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## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) citation</b>	9 VAC 25-32-10 et seq. Primary Action 9 VAC 25-31-10 et seq. Secondary Action 9 VAC 25-20-10 et seq. Secondary Action
<b>Regulation title</b>	Virginia Pollution Abatement Permit Regulation (Primary), Virginia Pollutant Discharge Elimination System Permit Regulation, Fees for Permits and Certificates
<b>Action title</b>	Amendment of Regulations Pertaining to Biosolids After Transfer from the Virginia Department of Health
<b>Date this document prepared</b>	February 8, 2008

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*.

### Purpose

*Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.*

On September 25, 2007, the State Water Control Board voted to amend the Virginia Pollution Abatement Permit Regulation (9 VAC 25-32-10 et seq.), the Virginia Pollutant Discharge Elimination System Permit Regulation (9 VAC 25-31-10 et seq.), the Fees for Permits and Certificates regulation (9 VAC 25-20-10 et seq.), and the Sewage Collection and Treatment Regulations (9 VAC 25-790-10 et seq.), where applicable, to reflect changes to §62.1-44.19:3 of the Code of Virginia. The changes to the Code and these related amendments transferred oversight of the regulatory program pertaining to biosolids (treated sewage sludge) from the Virginia Department of Health to the Virginia Department of Environmental Quality as a final exempt regulatory action.

The final exempt process did not allow substantive changes to be made to the regulation apart from those specifically outlined in the statutory mandate. As a result, several issues regarding inconsistency between biosolids land application requirements in the Virginia Pollution Abatement Permit Regulation (9 VAC 25-32-10 et seq.) and the Virginia Pollutant Discharge Elimination System Permit Regulation (9 VAC 25-31-10 et seq.) still exist. It is the desire of the Department of Environmental Quality to better align these regulations so that all land application of biosolids is regulated consistently.

The State Board of Health also had three regulatory actions underway to amend the Biosolids Use Regulations (12VAC5-585), which were not completed prior to the transfer of the regulations to the State Water Control Board on January 1, 2008. These amendments pertained to 1) field storage of biosolids, 2) permit fees, and 3) site access control. The State Water Control Board will therefore consider the substance of these proposed amendments during this regulatory action. In order to include consideration of the fee structure for biosolids land application permits, the Fees for Permits and Certificates regulation (9 VAC 25-20-10 et seq.) is also included in this intended regulatory action.

In addition to the above, questions have been raised by the State Water Control Board and the public regarding issues such as public notice processes, processes to establish appropriate buffers to address health concerns, permit modification procedures, sampling requirements, nutrient management requirements, animal health issues associated with grazing, and financial assurance procedures. Changes to permitting procedures to reduce administrative burden while securing adequate requirements for public notice and site specific nutrient management and health related issues also need to be addressed during this regulatory action.

Finally, an expert panel has been convened by the Secretary of Health and Human Resources and the Secretary of Natural Resources, pursuant to House Joint Resolution 694 of the 2007 Acts of Assembly, to explore the health and environmental implications of biosolids use. The panel is scheduled to complete its meetings by November, 2008, and the timing of this intended regulatory action will allow the State Water Control Board to consider the responses of the panel in amendments to the biosolids regulatory program.

### Legal basis

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

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The legal basis for the Virginia Pollution Abatement Permit Regulation (9 VAC 25-32-10 et seq.), the Virginia Pollutant Discharge Elimination System Permit Regulation (9 VAC 25-31-10 et seq.) and the Fees for Permits and Certificates regulation (9 VAC 25-20-10 et seq.) is the State Water Control Law (Chapter 3.1 of Title 62.1 of the Code of Virginia). Virginia Code § 62.1-44.15 authorizes the State Water Control Board to promulgate regulations necessary to carry out its powers and duties. Specifically, §62.1-44.19:3 requires the State Water Control Board to include in regulation certain requirements pertaining to land application of sewage sludge.

The corresponding federal authority for the criteria for land application of biosolids is found at 40 CFR Part 503. The federal and state authority is mandatory.

### Need

*Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.*

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As described above, the immediate changes to the regulations as a result of statutory mandate were incorporated using the final exempt process. This swift incorporation of language to effect program transition between agencies did not allow for full consideration of the program nor provide for public input. It is important that the biosolids use regulations be fully reviewed, both due to the interrupted regulatory review process begun by the State Board of Health, and because of the transfer of the regulations to a different regulatory authority.

In addition, the current regulatory language is inconsistent in several areas, creating confusion to the public as well as the permitted facilities regarding the regulatory requirements, and creating barriers to appropriate compliance assurance. Certain statutory requirements that focused on modifications to the Biosolids Use Regulations (12VAC5-585-10 et seq.) do not mesh clearly with language that currently exists in the Virginia Pollution Abatement Permit Regulation (9VAC25-32-10 et seq.) and Fees for Permits and Certificates regulation (9VAC25-20-10 et seq.).

Finally, the deliberations and some of the outcomes from the Biosolids Expert Panel created by the General Assembly are appropriate to consider as part of the regulatory process.

**Substance**

*Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.*

The following areas will be addressed as part of this regulatory action:

1. Consideration of Outstanding State Board of Health Amendments:

- a. Field Storage – Regulatory requirements for on-farm storage of biosolids for less than 45 days for sites that would not be regulated by local conditional use permits.
- b. Permit Fees – Clarification of permit fee requirements for VPA and VPDES permit holders such that the fee structure is equitable with the agency resources necessary to process a permit, perhaps based on acres permitted. Also, clarification of reimbursement amounts for local governments with biosolids monitoring programs may be considered, given changes to the land application fees in 2007.
- c. Access Control – These 2005 Joint Legislative Audit and Review Commission Report (House Document No. 89) entitled “Review of Land Application of Biosolids in Virginia.” contained recommendations on site access control that need to be addressed

2. Consistency between VPA and VPDES permit requirements:

The differing regulatory requirements for those permitted under a Virginia Pollution Abatement Permit versus a Virginia Pollutant Discharge Elimination System Permit will be examined and alternatives to eliminating inconsistency developed. One alternative that will be considered is to require all facilities land applying biosolids to obtain a VPA permit, whether or not they have a VPDES permit.

3. Public Notice Processes and Permit Modification Procedures:

The VPDES and VPA regulations need to be reviewed for requirements concerning public noticing during the initial issuance and during permit modifications so that all requirements are consistent. In addition, the public notice process will be examined to ensure that adequate provisions are in place to notify neighbors potentially affected by biosolids land application.

#### 4. Establishing Appropriate Buffers to Address Health Concerns:

The technical requirements and the timing of establishing additional buffers to address health concerns will be addressed. This is an important consideration due to the fact that not all concerns may be identified during the permitting process, and some issues that may not have been present prior to application may arise after land application has occurred.

#### 5. Biosolids Sampling Requirements:

The existing sampling protocol for land applied biosolids is recommended but not mandatory. This regulatory action will address whether these protocols should be required and if so what additional parameters, if any, should be included.

#### 6. Nutrient Management Requirements:

As nutrient management plans are now mandatory for all biosolids land application sites, there is existing language that may be duplicative or inconsistent with Department of Conservation Nutrient Management Standards and Criteria, and needs to be clarified and criteria developed.

#### 7. Animal Health Issues Associated with Grazing:

Concerns have been raised regarding whether grazing restrictions adequately address equine species as well as specific micronutrient issues that may affect grazers.

#### 8. Financial Assurance Procedures:

Persons holding or applying for permits to land apply sewage sludge are required to provide written evidence of financial responsibility. This regulatory action will address mechanisms for meeting the financial responsibility requirements, where the responsibility lies and may be written as a separate proposal to address both the VPA and VPDES regulations.

#### 9. Permitting Procedures:

Changes to the existing permitting procedures will be considered, to include altering the permit structure to reduce administrative burden while providing adequate requirements for public notice and site specific nutrient management and health related issues. The development of general permits for specific types of applications will be considered, including but not limited to land application of Class A exceptional quality biosolids and the application of biosolids for research and development projects.

#### 10. Other:

Other changes may be considered based on comments received in response to the NOIRA or discussions of the advisory committee.

Due to the diversity of areas being addressed, several proposals incorporating common areas of interest may be presented.

## Alternatives

*Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the*

agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

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The Board could take no regulatory action at this time, and attempt to clarify inconsistencies between the regulations through agency guidance; however, this would not provide the needed clarity and consistency for the biosolids use program. In addition, this would preclude consideration of program improvements and input from the public and the regulated community on programmatic issues.

**Public participation**

*Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.*

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The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of proposals, 2) the costs and benefits of the alternatives stated in this background document or other alternatives, 3) potential impacts of the regulation and 4) impacts of the regulation on farm and forest land preservation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so at the public meeting, by mail, email or fax to Christina Wood, Post Office Box 1105, Richmond, VA, 23218, (804) 698-4263, fax (804) 698-4116, [cmwood@deq.virginia.gov](mailto:cmwood@deq.virginia.gov). Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: [www.townhall.virginia.gov](http://www.townhall.virginia.gov). Written comments must include the name and address of the commenter. In order to be considered comments must be received by 5:00 p.m. on the last day of the public comment period.

A public meeting will be held and notice of the meeting may be found on the Virginia Regulatory Town Hall website ([www.townhall.virginia.gov](http://www.townhall.virginia.gov)). Both oral and written comments may be submitted at that time.

**Participatory approach**

*Please indicate, to the extent known, if advisers (e.g., ad hoc advisory committees, technical advisory committees) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.*

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The Board is using the participatory approach to develop the proposals. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). Any persons who want to be on the advisory committee are encouraged to attend the

public meeting mentioned above. The primary function of the advisory committee is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the advisory committee will be sent to all applicants.

### Family impact

*Assess the potential 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.*

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While no impact on the institution of family and family stability is anticipated with this amendment regarding items 1 through 3 stated above, altering the requirements to use biosolids as a free nutrient source could impact the disposable income of farm families choosing this method of fertilization.