



## Proposed Regulation Agency Background Document

<b>Agency name</b>	Department of Historic Resources
<b>Virginia Administrative Code (VAC) citation</b>	_17__ VAC_5__-__20 -- 80__
<b>Regulation title</b>	Regulations Governing Permits for the Archaeological Removal of Human Remains
<b>Action title</b>	Revision to § 30: General Provisions; § 40: Permit application; § 50: Public comment; and § 60: Issuance or denial of permit
<b>Date this document prepared</b>	August 11, 2014

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.*

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

In accordance with § 10.1-2305(D), the Virginia Board of Historic Resources is required to promulgate implementing regulations to “provide for appropriate public notice prior to issuance of a permit, provide for appropriate treatment of excavated remains, the scientific quality of the research conducted on the remains, and the appropriate disposition of the remains upon completion of the research,” which regulations are codified at 17VAC5-20 through 17VAC5-80. The Department and the Board propose several revisions to 17VAC5-20 *et seq* in order to reflect the recent revisions to the court-ordered process, to require confirmation that the permit holder is able to complete the recovery process, and to

generally update and simplify its regulatory language. Through these revisions, the Department and the Board intend to render the application process more transparent to the general public, to ensure the careful and respectful treatment of all recovered human remains and associated artifacts, and to fully modernize the language of the regulations themselves.

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

### Acronyms and Definitions

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

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

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.*

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

### Purpose

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.*

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Public concerns about local governments and private property owners seeking court orders or other permits for the removal of "abandoned" cemeteries without sufficient public notification resulted in the passage of new Code requirements for these processes. In order to be consistent with the new court order process, and because of past occurrences where an applicant removed graves and then claimed they did not have the funds to rebury those remains with due respect and consideration, the Department

of Historic Resources, Board of Historic Resources has revised its implementing regulations (17VAC5-20 *et seq*) as follows: to enhance public notification requirements, rendering the application process more transparent and responsive to community interests; to ensure that the applicant has the resources (financial and otherwise) to complete the proposed work and the respectful disposition of the recovered remains; and to incorporate other technical changes, including removal of gender-specific references, in order to modernize the language of the regulations.

**Substance**

*Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)*

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

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

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

17VAC5-20-50(C): revised to clarify instances in which the above referenced public notice may be waived. These revisions are necessary in order to fully inform both applicants and the interested public of this option, which is rarely exercised.

17VAC5-20-60(C): revised to remove gender-specific references to the directorship of the Department.

In pursuing these revisions, the Department intends to render the permit application and consideration process more transparent to the interested public, to further ensure the respectful treatment of recovered human remains, and to more fully modernize the language of these implementing regulations.

**Issues**

*Please identify the issues associated with the proposed regulatory action, including:*  
 1) *the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*

- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.

If the regulatory action poses no disadvantages to the public or the Commonwealth, please indicate.

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

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

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

**Requirements more restrictive than federal**

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

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

**Localities particularly affected**

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

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

**Public participation**

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

In addition to any other comments, the Department is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the Department is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email or fax to Joanna Wilson Green, Virginia Department of Historic Resources, 2801 Kensington Avenue, Richmond, VA 23221, telephone 804-482-6098, fax 804-367-2391, email [joanna.wilson@dhr.virginia.gov](mailto:joanna.wilson@dhr.virginia.gov). Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last date of the public comment period.

A public hearing will be held after this regulatory stage is published in the *Virginia Register of Regulations* and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<http://www.virginia.gov/cmsportal3/cgi-bin/calendar.cgi>). Both oral and written comments may be submitted at that time.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact. Please keep in mind that we are looking at the impact of the proposed changes to the status quo.*

<p><b>Description of the individuals, businesses or other entities likely to be affected (positively or negatively) by this regulatory proposal.</b> Think broadly, e.g., these entities may or may not be regulated by this board</p>	<p>Those likely to be affected include: individuals, organizations, or agencies that own property containing unmarked and/or historic burials and cemeteries that they wish to relocate; individuals with an interest in or objection to this recovery; local and state agencies with a regulatory interest in the process; owners and employees of archaeological firms contracted to perform the recovery; physical anthropologists and their employers; owners and employees of funeral homes contracted to perform reburials where required by local ordinance.</p>
<p><b>Agency’s best estimate of the number of (1) entities that will be affected, including (2) small businesses affected.</b> Small business means a business, including affiliates, that is independently owned and operated, employs fewer than 500 full-time employees, or has gross annual sales of less than \$6 million.</p>	<p>With very few exceptions, archaeological firms qualify as small businesses. Given current permitting rates we anticipate that approximately 5 such businesses will be affected per year. Depending on land ownership, permit applicants may also be businesses and may be affected at the same rate.</p>

<p><b>Benefits expected as a result of this regulatory proposal.</b></p>	<p>1) Greater public understanding of and participation in a process that is of great importance to the citizens of Virginia; 2) increased clarity of process for both applicants and interested parties; 3) confirmation that applicants are capable of completing the recovery process, up to and including respectful reburial.</p>
<p><b>Projected cost to the <u>state</u> to implement and enforce this regulatory proposal.</b></p>	<p>No additional costs to the state are anticipated.</p>
<p><b>Projected cost to <u>localities</u> to implement and enforce this regulatory proposal.</b></p>	<p>No costs to localities as a result of implementation of these regulations are anticipated. Localities may choose to participate in the process to a greater degree but are not required to do so.</p>
<p><b>All projected costs of this regulatory proposal for <u>affected individuals, businesses, or other entities</u>.</b> Please be specific and include all costs, including projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses, and costs related to real estate development.</p>	<p>Individuals, businesses, or other entities applying for archaeological recovery permits are responsible for costs associated with public notification and informational meetings.</p>

**Alternatives**

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

The Department has considered maintaining the regulations in their current form and simply requesting that applicants diverge from the existing requirements during the application process. However, in practice the Department has found that applicants tend to adhere to the minimum and are reluctant to provide any information not required by regulation. The Department is of the opinion that the proposed changes are minimal, yet will provide enhanced protection for the buried individuals as well as for the interests of the living community. Failure to make the proposed changes would create a permit process that is inconsistent with and less transparent than requirements for a related court order, or would tacitly allow applicants to remove but not rebury human remains. Neither option is acceptable or in the public interest.

**Regulatory flexibility analysis**

*Pursuant to §2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

1) The proposed revisions to 17VAC5-20 et seq, where not technical in nature, are designed to address two key issues: bringing public notice requirements into conformance with changes to VA Code §§ 57-36 and 57-38.1, and ensuring that the permit applicant is able to complete all permit requirements including the reburial of all recovered remains in an appropriate manner and location. Existing compliance and reporting requirements are not onerous and are within industry standards. No further reduction is possible without the risk of loss of human remains and data, program integrity, or public confidence.

2) The existing regulations allow the applicant to define most aspects of the schedule based upon specific details of the planned burial removal, with the only additional requirement being that of completing analysis, reburial, and reporting within a two-year period. Current regulations also allow the director discretion to reduce or extend this period based upon specific circumstances. Under existing regulations, the agency’s only recourse in the event that permit conditions are not met is to deny issuance of any future permits to the applicant.

3) Current regulations require reburial or an appropriate alternative disposition of recovered remains and submittal of a final technical report. Further simplification is not possible.

4) Small businesses, when serving as permit applicant, will be held to the requirements of the permit itself. Small businesses in the form of archaeological or anthropological contractors associated with the permit will be held to professional qualification and reporting standards for all work performed pursuant to that permit. These standards are maintained by both the United States Department of the Interior and by the Virginia Department of Historic Resources and reflect industry standards.

5) In order to maintain program integrity and protect both the rights of the deceased and the public’s interest, exempting small businesses involved as permit applicants or as contractors from these regulatory requirements is not possible.

**Public comment**

*Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.*

<b>Commenter</b>	<b>Comment</b>	<b>Agency response</b>
Boyd Sipe	No objection to proposed changes to 17VAC5-20-40 and 17VAC5-20-60. Concerned that proposed changes to 17VAC5-20-50 would exceed the requirements of Code Section 57-38.1 with regard to electronic media, and that it would be difficult to identified appropriately inclusive media outlets.	This comment was written before the July 1 effective date that changed Code of Virginia § 57-38.1 to expand public notification including encouragement to use electronic media. The revision proposed for 17VAC5-20-50 brings the regulation into consistency with existing Code language. Both the change in Code and the change in regulations to require use of electronic media responds to documented public concern with the use of newspaper outlets only, as well as the opinion of the advisory committee convened to review and revise the Department’s implementing regulations.

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

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

**Detail of changes**

*Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all differences between the **pre-emergency** regulation and this proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

For changes to existing regulation(s) or regulations that are being repealed and replaced, use this chart:

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change, intent, rationale, and likely impact of proposed requirements</b>
17VAC5-20-30			Division of existing Paragraph 10 into two paragraphs. Revised in order to emphasize the consequences of a failure to complete the terms of a permit in a timely manner. Expected to reduce the incidence of such failures.
17VAC5-20-40(A)(1)		Name, address, phone number and institutional affiliation of the applicant	Revised to require that the applicant also provide a current <u>email address</u> . Revision intended to acknowledge the prevalence of electronic communication. Expected to facilitate direct communication with applicant, improve timeliness, and reduce costs for both agency and applicant.
17VAC5-20-40(A)	17VAC5-20-40(A)(3)	None	Paragraph added – requirement for proof of ownership of the property of archaeological site upon which the field investigation will be conducted. Necessary for legal sufficiency.
17VAC5-20-40(A)(3)	17VAC5-20-40(A)(4)	Written statement of landowner permission for research as well as for	Revised to remove gender specificity and to reflect addition of new paragraph 17VAC5-20-40(A)(3). Intended to

		access to the property by Department staff	modernize and clarify language of regulations.
17VAC5-20-40(A)(4)	17VAC5-20-40(A)(5)	Applicant to provide evidence of adequate resources to carry out the research design	Revised to require a signed statement confirming both financial and other resources, requirement for approval of research design, and requirement for reburial in an appropriate location. Also revised to reflect addition of new paragraph 17VAC5-20-40(A)(3). Intended to clarify and strengthen affirmative responsibilities of applicant.
17VAC5-20-40(A)(5)	17VAC5-20-40(A)(6)	Applicant required to indicate whether the permit is requested as part of a federal, state, or local government undertaking	Revised to reflect addition of new paragraph 17VAC5-20-40(A)(3).
17VAC5-20-50(B)		Applicant required to publish a notice of intent in a local newspaper in the area of the proposed field investigation	Revised to require additional posting of notice at the investigation site, notice to and consultation with local historical and genealogical commissions/societies, and at least one public hearing. Revisions a direct reflection of those already made to §§ 57-36 and 57-38.1. Expected to result in increased public participation.
17VAC5-20-50(B)	17VAC5-20-50(B)(3)	None	Paragraph added – requirement for a statement regarding the reason for the proposed relocation. Intended to provide additional information to interested parties.
17VAC5-20-50(B)(3)	17VAC5-20-50(B)(4)	Requires that the notice include a statement informing the public that they may request a public meeting	Revised to reflect addition of new paragraph 17VAC5-20-50(B)(3) as well as to replace “public” with “readers”. Intended to clarify/streamline regulations.
17VAC5-20-50(B)(4)	17VAC5-20-50(B)(5)	Requires that the notice provide the applicant’s contact information and a location where the application itself may be viewed	Revised to reflect addition of new paragraph 17VAC5-20-50(B)(3), as well as to include a requirement for the applicant’s email address. The requirement for location information was moved into a separate paragraph. Revision intended to reflect increasing reliance on electronic communication.
17VAC5-20-50(B)(4)	17VAC5-20-50(B)(6)	Originally part of 17VAC5-20-50(B)(4)	Revised to render information about locations for public viewing of application a separate requirement. Further revised to require a street address and clarify that the application must be available during normal business hours. Intended to increase and facilitate public participation.
17VAC5-20-50(B)(6)	17VAC5-20-50(B)(7)	Requires that the notice include a statement that a complete copy of the application may also be viewed/copied at the Department	Revised to reflect paragraph numbering changes, as well as to include notification that the application will be posted on the Department’s website. Intended to facilitate public participation.
17VAC5-20-	17VAC5-20-50(B)(8)	Requires that the notice include a statement regarding	Revised to reflect paragraph numbering changes, as well as to clarify that the

50(B)(7)		the proposed disposition of the remains and a request for public comment	statement should encompass both human remains and associated funerary artifacts, and that if any disposition other than reburial is proposed this information be provided and public comment on this aspect of the permit must be specifically requested. Revised to ensure that the public is aware of the intended outcome of any permitted recovery.
17VAC5-20-50(C)		Introduces section regarding potential waiver of public notice	Revised to replace "Such" with "The public" and adding the word "requirement". Intended to further clarify the regulation.
17VAC5-20-50(C)(1)		Indicates that a waiver may be granted if the family of the deceased is in agreement	Paragraph removed in its entirety. Revision reflects the difficulty in identifying descendants of individuals buried prior to mid-20 <sup>th</sup> century or determining which individuals may legally be considered "family".
17VAC5-20-50(C)(2)	17VAC5-20-50(C)(1)	Indicates that a waiver may be granted if the burial may be looted as a result of public notification	Paragraph renumbered to reflect deletion of previous paragraph. Revised to replace "there is a likelihood" with "it is likely", and to add the statement "or other damage to the burial or surrounding site". Intended to further clarify this exemption and avoid placing burial sites in danger.
17VAC5-20-50(C)(3)	17VAC5-20-50(C)(2)	Indicates that a waiver may be granted at the director's discretion and in recognition of a demonstrated emergency, with public notice to be provided as determined by the director	Revised to reflect paragraph numbering changes, to replace "If" with "In an emergency situation", and to add "vandalism, looting, or". The statement "or that the publication of such notice may substantially increase the threat of such loss through vandalism" was removed. The clause "In such cases" was removed from the third sentence and added to the second. Intended to further clarify this exemption.
17VAC5-20-50(D)		Indicates that, when permits sought pursuant to a court order, applicant must provide evidence of a reasonable effort to contact next of kin	Revised to add "subject to § 57.38.1 or 57.36" to reflect recent legislative changes.
17VAC5-20-50(E)		Indicates that any permit application for recovery of prehistoric or historic Native American burials requires that the Department notify the Virginia Council on Indians and appropriate tribal leaders	Revised to remove "the Virginia Council on Indians and", reflecting the fact that this organization no longer exists. Further revised to add "of state- and federally-recognized tribes". Intended to encompass all interested tribes and reinforce requirement for direct consultation.
17VAC5-20-60(C)		Introducing the process by which the director may consider issuing a permit	Revised to remove gender-specific pronoun ("his") and replace with "a".