



Exempt Action Proposed Regulation 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
Document preparation date	February 7, 2013

When a regulatory action is exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the Administrative Process Act (APA), the agency is encouraged to provide information to the public on the Regulatory Town Hall using this form.

Note: While posting this form on the Town Hall is optional, the agency must comply with requirements of the Virginia Register Act, the *Virginia Register Form, Style, and Procedure Manual*, and Executive Orders 14 (2010) and 58 (99).

Summary

Please provide a brief summary of all regulatory changes, including the rationale behind such changes. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

This rulemaking is proposed in order to reissue the existing VPDES general permit which expires on December 31, 2013. The permit must be reissued in order to make coverage under the general permit available to operators after December 31, 2013. The existing regulation contains the general permit requirements to control point source discharges of chemical pesticide residues and biological pesticides applied in or over, including near, surface waters. The following pesticide uses are covered under the existing general permit as they are most likely to reach surface waters:

- Mosquito and other flying insect pest control
- Weed, algae and pathogen control
- Animal pest control
- Forest canopy pest control

The regulatory changes include updates to the narrative technology and water quality based permit requirements, monitoring requirements and special conditions (best management practices, recordkeeping and adverse incident reporting and responses). The regulatory changes are based on the

2011 EPA Pesticide General Permit (PGP) for Discharges from the Application of Pesticides, technical advisory committee recommendations, public comment and agency needs.

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., the 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 State Water Control Board (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 EPA. This Memorandum of Understanding was modified on May 20, 1991 to authorize the Commonwealth to administer a General VPDES Permit Program. Under this authorization, the Board is required to maintain an NPDES permit for both chemical pesticide applications that leave a residue or excess in surface waters, and all biological pesticide applications that enter surface waters. This requirement for NPDES permits (or in the case of Virginia -VPDES permits) for these types of pesticide applications is the result of a 2009 Sixth Circuit Court of Appeals decision in *National Cotton Council, et al. v. EPA*.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

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 2006 interpretation of the Clean Water Act. On June 8, 2009, the Court granted the Department of Justice's request for a stay of the decision to provide EPA and the States time to develop and issue NPDES permits. The State Water Control Board's NPDES (VPDES) pesticides general permit was effective October 31, 2011 and expires December 31, 2013. The regulation must be readopted in order to make a pesticide general permit available to operators after the expiration date to allow them to legally apply pesticides to surface waters in Virginia, and to protect the health, safety and welfare of citizens.

Substance

Please briefly identify and explain the new substantive provisions (for new regulations), the substantive changes to existing sections, or both where appropriate.

9VAC25-800-10. Definitions. Definitions were updated or deleted to match EPA's where appropriate.

9VAC25-800-30. Authorization to discharge. Expanded forest pest control category to include aerial utility transmission and distribution line pest control. Made the annual treatment area acreage calculations consistent for all four pesticide use categories (under the current regulation there are two different ways to calculate acreages depending on pesticide use category).

9VAC25-800-60. General Permit. Permit will be reissued for a five year period effective January 1, 2014 and expiring December 31, 2018. The current Virginia permit was adopted as a two-year permit because at the time of adoption, EPA's pesticide permit had not been finalized yet. The two-year permit allowed DEQ to evaluate EPA's final permit to include the parts of EPA's permit that could be useful to Virginia.

9VAC25-800-60, continued... (Part I A 1 a, and b). Clarified the requirements that apply to the operator/decision maker vs. the operator/applicator. For example, made the operator/applicator responsible for meeting the requirements to 'minimize pesticide discharges to surface waters' by using the lowest effective amount of pesticide and maintaining the equipment. These requirements are basically the same as VDACS regulations at 9VAC5-670-170 A and B (application and equipment) and following the FIFRA label requirements. Another requirement to 'minimize pesticide discharges to surface waters' is the use of integrated pest management (IPM) IPM is done by the operator with control over the financing for, or the decision to perform pesticide applications that result in discharges to surface waters. Also larger operators (either decision maker or applicator) who must prepare a Pesticide Discharge Management Plan (PDMP) must document IPM in their PDMP.

9VAC25-800-60, continued... (Part I B). Simplified the monitoring requirements for all operators to be just visual monitoring, and when feasible.

9VAC25-800-60, continued... (Part I C) Pesticide discharge management plan requirements have been clarified and amended to more closely align with EPA's pesticide general permit requirements.

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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The advantages to the public and the agency are that a Virginia Pollutant Discharge Elimination System general permit will continue to be available to pesticide operators to enable them to legally discharge chemical residues and biological pesticides resulting from pesticide application to surface waters. The disadvantage to the public is that the cost of pesticide application may increase due to the cost of recordkeeping and planning requirements. The disadvantage to the Commonwealth is that there continue to be no additional staff resources to implement this permit.

Pertinent matters of interest are that this permit differs from the EPA pesticide general permit in that this permit does not require submittal of a 'registration statement' or 'notice of intent' from the pesticide operators that wish to be covered under the permit. Since registration statements would only provide very general information the staff does not believe that registration statement should be required. Not requiring registration statements also eliminates staff resources needed to review registrations, send out

acceptance letters and other correspondence normally associated with registrations. All operators falling under one or more of the four pesticide 'uses' are automatically covered for discharge to surface waters. Since there is no registration requirement, there is also no fee requirement.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are 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.

There are no requirements more stringent than applicable 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.

There are no localities particularly affected by the proposed regulation bearing disproportionate material impact not experienced by other localities. All localities in Virginia are equally impacted.

Public Participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal, the potential impacts of the regulation on the regulated community and the impacts of the regulation on farm or forest land preservation.

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal, the potential impacts on the regulated community and on any impacts of the regulation on farm and forest land preservation. Also, the Board is 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 hearing or by mail, email or fax to William Norris, P.O. Box 1009, Richmond, VA 23218, (804) 698- 4022 (phone), (804) 698-4346 (fax), 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 by the close of the comment period.

A public hearing will be held and notice of the public hearing will appear on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov) and can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

It is anticipated that approximately 400 pesticide businesses (including local governments) would be covered under this general permit. Businesses that apply pesticides exceeding a certain annual threshold will be required to develop a pesticide discharge management plan, and to keep pesticide application records. This may require additional staff time or consulting fees to maintain or develop those plans or records. All operators making the decision to apply pesticides, regardless of the number of acres on which they apply pesticides, are required to consider integrated pest management (IPM). Furthermore, all operators exceeding the annual treatment area thresholds are also required to consider IPM. This consideration of IPM may or may not cost additional monies.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

One alternative is to issue individual VPDES permits to each pesticide applicator. Due to the number of pesticide applicators that are potentially required to be permitted, it is not practical to issue individual permits to each of these operators. The agency decided to pursue the alternative to continue with a VPDES general permit to cover this category of discharger.

The agency could have followed EPA's general permit and required operators to file a notice of intent or a registration form in order to be covered under the general permit. The decision was to keep the process simplified by not requiring a registration or notice of intent. All operators falling under one or more of the four pesticide 'uses' are automatically covered for discharge to surface waters. This is allowed under the VPDES permit regulation at 9VAC25-31-170- B 2 a. Since there is no registration requirement, there is also no fee requirement.

The agency also considered the level of detail recommended by EPA in the annual report requirement and decided to continue the current permit requirement that only adverse incidents need to be reported annually. All other records would be maintained on site and would be consistent with and not exceed the current recordkeeping required by the Virginia Department of Agriculture and Consumer Services.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5)

the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

As stated in 'Alternatives' above, the agency decided to continue the following:

- No registration statements or notice of intent.
- No registration fee.
- Less stringent reporting requirement than those recommended by EPA.
- Exempt pesticide operators that treat below a certain acreage of surface water from developing a pesticide discharge monitoring plan.

The agency also simplified the monitoring and pesticide discharge monitoring plan language in Parts I B and C.

All these alternatives will accomplish the objectives of applicable law but will minimize the adverse impact on small business and will be consistent with health, safety, environmental, and economic welfare.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

Commenter	Comment	Agency response
Jim Rindfleisch Biologist, York County Mosquito Control County of York Yorktown, Va.	<p>The agency background document is misleading and grossly incorrect. The "family impact" assumption says this regulation will not have a direct impact on the institution of the family or family stability. This statement is incorrect and potentially quite dangerous. Please be advised that mosquitoes have had a profound impact on human affairs and family stability (Noted where the 1607 Jamestown epidemic, the repeated outbreaks of parasitic, bacterial and viral mosquito-borne diseases since the first epidemics 1607 Jamestown, the Norfolk Yellow Fever epidemic).</p> <p>Even today, in York County, hundreds of complaints about mosquitoes are received every year; about the inability to go outside, the inability of children to stand at the bus stops, distraction to outside workers, the inability for people to congregate, about cancelled ball games and other outside activities, the inability to use</p>	<p>The purpose of this regulation is not to inhibit mosquito control but to ensure the application is covered under the general permit and the operator properly controls its application so that the chemical residues do not impact water quality. Note that this regulation does not apply to the pesticide as it is doing its intended purpose (in this case, to kill mosquitoes); rather, applies to the chemical residue (and all biological pesticides). In our experience mosquito control districts have had no problems controlling mosquitoes while meeting the requirements of this general permit.</p>

	<p>parks and recreational space and the inability of school children to use ball fields and playgrounds. And when someone gets sick considerable pressure is brought to bear.</p> <p>The assumption that mosquitoes have no impact on "the family" (human affairs) is sadly shortsighted and grossly misinformed. Unfortunately, this has become a pattern with State agencies attempting to exceed their jurisdictions through paperwork manipulation and absurd interpretation. The adoption of repetitive and nonsensical paperwork procedures and the manipulation of pesticide labels to gain jurisdiction places the public at considerable risk because of the adverse effect on mosquito control in general.</p>	
<p>Matt Boyce, Virginia Golf Course Superintendents Association *</p>	<p>The Virginia Department of Environmental Quality was very responsible in working with businesses on its advisory panel and listening to the concerns on how this would affect small business. We believe that what could be done within the parameters set by the EPA was given full consideration to have a working solution. That said, we still feel strongly that this Permit is redundant to what is already covered by FIFRA and an undue burden to small business. In challenging times for all, putting additional costs to any business for reasons that already have regulatory guidance and requirements would seem inappropriate.</p>	<p>The comments are appreciated.</p>

Family impact

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.

Although it is not anticipated by this agency that this regulation will have a direct impact on the institution of the family or family stability, the agency has received a comment that it will. See public comments and response above.

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.

EPA - Environmental Protection Agency
FIFRA - Federal Insecticide, Fungicide and Rodenticide Act
IPM - Integrated pest management
NPDES - National Pollutant Discharge Elimination System
PDMP - Pesticide Discharge Management Plan
PGP - Pesticide General Permit
VAC - Virginia Administrative Code
VDACS - Virginia Agriculture and Consumer Services
VPDES - Virginia Pollutant Discharge Elimination System
USC - United States Congress