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Proposed Regulation Agency Background Document

Agency name	Virginia Department of Health
Virginia Administrative Code (VAC) citation	12 VAC 5 -585
Regulation title	Amendment to the Biosolids Use Regulations
Action title	Site Access Control
Document preparation date	April 20, 2007

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The *Biosolids Use Regulations* (12 VAC 5-585) were adopted by the State Board of Health in 1995 pursuant to Section 32.1-164.5 of the Code of Virginia. The *Biosolids Use Regulations* (Regulations) were subsequently revised, effective on October 15, 1997, in accordance with the Virginia Administrative Process Act (APA). The Regulations are to be amended to provide standards for the control of access to sites where Class B Pathogen Control Biosolids are land applied. The Regulations are to include standards and criteria to address recommendations on site access control as contained in the 2005 Joint Legislative Audit and Review Commission (JLARC) Report (House Document No. 89) entitled, "Review of Land Application of Biosolids In Virginia" (<http://jlarc.state.va.us>). The 2005 JLARC Report recommended that VDH implement additional restrictions on public and animal access to land application sites. The recommended restrictions will require the Regulations to be amended.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The *Biosolids Use Regulations* (12 VAC 5-585) were adopted by the Board of Health, in 1995, under Section 32.1-164.5 of the Code of Virginia. The *Biosolids Use Regulations* were subsequently revised, effective on October 15, 1997, in accordance with the Virginia Administrative Process Act (APA). The State Board of Health approved the submittal of a Notice of Intended Regulatory Action (NOIRA) for an amendment to the Regulations concerning the control of access to land application sites at its July 28, 2006 meeting. A Notice of Intended Regulatory action was published in the *Virginia Register* on January 8, 2007, inviting comments on the amendment for certification of land applicators. The Public Comment period was completed on February 8, 200~~7~~²⁰⁰⁷.

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 and the problems the proposal is intended to solve.

The *Biosolids Use Regulations* (Regulations) provide the means to protect public health from improper and unregulated disposal of sewage sludge. However, individuals have expressed opposition to the land application of biosolids and have insisted that access to land application operations on permitted sites are not being adequately controlled and supervised. These amendments are designed to provide a consistent and uniform set of state requirements that will ensure that access is properly controlled for operations in which biosolids are land applied. It is anticipated that the development of state requirements for site access control will help improve the credibility of the VDH permit program and prevent extended litigation brought by permitted entities concerning restrictive local government ordinances that would effectively ban land application of biosolids.

Substance

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

The 2005 JLARC Report recommendations involving site access requirements can be summarized as follows:

Recommendation (11) – VDH should require that appliers of biosolids post signs about the application for a minimum of 30 days (or one year, for high access sites) following the application. Signs should be posted at known access points and along road frontage.

Recommendation (12) – VDH should develop a “medium” public access designation for biosolids sites, providing somewhat longer access restrictions and signage requirements than 30 days. This designation would be used to address sites that do not fit the “high” access designation, but are in areas that are not actually remote from the public, such as sites that are close to trailer parks, neighborhoods, or towns.

Recommendation (13) – VDH should examine the animal grazing restrictions of its regulations. VDH should develop language that requires, on farms where animals are grazed, the use of fencing or physical barriers to prevent animal grazing on the biosolids fields. VDH should continue to require that landowners sign agreements to keep animals off the biosolids sites for the required timeframe. In addition, VDH should develop regulatory language that sets forth clear and realistic expectations for the actions that biosolids appliers are to take to help ensure compliance with the animal access restrictions on biosolids sites.

This amendment to the Regulations is designed to provide site access control through revisions to clarify the description of high and low potential for public access and revise the requirements contained in the farmer/land owner agreements. Permit applicants provide copies of these agreements to VDH when requesting a permit authorizing land application of biosolids on the sites listed in the signed agreements. VDH requested that the Regulations advisory committee (BURAC) provide recommendations that were used to develop the draft amendment.

The proposed amendment to the Regulations will involve the addition of new sections, (12 VAC 5-585-480, 570 and Table A-1) addressing standards for access control to sites where Class B biosolids are land applied in the Commonwealth.

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 so indicate.

The majority of the BURAC members were in favor of the draft amendment language. The primary advantage to the public and to the Commonwealth of adopting the requested amendments is to ensure that site access control can be achieved by establishing reasonable requirements for land application operations, so that the most economical and most beneficial means of sludge management will continue to be available to the owners of sewage treatment works, who are primarily metropolitan governments. No disadvantages to either are known to exist.

Several members of the Advisory committee requested that a provision be added to the amendment for maintaining signs around the land application site for 30 days following the completion of the land application operation. A member of the Advisory Committee recommended that:

1. The land appliers shall be required by VDH to provide the Table A-1 information to the landowner and current farmer in writing.
2. The posting of signs at land application sites should be required by the permit issued by VDH.

VDH received written comments on the NOIRA from the Virginia Association of Municipal Wastewater Agencies (VAMWA) as follows:

1. If signs are required at land application sites, then the signs should be posted in accordance with the Regulations. VDH should consider that the landowner or farmer post signs concerning control of access to the site.
2. The definition of high and low potential for public exposure to biosolids should be clarified.
3. The grazing restriction requirements in the Regulations should not place any compliance responsibility on the biosolids generator.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	Cost included in the Division of Wastewater Engineering budget.
Projected cost of the regulation on localities	None
Description of the individuals, businesses or other entities likely to be affected by the regulation	Private firms that land apply biosolids through contracts with Municipalities and agreements with landowners and farmers.
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	10
All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.	Approximately \$500 annually for each county where the land applier has permitted sites to update the Table A-1 Agreements.

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.

The Virginia Department of Health may elect to request the that State Board of Health consider the following alternatives:

1. Do not revise the Biosolids Use Regulations,
2. Revise the entire set of Biosolids Use Regulations, or
3. Revise the sections of the Biosolids Use Regulations dealing only with the amendment for access control for land application sites.

Failure to provide specific State requirements as requested will likely result in local adoption of ordinances with varying non-uniform requirements that could have significant financial impacts on the regulated entities. Court challenges are likely to result from inconsistent and overly restrictive local ordinances, leading to expensive litigation. Although additional requests for revisions to the Biosolids Use Regulations have been submitted by local governments and private individuals, the process of revising the entire set of the Biosolids Use Regulations will likely become a long drawn out process, as the land application of biosolids is a highly controversial subject. Thus, the Virginia Department of Health is electing to recommend that only the previously listed sections of the Biosolids Use Regulations be revised at this time.

Public comment

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

Commenter	Comment	Agency response
Karen Pallansch, Chair of the Virginia Association of Municipal Wastewater Agencies (VAMWA), submitted a letter stating the position of VAMWA.	VAMWA recommends that: VDH consider providing guidelines or regulatory standards specifying the size and content of signs posted at land application sites, allow the localities the option of not requiring posted signs, consider whether it is necessary to leave the signs at the site for 30 days or more following completion of land application operations and whether the landowner and farmer should provide no trespassing signs. VAMWA agreed with the BURAC recommendation to define the high and low potentials for public access, but not establish a medium potential for public access. VAMWA requested that the amendment specifically state that compliance with grazing restrictions is not the responsibility of the biosolids generator.	VDH Biosolids Program staff will work with
Recyc Systems, Inc.	Recyc Systems expressed support for the amendment. Recyc Systems recommended that	VDH recognizes that

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability.

The proposed regulatory action will have no anticipated or associated impacts on family rights to educate and supervise children. It will not discourage economic self-sufficiency and family responsibilities and commitments or decrease disposable family income.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

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

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
			Biosolids Use Regulations - land application access control.
12 VAC 5-585- 480		A written agreement shall be established between the landowner and the owner, with the information specified in Table A-1.	The following change is proposed to clarify the responsibility of the permitted land applier to post signs at land application sites and to obtain and furnish up-to-date copies of the Table A-1 Agreement as follows: A written agreement shall be established between the landowner and the owner <u>permitted land applier (owner)</u> , with the information specified in Table A-1. <u>Biosolids cannot be applied to a site unless the required signs have been posted at the permitted site and the department has received an up-to-date copy of the biosolids agreement specified in Table A-1 and copies are provided to the landowner and current farmer.</u>
12 VAC 5-585-570A.		Unrestricted access (UA). Biosolids that have undergone Class I Treatment to achieve Class A Pathogen Control may be applied or incorporated into the soil of agricultural lands and immediate	The following change is proposed to clarify the access restrictions for land application of biosolids that have undergone Class I Treatment to achieve Class A Pathogen Control: Unrestricted <u>Limited</u> access (UA). Biosolids that have undergone Class I Treatment to achieve Class A Pathogen Control may be applied or incorporated into the soil of agricultural lands and immediate <u>public</u> access is permitted <u>to sites with a low potential for public contact</u> . A waiting period is

		<p>public access is permitted following land application. A waiting period is required up to 30 days following application (to allow adhering biosolids to be washed from the foliar portion of the plants by precipitation). This waiting period is required before: (i) crops are harvested for human consumption, (ii) domestic animals are allowed to graze on the site.</p>	<p>required up to 30 days following application of <u>Class I Treatment level biosolids to sites with a high potential for public contact, such as sites on which food preparation and consumption can occur</u> (to allow adhering biosolids to be <u>either desiccated or, washed from the foliar portion of the plants by precipitation</u>). This waiting period is <u>also required following application of Class I Treatment level biosolids before: (i) crops with harvested parts that touch the biosolids/soil mixture and are not totally above the land surface</u> are harvested for human consumption, (ii) domestic <u>livestock</u> animals are allowed to graze on the site.</p>
<p>12 VAC 5-585-570B.</p>		<p>B. Restricted access (RA). Following application or incorporation of biosolids that have undergone Class II treatment to achieve Class B Pathogen Control public access and crop management shall be restricted as follows: (i) access to any site with a high potential for contact with the ground surface (public use) by the general public shall be controlled for a minimum time period of one year, (ii) access to agricultural sites and other sites with a low potential for public exposure shall be controlled for 30 days, (iii) food crops</p>	<p>The following change is proposed to clarify and strengthen the access restrictions for land application of biosolids that have undergone Class II Treatment to achieve Class B Pathogen Control: B. Restricted access (RA). Following application or incorporation of biosolids that have undergone Class II treatment to achieve Class B Pathogen Control public access and crop management shall be restricted as follows: (i) access to any site with a high potential for <u>public exposure and direct contact with the ground surface (public use such as picnics, preparation or consumption of food, outdoor concerts and team sporting events, guided tours, or exhibits, etc., on the site)</u> by the general public shall be controlled <u>prohibited</u> for a minimum time period of one year, (ii) access to agricultural sites and other sites with a low potential for public exposure and limited contact with the ground surface <u>(such as vehicle parking and transportation, bicycling, jogging, bird watching, hunting, etc., on the site)</u> shall be controlled for 30 days, (iii) food crops</p>
<p>12 VAC 5-585-</p>		<p><u>C. Modified</u></p>	<p><u>The following changes will clarify access</u></p>

<p><u>570B.</u></p>		<p><u>Access (MA). If a biosolids processing sequence is used to treat PSRP or PSLP biosolids that eliminates or inactivates helminth eggs (EH), public use access restrictions are reduced to six and eight months respectively, which shall include two summer months.</u></p>	<p><u>restrictions for biosolids receiving additional treatment.</u> <u>C. Modified Access (MA). If a an additional biosolids processing sequence is used to treat PSRP biosolids, or other types of biosolids treated to a lesser degree that achieves Class B Pathogen Control (PSLP) PSLP biosolids that and that additional treatment eliminates or inactivates helminth eggs (EH), then high potential for contact public use access restrictions are reduced to six and eight months respectively for these types of biosolids, which shall include two summer months.</u></p>
<p>12 VAC 5-585-640</p>		<p>..... Table A-1 This Biosolids application agreement is made on..... between....., referred to here as "landowner, " and....., referred to here as "owner." Landowner is the owner of agricultural land shown on the map attached as Exhibit A and designated there as..... ("landowner's land"). Owner agrees to apply and landowner agrees to comply with certain permit requirements following application of Biosolids on landowner's land in amounts and in a manner authorized by permit number..... which is held by</p>	<p>The Table A-1 Biosolids Application Agreement to clarify the responsibility of the permitted land applier to inform the landowner and farmer of their responsibilities to comply with the requirements of the Regulations: Table A-1</p> <p>This Biosolids application agreement is made on..... between....., referred to here as "landowner, " and....., <u>the leasee, referred to as the "farmer, " andthe permitted land applier, referred to here as "owner."</u> <u>Landowner and farmer may terminate this agreement in writing to the Virginia Department of Health.</u></p> <p>Landowner is the owner of agricultural land shown on the map attached as Exhibit A and is the farmer, for the site(s) designated there as..... ("landowner's land"). Owner agrees to apply and landowner <u>and farmer agrees agree to comply with certain permit requirements following application of Biosolids on landowner's land in amounts and in a manner authorized by permit number..... which is held by the owner. Landowner and farmer acknowledge that the site(s) listed in Attachment A are not permitted for land application of biosolids by any other owner, unless approved in writing by the owner named in this agreement and the Virginia Department of Health.</u></p> <p>Landowner <u>and farmer acknowledges acknowledge</u> that the appropriate application of <u>Biosolids biosolids</u> will be beneficial in providing fertilizer and soil conditioning to <u>his property the permitted site(s).</u> Landowner and</p>

		<p>the owner. Landowner acknowledges that the appropriate application of Biosolids will be beneficial in providing fertilizer and soil conditioning to his property. Moreover, landowner acknowledges that he has been expressly advised that, in order to protect public health:</p> <p>1. Public access to landowner's land upon which Biosolids has been applied should be controlled for at least 30 days following any application of biosolids, and no biosolids amended soil shall be excavated or removed from the site during this same period of time unless adequate provisions are made to prevent public exposure to soil, dusts or aerosols;</p> <p>2. Food crops with harvested parts that touch the biosolids/soil mixture and are totallyFood crops with harvested parts below the surface of the land shall not be harvested</p>	<p><u>farmer acknowledge that the permitted site(s) may be permanently removed from the owner's permit by the owner, or the Virginia Department of Health, as a result of non-compliance with this agreement and violation of other permit requirements, caused by a deliberate action on the part of the landowner or farmer.</u> Moreover, landowner and farmer <u>acknowledges</u> acknowledge that he has been expressly advised that, in order to protect public health:</p> <p>4. <u>Public access to and harvesting of crops on landowner's land upon which Biosolids biosolids has been applied should shall be controlled or prohibited for at least 30 days following any application of biosolids, and no as follows:</u></p> <p><u>1. Following application or incorporation of biosolids that have undergone Class II treatment to achieve Class B Pathogen Control, (i) access to any site with a high potential for public exposure and direct contact with the ground surface (such as picnics, preparation or consumption of food, outdoor concerts and team sporting events, guided tours, or exhibits, etc., on the site) by the general public, shall be prohibited for a minimum time period of one year, (ii) access to agricultural sites and other sites with a low potential for public exposure and limited contact with the ground surface (such as vehicle parking and transportation, bicycling, jogging, bird watching, hunting, etc., on the site) shall be controlled for 30 days. Such 30 day site access control can involve the posting of visible no trespassing signs around a site with low potential for public exposure in accordance with this chapter and local ordinances. In addition, no such biosolids amended soil shall be excavated or removed from the site during this same period of time unless adequate provisions are made to prevent public exposure to soil, dusts or aerosols;</u></p> <p>2. Food crops with harvested parts that touch the <u>Treatment II Level</u> biosolids/soil mixture and are totally above the land surface shall not be harvested for 14 months after the application of biosolids. Food crops with harvested parts below the surface of the land shall not be harvested for 20 months after the application of <u>Treatment II Level</u> biosolids when the <u>such</u> biosolids remain on the land</p>
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		<p>for 20 months after the application of biosolids when the biosolids remain on the land surface for a time period of four (4) or more months prior to not be harvested for 30 days after the application of biosolids;</p> <p>3. Following biosolids application to pasture or hayland sites, meat producing livestock ...</p>	<p>surface for a time period of four (4) or more months prior to incorporation into the soil, or 38 months when the biosolids remain on the land surface for a time period of less than four (4) months prior to incorporation. Other food crops, feed crops and fiber crops shall not be harvested for 30 days after the application of <u>Treatment II Level</u> biosolids;</p> <p>3. Following <u>Treatment II Level</u> biosolids application to pasture or hayland sites, meat producing livestock....</p>
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