



Fast Track Proposed Regulation Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) citation	2 VAC 5-690
Regulation title	Regulations for Pesticide Containers and Containment Under Authority of Virginia Pesticide Control Act
Action title	New regulations to establish standards and requirements for pesticide containers, repackaging pesticides, and pesticide containment structures.
Date this document prepared	August 14, 2012

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

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

These new Virginia regulations will be equivalent to Part 165 of Title 40 of the Code of Federal Regulations, *Pesticide Management and Disposal*. The regulations will establish standards for container design and residue removal in non-refillable pesticide containers, standards for container design in refillable pesticide containers, standards for repackaging pesticide products into refillable containers, and standards for pesticide containment structures.

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.

On August 7, 2012, the Board of Agriculture and Consumer Services (Board) adopted 2VAC5-690 *et seq.*, *Regulations for Pesticide Containers and Containment Under Authority of the Virginia Pesticide Control Act*.

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.

Section 3.2-109 of the *Code of Virginia* (Code) establishes the Board as a policy board that may adopt regulations in accordance with Title 3.2 of the Code.

Section 3.2-3906 of the Code authorizes the Board to adopt regulations that are necessary to carry out the purposes of Chapter 39 of Title 3.2 of the Code regarding pesticides. This authority is discretionary.

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 the regulation 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.

Regulatory standards and requirements for pesticide containers, repackaging pesticides, and pesticide containment structures are essential to protect the environment from potential contamination resulting from accidental pesticide discharges. The enforcement of the current federal regulations utilizing the federal credentials issued to Virginia's pesticide investigators by the United States Environmental Protection Agency (EPA) is sufficient to demonstrate compliance with the federal rule. However, the promulgation of Virginia's own regulations would allow more flexibility and greater discretion in the enforcement of pesticide container and containment requirements based on Virginia's unique needs and conditions, thereby benefitting the welfare of the regulants subject to the provisions of this regulation. The health, safety, and welfare of Virginians would not be adversely impacted because the proposed regulations are equivalent to those currently in place at the federal level. Moreover, the enforcement of a state pesticide container and containment regulation would be more cost-effective because, under the proposed regulations, investigators would be able to perform container and containment inspections in conjunction with other inspection activities at all applicable sites.

Rationale for using fast track process

Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

Please note: If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall (i) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

We expect these regulations will be noncontroversial because the requirements are identical to those of the Part 165 of Title 40 of the Code of Federal Regulations, *Pesticide Management and Disposal*, with which industry is already expected to comply. Since the finalization of the federal regulations, the Department of Agriculture and Consumer Services has provided compliance assistance to the approximately 50 pesticide businesses that are required to comply with its provisions.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.) Please be sure to define any acronyms.

These regulations establish standards for container design and residue removal for non-refillable pesticide containers, standards for container design for refillable pesticide containers, standards for repackaging pesticide products into refillable containers, and standards for pesticide containment structures. The regulations establish standards for both the registrant of a pesticide product and the refiller who repackages a pesticide product. The regulations also establish recordkeeping requirements.

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.*

The promulgation of Virginia's own regulations will allow more flexibility and greater discretion in the enforcement of pesticide container and containment requirements based on Virginia's unique needs and conditions. This additional flexibility and discretion will be an advantage to both regulants and the agency.

The proposed regulations pose no disadvantages to the public or the Commonwealth as the regulations are equivalent to federal regulations that are currently in place.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need 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.

These regulations are not more restrictive than the applicable federal requirements, Part 165 of Title 40 of the Code of Federal Regulations, *Pesticide Management and Disposal*.

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.

No locality will be particularly affected by the proposed regulations.

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.

In Virginia, compliance with the federal rule is currently met through the use of federal credentials issued to Virginia pesticide investigators by the EPA. The promulgation of state regulations is viewed as a more desirable, more practical, and more cost-effective alternative to the current practice.

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.

<p>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</p>	<p>The agency will incorporate implementation, compliance assistance, and enforcement of the proposed regulation into its current work plan and utilize current resources to fund one-time and on-going expenditures.</p>
<p>Projected cost of the new regulations or</p>	<p>Localities will not incur any new costs related to the</p>

changes to existing regulations on localities.	proposed regulations, as the regulations are equivalent to federal regulations currently in place.
Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.	Individuals, businesses, or other entities affected by the proposed regulations may include pesticide registrants, retailers, distributors, commercial applicators, custom blenders, and end-users.
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.	Approximately 50 facilities will be required to comply with the proposed regulations. The vast majority of these facilities are small businesses.
All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.	Affected individuals, businesses, and other entities will not incur any new costs related to the proposed regulations as the regulations are equivalent to federal regulations currently in place.
Beneficial impact the regulation is designed to produce.	The promulgation of Virginia's own regulations that are equivalent to the federal regulations that are currently in place would allow more flexibility and greater discretion in the enforcement of pesticide container and containment requirements based on Virginia's unique needs and conditions.

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.

States like Virginia have three alternatives to comply with the federal rule. Those alternatives are:

1. Enforce provisions of the federal rule using federal credentials;
2. Incorporate the federal rule into the state’s current regulations; or
3. Promulgate new regulations that are at least equivalent to the federal rule.

With respect to Alternative 1, the enforcement of the federal rule using federal credentials is deemed a less desirable, less practical, and less cost-effective alternative to the promulgation and enforcement of Virginia's own regulations. Alternative 2 is not applicable in Virginia because the statute does not

authorize the Board to incorporate by reference the federal rule. Thus, Alternative 3 is deemed to be the most viable alternative.

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.

These regulations will have no impact on the institution of the family and family stability.

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.

Acronyms used below:

“CFR” means the Code of Federal Regulations.

“FIFRA” means the Federal Insecticide, Fungicide, and Rodenticide Act.

“USDOT” means the United States Department of Transportation.

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
Part I - General			
2 VAC 20-60-10	This section describes the scope of the regulations.	N/A	This section does not establish any requirements.
2 VAC 20-60-20	This section defines terminology used throughout the regulations.	N/A	Defining the terminology used throughout the regulations will assist regulants in understanding the regulations.
Part II – Nonrefillable Container Standards: Container Design and Residue Removal			
2 VAC 20-60-30	This section establishes that registrants who distribute or sell pesticide products in nonrefillable containers must comply with the construction requirements set forth in the regulations. This section also establishes that registrants	N/A	The provisions of this section are intended to establish the entities that must comply with the construction requirements set forth for pesticide containers.

	<p>whose pesticide products are subject to these regulations must distribute the product in a nonrefillable container that complies with the construction requirements set forth in the regulations.</p>		
2 VAC 20-60-40	<p>This section defines those pesticide products that are subject to the nonrefillable container standards in these regulations. This section also defines the criteria for pesticide products that are exempt from the nonrefillable container standards established in the regulations.</p>	<p>40 CFR 158.153(h): defines “manufacturing use products”. 40 CFR 174.3: defines “plant-incorporated protectants”. FIFRA § 2(mm) defines “antimicrobial pesticide”. Federal Food, Drug, and Cosmetic Act §§ 408 and 409 set forth regulations used to identify pesticide products exempt from the nonrefillable container standards established in the regulations. 40 CFR 261 identifies hazardous waste. 40 CFR 156.62 establishes Toxicity Categories I and II. 40 CFR 152.160 through 40 CFR 152.175 classifies pesticide products for restricted use. 40 CFR 173.24 establishes certain package standards. 49 CFR 171.8 defines “hazardous material”. 49 CFR 171-180 establishes USDOT packaging requirements.</p>	<p>The provisions of this section are intended to establish those pesticide products that must comply with nonrefillable container standards in order to prevent an unreasonable adverse effect on the environment.</p>
2 VAC 20-60-50	<p>This section establishes standards for nonrefillable containers that package certain pesticide products.</p>	<p>49 CFR Part 107 Subpart B, 49 CFR 173.4, 173.5, 173.6, 173.24, 173.24a, 173.24b, 173.28, 173.155, 173.203, 173.213, 173.240(c), 173.240(d), 173.241(c), 173.241(d), part 178, and part 180 establish standards for portable nonrefillable containers. 49 CFR 171.8 defines “hazardous material”. 49 CFR Part 171 through 49 CFR Part 180 and 49 CFR</p>	<p>The provisions of this section are intended to ensure the safety of nonrefillable containers used to package certain pesticide products.</p>

		Part 107 Subpart B establishes standards for nonrefillable containers that package USDOT hazardous material. 40 CFR 165.25(g) establishes the process by which a registrant may obtain from EPA a waiver to the nonrefillable container standards.	
2 VAC 20-60-60	This section establishes reporting and recordkeeping requirements for registrants distributing or selling certain pesticide products in nonrefillable containers.	40 CFR 159 and FIFRA § 6(a)(2) establish reporting standards regarding container failures.	The provisions of this section are intended to document compliance with nonrefillable container standards.
Part III – Refillable Container Standards: Container Design			
2 VAC 20-60-70	This section establishes that registrants who distribute or sell pesticide products in refillable containers must comply with the container construction requirements set forth in the regulations.	N/A	The provisions of this section are intended to establish the entities that must comply with the construction requirements set forth for refillable pesticide containers.
2 VAC 20-60-80	This section defines those pesticide products that are subject to the refillable container standards in these regulations. This section also defines the criteria for pesticide products that are exempt from the refillable container standards established in these regulations.	40 CFR 158.153(h): defines “manufacturing use products”. 40 CFR 174.3: defines “plant-incorporated protectants”. FIFRA § 2(mm) defines “antimicrobial pesticide”. Federal Food, Drug, and Cosmetic Act §§ 408 and 409 set forth regulations used to identify pesticide products exempt from the refillable container standards established in the regulations. 40 CFR 261 identifies hazardous waste. 40 CFR 165.43(e) sets forth the circumstances under which EPA may determine that an antimicrobial pesticide product is subject to the proposed regulations.	The provisions of this section are intended to establish those pesticide products that must comply with refillable container standards in order to prevent an unreasonable adverse effect on the environment.
2 VAC 20-	This section establishes	49 CFR 171.8 defines	The provisions of this section are

60-90	standards for refillable containers that package certain pesticide products.	hazardous material. 49 CFR 173.4, 49 CFR 173.5, 49 CFR 173.6, 49 CFR 173.24, 49 CFR 173.24a, 49 CFR 173.24b, 49 CFR 173.28, 49 CFR 173.155, 49 CFR 173.203, 49 CFR 173.213, 49 CFR 173.240(c), 49 CFR 173.240(d), 49 CFR 173.241(c), 49 CFR 173.241(d), 49 CFR Part 178, 49 CFR Part 180, 49 CFR Part 107 Subpart B: establishes construction requirements for certain refillable containers. 49 CFR 171 through 49 CFR 180 and 49 CFR Part 107 Subpart B establishes standards for refillable containers that package USDOT hazardous material. 40 CFR 165.45(g) establishes the process by which a registrant may obtain from EPA a waiver from refillable containers standards.	intended to ensure the safety of refillable containers used to package certain pesticide products.
2 VAC 20-60-100	This section establishes that refillers are not required to report certain information to VDACS.	40 CFR Part 159 establishes certain reporting requirements. FIFRA § 6(a)(2) establishes certain reporting requirements.	The provisions of this section are intended to clarify the reporting standards that may apply to certain refillable containers.
PART IV – Standards for Repackaging Pesticide Products into Refillable Containers			
2 VAC 20-60-110	This section establishes that registrants who distribute or sell pesticide products in refillable containers or refillers of a pesticide product who are not the registrant of the pesticide product must comply with the requirements for repackaging pesticide products into refillable containers set forth in the regulations.	N/A	The provisions of this section are intended to establish the entities that must comply with repackaging requirements.
2 VAC 20-60-120	This section defines those pesticide products that are subject to the standards for repackaging pesticide products into refillable containers. This section also defines the	40 CFR 158.153(h): defines “manufacturing use products”. 40 CFR 174.3: defines “plant-incorporated protectants”.	The provisions of this section are intended to establish those pesticide products that must comply with repackaging standards in order to prevent an unreasonable adverse effect on the environment.

	<p>criteria for pesticide products that are exempt from these standards.</p>	<p>FIFRA § 2(mm) defines “antimicrobial pesticide”. Federal Food, Drug, and Cosmetic Act §§ 408 and 409 set forth regulations used to identify pesticide products exempt from the repackaging standards established in the regulations. 40 CFR 261 identifies hazardous waste. 40 CFR 165.43(e) sets forth the circumstances under which EPA may determine that an antimicrobial pesticide product is subject to the proposed regulations.</p>	
<p>2 VAC 20-60-130</p>	<p>This section establishes certain standards for registrants who distribute or sell pesticide products in refillable containers. These standards also apply to those registrants who do not distribute or sell pesticide products to refillers. The provisions of this section require certain registrants to develop a refilling residue removal procedure and a description of acceptable refillable containers for distributing or selling the registrant’s pesticide product. This section also establishes repackaging requirements for refillers who repackage a pesticide product into refillable containers.</p>	<p>Section 3 of FIFRA establishes the requirements for a pesticide product’s confidential statement of formula. 40 CFR 167.20 requires the registration of producing establishments. 40 CFR Part 169 requires refilling establishments to maintain records. 40 CFR Part 167 requires refilling establishments to make certain reports. 40 CFR Part 156 establishes pesticide product labeling requirements.</p>	<p>The provisions of this section are intended to ensure that the composition of a pesticide product at the time of its distribution is not different from the composition described in its confidential statement of formula required under § 3 of FIFRA.</p>
<p>2 VAC 20-60-140</p>	<p>This section establishes certain standards for registrants who distribute or sell pesticide products to a refiller that is not part of the registrant’s company for repackaging into refillable containers. The provisions of this section establish the conditions under which a registrant may allow a refiller to repackage the</p>	<p>40 CFR 167.20 pertains to refilling establishments. Repackaging a pesticide product without either obtaining a registration or meeting the conditions of 2 VAC 20-60-140 B is a violation of § 12 of FIFRA. Section 3 of FIFRA establishes the requirements for a pesticide</p>	<p>The provisions of this section are intended to ensure that the composition of a pesticide product at the time of its distribution is not different from the composition described in its confidential statement of formula required under § 3 of FIFRA.</p>

	<p>registrant’s pesticide product into refillable containers and to distribute the repackaged product under the registrant’s registration.</p> <p>This section establishes that a registrant is responsible for the pesticide product not being different from the composition described in its confidential statement of formula.</p> <p>The provisions of this section require certain registrants to develop a refilling residue removal procedure and a description of acceptable refillable containers for distributing or selling the registrant’s pesticide product.</p>	<p>product’s confidential statement of formula.</p>	
2 VAC 20-60-150	<p>This section establishes certain standards for refillers of pesticide products who are not the registrant of the pesticide product.</p> <p>The provisions of this section establish the conditions under which a registrant may allow a refiller to repackage the registrant’s pesticide product into refillable containers and to distribute the repackaged product under the registrant’s registration.</p> <p>This section establishes that a refiller is responsible for the pesticide product the refiller distributes not being different from the composition described in its confidential statement of formula.</p> <p>This section requires refillers to maintain and make available certain records.</p>	<p>40 CFR 167.20 pertains to refilling establishments.</p> <p>Repackaging a pesticide product without either obtaining a registration or meeting the conditions of 2 VAC 20-60-150 B is a violation of §12 of FIFRA.</p> <p>Section 3 of FIFRA establishes the requirements for a pesticide product’s confidential statement of formula.</p> <p>40 CFR Part 169 requires refillers to maintain records.</p> <p>40 CFR Part 167 requires refillers to make certain reports.</p> <p>40 CFR Part 156 establishes pesticide product labeling requirements.</p>	<p>The provisions of this section are intended to ensure that the composition of a pesticide product at the time of its distribution is not different from the composition described in its confidential statement of formula required under § 3 of FIFRA.</p>
Part V – Standards for Pesticide Containment Structures			
2 VAC 20-60-160	<p>This section explains the purpose for establishing standards for pesticide containment structures.</p>	<p>N/A</p>	<p>This section is intended to clarify that the standards established for pesticide containment structures are intended to protect individuals and the environment from exposure to agricultural pesticides</p>

			that have spilled or leaked.
2 VAC 20-60-170	This section establishes the stationary pesticide containers that are subject to the regulations in Part V of this chapter. This section also establishes the stationary pesticide containers that must have a secondary containment unit.	N/A	The provisions of this section are intended to protect individuals and the environment from exposure to agricultural pesticides that have spilled or leaked.
2 VAC 20-60-180	This section establishes those pesticide dispensing areas that are subject to the regulations of Part V of this chapter. This section also establishes those pesticide dispensing areas that must have a containment pad.	N/A	The provisions of this section are intended to protect individuals and the environment from exposure to agricultural pesticides that have spilled or leaked.
2 VAC 20-60-190	This section defines new containment structures and existing containment structures.	N/A	The provisions of this section are intended to provide clarification for the two subsequent sections of this chapter.
2 VAC 20-60-200	This section establishes material specifications and design requirements for new containment structures. This section also establishes design standards and capacity requirements for new secondary containment units for stationary containers of liquid pesticides as well as for new containment pads in pesticide dispensing areas.	N/A	The provisions of this section are intended to protect individuals and the environment from exposure to agricultural pesticides that have spilled or leaked.
2 VAC 20-60-210	This section establishes material specifications and design requirements for existing containment structures. This section also establishes design standards and capacity requirements for existing secondary containment units for stationary containers of liquid pesticides as well as for existing containment pads in pesticide dispensing areas. This section establishes design requirements for existing secondary containment units for stationary containers of dry pesticides.	N/A	The provisions of this section are intended to protect individuals and the environment from exposure to agricultural pesticides that have spilled or leaked.

<p>2 VAC 20-60-220</p>	<p>This section establishes operating procedures with which owners or operators of new or existing pesticide containment structures must comply. This section also establishes inspection and maintenance requirements with which owners or operators of new or existing pesticide containment structures must comply.</p>	<p>N/A</p>	<p>The provisions of this section are intended to protect individuals and the environment from exposure to agricultural pesticides that have spilled or leaked.</p>
<p>2 VAC 20-60-230</p>	<p>This section permits owners or operators subject to the standards for pesticide containment structures to combine the use of containment pads and secondary containment units.</p>	<p>N/A</p>	<p>The provisions of this section are intended to protect individuals and the environment from exposure to agricultural pesticides that have spilled or leaked.</p>
<p>2 VAC 20-60-240</p>	<p>This section requires owners or operators subject to the standards for pesticide containment structures to maintain certain records and to make those records available upon request.</p>	<p>N/A</p>	<p>The provisions of this section are intended to ensure certain inspection and construction records are available.</p>