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Fast-Track Regulation Agency Background Document

Agency name	Virginia Waste Management Board
Virginia Administrative Code (VAC) citation(s)	9VAC20-160
Regulation title(s)	Voluntary Remediation Regulations
Action title	Amendment clarifying definitions, applicability of fees for sites conducting remediation in phases, and the issuance of multiple certificates for a site.
Date this document prepared	October 9, 2018

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 (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

Changes are being made to improve the clarity of requirements of the regulation. These changes include the addition of definitions, clarifications concerning the applicability of fees for sites that conduct remediation in phases, and the issuance of multiple certificates for a site.

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.

CERCLA - Comprehensive Environmental Response, Compensation and Liability Act
RCRA- Resource Conservation and Recovery Act
VRP- Voluntary Remediation Program

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.

On December 17, 2018, the Virginia Waste Management Board authorized the department to:

1. Promulgate the proposal for public comment using the fast-track process established in § 2.2-4012.1 of the Administrative Process Act for regulations expected to be non-controversial. The board's authorization

also constituted its amendment of the regulation at the end of the public comment period provided that (i) no objection to use of the fast-track process is received from 10 or more persons, or any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, and (ii) the department does not find it necessary, based on public comments or for any other reason, to make any changes to the proposal.

2. Set an effective date 15 days after close of the 30-day public comment period provided (i) the proposal completes the fast-track rulemaking process as provided in § 2.2-4012.1 of the Administrative Process Act and (ii) the department does not find it necessary to make any changes to the proposal.

Mandate and Impetus

Please identify the mandate for this regulatory change, and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, board decision, etc.). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

As required by Virginia Code § 2.2-4012.1, please also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.

Changes are being made to improve the clarity of requirements of the regulation. These changes include the addition of definitions, clarifications concerning the applicability of fees for sites that conduct remediation in phases, and the issuance of multiple certificates for a site. These changes will make the regulation easier to understand for both the regulated community and the agency.

The proposed amendments are expected to be non-controversial, and therefore justify using the fast-track process. An informal comment period was held on the proposed changes and no comments were received on the changes.

Legal Basis

Please identify (1) the agency or other promulgating entity, 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 entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity's overall regulatory authority.

The Virginia Code in § 10.1- 1232 directs the Virginia 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. Section 10.1-1402(11) of the Virginia Code authorizes the Board to promulgate and enforce regulations necessary to carry out its powers and duties, the intent of the Virginia Waste Management Act and the federal acts.

The Voluntary Remediation Regulations are a state regulation and there is no equivalent corresponding federal regulation. This regulation applies only where remediation is not otherwise required under state or federal law, or where such jurisdiction has been waived. Entities that qualify may choose to utilize this regulation to conduct remediation of contaminated sites.

Purpose

Please explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

Changes need to be made to the Voluntary Remediation Regulation to improve the clarity of requirements of the regulation. These changes include the addition of definitions, clarifications concerning the applicability of fees for sites that conduct remediation in phases, and the issuance of multiple certificates for a site. Clarifying these requirements will help to minimize confusion concerning the requirements of the regulation.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

Changes to the regulation include the addition of definitions, clarifications concerning the applicability of fees for sites that conduct remediation in phases, and the issuance of multiple certificates for a site. Clarifying these requirements will help to minimize confusion concerning the requirements of the regulation.

Issues

Please identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

The public and the agency will both benefit from the amendments to the regulation. The clarifications that are being made to the regulation will minimize confusion concerning the requirements of the regulation. There are no disadvantages to the public or the Commonwealth from these changes.

Requirements More Restrictive than Federal

Please identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.

The Voluntary Remediation Regulations are a state regulation and there is no equivalent corresponding federal regulation. This regulation applies only where remediation is not otherwise required under state or federal law, or where such jurisdiction has been waived. Entities that qualify may choose to utilize this regulation to conduct remediation of contaminated sites. State law (§10.1-1232) directs the Waste Management Board to adopt this regulation.

Agencies, Localities, and Other Entities Particularly Affected

Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected:
No state agency is particularly affected by this regulation.

Localities Particularly Affected:
This regulation is a statewide regulation and no locality is particularly affected by this regulation.

Other Entities Particularly Affected:

No entity is particularly affected by this regulation.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, please identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Please keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources</p>	<p>There is no cost to the state to implement the clarifying amendments to the regulation.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>There is no cost to other state agencies to implement the clarifying amendments to the regulation.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>The changes clarify the requirements of the regulation and will reduce confusion concerning the regulatory requirements.</p>

Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>The changes clarify the requirements of the regulation and there is no financial impact from the changes.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>The current regulatory language has caused confusion concerning the fees associated with obtaining multiple certificates for a site. Additional language has been added to clarify the requirements associated with sites being subdivided and receiving multiple certificates and sites undergoing phased remediation and receiving multiple certificates. The changes clarify the requirements of the regulation and do not increase costs to localities.</p>

Impact on Other Entities

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>Additional language has been added to clarify the requirements associated with sites being subdivided and receiving multiple certificates and sites undergoing phased remediation and receiving multiple certificates. The changes clarify the requirements of the regulation.</p>
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Impact on Other Entities

<p>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that:</p> <ul style="list-style-type: none"> a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million. 	<p>As of September 12, 2018, 143 sites are enrolled in the VRP. Five additional sites have submitted applications to participate in the VRP.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please be specific and include all costs including, but not limited to:</p> <ul style="list-style-type: none"> a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements. 	<p>Additional language has been added to clarify the requirements associated with sites being subdivided and receiving multiple certificates and sites undergoing phased remediation and receiving multiple certificates. The changes clarify the requirements of the regulation.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>The current regulatory language has caused confusion concerning the fees associated with obtaining multiple certificates for a site. Additional language has been added to clarify the requirements associated with sites being subdivided and receiving multiple certificates and sites undergoing phased remediation and receiving multiple certificates. The changes clarify the requirements of the regulation and will reduce confusion concerning the regulatory requirements.</p>

Alternatives

Please describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

The purpose of this regulatory action is to clarify the requirements if the existing regulation. The agency was not able to identify less intrusive or less costly alternatives that would be available for use by small businesses. This regulation contains risk based remediation standards that are used for all sites. The remediation activities for each site are unique and are evaluated individually based on the contaminants present and the future use of the site. Risk based remediation standards are utilized that are protective of human health and the environment. No viable alternatives for small businesses were identified that would be protective of human health and the environment.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or

reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

The remediation activities for each site are unique and are evaluated individually based on the contaminants present and the future use of the site. Risk based remediation standards are utilized that are protective of human health and the environment. The use of less stringent risk based remediation standards or performance standards for small businesses would not be protective of human health and the environment. Exempting small businesses from the remediation standards would not be consistent with the goal of remediating sites and returning them to productive use.

Public Participation

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Melissa Porterfield, DEQ - Office of Regulatory Affairs, P.O. Box 1105, Richmond, VA 23218; phone (804) 698-4238, FAX: 804-698-4019, email: melissa.porterfield@deq.virginia.gov . Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: www.townhall.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

Please list all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation.

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
10		Definitions	Adding a definition of "Adjacent property" to the regulation. The addition of this defined term clarifies the department's expectations concerning the public notification requirements for notification of owners of surrounding properties. Adding definitions of "Board" and "Director" to clarify the identity of the board and director referenced in the regulation.

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
30 B.		Eligibility criteria- Applicants that are not the site owner are required to demonstrate that they have access to the property at the time of payment of the registration fee.	Applicants that are not the site owner are required to demonstrate that they have access to the property at the time of payment of the Phase 2 registration fee. This change allows an applicant to submit a phase 1 registration fee and apply for the program without having to demonstrate they have access to the property. This change allows the department to review the eligibility of a site to participate in the VRP without requiring the applicant to have access to the site.
40 A 1		Application for participation in the program requires an overview of the project, transaction, or other reason for participation in the program	Some applicants may be discouraged from participating in the program if they believe that they are required to disclose information about a potential confidential real estate property transaction as part of the application process for the VRP. DEQ does not need to obtain information concerning any negotiations that are occurring for the sale or transfer of a site seeking participation in the VRP and does not want the language of the regulation to be interpreted as requiring this information to be submitted. The regulation has been amended to state that the application for participation in the program should include an overview of the project and the reason for application for participation in the program. This change clarifies the requirements of the application.
40 A 3		Application for participation to include for authorized agents, a letter of authorization from an eligible party.	This requirement for a letter of authorization to be provided from the eligible party for an authorized agent is being removed. Application is being made to the VRP program and at this point in the application process, a party can not be deemed an eligible party. This change streamlines the application process. The remaining subdivisions have been renumbered as a result of this requirement being removed from the application process.
40 A 7	40 A 6	Application for participation	The term "clean-up" is being replaced with the term "remediation" since the term "clean-up" is not defined in the regulation. The term "remediation" is defined by the regulation and this change improves the clarity of the regulation.

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
40 A 9		Application for participation-requirements for applicants that are not the owners of the site to provide additional information including the consent of the owner for submission of the application and agreeing the contents of the application are correct.	This requirement is being removed from the regulation. In cases where the current owner is not the applicant to the VRP, this requirement places a burden on the site owner that is unnecessary. In some cases the site owner and applicant may have an agreement for the transfer of the property that will occur prior to remediation of the site. In such cases, the information in this subdivision is irrelevant. The goal of the VRP is to remediate sites. If an applicant that is not the property owner is willing and able to participate in the program for the site, this requirement would potentially hinder the site from participating in the program, therefore this requirement is being removed.
55 A		Registration fees for applications received prior to January 29, 2014	The following language is being added to the regulation: "If the participant elects to subdivide the site or conduct a phased remediation project requiring multiple certificates for the site, the additional site or sites shall be subject to phase 2 registration fees as required by 9VAC20-160-65 C 1 b and phase 3 registration fees as required by 9VAC20-160-65 D 6." This language clarifies the applicability of the registration fees previously paid. The registration fees previously assessed were based on the original application for participation in the program. If the participant chooses to subdivide the site and obtain multiple certificates, the additional site or sites will be subject to the phase 2 and phase 3 registration fees. The language is consistent with the current billing practices.

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
60 A		Registration fees for applications received on or after January 29, 2014, and prior to July 1, 2014	The following language is being added to the regulation: "If the participant elects to subdivide the site or conduct a phased remediation project requiring multiple certificates for the site, the additional site or sites shall be subject to phase 2 registration fees as required by 9VAC20-160-65 C 1 b and phase 3 registration fees as required by 9VAC20-160-65 D 6." This language clarifies the applicability of the registration fees previously paid. The registration fees previously assessed were based on the original application for participation in the program. If the participant chooses to subdivide the site and obtain multiple certificates, the additional site or sites will be subject to the phase 2 and phase 3 registration fees. The language is consistent with the current billing practices.
65 C 1 b.		Payment of separate Phase 2 registration fees	The regulation is being clarified concerning the applicability of phase 2 registration fees for phased remediation projects. If a phased remediation project requires a separate eligibility determination or a separate certificate for a section of a site, multiple phase 2 registration fees are required. A clarification is also being added concerning phased remediation work and the applicability of the phase 3 registration fee. The language is consistent with the current billing practices.
65 C 1 c		Phase 2 registration fees for sites that applied for the program prior to July 1, 2014	Language is being added to the regulation to clarify that if the site requires more than a single certificate, the site is subject to additional fees. The language is consistent with the current billing practices.
	65 C 1 d	Multiple certificates issued at the same time	Additional language is being added to address the issuance of multiple certificates for different portions of a project and the applicable phase 1 fees. The language is consistent with the current billing practices.
65 D 1. a.		Example concerning the billing of phase 3 registration fees	Example is no longer applicable and has been removed from the regulation.

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
65 D 1 b.	65 D 1 a.	Example concerning the billing of phase 3 registration fees	The example has been revised to remove references to previous. This change makes the example easier to understand.
	65 D 1 b.	Applicability of phase 3 registration fee for applications prior to July 1, 2014	This language clarifies the applicability of the phase 3 registration fee for applications submitted prior to July 1, 2014. If the participant chooses to obtain multiple certificates for a site, the site may be subject to multiple phase 3 registration fees.
65 D 6.		Applicability of phase 3 registration fee for applications prior to July 1, 2014	If the participant chooses to obtain multiple certificates for a site, the site may be subject to multiple phase 3 registration fees.
65 I		Request to change the participant	Language has been revised to clarify the participant for a specific site may be changed without being subject to phase 1, 2, or 3 registration fees or amendment fees.
70 A 4 e		Certification that activities at the site were performed in compliance with applicable regulations	The language has been changed to no longer require a certification from the participant. Certifications are typically provided by individuals that have professional licenses, for example, professional engineers, and a program participant is not required to be an individual with a professional license. The language now requires a signed statement from the participant indicating to the best of their knowledge the activities performed at the site pursuant to the chapter have been in compliance with applicable regulations.
70 D		Notification of the department when change in property ownership	The regulation is being clarified to state if the participant changes, the department shall be notified in writing within 30 days. Previously the regulation only mentioned the requirement of notification of the department of a change in property ownership. There is no fee related to the change in the participant (9VAC20-160-65 I).
110 A 3.		Certification of Satisfactory Completion of Remediation	Changing "approved remedial action plan" to "final remedial action plan" to be consistent with the actions the agency takes on the remedial action plan. The agency does not approve a remedial action plan but reviews the content of the remedial action plan.