



Final Regulation Agency Background Document

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| Agency name | Virginia Department of Health |
| Virginia Administrative Code (VAC) citation | 12 VAC 5-585 |
| Regulation title | Biosolids Use Regulations |
| Action title | Final Amendments |
| Date this document prepared | 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 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The *Biosolids Use Regulations* (12 VAC 5-585) are to be amended to provide regulations and standards for training, testing and certification of persons land applying Class B sewage sludge (biosolids) in the Commonwealth, and for revoking, suspending or denying such certification from any person for cause. The amended regulations are to include standards and criteria for the approval of instructional programs to be taught by governmental entities and by the private sector for the purpose of certifying biosolids land applicators.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The State Board of Health adopted the proposed amendment as a final amendment at their April 20, 2007 meeting in Richmond, Virginia

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 numbers, if applicable, and (2) promulgating entity, i.e., 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 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). Legislation passed by the General Assembly (SB 1088, Acts of Assembly c. 681, 2003) and signed into law by the Governor, added § 32.1-164.6 of the *Code of Virginia* (available electronically at <http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+CHAP0681>), requiring that no person shall land apply Class B sewage sludge pursuant to a permit under § 32.1-164.5 or § 62.1-44.19:3 unless a certified sewage sludge land applicator is onsite at all times during such land application, as of 180 days following the effective date of regulations required by this section. This legislation also provided that the State Board of Health, with the assistance of the State Department of Health, Department of Environmental Quality and Department of Professional and Occupational Regulation shall promulgate regulations and standards for training, testing and certification of persons land applying Class B sewage sludge in the Commonwealth, and for revoking, suspending or denying such certification from any person for cause. This final amendment was adopted in accordance with this provision of § 32.1-164.6 of the *Code of Virginia*.

The State Board of Health approved the submittal of a Notice of Intended Regulatory Action (NOIRA) for an amendment to the Regulations concerning at its July 24, 2004 meeting. The draft amendment was presented to the State Board of Health at its January 21, 2005 meeting for its approval as a proposed amendment. The State Board of Health recommended two minor revisions concerning the conditions under which a certified land applicator is "on-site" at the location of land application of biosolids. The State Board of Health requested that the draft language be revised from "is considered to be onsite," to "may be considered to be onsite." The State Board of Health also requested that the amendment specify that certified land applicators make their credentials available if requested. The draft amendment was revised to require the applicator to have the certificate number issued by VDH and their personal identification with them at the land application site. The State Board of Health approved the revised draft amendment as a proposed amendment. A Notice of the public comment period for the proposed amendments was forwarded to the State Registrar of Regulations and published in the *Virginia Register* on September 4, 2006. The 60 day public comment period ended on November 10,

2006. A public hearing was scheduled and held on October 4, 2006, in the Henrico County Training Center.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The Regulations provide the means to protect public health from improper and unregulated disposal of sewage sludge. These amendments are to be designed to provide a consistent and uniform set of State requirements that will address a number of issues that Local Governments must routinely deal with. It is anticipated that the development of State requirements will eliminate the need to develop non-uniform local requirements in these areas of concern and prevent extended litigation, brought by permitted entities, concerning restrictive Local Government ordinances. These State requirements will protect public health by providing standards for certifying the expertise of the contractor supervisors that direct operations at permitted land application sites. The certification standards will serve as a basis for additional operational restrictions placed on land applicators by the Virginia Department of Health to further protect the neighbors and public from any adverse impacts of land application operations.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The proposed amendment to the Regulations will involve the addition of new sections, 12 VAC (5-585-760 through 830) addressing standards for training, testing and certification of persons land applying Class B biosolids in the Commonwealth, and for revoking, suspending or denying such certification from any person for cause (attached). The land applicator must have a certified individual on site and if the certified land applicator leaves the site they must be available to return to that site within 30 minutes and if not so available, then the land application operation must be shut down at that site. The certified land applicator must provide required identification upon request by VDH staff or local government representatives.

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 there are no disadvantages to the public or the Commonwealth, please indicate.

An Ad Hoc Advisory Committee including staff with the concerned agencies, assisted the Virginia Department of Health (VDH) in developing the draft amendment language that reflects the recommendations received from a majority of committee members. The NOIRA public comment period closed on January 13, 2005. The public comments received up to that date did not raise any new issues that had not been discussed at the Ad Hoc Advisory Committee meetings. The draft amendment was revised and the revised amendment was approved as a proposed amendment by the State Board of Health at its meeting on January 21, 2005.

The proposed amendment was submitted to the Department of Planning and Budget (DPB) for an Economic Impact Analysis. The DPB analysis was completed on August 26, 2005 and the amendment was then sent to the Office of the Secretary for Health and Human Resources (OSHHR) for further evaluation. The OSHHR requested that two revisions be made to the proposed amendment, including a minor wording change to consistently use plural references to certified land applicators in the amendment text. In addition, the OSHHR requested that the reference to a fee fund stated in section 12 VAC 5-585-780F, be removed as such a fund was not established by the enabling legislation. Those changes requested by the OSHHR have been included in the final amendment. The proposed amendment was approved by the Governor on August 3, 2006. The proposed amendment was then noticed in the *Virginia Register* on September 4, 2006, establishing the public comment period that closed on November 10, 2006 (Volume 22, Issue 6). A public Hearing was held at the Henrico County Training Center on October 4, 2006.

No public comments were received by VDH from local governments other than those listed in the letter from the Virginia Association of Municipal Wastewater Agencies, Inc., dated January 10, 2007.

The advantage of adopting the requested amendments is that the credibility of this controversial state permit program will be enhanced. By establishing reasonable requirements for certifying the expertise of the supervisors of land application operations, 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.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

No changes have been made to the proposed amendments since they were published in the *Virginia Register*, Volume 22, Issue 6, September 4, 2006.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

| Commenter | Comment | Agency response |
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| Department of Planning and Budget (DPB) | The DPB Economic Impact Analysis (EIA) Statement was published with the proposed amendments in the Virginia Register Volume 22, Issue 6, September 4, 2006. | The DPB analysis was directed to the potential fiscal impacts on the Biosolids Contractors and land appliers that may be incurred upon adoption of the proposed amendments. However, DPB also considered the potential environmental and public health impacts may occur upon adoption of the proposed amendments. VDH concurs substantially with the conclusions drawn and the analysis contained in the EIA Statement. |
| Karen Pallansch, Chair of the Virginia Association of Municipal Wastewater Agencies (VAMWA) | Karen Pallansch, submitted a letter stating the position of VAMWA recommending increasing from 30 to 60 minutes the time period that a certified land application supervisor could be away from the site of operations. VAMWA also recommended that VDH establish the schedule of training sessions so that any conflicts with business needs would be minimized. | VDH believes that 30 minutes is a reasonable period for absence of the land application supervisor during operations. If the certified supervisor must be absent for more than 30 minutes, the operation of spreading equipment must be halted until a certified supervisor returns to the site. VDH intends to discuss the certification training with the land application companies once the amendment is noticed as final and establish the training schedule so that potential conflicts with work schedules are minimized. |
| Susan Trumbo, Recyc Systems, Inc. | Susan Trumbo submitted two letters in support of the amendment. However, Ms. Trumbo requested that revisions be made to the amendment language as follows; 1. VDH should not increase the 30 minute time period that a certified land application supervisor could be away from the site of operations. 2. VDH should delete the requirement that a statement of felony convictions be part of the | VDH is not planning to increase the period for absence of the land application supervisor during operations as noted in the response to the VAMWA request. VDH believes that knowledge of any felony convictions related to the responsibilities for ensuring permit compliance is an important factor to consider in the certification of land appliers. VDH will provide training sessions more frequently than once annually. VDH believes that the renewal of individual land applier certification should be delayed until any proceedings brought to consider removal of that individual's certification have been |

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| | <p>certification eligibility requirements listed within the amendment.</p> <p>3. VDH should provide at least annual training sessions.</p> <p>4. VDH should not deny renewal of certification in cases where a proceeding to remove certification has begun.</p> | completed. |
| <p>Katie Kyger Frazier, Assistant Vice President of Public Affairs with the Virginia Agribusiness Council</p> | <p>Katie Kyger Frazier, Assistant Vice President of Public Affairs with the Virginia Agribusiness Council submitted a letter in support of the amendment. Mrs. Frazier recommended that the amendment be well publicized and that VDH maintain flexibility in the scheduling and content of the certification training to address the needs of the land application companies.</p> | <p>VDH intends to notify all permitted land applicers and local governments with permitted sites within its jurisdiction prior to the implementation of the certification amendment. VDH believes that the training elements listed in the certification amendment provide for a comprehensive training program that will address the needs of the land applicers. The training courses will also be scheduled to address the needs of the land applicers.</p> |
| <p>Public Hearing in Henrico County on October 4, 2006</p> | <p>Six people attended the public hearing in Henrico County and 1 person indicated a desire to speak at the meeting. Hunter Richardson representing Synagro Mid Atlantic, Inc., spoke in support of the proposed amendment.</p> | <p>VDH recognizes the support of the amendment from the largest land application company conducting operations in the Commonwealth.</p> |

Enter any other statement here

All changes made in this regulatory action

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

| Current section number | Proposed new section number, if applicable | Current requirement | Proposed change and rationale |
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| None | 12VAC 5-585-760. | None | A. No person shall land apply biosolids pursuant to a permit issued in accordance |

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| | <p>Certificate requirements for land applicators</p> | | <p>with this chapter unless an individual holding a valid certificate of competence as specified in this chapter (certified land applicator) is onsite at all times during such land application. Certified land applicators may be considered to be onsite if they are at the site permitted for land application and, if it is necessary to leave the site, they are available within 30 minutes to return to the site to verify and ensure that land application of biosolids is in compliance with the issued permit. <u>Certified land applicators shall possess the site specific permit information necessary to conduct land application on the site in accordance with the issued permit and make available at the land application site proper identification, including their certificate number issued by VDH.</u> -Monthly Reports submitted in accordance with the requirements of this chapter (12 VAC 5-585-370B) shall bear the name and certificate number of the certified land applicators with an approved statement attesting that they were onsite at the times of the reported operations and that those operations were in compliance with the permit. The following parts of this chapter apply to any individual seeking a certificate of competence as required in §32.1-164.6 of the <i>Code of Virginia</i>.</p> <p>B. Certificates of competence shall be issued by the Department to certified land applicators. The Department may issue such certification based on specified areas of training, experience and level of knowledge as demonstrated through successful completion of examinations as acceptable to the Department.</p> |
| <p>None</p> | <p>12VAC 5-585-770. Eligibility requirements</p> | <p>None</p> | <p>A. Certification may be obtained by satisfying all of the following requirements:</p> |

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| | | | <p>1. Satisfactorily completing and submitting to the Department an application in the form required by the Department, including a statement of any felony convictions. Such application shall be submitted to the Department at least 30 days before the scheduled examination date set by the Department. The application shall request information relating to the person's education, work experience, knowledge of land application of biosolids and applicable regulations, and willingness to abide by the requirements of this chapter.</p> <p>2. Supplying proof of meeting one of the following:</p> <p>a. A copy of a transcript or similar documentation indicating completion of a high school or higher degree or equivalent education level, with work experience in an agriculturally related area including farming, and three months of practical experience related to land application of biosolids acceptable to the Department, or</p> <p>b. A combination of training acceptable to the Department that may include soil science or nutrient management or farming practice related educational training and a minimum of six months of practical experience related to land application of biosolids, or</p> <p>c. Evidence of prior supervisory level experience with land application of biosolids of two or more years that is acceptable to the Department.</p> <p>3. Obtaining a passing score on each part of the land applicators certification examination administered by the Department; and</p> |
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| | | | <p>4. Submitting the required certification fee by check or money order to the Department.</p> <p>B. Certificates shall be valid upon notification by the Department and for two years following each renewal from the established renewal date and will expire on the last day of the expiration month. Certified land applicators or applicants shall notify the Department of any change in mailing address within 30 days of such change in address.</p> <p>C. The Department, upon review, may accept or approve land applicator certification programs of other states as satisfying partial requirements for certification. Individuals certified as land application operators in other states under certification or licensing programs acceptable to the Department will be eligible for certification in Virginia by complying with all requirements of these regulations except for subdivision A 2 of this section. These individuals may also substitute, for the requirements in this chapter, 12VAC 5-585-790, the attainment of a passing score on a Virginia specific examination component which shall include at a minimum the elements listed in 12VAC 5-585-790C 1 and C 6.</p> |
| None | 12 VAC 5-585-780. Fees | None | <p>A. Fees shall be collected for certification and recertification to defray the administrative cost for the certification program.</p> <p>B. A fee may be charged to supply training materials and present education and training programs, including continuing education, which support the certification program.</p> |

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| | | | <p>C. Fees are nonrefundable and shall not be prorated.</p> <p>D. The certification fee of \$100 for the initial certification period shall be due with the application for certification. If an applicant is unsuccessful in achieving a passing score on the examination, the applicant is eligible to retake the examination at a scheduled time as offered by the Department. Applicants may retake the examination one time with no additional charge by resubmitting the application for certification. Eligibility for any additional examinations beyond the initial retaking will require the submittal of an application and appropriate fees.</p> <p>E. The certificate of competence renewal fee is \$100.</p> <p>F. All fees collected by the Department shall be used exclusively for the operation of the Land Applicator Training and Certification Program</p> |
| None | 12 VAC 5-585-790. Examination | None | <p>A. The Department may offer the land applicator certification examinations on request and will schedule an examination at least once per year. The examinations shall require a demonstration of the ability to ensure that biosolids will be land applied in compliance with the requirements of this chapter. The Department may limit the number of applicants taking the examination based upon available examination space.</p> <p>B. Applicants for a certificate of competence shall achieve a passing score on each part of the land applicator certification examination to become eligible for certification. If applicants receive a passing score on any part of the examination they will only be retested on</p> |

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| | | | <p>the remaining parts.</p> <p>C. The examinations for qualified applicants for a certificate of competence in accordance with this chapter shall address the elements listed below.</p> <ol style="list-style-type: none"> 1. General understanding of biosolids treatment processes and biosolids characteristics; 2. Basic principles of soils, agriculture, and silviculture; 3. Public health protection concepts; 4. Land application concepts and site management and operations; 5. Occupational safety and health protection concepts; and 6. Land application training and certification regulatory requirements, and requirements of other land application related laws, regulations, and incentive programs. <p>D. An individual who is unable to take an examination at the scheduled time shall notify the Department at least five days prior to the date of the examination; such individual may reapply for an examination. The Department may consider accepting notice of less than five days due to individual hardship situations on a case-by-case basis. Failure to notify the Department may require the individual to submit a new application and payment of fees in accordance with 12 VAC 5-585-780.</p> <p>E. The Department shall establish acceptable passing scores for the examinations based on the Department's</p> |
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| | | | <p>determination of the level of examination performance required to show minimal acceptable competence.</p> <p>F. All applicants shall be notified of results in writing within 60 days of the completion of the examinations.</p> <p>G. A certificate renewal date will be established and provided to the certified land applicator.</p> |
| None | 12 VAC 5-585-800. Training | None | <p>A. The Department shall provide training sessions on the various topics essential to ensure that land application of biosolids complies with state and federal laws and regulations at least annually.</p> <p>B. The Department may provide a training course on concepts supporting and relating to land application of biosolids which may include: biosolids use regulation; basic soil and crop science; soil fertility; environmental management; and other relevant topics.</p> |
| None | 12 VAC 5-585-810. Certificate renewal | None | <p>The Department may not renew a certificate if a proceeding to deny certification under 12 VAC5-585-830 has begun, or if the Department has found that the applicant violated any requirements of this chapter. A certificate is to be renewed every two years and may be renewed on or before the expiration of a certificate by complying with all of the following requirements:</p> <ol style="list-style-type: none"> 1. Submittal of a renewal application on the form the Department requires; 2. Payment of the renewal fee to the Department; 3. Submittal of proof of satisfactory completion of at least four hours of |

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| | | | <p>continuing education course work within the past two years. The completed course work must be approved by the Department as providing satisfactory training. Requests for pre-approval of continuing education courses should be received at least 60 days prior to the expected course date(s) and must include a detailed syllabus indicating time to be spent on each topic area covered. Continuing education course work must be in subject matter consistent with 12 VAC5-585-790 C. Department personnel may attend continuing education sessions to verify that the requirements are met. Proof of attendance must be verified by the course provider. The Department may accept continuing education units obtained in other states if such continuing education units are specifically for the purpose of recertification in the state land application operator certification program.</p> |
| None | 12 VAC 5-585-820. Certificate expiration | None | <p>A. Certificates issued under this chapter shall expire two years from the last day of the month in which they were issued, as indicated on the certificate, if any of the requirements of 12 VAC 5-585-810 are not met.</p> <p>B. Following the expiration of a certificate, reinstatement may be accomplished only by reapplication and compliance with all requirements of 12 VAC5-585-770 A, including the examination requirements.</p> <p>C. It is the responsibility of the certified land applicators to accumulate the required continuing education requirements prior to expiration of the certificate of competence they hold. The Department will attempt to notify the</p> |

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| | | | certified land applicators of any continuing education needs and other requirements as necessary for certificate renewal 90 days or more prior to certificate expiration. |
| None | 12 VAC 5-585-830. Compliance with regulations and disciplinary action | None | <p>A. If the Department finds that a certified land applicator or an applicant for certification violated any applicable requirements of this chapter, including the procedural violations listed in part B of this section, the Department may deny, suspend or revoke certification, following the informal fact-finding procedures of the Virginia Administrative Process Act (§2.2-4019 et seq. of the <i>Code of Virginia</i>).</p> <p>B. Certification procedural violations include:</p> <ol style="list-style-type: none"> 1. Providing misleading, false, or fraudulent information in applying for a certificate; 2. Providing the Department with any misleading, false, or fraudulent report; 3. Failing to ensure that land application of biosolids complies with permit requirements in accordance with Sections 490 through 510 of this chapter due to negligence of responsibilities by the certified land applicator; 4. Failing to promptly and accurately record observed permit non-compliance or, failure to promptly notify the permittee of observed permit non-compliance or, preventing access to inspect any land application site or, failure to provide required field records upon request, in accordance with this chapter; and 5. Conviction of a felony related in any way to the responsibilities of a certified |

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Regulatory flexibility analysis

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.

The Virginia Department of Health may elect to request that the 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 certification of land applicators.

Ten Private firms that land apply biosolids through contracts with Municipalities and agreements with landowners and farmers will be affected by this amendment and 52 local governments will be involved. The private firms permitted to land apply biosolids by VDH will be required to have their field supervisors certified and present during land application operations. In addition, the land application companies must ensure that the certified supervisors meet the continuing education requirements imposed by this amendment. Failure to provide certified field supervisors will result in VDH orders to stop land application operations that would have significant financial impacts on the regulated entities. 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.

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.

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.