



Waste Board Amends VRP Regulations: What's Changed?

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The Virginia Waste Management Board has amended the Virginia Voluntary Remediation Program (VRP) regulations. The amended regulations, known as Amendment 2, went into effect on January 29, 2014. All sites now in the VRP and new sites that enroll must comply with the amended regulations going forward. This article discusses some of the more significant changes.

Background

Virginia's Voluntary Remediation Program was enacted by the Virginia General Assembly in 2005 to provide eligible persons with a mechanism to voluntarily investigate and cleanup property when remediation is not clearly mandated by law. The cleanup is conducted with oversight by the Virginia Department of Environmental Quality (DEQ). At the end of the process, DEQ issues a Certificate of Satisfactory Completion (a Certificate) which signifies the remediation is acceptable to DEQ. The Certificate also provides a limited grant of immunity from enforcement concerning the contamination.

The VRP is often used to facilitate redevelopment of contaminated property and close transactions when contaminated property is involved. The program has been very successful. As of January 1, 2014, 454 sites have enrolled in the program since its inception, and 258 Certificates have been issued. A common use of the VRP has been in connection with contamination from drycleaning sites in strip malls.

The VRP regulations were first promulgated in 1997 and then amended in 2002. Based on an internal review in or about 2007, DEQ determined that further changes to

the regulations were needed to improve reporting requirements, update sampling and analytical methods, and clarify eligibility, termination, and application requirements. DEQ began that process in 2008 and convened a Technical Advisory Committee of consultants, environmental lawyers, and interested persons to provide advice and counsel. After lengthy internal review and drafting, followed by review by the Attorney General's Office and the Governor, proposed regulations were published in the *Virginia Register* on September 24, 2012. A significant number of public comments were filed. DEQ reviewed the same and then made changes to the proposed regulations. Final regulations were thereafter adopted by the Waste Board on May 3, 2013 and sent to the Governor for review. Final regulations were published in the *Virginia Register* on December 30, 2013 with an effective date of January 29, 2014.

The Amendments

For the most part, the basic scope and parameters of the VRP remain the same. The amendments generally seek to "fill in the blanks" by requiring more detail in the application, in the reports and in the analyses. There are also more requirements for public notice and to protect the rights of property owners. In many instances, the impetus for the change was the experience gained by DEQ over many years of administering the program; that experience showed instances where new or different information, or a better way of doing things, was needed.

What's the biggest change? Probably that Tier II and Tier III remediation levels are now based on an individual lifetime cancer risk of one in one hundred thousand (1×10^{-5}) rather than the previous one in a million (1×10^{-6}). Other notable changes are discussed below.

- **Who can be a participant in the VRP?**

As before, all persons who own, operate, have a security interest in or enter into a contract for the purchase or use of an eligible site may participate in the VRP. However, applicants who are not site owners must meet a new requirement. At the time they enroll in the program by paying the VRP registration fee, non-owners must demonstrate to DEQ that they have access to the property. Thereafter, they must maintain that right of access until such time as a Certificate is issued or their participation in the program is terminated. What does this mean? It means if a site owner changes his or her mind after previously granting access, a VRP participant who has no ownership interest in the property or enforceable right of access has a problem. This is all the more reason why any such participant needs a valid and binding agreement, e.g., an access agreement, easement, lease, etc., that allows the participant to possess or have access to the property until the VRP is completed.

- **Which sites are eligible?**

Sites may be enrolled in the VRP only if remediation has not been clearly mandated by law, unless DEQ decides to waive jurisdiction. That hasn't changed. What has changed is how DEQ will determine if remediation has been clearly mandated at a site that is an unpermitted solid waste management facility or meets the criteria of an "open dump" under the Virginia Solid Waste Management Regulations. Under the amended regulations, sites that have been determined by DEQ prior to the submission of the VRP application to be an "open dump" or an unpermitted solid waste management facility may now be enrolled in the VRP *if* the conditions that made the site an "open dump" or unpermitted solid waste management facility no longer exist. This is a clarification that was not readily apparent in the previous regulations, and resolves a point of controversy about which sites were eligible to be enrolled in the VRP.

- **Application; Registration Fee**

Changes have been made to the information that must be included in the VRP application. Perhaps the most significant change concerns submission requirements that apply when the participant does not own the property. The regulation now requires written documentation to be included with the application demonstrating that the owner consents to its submission and agreeing that the information in it is substantially correct. This change was made to address situations where the property owner was not aware a VRP application was being submitted by a tenant, a prospective buyer, or a lender. The certification required by the property owner that the information is substantially correct also provides DEQ with another way to verify site historical information that may impact its eligibility.

While registration fees have not changed ? the fee is still the lesser of \$5,000 or 1% of the cost of remediation ? how those fees are paid and calculated has. A preliminary registration fee of \$5,000 must now be paid to DEQ within 90 days of the date it determines the site and the participant are eligible to enroll in the program. This is far different than the practice under the previous regulations of submitting 1% of the projected cost of remediation at the time the site was enrolled. Failure to pay the preliminary registration fee on time will result in loss of eligibility for the VRP unless DEQ grants an extension. Upon completion of the remediation and issuance of the Certificate, the participant may calculate 1% of the actual cost of remediation to determine if a refund is due. If that calculation yields a sum less than \$5,000, DEQ will refund the difference to the participant, provided the participant submits the calculation and a summary of costs within 60 days after the Certificate is issued. If the participant fails to do so, then the final registration fee will be the preliminary registration fee, i.e. \$5,000. Also, no portion of the preliminary registration fee will be refunded if participation in the program is terminated for any reason.

- **Public Notice**

Public notice requirements have been increased. Among other things, a description of the general nature of the release, any remediation conducted, and any proposed land use controls must be given to the local government in the jurisdiction where the property is located, to adjacent property owners *and* to other property owners whose property has been affected by the release. As before, a public notice must be printed in a local newspaper of general circulation before the Certificate is issued, and the public must be provided with a 30-day comment period. What has changed is that if comments are received, the letter the participant must send acknowledging the comment must now include a response to the comment. After the 30-day comment period closes, the participant must provide DEQ with the written comments received and a copy of each acknowledgement letter containing a response to the comment. Moreover, the participant must provide DEQ with an evaluation of the comment's impact on the planned or completed action. All of these changes are designed to ensure the public has a role in the decision-making process leading up to issuance of the Certificate.

- **Termination of Participation in the VRP**

The regulations have been revised to specify the circumstances under which DEQ may terminate participation in the VRP. There are two. First, participation may be terminated when DEQ determines the site was not eligible to begin with or the participant has taken an action to render the site ineligible. Second, participation may be terminated when DEQ (i) determines the participant has failed to make reasonable further progress towards completion of the program, and (ii) the participant fails to provide an update of program-related activities in a projected timeline to complete the program within 30 days of a written request by DEQ to do so. Aside from termination by DEQ, participants may voluntarily withdraw from the VRP by providing DEQ with a 30-day notice of their intent to do so. DEQ will acknowledge receipt of the notice followed by a termination letter. These procedures are little different from those specified in DEQ's *Guidance for Terminating Sites in the Voluntary Remediation Program* issued in 2000. That guidance has now been incorporated into the regulations

As of January 1, 2014, 49 sites enrolled in the VRP have been terminated from the program either because the participant voluntarily withdrew or DEQ determined reasonable progress had not been made.

- **Revocation of a Certificate**

The circumstances under which a Certificate may be revoked have been revised. In addition to reserving the right to revoke a Certificate if unknown conditions at the site

pose a risk to human health or the environment or if DEQ has been supplied with false, inaccurate or misleading information, a Certificate may now be revoked if one of the ?Conditions of Issuance? stated in the Certificate is not met. Thus, if a Certificate required a sub-slab depressurization to be installed in any new building constructed on the VRP site, DEQ could revoke the Certificate if that condition was not met. However, if DEQ proposes to revoke a Certificate, it must first provide the site owner with written notice of the deficiency and at least 60 days to cure it. Of the 258 Certificates issued since 1997, not a single Certificate has been revoked.

- **Remediation Levels**

As before, participants may select from three tiers of remediation levels. Any tier or combination of tiers may be applied to establish remediation levels for contaminants present at a site. Tier I remediation levels are based on media background levels determined from a portion of the property or nearby property that the participant demonstrates is not contaminated. Tier II remediation levels are used when land use restrictions would otherwise be required, but the participant does not wish to impose them. These ?unrestricted use? levels are based on media-specific values, such as Maximum Contaminant Levels or EPA Regional Screening Levels. Tier III remediation levels are based on site-specific assumptions about current and potential exposure for the populations of concern and may be based on a site-specific risk assessment. Land use controls may be taken into account in calculating Tier III remediation levels.

The most significant changes have been made to the Tier II and Tier III remediation levels and certain assumptions made in how they are determined.

A. **Tier II.** One significant change was made; two other changes provide clarification of existing requirements. First, the acceptable individual carcinogenic risk for Tier II remediation levels has been changed to a one in one hundred thousand (1×10^{-5}) from one in one million (1×10^{-6}). Second, the regulations now expressly require that Tier II values for groundwater be based on the assumption that the groundwater will be used for potable purposes, unless the participant demonstrates otherwise and DEQ agrees. This addition merely codifies existing practice. Third, the regulation now provides more detail about how Tier II remediation levels for surface water are to be determined. For contaminants subject to a Virginia Water Quality Standard, the regulations state that Tier II remediation levels for surface water are the lower of the appropriate human health criteria or the chronic aquatic life criteria. For contaminants not subject to a Virginia Water Quality Standard, the regulations specify the lower of the appropriate human health criteria or the federal criterion continuous concentration for aquatic life. If neither a Virginia Water Quality Standard nor a federal criterion is available, then alternate values for purposes of comparison to the

appropriate human health criteria are to be established through a literature search or through a risk assessment.

B. **Tier III.** One significant change was made; another change provides clarification. First, as with the Tier II remediation levels, the acceptable individual carcinogenic risk level has been changed from 1×10^{-6} to 1×10^{-5} . Second, the regulations now expressly state that Tier III remediation levels do not need to be calculated based on the assumption that site groundwater will be used for potable purposes. Instead, if site groundwater is not used for potable purposes, the calculation may be based on the assumption that land use controls will be implemented to prohibit use of groundwater. This is nothing new since this has always been the practice with Tier III remediation levels; it's merely a clarification.

By lowering the acceptable level of risk by an order of magnitude, DEQ has effectively raised the VRP screening levels for individual constituents. This means fewer sites will be deemed to present environmental issues. It also means that a greater number of sites will be able to be completed using land use controls rather than active remediation. In this regard, it is notable the regulations now explicitly state that "land use controls" are considered remediation for purposes of the VRP. Although the Virginia Uniform Environmental Covenants Act may be used to impose those controls, use of an environmental covenant under that Act is not required. Instead, participants may impose land use controls using a Declaration of Restrictive Covenants in the form prescribed by DEQ.

Conclusion

The amended regulations should help provide greater transparency for the public and more certainty for the regulated community. Through its streamline process and results-oriented approach, the VRP remains a shining success story, and one in which both DEQ and the regulated community can take great pride.

30 Va. Register of Regulations 1169 (Dec. 30, 2013).

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