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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) Chapter citation(s)	2 VAC 5-680; 2 VAC 5-685
VAC Chapter title(s)	Regulations Governing Licensing of Pesticide Businesses Operating under Authority of the Virginia Pesticide Control Act; Regulations Governing Pesticide Applicator Certification under Authority of Virginia Pesticide Control Act
Action title	Conformance with EPA pesticide applicator standards
Date this document prepared	December 21, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

This regulatory action will amend Regulations Governing Licensing of Pesticide Businesses Operating under Authority of the Virginia Pesticide Control Act (2 VAC 5-680) and Regulations Governing Pesticide Applicator Certification under Authority of Virginia Pesticide Control Act (2 VAC 5-685) to conform these chapters with the U.S. Environmental Protection Agency's (EPA) 2017 Certification of Pesticide Applicators Rule. This federal rule sets forth the minimum requirements for applicators who apply restricted use pesticides, including both commercial and private pesticide applicators. EPA's 2017 revisions to the federal rule were designed to enhance the competencies of pesticide applicators.

The revisions in the 2017 Certification of Pesticide Applicators Rule required the nation’s 68 “certifying authorities” with existing EPA-approved certification plans to submit proposed modifications to their current plans by March 4, 2020, to comply with the newly-revised federal standards. In Virginia, the Department of Agriculture and Consumer Services (VDACS) is the certifying authority for the regulation of pesticides, including the certification of pesticide applicators.

All “certifying authorities” are required to have an approved EPA Plan to be able to certify pesticide applicators in their respective jurisdictions. In the absence of an approved Plan, VDACS would no longer be able to certify pesticide applicators and the EPA would become the “certifying authority.” VDACS submitted its revised Plan to the EPA, and the Plan was subsequently reviewed and approved by the EPA.

The EPA’s approval of Virginia’s Plan is contingent upon demonstrating that Virginia’s laws and regulations meet or will be amended to meet the minimum requirements set forth in the 2017 Certification of Pesticide Applicators Rule. While Virginia’s laws and regulations meet or exceed most of the federal requirements, there are some revisions that are necessary to comply with the newly-revised federal standards for applicator certification. The amendments the agency will propose in this regulatory action will be limited to those set forth in the 2017 Certification of Pesticide Applicators Rule and that are necessary for Virginia to retain its authority to certify pesticide applicators. The primary areas of change include:

- Applicator competency standards [certification and recertification];
- Minimum age for certified applicators and persons working under the direct supervision of a certified applicator;
- Specialized certifications [categories] for applicators using specific application methods (fumigation and aerial); and
- Recordkeeping [pesticide applicators and pesticide businesses].

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

“Board” means the Board of Agriculture and Consumer Services.

“Law” means the Pesticide Control Act (Va. Code § 3.2-3900 et seq.).

“Regulations” means the Regulations Governing Licensing of Pesticide Businesses Operating under Authority of the Virginia Pesticide Control Act and the Regulations Governing Pesticide Applicator Certification under Authority of Virginia Pesticide Control Act.

“Certification of Pesticide Applicators Rule” means the Environmental Protection Agency’s 2017 Certification of Pesticide Applicators Rule (40 CFR Part 171).

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation, (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in the ORM procedures, “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

Title 40, Chapter I, Subchapter E, Part 171 of the Code of Federal Regulations (CFR) was amended in 2017 by the EPA to update the minimum standards for pesticide applicators who apply restricted use pesticides. VDACS is the designated agency for the regulation of pesticides and is the certifying authority for pesticide applicators in Virginia. All certifying authorities are required by federal law to have a plan approved by the EPA to certify pesticide applicators in their respective jurisdictions. The approval of this plan by the EPA requires VDACS to demonstrate that Virginia's regulations meet the minimum standards in the CFR. In order to comply with the 2017 revisions to the rule, the agency must amend specific components of Virginia's pesticide regulations. Failure to do so would result in VDACS no longer being able to certify pesticide applicators and, therefore, this authority reverting to the EPA.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Section 3.2-109 of the Code of Virginia (Code) establishes the 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 of the Law allows the Board to adopt regulations regarding the licensing of pesticide businesses, requiring reporting and record keeping related to licensing and registration, classifying or subclassifying certifications or certificates issued, and establishing training and testing standards and to adopt other regulations necessary or convenient to carry out the purposes of the Law.

Section 3.2-3907 of the Law allows the Board to delegate any authority vested in it under the Law to VDACS.

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

The Board is authorized to adopt regulations to establish training, testing, and standards for certification of commercial pesticide applicators and the licensing of pesticide businesses. Because of the inherent safety considerations associated with the application of pesticides, it is imperative that the requirements for pesticide businesses and individuals who apply pesticides are clear and unambiguous. The revisions to the federal rule were designed to enhance the competencies of pesticide applicators. The proposed action will continue to protect the health and safety of the citizens of the Commonwealth by ensuring that minimum competencies are met by pesticide applicators. Additionally, revising these regulations to comply with the federal rule will allow the Board to maintain its authority to certify pesticide applicators.

Substance

Briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

The changes to the federal Certification of Pesticide Applicators Rule will require amendments to the following areas of the regulations included in this regulatory action:

- Applicator competency standards [certification and recertification];
- Minimum age for certified applicators and persons working under their direct supervision;
- Specialized certifications [categories] for applicators using specific application methods (fumigation and aerial); and
- Recordkeeping [pesticide applicators and pesticide businesses].

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.

Section 3.2-3929 of the Law prohibits a person from using any pesticide classified for restricted use unless that person: (i) has first complied with the certification requirements of the Board; (ii) is under the direct supervision of a certified applicator on-site and training for certification as a commercial applicator or registered technician; or (iii) is producing an agricultural commodity while under the direct supervision of a private applicator on property owned or leased by that private applicator. In addition, Section 3.2-3930 of the Law requires that no person shall use (except under supervised conditions of training for certification) or supervise the use of any pesticide in exchange for compensation of any kind other than the trading of personal services between producers of agricultural commodities without first obtaining certification as either a commercial applicator or registered technician in accordance with regulations adopted by the Board.

In order to certify pesticide applicators, VDACS is required by the 2017 Certification of Pesticide Applicators Rule to have an EPA-approved certification plan in place.

The alternative to this proposal would be to make no changes to the regulations included in this regulatory action. If VDACS were to not make these changes, authority to certify pesticide applicators would become the sole responsibility of the EPA. It is unlikely the EPA would have the capacity that VDACS does to regulate the industry and ensure compliance with applicable laws and regulations within Virginia. Given that the Law requires pesticide applicators and businesses be certified and licensed, respectively, to demonstrate competency in pesticide use, VDACS believes making no changes to the regulation is not a viable alternative.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and the ORM procedures), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify it as

necessary for your agency. Otherwise, delete the paragraph below and insert “This NOIRA is not being used to announce a periodic review or a small business impact review.”

This NOIRA is not being used to announce a periodic review or a small business impact review.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia, describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email, or fax to:

Liza Fleeson Trossbach
Program Manager, Office of Pesticide Services
P.O. Box 1163
Richmond, VA 23218
Fax: 804-371-2283
Liza.Fleeson@vdacs.virginia.gov

In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.