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Final Regulation Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) citation(s)	2 VAC 5-685
Regulation title(s)	Regulations Governing Pesticide Applicator Certification under Authority of Virginia Pesticide Control Act
Action title	Amendments to certain definitions and certification requirements for pesticide applicators as well as clarifying language to reflect current program practices
Date this document prepared	May 27, 2016

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

This existing regulation establishes (i) certification requirements for commercial applicators, registered technicians, and private applicators; (ii) the conditions under which a certification may be suspended or revoked; (iii) requirements for reporting pesticide accidents or incidents; and (iv) recordkeeping requirements.

The proposed amendments seek to update the regulation and align it with current agency practices by (i) amending certain definitions; (ii) deleting the requirement that individuals who fail the certification examination must wait a prescribed number of days before retaking the

examination; (iii) revising the process by which persons who cannot read pesticide labels can be certified to apply restricted use pesticides on their own property; (iv) clarifying the on-the-job training requirements for prospective applicators; (v) establishing numeric identifiers for the existing categories of private applicator certification; (vi) prescribing the minimum educational requirements for certified commercial applicators and registered technicians taking board-approved recertification training programs; and (vii) clarifying the requirements for the issuance of a certificate pursuant to a reciprocal agreement with another state. The proposed amendments are intended to ensure the competence of pesticide applicators through consistent standards of training, testing, and certification.

Acronyms and Definitions

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

“VDACS” or “the agency” means the Virginia Department of Agriculture and Consumer Services.

“Virginia Pesticide Control Act” means Chapter 39 of Title 3.2 of the Code of Virginia (Va. Code § 3.2-3900 et seq.).

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 May 26, 2016, the Board of Agriculture and Consumer Services took final action to adopt amendments to 2 VAC 5-685, *Regulations Governing Pesticide Applicator Certification under Authority of 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 of Agriculture and Consumer Services (Board) as a policy board with the authority to adopt regulations in accordance with the provisions of Title 3.2 of the Code.

Section 3.2-3906(4) of the Code authorizes the Board to adopt regulations to establish training, testing, and standards for certification of commercial applicators, registered technicians, and private applicators. 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. Describe 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.

The Board is authorized to adopt regulations to establish training, testing, and standards for certification of commercial pesticide applicators. The proposed action seeks to update the regulation and align it with current agency practices by (i) amending certain definitions; (ii) deleting the requirement that individuals who fail the certification examination must wait a prescribed number of days before retaking the examination; (iii) revising the process by which persons who cannot read pesticide labels can be certified to apply restricted use pesticides on their own property; (iv) clarifying the on-the-job training requirements for prospective applicators; (v) establishing numeric identifiers for the existing categories of registered technician and private applicator certifications; (vi) prescribing the minimum educational requirements for certified commercial applicators and registered technicians taking board-approved recertification training programs; and (vii) clarifying the requirements for the issuance of a certificate pursuant to a reciprocal agreement with another state. This regulatory action is intended to ensure the competence of pesticide applicators through consistent standards of training, testing, and certification while ultimately protecting the health, safety, and welfare of the citizens of the Commonwealth of Virginia.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both.

The proposed amendments to the regulation will:

1. Amend the definition of the terms “Under the direct supervision of” and “Under the direct on-site supervision of” to clarify that the individual providing the supervision be a certified commercial applicator. Currently, the regulation calls for the individual providing instruction and control to others who apply pesticides to be a certified applicator, omitting the qualifier “commercial.”
2. Remove the requirement that individuals who fail to pass the certification examination must wait a specific number of days to retake the exam. Currently, individuals must wait 10 days to retake the exam after failing the exam for the first time and 30 days after failing the exam the second or subsequent times. The agency proposes that individuals who fail to pass the exam may, at any time, reapply to take the exam and be placed in the work queue along with other pending applications.
3. Revise the process by which persons who cannot read pesticide labels can demonstrate competence and obtain certification as private applicators to apply restricted use pesticides on their own properties. Currently, in order for an individual to obtain a waiver of the literacy requirement, a pesticide investigator must make a recommendation to the Board regarding the

waiver. The agency intends to propose that the individual petition the Board directly for the waiver.

4. Eliminate inconsistent language regarding the period of time during which individuals seeking certification as registered technicians must receive on-the-job-training.

5. Establish the category number for Registered Technicians and Private Applicator certifications in a manner similar to the category codes already being used in other pesticide application specialties.

6. Require applicants who do not meet the certification requirements within two years of the date of passing the examination to be reexamined. A passing score on a certification exam is only valid for two years from the date the exam was taken. Several exams may be necessary in order for an applicant to become fully certified. If the applicant does not pass all of the exams required to become certified within a two year period, the applicant must retake all required exams.

7. Clarify that a person seeking pesticide applicator certification in Virginia on a reciprocal basis must hold current certification by the reciprocating state or federal agency.

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 proposed regulatory action is advantageous to the public, as the amendments clarify and streamline the requirements for pesticide applicator certification while ensuring applicators' continued competence. The continued competence of pesticide applicators ensures individuals who apply pesticides make informed decisions while on the job, reducing the chance for misapplication and potential threats to the health, safety, and welfare of citizens. These actions do not add any additional requirements to the applicator when completing the certification or recertification process nor do they affect the issuance of a certification to an applicator by the agency. There are no known disadvantages to the public or the state. This regulatory action will clarify and streamline requirements and will lead to an increase in compliance through better understanding of applicable requirements.

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.

This regulation conforms to and is no more restrictive than applicable federal requirements. The proposed amendments reflect the specific needs of the regulated industry and pesticide regulatory program in Virginia and do not add any additional requirements to the existing regulation that would make it more restrictive than federal requirements.

Localities particularly affected

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

No locality will be particularly affected by this regulatory action.

Family impact

Please assess the impact of this 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.

This regulatory action will have no measurable impact on the institution of the family and family stability.

Changes made since the proposed stage

*Please list all changes that made to the text of the proposed regulation and the rationale for the changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. *Please put an asterisk next to any substantive changes.*

Section number	Requirement at proposed stage	What has changed	Rationale for change
50	<p>This section establishes the certification procedures for registered technicians.</p> <p>At the proposed stage, the proposed amendments eliminated the 30 days an individual has to pass the exam after the individual fails his initial exam.</p>	<p>*Add allowance for an additional 90-day training period after an individual fails his initial examination.</p> <p>Add description of initial 90-day training period, as described earlier in Section 50.</p>	<p>Changes were made to allow additional training time in response to comments received from stakeholders during the proposed stage public comment period.</p> <p>Changes were made in an effort to provide registered technician candidates adequate time to receive additional training under the direct</p>

			<p>on-site supervision of a certified commercial applicator after failing the initial exam. Candidates who do not pass the subsequent exam within 90 days after failing the initial exam must reapply and may not apply pesticides even under direct on-site supervision.</p> <p>Change was made to provide additional clarity of requirements for registrants.</p>
65	N/A	Add explanation of Category 60 for registered technician certification.	Categories for all other certifications are listed and explained in the regulation; therefore, the agency believes it is important to reference all certification categories in the regulation in order to provide clarity for registrants.

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. Please distinguish between comments received on Town Hall versus those made in a public hearing or submitted directly to the agency or board.

Commenter	Comment	Agency response
Andrea Coron, Virginia Pesticide Management Association	<p>VDACS received Ms. Coron’s comments via the Town Hall as well as during the public hearing held on 12/10/2015.</p> <p>Expressed appreciation for oversight of pesticide industry by Office of Pesticide Services.</p> <p>Expressed support for proposed changes to Section 20 that would eliminate 10-day waiting period to retake a failed certification examination.</p>	<p>Currently, the regulation requires applicants requesting reexamination to resubmit a completed application to the commissioner and pay the nonrefundable applicator certification fee. This regulatory action does not amend this requirement.</p> <p>In response to comments received from stakeholders during the proposed stage public comment period, the agency amended the portion of the proposed text regarding the time period during which a registered technician candidate who has failed his initial exam may seek additional training. Changes were made in an effort</p>

	<p>Expressed opposition to portion of Section 20 that requires applicants who fail the exam the first time to pay the full applicator certification fee to retake the exam. She recognized the costs to the Office of Pesticide Services involved with re-processing related paperwork but asserts that the full applicator certification fee is not justified.</p> <p>Expressed opposition to proposed changes to Section 50 to eliminate the 30-day grace period during which a candidate for registered technician who has failed his initial exam may continue to train and apply pesticides commercially under direct on-site supervision. She notes that this change could be costly for the candidate and the company for which the candidate works.</p> <p>Stated that supervised, hands-on training experience is the best preparation for individuals seeking to become certified pesticide applicators.</p>	<p>to provide registered technician candidates adequate time to receive the additional training under the direct on-site supervision of a certified commercial applicator necessary to pass the examination. The proposed amendments ultimately seek to ensure the competence of pesticide applicators through consistent standards of training, testing, and certification while ultimately protecting the health, safety, and welfare of the citizens of the Commonwealth of Virginia.</p>
<p>Virginia Crop Production Association</p>	<p>VDACS received comments from the Virginia Crop Production Association via the Town Hall.</p> <p>Expressed opposition to the proposed changes to Section 50 to eliminate the 30-day grace period during which a registered technician candidate who has failed his initial exam may continue to train and apply pesticides commercially under direct on-site supervision. It was noted that this change could be costly for the candidate and the company for which the</p>	<p>In response to comments received from stakeholders during the proposed stage public comment period, the agency amended the portion of the proposed text regarding the time period during which a registered technician candidate who has failed his initial exam may seek additional training. Changes were made in an effort to provide registered technician candidates adequate time to receive the additional training under the direct on-site supervision of a certified commercial applicator necessary to pass the examination. The proposed amendments ultimately seek to ensure the competence of pesticide applicators through consistent standards of training, testing, and certification while</p>

	<p>candidate works.</p> <p>Expressed support for proposed changes to Section 20 that would eliminate the 10-day waiting period to retake a failed certification examination.</p>	<p>ultimately protecting the health, safety, and welfare of the citizens of the Commonwealth of Virginia.</p>
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All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections. Explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
10	N/A	Currently, the definitions of “Under the direct supervision of” and “Under the direct on-site supervision of” require that supervision be provided by a certified applicator.	Clarifying the definitions of “Under the direct supervision of” and “Under the direct on-site supervision of” by including the word “commercial” in these definitions. “Commercial applicators” may, by definition, supervise the use of pesticides. The agency is seeking to provide clarification that direct and direct on-site supervision can only be provided by a “certified commercial applicator,” as opposed to an applicator who may only be certified as a registered technician. This was the original intent, and the regulation is currently enforced as such.
10	N/A	Currently, the definition of “registered technician” does not include the certification category number.	Add language regarding the category number in which a “registered technician” is trained and applies pesticides. The agency seeks to add to the regulation the category number used in its administrative process in order to increase compliance and decrease confusion among regulants.
20 D	N/A	Currently, applicants who fail the examination on their first attempt are eligible to be reexamined for the same category 10 days after the date of their first examination, and applicants who fail	Strike language referencing timeframes and deadlines regarding retaking certification examinations after a failed attempt. The agency seeks to allow individuals who fail to pass the examination to immediately reapply for reexamination.

		the examination on their second or subsequent attempts must wait 30 days from the date of the last examination before being reexamined.	
20 G	N/A	Currently, the regulation states that the department will issue duplicate cards to applicators or technicians for a fee.	Strike the reference to the fee for duplication of certification cards. The agency seeks to align the regulation with existing policy. The agency has never charged for duplicate certification cards.
30 B	N/A	Currently, the word "Under" is capitalized	Strike the work "Under" and replace with "under." The agency does not believe this word requires capitalization.
N/A	30 D	N/A	Add a provision requiring applicants who do not meet the certification requirements within two years of the date of passing the examination to be reexamined. A passing score on a certification exam is only valid for two years from the date the exam was taken. Several exams may be necessary in order for an applicant to become fully certified in more than one category or specialty. If the applicant does not pass all of the exams required to become certified within a two year period, the applicant must retake the required exams. Currently, certified applicators failing to obtain the required number of recertification credits are required to take the certification exam to renew. The agency seeks to ensure the same requirements are applied for all pesticide applicators and to align the regulation with current agency policy.
40 B	N/A	Currently, persons who cannot read pesticide labels shall not be certified as private applicators until they demonstrate competence to apply restricted use pesticides on their own property. After consulting with the appropriate Virginia Cooperative Extension agent, a pesticide inspector may	Strike language requiring consultation with a Virginia Cooperative Extension agent and recommendation by a pesticides investigator that a waiver be granted and add language specifying that persons seeking a waiver of literacy requirements shall petition the Board directly. The agency has determined that the authority to accomplish such an action lies with the Board pursuant to Va. Code § 3.2-3906.

		recommend that the Board of Agriculture and Consumer Services (Board) grant a waiver of the literacy requirement	
50 A	N/A	Currently, the regulation states that registered technicians must receive on-the-job training during the first six month period prior to applying for certification.	Strike the language regarding the six month period prior to applying for certification. The agency has determined that this statement conflicts with the 90 day requirement referenced in subdivision 4 of subsection A.
50 A	N/A	Currently, the regulation states that an applicant must retake the examination within 30 days after failing the first attempt.	Strike the 30-day deadline to retake the exam after the first attempt and replace with 90-day deadline. The agency seeks to ensure that individuals seeking certification as registered technicians, given the importance of on-the-job training in the practical application of pesticides, have additional time, if needed, to continue training under the direct on-site supervision of a certified commercial applicator.
50 A	N/A	Currently, the regulation states that individuals failing to take and pass the exam within 30 days of the initial exam may not apply pesticides commercially.	Replace the requirement to pass the exam within 30 days of the initial exam with the requirement to pass the exam within 90 days of the initial exam. Changes were made to the proposed text regarding the time period during which a candidate for registered technician who has failed his initial exam may seek additional training, in response to comments received from stakeholders during the Proposed Stage Public Comment Period. Changes were made in an effort to provide candidates for registered technician adequate time to receive additional training under the direct on-site supervision of a certified commercial applicator necessary to pass the examination. The proposed amendments ultimately seek to ensure the competence of pesticide applicators through consistent standards of training, testing, and certification while ultimately protecting the health, safety, and welfare of the citizens of the Commonwealth of Virginia.
N/A	50 A	Currently, the regulation allows individuals	Close the unintended loophole that allows individuals who have previously

		seeking certification as registered technicians who have previously submitted application forms and either did not take the exam within the 90 days allotted or did not pass the exam to apply pesticides commercially if they are under direct on-site supervision.	submitted application forms and did not take the exam within the 90 days allotted for training to apply pesticides commercially if they are under direct on-site supervision. The agency seeks to clarify that those who did not take the exam within 90 days after being hired or transferred into a position where duties and functions involve the commercial use of pesticides may not apply pesticides commercially until they reapply and pass the exam.
N/A	50 A	Currently, certified applicators failing to get the required number of recertification credits are required to retest to renew. The language of the regulation is vague regarding the certification of applicants who do not complete the certification process within two years of the date of passing the examination.	Add language that will clarify that all certified applicators be recertified every two years and that any prospective applicator has two years from the date of passing the required exam(s) to complete the certification process, or the exam(s) must be retaken. Several exams may be necessary in order for an applicant to become fully certified. The agency seeks to clarify the recertification and certification two-year requirements. The added language will ensure that the applicators have the most current knowledge available.
60	N/A	Currently, the word “certified,” used to describe “commercial applicator,” is not applied uniformly throughout the regulation.	Add “certified” to describe “commercial applicator.” The agency seeks to clarify the requirement that the commercial applicator who directly supervises is a “certified commercial applicator.”
60	N/A	Currently, the word “commercial,” used to describe “certified applicator,” is not uniformly applied throughout the regulation.	Currently, the word “commercial”, used to describe “certified applicator,” is not uniformly applied throughout the regulation.
N/A	65	N/A	Add explanation of Category 60 for registered technician certification. Categories for all other certifications are listed and explained in the regulation; therefore, the agency believes it is important to reference all certification categories in the regulation in order to provide clarity for regulants.
80	N/A	Currently, private applicator categories are	Strike the categories as they are currently listed and add categories

		numbered one through four and listed by title.	sequentially by category number. The agency seeks to add the category numbers used in the administrative process in order to increase compliance and decrease confusion among regulants.
90 B	N/A	Currently, the language of the regulation reflects "mixing/loading."	Strike "mixing/loading" and replace with "mixing, loading." The agency seeks to clarify that mixing and loading are distinct activities.
130 B	N/A	Currently, the regulation does not reflect the training requirements to be met by commercial applicators and registered technicians seeking recertification.	Add language that states that certified commercial applicators and registered technicians must complete Board-approved training and what Board-approved training entails. The agency seeks to add this language to the regulation in order to align the regulation with the official guidance document.
180 A	N/A	Currently, the regulation is ambiguous in regards to issuance of a certificate on a reciprocal basis.	Add the word "currently" to the statement referring to a person who is certified by another state or federal agency. The agency seeks to clarify the fact that persons requesting certification in Virginia on a reciprocal basis must be currently certified in the state or by the federal agency upon which the certification will be issued in order to decrease confusion among regulants.