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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-800
Regulation title	General VPDES Permit For Pesticides Discharges
Action title	Adopt New General Permit Regulation
Date this document prepared	April 19, 2010

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.

The purpose of the proposed action is to develop and issue a VPDES general permit for discharges from pesticides applied directly to surface waters to control pests, and/or applied to control pests that are present in or over, including near, surface waters. This general permit regulation is needed in order to comply with court ordered requirements for EPA and states to issue NPDES permits for both chemical pesticide applications that leave a residue or excess in water, and all biological pesticide applications that are made in or over, including near, waters of the United States.

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.

The basis for this regulation is § 62.1-44.2 et seq. of the Code of Virginia. Specifically, § 62.1-44.15(5) authorizes the Board to issue permits for the discharge of treated sewage, industrial wastes or other waste into or adjacent to state waters and § 62.1-44.15(7) authorizes the Board to adopt rules governing the procedures of the Board with respect to the issuance of permits. Further, § 62.1-44.15(10) authorizes

the Board to adopt such regulations as it deems necessary to enforce the general water quality management program, § 62.1-44.15(14) authorizes the Board to establish requirements for the treatment of sewage, industrial wastes and other wastes, § 62.1-44.16 specifies the Board's authority to regulate discharges of industrial wastes, § 62.1-44.20 provides that agents of the Board may have the right of entry to public or private property for the purpose of obtaining information or conducting necessary surveys or investigations, and § 62.1-44.21 authorizes the Board to require owners to furnish information necessary to determine the effect of the wastes from a discharge on the quality of state waters. Section 402 of the Clean Water Act (33 USC 1251 et seq.) authorizes states to administer the NPDES permit program under state law. The Commonwealth of Virginia received such authorization in 1975 under the terms of a Memorandum of Understanding with the U.S. EPA. This Memorandum of Understanding was modified on May 20, 1991 to authorize the Commonwealth to administer a General VPDES Permit Program.

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.

On November 27, 2006, EPA issued a final regulation to codify its interpretation of the Clean Water Act as not requiring NPDES permits for application of pesticides to or over, including near, waters of the United States, if the applications are consistent with relevant Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requirements. After the rule was published, petitions for review were filed in 11 Circuit Courts. On January 7, 2009, the Sixth Circuit Court of Appeals ruled in *National Cotton Council, et al. v. EPA* to vacate EPA's Pesticides Rule. On June 8, 2009, the Court granted the Department of Justice's request for a two-year stay of the decision, until April 9, 2011, to provide EPA and states time to develop and issue NPDES permits, and provide outreach to stakeholders on the implications of these actions.

The Sixth Circuit Court ruled that NPDES permits are required for both chemical pesticide applications that leave a residue or excess in water, and all biological pesticide applications that are made in or over, including near, waters of the United States. At the end of the two-year stay, NPDES permits will be required for discharges from pesticides applied directly to surface waters to control pests and/or applied to control pests that are present in or over, including near, surface waters.

The Court's decision will cover, at a minimum, the following pesticide uses:

- Mosquito and other aquatic nuisance insect control
- Aquatic weed and algae control
- Aquatic nuisance animal control
- Area wide pest control

Since the Court ruling, EPA has collected and analyzed data on pesticide applications, including labeling requirements, pesticide uses, best management practices employed to minimize the impact of pesticides on water quality, and existing state water quality standards for pesticides. EPA has begun drafting an NPDES Pesticides General Permit that will be issued by them for areas where EPA remains the NPDES permitting authority. EPA's draft general permit is proposed to cover the pesticide uses identified above, and the Agency will also request comments from the public on whether other types of pesticide applications have discharges that should also be included for coverage under the general permit.

The State Water Control Board will develop and issue a VPDES general permit to comply with the court's ruling.

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 State Water Control Board will develop and issue a VPDES general permit for discharges from pesticides applied directly to surface waters to control pests, and/or applied to control pests that are present in or over, including near, surface waters. No specific proposal has been developed at this time. EPA intends to public notice a draft general permit for comment in the Spring of 2010. The permit is intended to require pesticide applicators to implement integrated pest management practices to minimize the discharge of pesticides to surface waters. The Board will use the EPA draft permit as a starting point for general permit development and discussions. Changes to the Board proposed general permit may come through the technical advisory committee process, the public comment process, and/or based upon the final permit that EPA ultimately develops and issues.

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.

There are several alternatives for compliance with the court ordered requirement to permit pesticides discharges. One is to issue individual VPDES permits to each pesticide applicator. Due to the magnitude of pesticide applicators that are potentially required to be permitted, it is not practical to issue individual permits to each of these applicators. Individual permits will only be issued to those applicators that do not qualify to be permitted under the general permit. Another alternative is to issue a VPDES general permit to cover this category of discharger. However, it also may not be practical to require general permit coverage, or permittee registration for general permit coverage, for pesticide applications below a certain treatment area threshold. The Board plans to work closely with the Virginia Department of Agriculture and Consumer Services, the EPA and the public in order to consider other alternatives for achieving the court's requirements in the most cost-effective manner.

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.

The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 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 or by mail, email or fax to William K. Norris, Regulation Writer, Office of Regulatory Affairs, Virginia DEQ, P.O. Box 1105, Richmond, VA 23216, Phone: (804) 698.4022, FAX: (804) 698.4347; william.norris@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. Written comments must include the name and address of the commenter. In order to be considered comments must be received by DEQ between May 10, 2010, and June 18, 2010.

A NOIRA public meeting will be held on Wednesday, June 9, 2010 at the Department of Environmental Quality's Piedmont Regional Office at 4949-A Cox Road, Glen Allen, VA, 23060. The meeting is scheduled to start at 2:00 PM and will be held in the PRO Training Room. Notice of the meeting may also be found on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov). Both oral and written comments may be submitted at that time.]

Public Hearing at Proposed Stage

A public hearing will be held after publication of the proposed stage of the regulatory action.

Technical Advisory Committee

A technical advisory committee will be involved in the development of the proposed regulation.

The Board is using a technical advisory committee to develop a proposal. 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.

It is not anticipated that this regulation will have a direct impact on the institution of the family or family stability.