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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9VAC25-800
Regulation title	Virginia Pollutant Discharge Elimination System (VPDES) General Permit for Discharges Resulting from the Application of Pesticides to Surface Waters
Action title	Amendment and Reissuance of General Permit Regulation
Date this document prepared	March 15, 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*.

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 amend and reissue 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 permit expires on December 31, 2013 and needs to be reissued so pesticide operators can continue to have coverage in order to apply chemical pesticides that leave a residue in water, and all biological pesticide applications that are made in or over, including near, waters of the United States. This regulatory action is also needed in order to incorporate appropriate changes from the federal NPDES Pesticide General Permit.

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. The identification should include (i) a reference to the agency/board/person's overall regulatory authority, as well as a specific provision authorizing the promulgating entity to regulate this specific subject or program; and a description of 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 and required that NPDES permits be issued for all biological pesticide applications and chemical pesticide applications that leave a residue in water when such applications are made in or over, including near, waters of the U.S. 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. Based on the stay, EPA's rule remained in effect and NPDES permits for applications of pesticides to or over, including near U.S. waters were not required until April 9, 2011. The current Virginia VPDES general permit regulation was developed to comply with the 6th Circuit Court's ruling.

On March 28, 2011, the 6th Circuit Court of Appeals granted EPA's request for a further extension of the effective date of the Court's ruling and deadline for when permits will be required for pesticide discharges from April 9, 2011 to October 31, 2011. The DEQ Director suspended the effective date of 9VAC25-800 to be consistent with the 6th Circuit Court's ruling. At their April 14, 2011 meeting, the State Water Control Board re-adopted the amended Pesticides General Permit Regulation with a revised effective date of October 31, 2011, and a revised expiration date of December 31, 2013.

The current General Permit was developed with a 2-year coverage period rather than the standard 5-year general permit coverage due to the timing of the release of EPA's NPDES Permit and the required Court ruling deadline. The use of this 2-year permit allowed Virginia to put in place a general permit by the court required deadline and also provides a reasonable time period to evaluate the federal permit to incorporate appropriate changes for the reissuance of the Virginia general permit. The Virginia 2-year permit also provides a timing off-set to future EPA general permit reissuance (every 5 years) and allows more time for DEQ to react to future changes in the EPA requirements.

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 amend and reissue 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. 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 NPDES General Permit and the Virginia VPDES General Permit as a starting point for amendment of the general permit and discussions. Changes to the Board's general permit will come through both the technical advisory committee process and the public comment process.

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 federal requirement to permit pesticide 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. The current regulatory approach is to issue a VPDES general permit to cover this category of discharger. Individual permits will only be issued to those applicators that do not qualify to be permitted under the general permit. .

The EPA NPDES Pesticide General Permit includes a permit registration or 'notice of intent' requirement. This was not a viable alternative for the VPDES process due to the magnitude of pesticide operators and available staff resources. Therefore, Virginia's current general permit does not require permit registration for this category of discharger. All operators falling under one or more of the four pesticides 'uses' are automatically covered for discharge to surface waters. This is allowed under the VPDES permit regulation at 9VAC25-31-17 B 2 a. Since there is no registration requirement, there is also no fee requirement.

The current regulations contain a requirement for operators exceeding an annual pesticide application threshold to develop a pesticide discharge management plan. Possible revisions or alternatives to the required threshold limits identified in 9VAC25-800-30 C Table 1 could be developed through the technical advisory committee process.

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 requirements in the most cost-effective manner.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, including 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 this regulatory action, including but not limited to 1) ideas to be considered in the development of this 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) the probable effect of the regulation on affected small businesses, and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to William K. Norris, Regulation Writer, Office of Regulatory Affairs, Virginia DEQ, P.O. Box 1105, Richmond, VA 23218, 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 11:59 pm on the last day of the public comment period.

Public hearing at proposed stage

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<http://www.virginia.gov/cmsportal3/cgi-bin/calendar.cgi>). Both oral and written comments may be submitted at that time.

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). 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.

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.

Board: State Water Control Board

EPA (U.S. EPA): United States Environmental Protection Agency

DEQ: Department of Environmental Quality

FIFRA: Federal Insecticide, Fungicide and Rodenticide Act

NOIRA: Notice of Intended Regulatory Action

NPDES: National Pollutant Discharge Elimination System

USC: United States Code

VPDES: Virginia Pollutant Discharge Elimination System