



Virginia Department of Planning and Budget **Economic Impact Analysis**

9 VAC 20-160 Voluntary Remediation Regulations
Department of Environmental Quality
Town Hall Action/Stage: 5333 / 9095
November 16, 2020

Summary of the Proposed Amendments to Regulation

The Waste Management Board (Board) proposes to amend the fee structure in the voluntary remediation program to make it financially self-sufficient.

Background

The voluntary remediation program (VRP) facilitates the cleanup of contaminated sites that might not otherwise occur. These are sites where remediation is not clearly mandated by the Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation and Recovery Act, the Virginia Waste Management Act, State Water Control Law or other applicable authority. The program establishes procedures for owners or operators to voluntarily remedy contamination at their sites. When remediation is satisfactorily completed, the Department of Environmental Quality (DEQ) issues a “Certification of Satisfactory Completion of Remediation” or “certificate”. This certificate provides immunity from enforcement of Virginia environmental laws. The immunity granted by the certificate is limited to the known releases described in the certificate and is conditional upon satisfactory performance by the participant of all obligations required by DEQ under the program.

Site remediation protects the health, safety, and welfare of citizens and resolves environmental liability issues. As a result, DEQ notes that remediation facilitates the sale, reuse or redevelopment of affected sites, thereby providing economic benefits for the buyer and seller and reducing development of undeveloped (“green”) space. Communities in the Commonwealth benefit because the cleanup of a contaminated site increases the value of surrounding properties, which in turn increases tax revenues, employment opportunities, and community pride. The

citizens, businesses, and local governments of the Commonwealth all derive benefits from the program.

DEQ reports that the program's administrative costs are approximately \$1.4 million annually. Historically, federal funding has provided the bulk of the fiscal support for program operations. However, federal funding of Virginia's program has been steadily declining since 2002 because of the increased participation of other states, territories, and tribes in this program. Approximately \$50 million was set aside nationwide in 2002 under the federal Brownfields legislation. This amount has not changed, but the number of recipients, particularly the tribes, has increased over time which decreased the amount available to each jurisdiction. The most Virginia received from the federal Brownfields grant was \$1.18 million early in the program however by 2019, this amount had steadily decreased down to \$486,000.

This regulation provides for the collection of registration fees. The fee structure was last amended in 2014, in response to Chapter 366 of the 2014 Acts of Assembly,¹ which amended the statute governing the VRP.² As directed by statute, the Board removed a cap on registration fees that applied to sites that enrolled on or after July 1, 2014.³ This cap had limited the one-time registration fee to 1% of the total cost of remediation or a maximum of \$5,000, whichever was less. At the end of the project, the program participant would provide DEQ with the total costs of remediation for the project. The registration fee would then be calculated based on 1% of the total cost of remediation and would be compared to the registration fee paid to date. Any overpayment of the registration fee would be refunded or in the case of an underpayment, the participant would pay the additional required registration fee, not to exceed the statutory maximum (\$5,000).

In addition to removing the registration fee cap for all sites that enrolled on or after July 1, 2014, the 2014 amendments put in place a three phase registration fee structure. Phase I is an application registration fee, Phase II is an enrollment registration fee, and Phase III is an annual registration fee. According to DEQ, despite the additional fees authorized in 2014, the fee structure covers only a fraction of the program's entire administrative costs. Moreover, the lack of annual registration fees for sites that registered before July 1, 2014 is problematic because

¹ See <https://lis.virginia.gov/cgi-bin/legp604.exe?141+sum+SB431>

² See <https://law.lis.virginia.gov/vacode/title10.1/chapter12.1/section10.1-1232/>

³ See <https://townhall.virginia.gov/l/ViewStage.cfm?stageid=7004>

DEQ continues to perform work on the pre-July 2014 sites without receiving additional funds from those sites. As a result, the program has been incurring costs for the continued oversight of sites that enrolled prior to July 1, 2014, without receiving any annual revenue for these sites. DEQ has been heavily relying on federal funding to cover the funding shortage. DEQ also notes that even as federal funding has steadily declined, more sites have enrolled in the program. This has exacerbated the funding shortage, which DEQ states has reached an unsustainable level. Evaluations have determined an average cost per site to be relatively equal to the proposed Phase III fee.

This action primarily proposes to make the voluntary remediation program financially self-sufficient. The proposal would require all sites continuing to participate in the program, regardless of their enrollment date, to pay annual registration fees. The Board would also adjust the fees so the program has enough resources to continue its operations.

Estimated Benefits and Costs

The voluntary remediation program allows property owners to voluntarily clean up and obtain the “Certification of Satisfactory Completion of Remediation” which in turn provides immunity from enforcement unless new issues are discovered. Historically, program participants have been private property owners, real estate investors and developers, governmental organizations and corporations wishing to divest property and resolve liability. For example, the owner of a strip mall may wish to redevelop a store front that was previously used to operate a dry cleaner and now desires to run a day care center. In order to cleanup any residual chemicals such as the dry cleaning solvent, tetrachloroethylene released to the environment, and thereby obtain immunity from enforcement actions under Virginia’s environmental laws, the owner may choose to participate in the program.

While the project owners pay for the costs of the remediation itself, the program incurs administrative costs in terms of personnel, travel, and oversight of remediation of the sites. DEQ can withhold the certificate of completion for a project until all fees are paid, but has no recourse for recouping fees if a pre-2014 participant drops out of the program before his project is completed or has no interest in obtaining the certificate. In addition, the current fees cover only a fraction of the actual administrative costs. The costs to DEQ for individual pre-2014 sites are estimated to be between \$20,000 and \$150,000. DEQ has had some projects where participants

have only paid several hundred dollars when the actual program administration costs were much more than that. As an example, a site enrolled in the year 2000 and paid a registration fee of \$27.05 and this site is still enrolled in the program with minimal progress being made towards completion. Numerous sites paid a registration fee of \$1,000 or less and have remained in the program for years.

Currently, three types of registration fees are assessed to cover administrative costs: Phase I (application registration fee), Phase II (enrollment registration fee), and Phase III (annual registration fee). Phase I requires the submission of an application and the fee and, DEQ staff would review submitted materials, agency records and may visit the site. Once DEQ determines the site is eligible for participation, the owner is charged a Phase II or enrollment fee and then submits a voluntary remediation report, which consists of a site characterization report, a risk assessment, a remedial action plan, documentation of public notice and a demonstration of completion. The owner is responsible, at his own cost, to remediate environmental hazards on the property. For every subsequent year the property participates in the program beyond the first calendar year, the owner is charged a Phase III annual registration fee. Once remediation is completed and the certificate is issued then no further fees are incurred.

According to DEQ, there are 143 enrolled sites. All of these sites have paid a registration fee to participate in the program. Seventy-two of the sites were enrolled prior to July 1, 2014, and were assessed only a single registration fee of one percent of the remediation costs, not to exceed \$5,000; these sites are not currently assessed annual registration fees for their continued participation in the program. Some of these 72 sites have been enrolled in the program for over 23 years. Of the 71 sites enrolled on or after July 1, 2014, 63 have not completed the remediation and remain enrolled and are assessed an annual registration fee of \$4,500 for their continued participation after the first calendar year. Administrative costs that exceed the fees collected are paid from federal funds.

Under the current fee structure, program participants do not share the full administrative costs of the program operation, but stand to directly gain from it. This may create a free-rider problem and some adverse incentives. This is particularly the case for the pre-2014 site owners who are no longer interested in remediating the site in a timely manner, but have no incentives to leave the program because they are not assessed any annual registration fees. The funding

shortage is worsened by these incentives. Since federal funding continues to be reduced, this presents an unsustainable path for the program as funding is divided among more recipients.

According to DEQ, most entities that participate in this program are in the process of trying to sell or develop their land and take part in the program in hopes of increasing the value of their holding by limiting the environmental liabilities their property may carry through the certificate. Simply, the participants stand to directly gain from participation in the program.

An economically efficient allocation of limited resources (i.e. limited administrative funding for the program) calls for each participant to pay for the full administrative costs of their clean up. The Board proposes to adjust the fees to make the program financially self-sustainable by the fees assessed. Once the new fees go into effect, DEQ plans to distribute a portion of the federal funding it receives under this program to the localities to assist with the environmental assessment of properties. The following table shows the estimated current and the proposed changes in the fee structure by site type. The proposed fees also include an annual adjustment for inflation according to the U.S. Department of Labor Consumer Price Index for all-urban consumers.⁴

Sites	Current annual registration fees	Proposed annual registration fees to be adjusted by inflation
Pre July 1, 2014 sites	None (\$0 X 72 sites)	Phase III: \$525,000 (\$10,500 X 50 sites)
Post July 1, 2014 sites	Phase I: \$44,000 (\$2,000 X 22 sites)	Phase I: \$66,000 (\$3,000 X 22 sites)
	Phase II: \$165,000 (\$7,500 X 22 sites)	Phase II: \$165,000 (\$7,500 X 22 sites)
	Phase III: \$283,500 (\$4,500 X 63 sites)	Phase III: \$661,500 (\$10,500 X 63 sites)
Estimated Annual Revenue	\$492,500	\$1,417,500
Source: Voluntary Remediation Program Regulatory Advisory Panel Presentation, DEQ, February 21, 2020.		

⁴ This CPI value changed from 254.943 to 255.548 from April 2019 to April 2020 representing a 0.24% increase. The CPI can also decrease and cause a reduction in the fees.

As a result of the proposed fee changes for the pre-2014 projects, some project participants, particularly participants who remain dormant before project completion, would either chose to pay the additional fees or terminate from the program. Such an impact would improve the economic allocation of the program's administrative resources by either requiring dormant participants to pay for the costs they may be unnecessarily imposing on the program or eliminate such unnecessary costs if they terminate from the program. DEQ estimates that of the 72 sites that entered the program prior to July 1, 2014, up to 22 may terminate from the program rather than pay the proposed annual registration fee of \$10,500.

The proposed fee increase for post-2014 projects would raise participation costs, encourage speedy project completion, and free up federal funds to be used within the grant requirements to enhance the state programs with a portion to be utilized for environmental assessments in localities. In general, higher participation costs would be expected to discourage voluntary remediation activities; however, DEQ notes that the increase in fees would be relatively small compared to overall project costs and economic gains an owner may expect from his remediated property. Thus, this potential negative impact would likely be small. In addition, participation in the program is voluntary. We can reliably infer that by enrolling in the program, and maintaining enrollment, a project owner reveals that the expected economic gains exceed the likely costs. DEQ also expects about 22 new sites to register for the program annually. The amount that would likely be available to be used within the grant requirements to enhance the state programs with a portion available to be utilized for environmental assessments in localities which would be approximately \$486,000 based on 2019 data, but that amount would likely be smaller in the future as more and more jurisdictions participate nationally in the federal Brownfields program and the amount of the federal grant decreases..

Additional proposed amendments include revisions to the definitions, clarification of public notice requirements, and clarification to the language of the eligibility and waiver requirements. These amendments will not change the current practices and are unlikely to create monetary costs or benefits. However, to the extent these clarifying changes streamline processes and/or make these regulations easier to understand, affected entities would likely benefit.

Businesses and Other Entities Affected

The proposed amendments apply to site owners voluntarily participating in the program. Currently, 143 sites are enrolled.⁵ Approximately, 72 site owners who enrolled in the program prior to July 1, 2014 would be subject to the same annual registration fees as the 73 sites that are enrolled after this date.

As noted above, the proposals to amend the fee structure would increase costs for site owners, but also make the program financially self-sufficient. An adverse economic impact⁶ on site owners is indicated.

Small Businesses⁷ Affected:

Types and Estimated Number of Small Businesses Affected

DEQ estimates that of the 143 of sites currently participating in the program 100 are small businesses.

Costs and Other Effects

The proposed changes introduce the same fees to the sites owned by small businesses.

Alternative Method that Minimizes Adverse Impact

There does not appear to be a clear alternative method that both reduce the adverse impact and meet the intended policy goals.

Localities⁸ Affected⁹

Once this program becomes financially self-sufficient with the proposed fee revenues, DEQ plans to use federal funds within the grant requirements to enhance the state programs with a portion to be utilized for environmental assessments within the localities. In 2019, this amount was \$486,000, but the amount has been steadily decreasing and will likely continue to decrease. However, this regulation contains no language about such a distribution. Thus, the proposed

⁵ Data source: DEQ

⁶ Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

⁷ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

⁸ “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

⁹ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.

amendments do not introduce costs or benefits for local governments, nor do they particularly affect any locality more than others. Accordingly, no additional funds would be required. Any potential benefit to localities depends on how DEQ would implement the planned brownfield assistance to these organizations.

Projected Impact on Employment

The proposed amendments do not appear to affect total employment.

Effects on the Use and Value of Private Property

The proposed fee structure is expected to improve economic allocation of program's administrative costs and align site owner's incentives with the administrative costs the sites generate for DEQ. To the extent such effects speed up existing remediation programs and redirect DEQs existing administrative resources from dormant sites to active sites, we may see an increase in the remediated land areas or properties which in turn would add to the use and value of such properties and potentially reduce real estate development costs.

Legal Mandates

General: The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

Adverse impacts: Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.