

**TENTATIVE AGENDA AND MINIBOOK
WASTE MANAGEMENT BOARD MEETING**

FRIDAY, MAY 3, 2013
HOUSE ROOM C
GENERAL ASSEMBLY BUILDING
9TH & BROAD STREETS
RICHMOND, VIRGINIA

CONVENE – 10:00 a.m.

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NOTES: The Board reserves the right to revise this agenda without notice unless prohibited by law. Revisions to the agenda include, but are not limited to, scheduling changes, additions, or deletions. Questions on the latest status of the agenda or should be directed to Debra A. Harris at (804) 698-4209 or Debra.Harris@deq.virginia.gov.

PUBLIC COMMENTS AT WASTE MANAGEMENT BOARD MEETINGS

The Board encourages public participation in the performance of its duties and responsibilities. To this end, the Board has adopted public participation procedures for regulatory action and for case decisions. These procedures establish the times for the public to provide appropriate comment to the Board for its consideration.

For REGULATORY ACTIONS (adoption, amendment or repeal of regulations), public participation is governed by the Administrative Process Act and the Board's Public Participation Guidelines. Public comment is accepted during the Notice of Intended Regulatory Action phase (minimum 30-day comment period) and during the Notice of Public Comment Period on Proposed Regulatory Action (minimum 60-day comment period). Notice of these comment periods is announced in the Virginia Register, by posting to the Department of Environmental Quality and Virginia Regulatory Town Hall web sites and by mail to those on the Regulatory Development Mailing List. The comments received during the announced public comment periods are summarized for the Board and considered by the Board when making a decision on the regulatory action.

For CASE DECISIONS (issuance and amendment of permits), the Board adopts public participation procedures in the individual regulations which establish the permit programs. As a general rule, public comment is accepted on a draft permit for a period of 30 days. If a public hearing is held, there is an additional comment period, usually 45 days, during which the public hearing is held.

In light of these established procedures, the Board accepts public comment on regulatory actions and case decisions, as well as general comments, at Board meetings in accordance with the following:

REGULATORY ACTIONS: Comments on regulatory actions are allowed only when the staff initially presents a regulatory action to the Board for final adoption. At that time, those persons who commented during the public comment period on the proposal are allowed up to 3 minutes to respond to the summary of the comments presented to the Board. Adoption of an emergency regulation is a final adoption for the purposes of this policy. Persons are allowed up to 3 minutes to address the Board on the emergency regulation under consideration.

POOLING MINUTES: Those persons who commented during the public hearing or public comment period and attend the Board meeting may pool their minutes to allow for a single presentation to the Board that does not exceed the time limitation of 3 minutes times the number of persons pooling minutes, or 15 minutes, whichever is less.

NEW INFORMATION will not be accepted at the meeting. The Board expects comments and information on a regulatory action or pending case decision to be submitted during the established public comment periods. However, the Board recognizes that in rare instances new information may become available after the close of the public comment period. To provide for consideration of and ensure the appropriate review of this new information, persons who commented during the prior public comment period shall submit the new information to the Department of Environmental Quality (Department) staff contact listed below at least 10 days prior to the Board meeting. The Board's decision will be based on the Department-developed official file and discussions at the Board meeting. In the case of a regulatory action, should the Board or Department decide that the new information was not reasonably available during the prior public comment period, is significant to the Board's decision and should be included in the official file, the Department may announce an additional public comment period in order for all interested persons to have an opportunity to participate.

PUBLIC FORUM: The Board schedules a public forum at each regular meeting to provide an opportunity for citizens to address the Board on matters other than those on the agenda, pending regulatory actions or pending case decisions. Those persons wishing to address the Board during this time should indicate their desire on the sign-in cards/sheet and limit their presentations to 3 minutes or less.

The Board reserves the right to alter the time limitations set forth in this policy without notice and to ensure comments presented at the meeting conform to this policy.

Department of Environmental Quality Staff Contact: Debra A. Harris, Policy and Planning Specialist, Office of Regulatory Affairs, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, Virginia 23218, phone (804) 698-4209; fax (804) 698-4346; e-mail: Debra.Harris@deq.virginia.gov

Final Regulations

Voluntary Remediation Regulations, 9VAC20-160, Amendment 2

Staff will bring to the Board a request to adopt the amendments to the Voluntary Remediation Regulations, Amendment 2 (9VAC20-160, and authorize its publication. The Voluntary Remediation Regulation was last amended in 2002 and became effective as a final regulation on July 1, 2002. Based on a 4-year periodic/small business impact review conducted as part of this regulatory action, it was determined that the regulations needed to be updated to include current remediation levels; sampling and analysis methods; improved reporting requirements; and clarification of eligibility, termination, and application requirements. Amendment 2 updates the regulation and revises the procedures of the program so that contaminated sites can be processed more efficiently and to reflect changes in technology. At the June 14, 2010 meeting, the Board authorized the Department to promulgate for public comment a proposed regulation revision concerning the voluntary remediation program (VRP) regulations. A public hearing was advertised accordingly and held in Richmond on November 6, 2012 and the public comment period closed on November 23, 2012. The regulation amendments proposed for public comment concerned provisions covering the voluntary remediation program. A summary of the proposed amendments follows:

1. Section 10: Definitions - Definitions were clarified and some additional ones added to clarify requirements;
2. Section 20: Purpose, applicability, and compliance with other regulations - were revised to include characterization as part of the purpose of this chapter;
3. Section 30: Eligibility criteria - Requirements were added that addressed both the applicant and candidate sites eligibility; that required applicants to have access to the property until the remediation is complete; that required that the department be notified of any change in ownership or agent for the owner; that required documentation of completed remediation be provided; that clarified when remediation had been clearly mandated; and that required written permission from off-site property owners.
4. Section 40: Application for participation: A requirement for a map and acreage of the property was added to the application materials. Completeness review and notification provisions were added;

5. Section 60: Registration Fee: A requirement that the initial registration fee shall be the statutory maximum was added. Conditions for a participant seeking a partial refund were added;
6. Section 70: Work to be performed: Clarified the required components of the Voluntary Remediation Report. Required the submittal of an assessment of any risks to off-site properties and clarifies the use of land use controls. Clarified the reporting requirements in the case where the participant determines that no remedial action is necessary. A requirement that analysis be performed by laboratories certified by the Virginia Environmental Laboratory Accreditation Program was added. A requirement for the submission of an annual report containing a brief summary of any actions ongoing or completed as well as any planned future actions was also included.
7. Section 90: Remediation levels: clarified carcinogenic risks, ecological risks, surface water quality standards, soil screening levels, groundwater concerns, and human health considerations.
8. Section 100: Termination: Clarified the conditions under which participation in the program may be terminated. Added a requirement that the participant must make reasonable progress towards completion of the program to remain eligible.
9. Section 110: Certification of satisfactory completion of remediation: Regulatory requirements were clarified. Provided for notification when there is a change in ownership;
10. Section 120: Public notice: Provided for written notice to adjacent property owners and other owners whose property had been impacted by the release being addressed under the VRP project as soon as the department accepts the site characterization report and the proposed or completed remediation and prior to the department's issuing a certificate. Provided for the acknowledgement of the receipt of written comments and an evaluation of the comment's impact on the planned or completed action or actions.
11. Documents incorporated by reference: Certain references were updated or replaced by more recent documents.

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

DEQ received a total of 60 comments from the fourteen commenters on the proposed amendments. A summary of each of the comments and the accompanying analysis begins on page 5. Based on the comments, DEQ made changes to the proposed regulation and a listing of all the changes since the publication of the proposed regulation begins on page 20. Additionally, DEQ made changes for clarification and style, numbering and typographical corrections throughout the regulation.

Final Exempts

Regulations Governing the Transportation of Hazardous Materials, Immediate Final Rule 2012 – CFR Update

Immediate Final Rule 2012 amends the Regulations Governing the Transportation of Hazardous Materials, 9VAC20-110. This amendment is presented to the Board for consideration for adoption. Each year, the U.S. Department of Transportation makes changes to the federal regulations regarding the transportation of hazardous materials in Title 49 of the Code of Federal Regulations (49 CFR). As 9VAC20-110 incorporates certain parts of Title 49 of the CFR, it is necessary to amend 9VAC20-110 in order to incorporate the federal changes. This amendment will bring the 49 CFR citations in 9VAC20-110 up to date and incorporate the applicable changes to 49 CFR to the most current CFR published in the October 1, 2012 update. Section 2.2-4006 A 4 (c) of the Code of Virginia allows the Board to adopt this regulatory amendment to 9VAC20-110 as the changes are necessary to conform to changes in the federal regulations. This regulatory amendment will be effective 30 days after publication in the *Virginia Register*. At the Board meeting on May 3, 2013, the department will request that the Board adopt Immediate Final Rule 2012 to 9VAC20-110, authorize its publication, and affirm that the Board will receive, consider and respond to requests by any interested person at any time with respect to reconsideration or revision.

Administrative Procedures for Hazardous Waste Facility Site Certification, Amendment to allow electronic transmission (HB2089)

This regulatory amendment to 9VAC20-40 is presented to the Board for consideration for adoption. Virginia's Administrative Procedures for Hazardous Waste Facility Site Certification under 9VAC20-40 details the procedures for the siting of a new hazardous waste management facility. As part of the process, notifications by mail are required. In accordance with Chapter 348 of the 2013 Acts of Assembly, wherever the term "mail" is used in regulatory provisions that the Department administers it shall mean electronic or postal delivery and the term "certified mail" means electronically certified or postal certified mail, except that this provision shall apply only to the mailing of plan approvals, permits, or certificates issued under the provisions of this chapter and those of the Air Pollution Control Law, the Virginia Waste Management Act and the State Water Control Law, and only where the recipient has notified the Department of his consent to receive plan approvals, permits, or certificates by electronic mail. This final exempt regulatory amendment to 9VAC20-40 will revise the text to allow for the notifications to be delivered through postal or electronic means as required by the statutory change to §10.1-1183. Section 2.2-4006 A 4 (a) of the Code of Virginia allows the Board to adopt this regulatory amendment to 9VAC20-40 as the changes are necessary to conform to changes in §10.1-1183 of the Code of Virginia. This regulatory amendment will be effective 30 days after publication in the Virginia Register. At the Board meeting on May 3, 2013, the department will request that the Board adopt this amendment to 9VAC20-40, authorize its publication, and affirm that the Board will receive, consider and respond to requests by any interested person at any time with respect to reconsideration or revision.

Significant Noncompliance Report (*updated as of 4/16/13) Active HW SNC Cases – Table A

Location (DEQ Region)	Case Name	Brief Description of Alleged Violations	Status
Gloucester Co. (PRO)	Advanced Finishing Systems, Inc.	Pre-treatment violations. TSDF violations. Record keeping violations.	Pending U.S. Environmental Protection Agency ("EPA") enforcement action.
City of Roanoke (BRRO)	Chemicals and Solvents, Inc.	Failure to adhere to HW generator and transporter requirements. Possible releases.	Pending EPA enforcement action. Pending DEQ administrative action.
Pittsylvania Co. (BRRO)	Columbia Forest Products	Exceeding HW accumulation time and amount. UW violations.	Consent Order under development.
City of Portsmouth (TRO)	Columbus Avenue LLC	Exceeding HW accumulation time. Failure to notify of LQG status and pay annual fee.	Consent Order under development.
City of Hampton (TRO)	Craft Machine Works, Inc.	Failure to make HW determination. Failure to obtain a permit. Labeling and storage violations	Referred for adversarial enforcement action.
Warren Co. (VRO)	Dupont Performance Coatings, LLC for the Front Royal Plant	Exceeding HW accumulation time, inadequate aisle space, open HW containers	Pending EPA enforcement action.
City of Lynchburg (BRRO)	Extended Care Associates	Failure to determine HW streams. Manifest violations. Failure to notify of HW locations and LQG status.	Consent Order under development.
Henry Co. (BRRO)	Northpoint Trading, Inc.	Exceeding HW accumulation time limits.	Consent Order under development.
City of Petersburg (PRO)	Pre Con, Inc.	Labeling violations. Manifest violations.	Consent Order under development
Caroline Co. (NRO)	R207 LLC.	Lack of EPA number. Manifest violations. HW container violations.	Consent Order under development. Pending EPA removal action.
Henrico County (PRO)	Standex Engraving LLC	Failure to make HW determination. SAA violations. HW management and contingency plan violations.	Consent Order under development.
City of Petersburg (PRO)	Virginia State University	Exceeding HW accumulation time and amount. Labeling and accumulation start date violations. SAA violations.	Executive Compliance Agreement under development.
Amherst Co. (BRRO)	Wright's Auto Sales & Body Shop	Failure to make HW determination, used oil violations.	Consent order in negotiations, waiting for ability to pay analysis from IRS.

Resolved HW Cases – Table B

Location (DEQ Region)	Case Name	Brief Description of Alleged Violations	Status
*City of Winchester (VRO)	Virginia Tech Alson H. Smith Jr. Agricultural Research and Extension Center	Lack of generator notification, nonpayment of annual fee, acute HW accumulation violations	Executive Compliance Agreement effective April 15, 2013.
Montgomery Co. (BRRO)	Federal-Mogul Corporation	Failure to make HW determination. HW container violations.	Consent Order effective February 5, 2013. \$11,600 civil charge. Schedule of compliance included.
City of Radford (BRRO)	J & J Sales	Failure to make HW determination. HW Container violations.	1186 Order effective December 7, 2012. \$10,000 civil charge. Injunctive relief included.
*Fairfax Co. (NRO)	Syntech Technology, Inc	Failure to make HW determination. Failure to properly dispose of HW. Failure to notify as LQG.	Self-reported, corrected and resolved. No order issued.
*Chesterfield County (PRO)	Wako Chemicals USA, Inc.	Failure to determine. Exceeding HW accumulation times. Manifest violations. Contingency plan violations.	Consent order effective April 27, 2013. \$12,300 civil charge. Schedule of compliance included.

Total FFY 13 YTD Hazardous Waste Consent Orders = 4

Total FFY 13 YTD Civil Charges = \$33,900

Resolved Solid Waste Cases – Table C

Location (DEQ Region)	Case Name	Brief Description of Alleged Violations	Status
Prince William Co. (NRO)	Potomac Landfill, Inc. for Potomac Landfill	Exceedance of permitted maximum height of waste. Failure to effectively control odors. Leachate violations. Exposed waste.	Consent Order effective November 7, 2012. \$50,000 civil charge. Schedule of compliance included.
Stafford Co. (NRO)	City of Fredericksburg for Cool Springs Road Closed Landfill	Exceeding methane gas levels. Failure to notify DEQ of exceedances. Failure to comply with Landfill Gas Remediation Plan.	Consent Order effective October 9, 2012. \$13,965 civil charge.
City of Radford (BRRO)	Virginia Casting Industries, LLC for VCI Radford Landfill	FA violations. Insufficient intermediate cover. Lack of adequate closure plan.	Consent Order effective February 5, 2013. Inability to pay determination made. Schedule of compliance included.

Total FFY 13 YTD Solid Waste Consent Orders = 3

Total FFY 13 YTD Civil Charges = \$63,965

ANALYSIS OF COMMENT - Voluntary Remediation Regulations, 9VAC20-160, Amendment 2

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

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

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

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

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

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

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

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

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

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

RESPONSE: See the response to comment 2.

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

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

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

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

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

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

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

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

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

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

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

COMMENTER: Channing J. Martin, Williams Mullen.

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

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

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

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

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

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

For approximately 10 years the Department has been working on guidance for consistent application of the eligibility criteria for open dumps. The regional offices have struggled with how to apply the open dump criteria to a site seeking eligibility not knowing whether it is necessary to require pre-eligibility sampling or what date or dates of disposal matter. One of the areas of the Commonwealth most benefitted by the VRP is the Carlyle area of Alexandria where the United States Patent and Trademark was developed partially on an old landfill. Even after a number of portions of such landfill had been entered into the program, a debate arose due to the “open dump” criteria when the Alexandria Carlyle Centre site applied for eligibility to enter the program. While ultimately allowed to enter the program, there should have never been a debate and could have been avoided with a clear standard.

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

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

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

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

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

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

8. **SUBJECT:** Application requirements.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

9. **SUBJECT:** Application requirements.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

10. **SUBJECT:** Application requirements.

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

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

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

11. **SUBJECT:** Application requirements.

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

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

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

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

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

RESPONSE: The department requires a full and accurate record regarding the past history of the site. The primary purpose of the application is for the establishment of VRP eligibility. The application summarizes the environmental compliance history of the site, and the environmental history/ current conditions are evaluated during the eligibility process. If the current property owner has specific knowledge related to the information requested in the application, this will provide the department with a greater level of understanding of the site as it is evaluated for participation in the VRP. No change is made to the proposal in response to this comment.

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

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

COMMENTER: Tom Hardy, ECC Inc.

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

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

RESPONSE: See the response to comment 12.

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

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

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

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

COMMENTER: Channing J. Martin, Williams Mullen.

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

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

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

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

COMMENTER: Tom Hardy, ECC Inc.

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

RESPONSE: See the response to comment 16.

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

COMMENTER: Pamela F. Faggert, Dominion.

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

RESPONSE: See the response to comment 16.

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

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

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

COMMENTER: Tom Hardy, ECC Inc.

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

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

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

RESPONSE: See the response to comment 19.

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

D. Until certificate issuance, all participants shall submit an annual report for the July 1st to June 30th time period to the department containing a brief summary of any actions ongoing or completed as well as any planned future actions for the next annual reporting period. This report shall be submitted by July 4 30th following the end of the previous annual reporting period using the "VRP Site Status Reporting Form-" if such form has been developed and made available by the department prior to the end of the applicable reporting period or, if not, in writing to the department. Failure to submit an annual report within 630 days of receipt of notice from the department that the annual report has not been received may result in the site's Voluntary Remediation Program eligibility status being terminated.

RESPONSE: See the response to comment 19.

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

COMMENTER: Pamela F. Faggert, Dominion.

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

RESPONSE: See the response to comment 19.

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

COMMENTER: Pamela F. Faggert, Dominion.

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

RESPONSE: See the response to comment 19.

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

COMMENTER: Pamela F. Faggert, Dominion.

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

RESPONSE: See the response to comment 24.

26. **SUBJECT**: Reference dates.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

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

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

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

COMMENTER: Pamela F. Faggert, Dominion.

TEXT: 9VAC20-160-100 describes the conditions in which program participants may be terminated from the program. Subsection A 3 states that a participant may be terminated for not making "reasonable progress toward completion of the program, as determined by the department." While it is understood that the Department should have the discretion to remove participants that are in essence inactive, the manner in which this statement is written leaves considerable doubt for any due process for the participant to stay in the program. As an alternative, we suggest this statement be amended as follows:

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

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

29. **SUBJECT**: Project termination.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

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

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

30. **SUBJECT:** Releases.

COMMENTER: Channing J. Martin, Williams Mullen.

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

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

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

32. **SUBJECT:** Certificate revocation.

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

H. The certificate may be revoked by the director department at any time in the event that conditions at the site, unknown at the time of issuance of the certificate, pose a risk to human health or the environment or in the event that the certificate was based on information that was false, inaccurate, or misleading. The certificate may also be revoked for the failure to meet or maintain the conditions of the certificate. Any and all claims may be pursued by the Commonwealth for liability for failure to meet a requirement of the program, criminal liability, or liability arising from future activities at the site that may cause contamination by

pollutants. By issuance of the certificate the ~~director~~ department does not waive sovereign immunity. Failure to implement and maintain land use controls may result in revocation of the certificate.

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

H. The certificate may be revoked by the director department at any time in the event that conditions at the site, unknown at the time of issuance of the certificate, pose a risk to human health or the environment or in the event that the certificate was based on information that was false, inaccurate, or misleading. Additionally, the certificate may also be revoked for the failure to meet or maintain the conditions of the certificate or failure to implement and maintain land use controls specified therein upon written notice to the current owner of the property that is the subject of the certificate and a failure to cure within sixty (60) days or some other longer reasonable period granted by the department. Any and all claims may be pursued by the Commonwealth for liability for failure to meet a requirement of the program, criminal liability, or liability arising from future activities at the site that may cause contamination by pollutants. By issuance of the certificate the ~~director~~ department does not waive sovereign immunity. ~~Failure to implement and maintain land use controls may result in revocation of the certificate.~~

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

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

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

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

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

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

COMMENTER: Channing J. Martin, Williams Mullen.

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

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

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

TEXT: (9VAC20-160-120 B 2) - The Department has proposed to revise the group of owners who must receive notice in 9VAC20-160-120 B 2 to include "other owners whose property has been impacted by the release being addressed under the VRP project." Please consider adding the word "physically" before "impacted" to avoid any confusion where individuals may believe they are entitled to personal notice because they are in the area of the release but not physically impacted.

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

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

COMMENTER: Pamela F. Faggert, Dominion.

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

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

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

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

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

COMMENTER: Pamela F. Faggert, Dominion.

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

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

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

COMMENTER: James A. Thornhill, McGuireWoods LLP.

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

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

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

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

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

COMMENTER: Channing J. Martin, Williams Mullen.

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

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

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

COMMENTER: Justin Thompson, Site Location Partnership.

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

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

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

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

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

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

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

COMMENTER: Thomas R. VanBlaricom, ECC Inc.

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

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

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

COMMENTER: Channing J. Martin, Williams Mullen.

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

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

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

COMMENTER: John Sweeney, ECC Inc.

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

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

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

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

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

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

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

COMMENTER: Gerry Myers, Stantec.

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

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

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

COMMENTER: Gerry Myers, Stantec.

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

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

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

COMMENTER: Amy Edwards, Holland and Knight LLP.

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

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

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

COMMENTER: Amy Edwards, Holland and Knight LLP.

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

RESPONSE: The owner signs the application and therefore has the opportunity to become familiar with the information in the application. If the application contains information that is not consistent with what the owner believes to be true, it is incumbent upon the owner to

resolve the inconsistency with the participant before signing the application. If the owner has no information to the contrary, then the owner can sign the application in good faith. Determining the correct information that forms the basis for the application is an issue to be resolved between the participant and the owner. What is or is not under their control is not relevant to the correctness of the information in the application. No change is made to the proposal in response to this comment.

51. **SUBJECT:** Registration fee.

COMMENTER: Amy Edwards, Holland and Knight LLP.

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

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

52. **SUBJECT:** Termination.

COMMENTER: Amy Edwards, Holland and Knight LLP.

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

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

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

COMMENTER: Amy Edwards, Holland and Knight LLP.

TEXT: 9 VAC 20-160-110 H provides that a certificate can be revoked for failure to meet or maintain the conditions of the certificate. This statement should be clarified to explain that any such revocation would only affect the current property owner, and would not have any impact upon a prior property owner who had adhered to the conditions in the certificate.

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

54. **SUBJECT:** Public notice.

COMMENTER: Amy Edwards, Holland and Knight LLP.

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

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

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

COMMENTER: Pamela F. Faggert, Dominion.

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

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

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

COMMENTER: Channing J. Martin, Williams Mullen.

TEXT: The department needs to decide how it will refer to the "certificate" throughout the regulations and then stick with it. At present, the regulations refer to a "Certificat~~ion~~ of Satisfactory Completion of Remediation," a Certificate of Satisfactory Completion of Remediation," a "Certification of Satisfactory Completion," a "Certificate of Satisfactory Completion," a "Certificate," a "certificate." Please pick one, do a word search, and then use it throughout.

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

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

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

COMMENTER: Channing J. Martin, Williams Mullen.

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

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

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

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

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

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

59. **SUBJECT**: Enrollment fee.

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

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

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

60. **SUBJECT:** Program implementation.

COMMENTER: Tom Hardy, ECC Inc.

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

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

CHANGES SINCE PROPOSED STAGE - Voluntary Remediation Regulations, 9VAC20-160, Amendment 2

Section number	Requirement at proposed stage	What has changed	Rationale for change
9VAC20-160 Voluntary Remediation Regulations			
Chapter 160.	Voluntary Remediation Program requirements are specified	Various changes are made to improve consistency in the terms used throughout the chapter (among others, replacing "director" with "department;" replacing "to show" with "demonstrating;" and standardizing various forms of the terms "onsite," "offsite," and "certificate").	Consistency in the use of terms improves clarity and reduces misunderstanding.
160-10.	The term "director" is defined.	The definition is deleted.	The term is no longer used in this chapter.
160-10.	None.	The term "environmental covenant" is defined.	The term is now used in section 10 in the definition of "institutional controls".
160-10.	The term "incremental upper-bound lifetime cancer risk level" is defined.	The definition is revised to refer to "risk" rather than "risk level" and to further qualify the probability of developing cancer.	Necessary to provide consistency with the term as it is used in the regulation and with federal regulation.
160-10.	The term "institutional controls" is defined.	The definition is revised to include land use restrictions and environmental covenants.	Necessary to include some additional examples of the controls.
160-10.	The term "monitored natural attenuation" is defined.	The definition is revised to remove the word "closely."	The use of the word "closely" in this definition is subjective and not necessary.
160-10.	The term "natural attenuation" is defined.	The definition is revised to more closely match the federal definitions.	This change is necessary to clarify that the processes include natural physical processes, and to improve consistency with federal regulations.
160-10.	The term "operator" is defined.	The definition is deleted.	The term is no longer used in this chapter.
160-10.	The term "post certificate monitoring" is defined.	The definition is revised to refer to the defined term "Certificate."	Necessary for consistency in the terms used in this chapter.
160-10.	The term "remediation" is defined.	The definition is revised to correct various grammar, punctuation, and spelling errors.	Necessary to conform to standards of style, correctness, and clarity.
160-10.	The term "termination" is defined.	The definition is revised to refer to the defined term "Certificate."	Necessary for consistency in the terms used in this chapter.
160-30 B.	Access requirements are specified.	The requirements for eligibility are revised to change the beginning and endpoint for when access by the participant is required.	Necessary to be more specific about when access must be provided. Numbering and taglines are no longer necessary.
160-30 B.	Notification of any change in ownership or agent is required.	These notification requirements are relocated to section 70.	Notifications are not eligibility criteria and need to be moved.
160-30 D 3.	Some conditions are specified under which open dump sites and permitted waste facilities are not eligible for the	The conditions are revised to be more specific.	This change is necessary to prevent misinterpretations.

	program.		
160-30 E.	The director is provided with discretion to determine whether some open dumps or unpermitted facilities may participate under certain conditions.	The discretionary provision is revised to refer to the department instead of the director.	This replacement is made for consistency reasons throughout the entire chapter.
160-40 A.	Application requirements are listed.	Various punctuation and grammar are revised throughout this subsection.	Corrections are made to conform to style, punctuation, and grammar guidelines.
160-40 A 1.	Written notice of intent to participate is required.	The requirement for a notice of intent is deleted and the overview is revised to allow reasons for an application other than for remediation projects.	This change eliminates an unnecessary requirement and corrects overly restrictive language in the revised application requirement.
160-40 A 4.	A plat or map showing boundaries and acreage is required in the application.	The revision allows the approximate boundaries and acreage of the site and property to be used in the application.	This change is necessary to allow the application to proceed before actual acreage and boundaries of the site are known.
160-40 A 7.	A discussion of other applicable programs is required.	The revision clarifies that the applicable programs to be discussed are only those that require cleanup of the release.	This change qualifies the requirement to avoid misinterpretation.
160-40 B.	Application review requirements are specified.	The completeness and eligibility determination requirements are revised to require a positive or a negative determination for notification of completeness or verification of eligibility.	This change is necessary to avoid misinterpretation in the event that any notification of the results of the completeness or eligibility determinations to the participant is delayed.
160-60 B.	The amount of the registration fee is specified and payment is required.	The registration fee to be paid up front is better clarified to be the maximum allowed under law for the highest potential cost of remediation (\$5000).	This change ensures that the Department defrays the costs of the program up to the maximum fee allowed.
160-60 C.	Consequences for the participant's failure to remit the registration fee on time are specified.	The flexibility allowed to the department for extending the registration payment period is clarified.	This revision ensures that the provisions for department discretion are sufficiently specific.
160-60 D.	Provisions for a partial refund of any excess fees are specified.	Provisions for calculating the refund amount and what requirements must be fulfilled are clarified.	These changes prevent miscommunication about what the requirements for a refund are.
160-60 E.	Terms under which no refund will be given are specified.	The exception allowing refunds for termination due to completion of the project is deleted.	This change is necessary because the reasons for termination in 9VAC20-160-100 were revised to remove project completion from the list to better conform to the definition of "termination."
160-70 A.	A separate report is required for each component of the Voluntary Remediation Report	The language is revised to allow flexibility in how the separate components of the report are submitted.	This change is necessary to allow reports to be submitted in a way that makes the best sense for that project.
160-70 A 1.	The information requirements for the Site Characterization Report are specified.	The requirements are clarified to be more specific about the criteria for the extent of contamination and to include a description of previous remediation activities.	This clarification is necessary to limit the extent of contamination to be reported, and to include a characterization requirement from another subdivision.
160-70 A 2.	The information requirements for the Risk Assessment Report are specified.	Language, terms, and punctuation are revised.	These revisions are necessary for consistency and to meet guidelines for style, grammar and spelling.
160-70 A 3.	The information requirements for the Remediation Action Plan Report are specified.	Requirements that belong in other sections of the report are removed and the remaining requirements are reorganized.	These changes are necessary to improve the organization and logic of the component reporting requirements.
160-70 A 4.	The information requirements for the Demonstration of Completion Report are specified.	Requirements that belong in other sections of the report are removed and the remaining requirements are reorganized and clarified. Language, terms, and punctuation are also revised.	These changes are necessary to improve the organization and logic of the component reporting requirements and to meet guidelines for style and grammar.
160-70 A 5.	The information requirements for the documentation of public notice are specified.	The requirements are revised to be those documents required in another subsection	These changes are necessary to improve consistency between two recordkeeping provisions that refer to the same

			documents.
160-70 C.	Sampling requirements are specified.	Spelling of some terms is revised to conform to a preferred variation.	This change is necessary for consistency and to meet guidelines for style and spelling.
160-70 D.	A new annual reporting requirement is described.	The annual reporting requirement is deleted and the property ownership reporting requirement removed from 9VAC20-160-30 B is inserted.	This change deletes an unnecessary requirement and relocates a necessary requirement.
160-70 E.	None.	The change in agent reporting requirement from 9VAC20-160-30 B is inserted.	This change relocates a necessary requirement.
160-80 A.	Reporting and review requirements are provided.	One example of additional information that the department may request, is clarified.	This change emphasizes the possibility that the department may request sampling data in areas where the extent of contamination is not yet demonstrated.
160-80 B.	Requirements for expediting permits are specified.	Language is added to allow the department to waive permits as appropriate.	This revision is necessary to fulfill statutory requirements.
160-90 B 2 b (3).	Flexibility to adjust screening values is provided.	The reference is corrected.	This revision is necessary to conform to the proposed renumbering of this subsection.
160-100 A 3.	Termination of eligibility is required for failure to make reasonable progress in the program.	Failure to respond to a notification is added as a criterion that must be met before a participant is terminated for lack of progress.	This change is necessary to ensure that a participant knows that the department is considering termination and has an opportunity to respond to prevent an unnecessary termination.
160-100 A 4.	Requirements for terminating a site's eligibility to participate in the VRP program are provided.	Successful completion of the remediation project is deleted from the list of reasons for termination.	This change is necessary to be consistent with the definition of "termination."
160-100 C.	Refund of the registration fee is prevented in cases of termination other than completion of the project.	This requirement is deleted.	As a result of changes made to 9VAC20-160-60, this requirement is redundant and unnecessary.
160-110 A through I.	Criteria for the issuance of a certificate of completion are provided.	Language, terms and spelling are revised.	These changes are made for consistency and to meet standards for style and grammar.
160-110 F.	Criteria for the immunity provided by the certificate of completion are specified.	Immunity is limited to the releases described in the certificate instead of the site conditions described in the Voluntary Remediation Report.	This revision is necessary to clarify the limits of immunity.
160-110 H	Criteria for revoking a certificate are specified.	Provisions are revised to require prior notice and opportunity to respond to a proposed revocation, and to reorganize and restate the conditions for revocation and are reorganized. Provisions reserving the Commonwealth's sovereign immunity and rights to pursue liability claims are removed. The provision concerning revocation for failure to implement or maintain controls is deleted.	The addition of the notice requirement is necessary to ensure that owners are aware of a pending revocation and have the opportunity to resolve deficiencies before a revocation is issued. Moving provisions unrelated to the process of revocation is necessary for clarity. Revocation provisions related to a failure to implement and maintain controls are redundant with subdivision 3 of this subsection and are unnecessary.
160-110 J.	Notification requirements for a change in ownership after project completion are specified.	The notification requirement is deleted. A statement removed from subsection H reserving rights to take lawful action for liability claims is revised and inserted.	The notification requirement is burdensome and unnecessary. Insertion of the revised liability claims provision improves organization and clarity.
160-110 K.	None.	A statement removed from subsection H preserving the Commonwealth's sovereign immunity is inserted.	This requirement is necessary, but is relocated to this new subsection to improve organization and clarity.
160-120 A.	A requirement for public notice of a proposed remediation is specified.	Revisions are made to conform to other revisions to terms and reporting requirements	These changes are made for consistency.
160-120 B.	The persons to be notified of a proposed remediation by the	The owners to the notified are clarified to be only those whose property is affected by	This change is necessary in order for participants to know who must be notified.

	participant are specified.	predicted or known amounts of contamination reported by the participant in the Site Characterization Report.	
160-120 C.	The length of the public comment period and contents of the notice are specified.	The length of time that the comment period may be extended is limited and a reference is corrected.	These changes are necessary to be more specific about how long the comment period may be, and to correctly identify the reference.
160-120 E.	Documentation requirements for the public notice are specified.	The requirement is restated so that it is clear that only one set of documentation has to be provided to the department (in the Voluntary Remediation Report).	This change is necessary to clarify reporting requirements and reduce redundancy.