned, the costs associated with protecting the public health and safety from the consequences of such abandonment may be recovered from the person abandoning the facility.

The Virginia Waste Management Board previously amended these regulations in 2001, 2005, 2011, 2012, 2013 and 2018.

Alternatives to Regulation

Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

One alternative considered was the repeal of this regulation and adoption of regulations that are identical to 40 CFR 258 Subpart G. This alternative has been rejected since it is inconsistent with state law. Federal regulations require owners and operators of Municipal Solid Waste Landfill units to provide financial assurance. Virginia statute is broader in scope and requires solid waste treatment, transfer or disposal facilities to provide financial assurance.

Public Comment

Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Commenter	Comment	Agency response
Laura Franke, CCLA	<p>Commenter Franke urges updates to these regulations to improve the regulations' ability to protect public health, safety, and welfare. Specifically, updates are needed to reduce risk of permitting a landfill that is prone to insolvency and the subsequent environmental and financial harm to localities and the Commonwealth. She cited news articles about the Bristol Landfill in Virginia and private Tennessee landfills declaring bankruptcies, as examples of facilities facing financial difficulty. She also noted how past financial crises in our nation (Enron, banking and mortgage) have shown how</p>	<p><u>Agency response:</u> Section 10.1-1410 A. of the Code of Virginia states, "The Board shall promulgate regulations which ensure that if a facility for the disposal, transfer, or treatment of solid waste is abandoned, the costs associated with protecting the public health and safety from the consequences of such abandonment may be recovered from the person abandoning the facility."</p> <p>This statute protects the citizens of the Commonwealth from paying costs associated with proper closure of a facility for the disposal, transfer or treatment of solid waste should the facility be abandoned. The amount of financial assurance required to be provided is based on factors such as the facility size and the amount of solid waste</p>

	<p>assurances may be inadequate. She proposed the following amendment to 9VAC2070-81. General purpose and scope.</p> <p>1."A...the owner or operator of such facility shall obtain one, or a combination of the financial responsibility mechanisms described in this part." At least two mechanisms should be required. Any one approach may be flawed, as we have seen through ratings agencies' failures to recognize the Enron risk or the mortgage backed securities risks in 2008. She proposed the following amendments to 9VAC20-70-140.</p> <ol style="list-style-type: none"> 1. Regarding "9VAC20-70-140. Allowable financial mechanisms. Owners and operators shall choose from the options specified in this article." <ol style="list-style-type: none"> a. Applicant discretion in selecting financial assurance mechanisms is inappropriate. The financial assurance mechanism should be selected by the regulatory agency (DEQ). b. The options are not equal in reliability or susceptibility to credit risk. Virginia should prefer the most stringent, non-credit based methods: Trust Fund; Surety bond and trust fund; certificate of deposit, corporate financial test. 2. Regarding 9VAC20-70-200. Corporate financial test. 1.a.(1) (2) and (3). Corporate financial test should be performed by DEQ for all applicants. Meeting the test should be a minimum requirement. All 3 elements of the corporate financial test should be required (as opposed to 	<p>managed at the facility. The amount of financial assurance required is based on the estimated costs related to properly close the facility. Multiple options for providing financial assurance are allowed by the regulation, which provides flexibility to the regulated community concerning the type of financial assurance mechanism used to demonstrate financial responsibility.</p> <p>As part of the annual financial assurance review process for each permit or consent order, DEQ financial assurance staff perform the following steps to minimize risks to the Commonwealth: 1) review the most recent cost estimate to make sure it is accurate and up to date; 2) proofread documents and verify the financial assurance instrument comports with regulatory requirements; 3) identify any inconsistencies or anomalies between the financial assurance submission and the regulatory requirements; and 4) file original documents in a secure place (e.g., a safe) and track the required deadlines for annual document submission.</p> <p>Under 9VAC-20-70-70, the agency director may revoke, suspend or amend any permit for cause as set in Section 10.1-1409 of the Code of Virginia and as provided for in 9VAC20-81-570 and 9VAC20-81-600 of the Solid Waste Management Regulations, 9VAC20-120-790 and 9VAC20-120-810 of the Regulated Medical Waste Regulations, and any other application regulations. Failure to provide or maintain adequate financial assurance in accordance with these regulations shall be a basis for revocation of such facility permit.</p> <p>The current requirements in the financial assurance regulation also address financial incapacity of owners, operators or financial institutions under 9VAC 20-70-270.</p> <p>The current requirements in the financial assurance regulation for the financial test mechanisms for corporations (9VAC20-70-200) and localities (9VAC20-70-210) include instructions and deadlines for submittal of alternative financial assurance that meets the requirements of this regulation if the owner or operator no longer meets the requirements for using the financial test mechanism. In addition, the director may, based on</p>
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	<p>any one of the three). (2) and (3) are simple calculations that can be done by agency employees in a few minutes. (1) Bond ratings are easily obtained in less than a minute.</p> <p>3. Due diligence research, when needed, must be supported by regulation. Currently there is no way to act on concerns of dishonesty/financial red flags that emerge outside of the list of assurance mechanisms (such as fraud, analyst concerns of corporate financials being misrepresented or criminal ties). DEQ should have the discretion to 1) research such information on their own or request thorough review by the attorney general's office, as they can do with other agencies during the solid waste permitting process; 2) reject permit applications based on these red flags even if other financial assurances can be met.</p> <p>As a final note, the commenter noted the following section is appropriate as it stands (9VAC20-70-81 section D.):</p> <p>The director may reject the proposed evidence of financial responsibility if the mechanism or mechanisms submitted do not adequately assure that funds will be available for closure, post closure care, or corrective action. The owner or operator shall be notified in writing within 60 days of receipt of a complete financial assurance submission of the tentative decision to accept or reject the proposed evidence.</p>	<p>reasonable belief that the owner or operator may no longer meet the requirement of this article, require reports of financial condition at any time from the owner or operator in addition to those specified in the regulation. If the director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of the regulation, the owner or operator shall provide alternate financial assurance as specified in the regulation within 30 days after notification of such a finding.</p> <p>Additionally, the director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements. An adverse opinion or a disclaimer of opinion will be cause for disallowance. The owner or operator shall provide alternate financial assurance as specified in this regulation within 30 days after notification of the disallowance.</p> <p>The regulations are modeled after federal regulations and are protective of human health and the environment.</p>
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<p>Keith Oulie</p>	<p>Commenter Oulie stated his remarks concerning possible changes to the financial assurance guidelines in Virginia are written with the proposed landfill in Cumberland County in mind, as submitted by the Green for Life (GFL) corporation. Commenter Oulie feels private enterprise should be required to have sufficient financial assurance resources to protect against public liability should there be infrastructure failures or unforeseen closure of the facility. Mr. Oulie also feels DEQ should be responsible for selecting the financial assurance mechanism in order to determine the financial strength of the corporation and to provide financial oversight throughout the life of the project and beyond. Mr. Oulie also suggested requiring multiple sources of backup financing for closure and repair at the facility and to protect the wellbeing and quality of life of citizens and the environment.</p>	<p><u>Agency response:</u> Please see the previous response to Commenter Franke shown above. Additionally, 9VAC20-70-81.B., General purpose and scope. In the case of new facilities, the selected financial responsibility mechanism or mechanisms shall be filed with the Department of Environmental Quality as part of the permit application procedures and prior to the issuance of an operating permit. The regulations are modeled after federal regulations and are protective of human health and the environment.</p>
<p>Cecil and Alice Youngblood</p>	<p>Commenters Cecil and Alice Youngblood agreed with Commenter Laura Franke concerning her proposed amendments to the financial assurance requirements because they believe they will better protect the public of our Commonwealth of Virginia from pollution of our air, water and soil brought by landfills.</p>	<p><u>Agency response:</u> Please see the previous response to Commenter Franke shown above. The regulations are modeled after federal regulations and are protective of human health and the environment.</p>
<p>Robin Mead</p>	<p>Commenter Mead agreed with Commenter Laura Franke regarding improving the standards for financial assurance for solvency in Virginia and cited the Bristol landfill as an example of a landfill with inadequate finances, and one that has also created significant liability for the affected communities and the</p>	<p><u>Agency response:</u> Please see the previous response to Commenter Franke shown above. Additionally, 9VAC20-70-90, Closure, post-closure care and corrective action requirements, states, "The owner or operator shall close his facility in a manner that minimizes the need for further maintenance; and controls, minimizes, or eliminates, to the extent necessary to protect human health and the environment, the post-closure</p>

<p>Betty Myers</p>	<p>Commonwealth. Commenter Mead proposes updates to the regulations to improve the protection of public health, safety and welfare. Additionally, the commenter stated "Mega landfills" under consideration for permitting within close proximity to populated communities have incalculable risks associated with the health, safety and welfare of individuals and communities as a whole. Costs associated with safe landfill operations over time have proven to be ever-changing thereby creating significant unknowns and make thirty year forecasting for closing and post operations activity costs nearly impossible.</p> <p>Commenter Myers agreed with the comments from Commenter Franke above regarding her concerns about the financial assurance regulations and she cited the landfill in Bristol as a problem and questioned the monitoring activities performed by regulators over the past 20 years to protect the citizens of Bristol. She also stated she does not understand why a corporation is allowed to pick its own option of financial assurance and stated she does not feel self-insurance is good business. Ms. Myers further commented about CCLA's previous letters to the Virginia Attorney General's Office regarding the company proposing a landfill in Cumberland County as well as the financial condition and leadership of the GFL company. Ms. Myers concluded noting there is a need to strengthen the regulation regarding financial assurance of corporations "seeking to ruin our environmental with landfills (dump)."</p>	<p>escape of uncontrolled leachate, surface runoff, or waste decomposition products to the groundwater, surface water, or to the atmosphere. The owner shall close his facility in accordance with all applicable regulations." The closure standards applicable to the solid waste management facilities are described in 9VAC20-81-160, 9VAC20-81-360 and 9VAC20-81-370 of the Solid Waste Management Regulations. The regulations are modeled after federal regulations and are protective of human health and the environment.</p> <p><u>Agency response:</u> Please see Agency's response to Commenter Franke shown above. In addition, the permitting requirements for landfills in Virginia are found in Part V. Permitting of Solid Waste Management Facilities in Chapter 81 of the Solid Waste Management Regulations. These requirements include submittal of a sworn statement or affirmation by all persons seeking or holding a permit required under this chapter as required by § 10.1-1400 of the Code of Virginia (see DEQ Form DISC-01 and 02 (Disclosure Statement)) and certification from the State Corporation Commission that the business entity pursuing the solid waste management permit is a valid entity, authorized to transact its business in Virginia. The regulations are modeled after federal regulations and are protective of human health and the environment.</p>
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Effectiveness

Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

This regulation is necessary for the protection of public health, safety and welfare and is clearly written and easily understandable.

Decision

Explain the basis for the promulgating agency's decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

The agency is recommending the regulation stay in effect without change. The regulation is beneficial to residents of the Commonwealth.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

The current regulation continues to be needed. If a facility for the disposal, transfer, or treatment of solid waste is abandoned, the facility will need to be closed in a manner to minimize impacts to human health and the environment. This regulation requires owners and operators to provide funding to properly close the facility prior to operation of the facility. These requirements protect citizens of the Commonwealth from having to pay for the closure of these facilities if they are abandoned.

During the public comment period, five commenters requested the agency consider changing the financial assurance requirements to strengthen the regulations by providing greater oversight of the financial status of owners and operators of landfills in Virginia in order to protect the public. The regulation provides instruction for financial incapacity of owners, operators or financial institutions and allows the agency director to reject the proposed evidence of financial responsibility if the mechanism or mechanisms submitted do not adequately assure that funds will be available for closure, post-closure care or corrective action. Failure to provide or maintain adequate financial assurance in accordance with these regulations shall be a basis for revocation of a facility permit. The amount of financial assurance required to be provided is based on factors such as the facility size and the amount of solid waste managed at the facility. The amount of financial assurance required is based on the estimated costs related to properly close the facility. Privately-owned facilities are required to meet the same requirements as local government-owned facilities in the Commonwealth.

The regulations contain many different ways to demonstrate financial assurance and these options may make the regulation appear to be complex to some readers, but the multiple

financial assurance mechanisms included in the regulation provide additional flexibility to the regulated community, including small businesses.

Federal regulations (40 CFR Part 258) require owners and operators of Municipal Solid Waste Landfill units to provide financial assurance. Virginia law requires solid waste treatment, transfer or disposal facilities to demonstrate financial assurance. Virginia's regulations do not conflict with federal law or regulations or with state law.

This regulation was last amended in 2018. Financial mechanisms used to demonstrate financial assurance have not changed since that time. The regulations continue to meet the requirements of state law and are being retained. The regulation includes multiple mechanisms for the regulated community to use to demonstrate financial assurance. The inclusion of multiple mechanisms is beneficial to small businesses.
