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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Board of Agriculture and Consumer Services
<b>Virginia Administrative Code (VAC) citation(s)</b>	2 VAC 5-685
<b>Regulation title(s)</b>	Regulations Governing Pesticide Applicator Certification under Authority of Virginia Pesticide Control Act
<b>Action title</b>	Amendments to certain definitions and certification requirements for pesticide applicators as well as clarifying language to reflect current program practices
<b>Date this document prepared</b>	April 2, 2015

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

This existing regulation establishes (i) certification requirements for commercial applicators, registered technicians, and private applicators; (ii) the conditions under which a certification may be suspended or revoked; (iii) requirements for reporting pesticide accidents or incidents; and (iv) recordkeeping requirements.

The proposed amendments seek to update the regulation and align it with current agency practices by (i) amending certain definitions; (ii) deleting the requirement that individuals who fail the certification examination must wait a prescribed number of days before retaking the examination; (iii) revising the process by which persons who cannot read pesticide labels can be certified to apply restricted use

pesticides on their own property; (iv) clarifying the on-the-job training requirements for prospective applicators; (v) establishing numeric identifiers for the existing categories of private applicator certification; (vi) prescribing the minimum educational requirements for certified commercial applicators and registered technicians taking board-approved recertification training programs; and (vii) clarifying the requirements for the issuance of a certificate pursuant to a reciprocal agreement with another state. The proposed amendments are intended to ensure the competence of pesticide applicators through consistent standards of training, testing, and certification.

### 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.*

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“VDACS” or “the agency” means the Virginia Department of Agriculture and Consumer Services.

“Virginia Pesticide Control Act” means Chapter 39 of Title 3.2 of the Code of Virginia (Va Code § 3.2-3900 et seq.).

### 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. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.*

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Section 3.2-109 of the Code of Virginia (Code) establishes the Board of Agriculture and Consumer Services (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(4) of the Code authorizes the Board to adopt regulations to require individuals who sell, store, or apply pesticides commercially to be adequately trained to observe appropriate safety practices. This authority is discretionary.

### Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

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The Board of Agriculture and Consumer Services is authorized to adopt regulations to establish training, testing, and standards for certification of commercial pesticide applicators. The proposed action seeks to update the regulation and align it with current agency practices by (i) amending certain definitions; (ii) deleting the requirement that individuals who fail the certification examination must wait a prescribed number of days before retaking the examination; (iii) revising the process by which persons who cannot read pesticide labels can be certified to apply restricted use pesticides on their own property; (iv) clarifying the on-the-job training requirements for prospective applicators; (v) establishing numeric identifiers for the existing categories of registered technician and private applicator certifications; (vi)

prescribing the minimum educational requirements for certified commercial applicators and registered technicians taking board-approved recertification training programs; and (vii) clarifying the requirements for the issuance of a certificate pursuant to a reciprocal agreement with another state. The proposed action is intended to ensure the competence of pesticide applicators through consistent standards of training, testing, and certification while ultimately protecting the health, safety, and welfare of the citizens of the Commonwealth of Virginia.

## Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the “Detail of changes” section below.*

The proposed amendments to the regulation will:

1. Amend the definition of the terms “Under the direct supervision of” and “Under the direct on-site supervision of” to clarify that the individual providing the supervision be a certified commercial applicator. Currently, the regulation calls for the individual providing instruction and control to others who apply pesticides to be a certified applicator, omitting the qualifier “commercial”.
2. Remove the requirement that individuals who fail to pass the certification examination must wait a specific number of days to retake the exam. Currently, individuals must wait 10 days to retake the exam after failing the exam for the first time and 30 days after failing the exam the second or subsequent times. The agency proposes that individuals who fail to pass the exam may, at any time, reapply to take the exam and be placed in the work queue along with other pending applications.
3. Revise the process by which persons who cannot read pesticide labels can demonstrate competence and obtain certification as private applicators to apply restricted use pesticides on their own properties. Currently, in order for an individual to obtain a waiver of the literacy requirement, a pesticide investigator must make a recommendation to the Board regarding the waiver. The agency intends to propose that the individual petition the Board directly for the waiver.
4. Eliminate inconsistent language regarding the period of time during which individuals seeking certification as registered technicians must receive on-the-job-training.
5. Establish the category number for Registered Technicians and Private Applicator certifications in a manner similar to the category codes already being used in other pesticide application specialties.
6. Add a statement requiring applicants who do not meet the certification requirements within two years of the date of passing the examination be reexamined. A passing score on a certification exam is only valid for two years from the date the exam was taken. Several exams may be necessary in order for an applicant to become fully certified. If the applicant does not pass all of the exams required to become certified within a two year period, the applicant must retake all required exams.
7. Clarify that a person seeking pesticide applicator certification in Virginia on a reciprocal basis must hold current certification by the reciprocating state or federal agency.

## 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 there are no disadvantages to the public or the Commonwealth, please indicate.*

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The proposed regulatory action is advantageous to the public, as the amendments clarify and streamline the requirements for pesticide applicator certification while ensuring applicators' continued competence. The continued competence of pesticide applicators ensures individuals who apply pesticides make informed decisions while on the job, reducing the chance for misapplication and potential threats to the health, safety, and welfare of citizens. These actions do not add any additional requirements to the applicator when completing the certification or recertification process nor do they affect the issuance of a certification to an applicator by the agency. There are no known disadvantages to the public or the state. The proposed regulatory action will clarify and streamline requirements and will lead to an increase in compliance through better understanding of applicable requirements.

**Requirements more restrictive than federal**

*Please identify and describe any requirement of the proposal which is 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.*

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The Regulations Governing Pesticide Applicator Certification under Authority of Virginia Pesticide Control Act conform to and are no more restrictive than applicable federal requirements. The proposed amendments reflect the specific needs of the regulated industry and pesticide regulatory program in Virginia and do not add any additional requirements to the existing regulation that would make it more restrictive than 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.*

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Section 3.2-3907 of the Virginia Pesticide Control Act provides the Board with exclusive authority to regulate pesticides throughout Virginia. No locality will be particularly affected.

**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 and the impacts of the regulated community.*

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In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. 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 for the public comment file may do so by mail, email or fax to:

Laura Hare  
 Policy Analyst, Division of Consumer Protection  
 Virginia Department of Agriculture and Consumer Services  
 P.O. Box 1163, Richmond, VA 23218  
 Phone: (804) 786-1908  
 Fax: (804) 255-2666  
 Email: [laura.hare@vdacs.virginia.gov](mailto:laura.hare@vdacs.virginia.gov)

Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: <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 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage, 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 (<https://www.virginia.gov/connect/commonwealth-calendar>). 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.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including:</b>  <b>a) fund source / fund detail; and</b>  <b>b) a delineation of one-time versus on-going expenditures</b></p>	<p>The cost of implementation is expected to be minimal, as there are no new requirements in the proposed amendments to the regulation that would require extensive outreach to the regulated industry or changes to the agency's current processes.</p>
<p><b>Projected cost of the new regulations or changes to existing regulations on localities.</b></p>	<p>There is no cost associated with the proposed amendments to the regulation on localities. The proposed amendments do not include any new requirements. The proposed amendments seek to clarify existing requirements and streamline the certification process.</p>
<p><b>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</b></p>	<p>Pesticide applicators and pesticide businesses operating within the Commonwealth will be affected by the proposed amendments.</p>
<p><b>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that:                  a) is independently owned and operated and;                  b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>There are approximately 3,000 licensed pesticide businesses and 22,750 certified applicators in Virginia, including commercial applicators, registered technicians, and private applicators. It is estimated that the vast majority of the licensed businesses would be considered small businesses.</p>
<p><b>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including:</b></p>	<p>There is no cost associated with the proposed amendments on individuals, businesses or other entities. The proposed amendments do not include any new requirements. The proposed amendments seek to clarify existing requirements</p>

<p><b>a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and</b>  <b>b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</b></p>	<p>and streamline the certification process.</p>
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>The proposed action is intended to ensure the competence of pesticide applicators through consistent standards of training, testing, and certification while ultimately protecting the health, safety, and welfare of the citizens of the Commonwealth of Virginia. The regulation is designed to clarify and streamline the requirements for pesticide applicator certification while ensuring the continued competence of pesticide applicators. Certification ensures that only applicants with adequate knowledge of safe handling of pesticides are permitted to practice in the field, thus ensuring the health of Virginia citizens and the environment. The proposed regulatory action will clarify and streamline requirements and will enhance compliance due to a decrease in confusion among regulants. In addition, the proposed amendments will benefit the economic well being of regulants by clarifying certification requirements and removing wait periods for re-examinations.</p>

### 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.*

No alternatives to achieve the proposed regulatory action are available. The agency has determined that the proposed amendments have been worded and crafted in the manner that is least burdensome to small businesses in the Commonwealth.

### Regulatory flexibility analysis

*Pursuant to § 2.2-4007.1B of the Code of Virginia, 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.*

Pesticides are used for the control of pests that adversely affect crops, structures, human health, and domestic animals. Pesticides have inherent risks because they are designed to prevent, destroy, repel, or mitigate pests. Exemption from existing requirements or establishment of less stringent requirements will lead to unsafe pesticide applications. Thus, the use of pesticides is highly regulated at the federal and state level. The proposed amendments seek to clarify and streamline the certification requirements for pesticide applicators, thus ensuring the competence of pesticide applicators and the proper use of pesticides.

### Periodic review and small business impact review report of findings

*If you are using this form to report the result of a periodic review/small business impact review that was announced during the NOIRA stage, please indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.*

Given the risks associated with the application of pesticides, the proposed regulation is necessary to ensure the safety of the pesticide applicators themselves, the general public, and the environment. The proposed amendments to the regulation are designed to provide additional clarity to the regulation. The agency considered the impact on small businesses when determining the proposed amendments and as a result the proposed amendments have been worded and crafted in the manner that is least burdensome. In general, public comments focus on the necessity of regulation governing pesticide applicators and are supportive of the regulation. Concerns from the public tend to focus on issues related to noncompliance with the regulations rather than on the regulations themselves. While pesticides are highly regulated at both the federal and state level, this regulation does not overlap, duplicate, or otherwise conflict with any federal or other state law or regulation. The regulation was last evaluated in 2008 and remains essential to protecting pesticide applicators, the public, and the environment.

### Public comment

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

The agency received no comments during the public comment period.

### Family impact

*Please 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.*

The proposed amendments to this regulation will have no direct impact on the institution of the family or family stability.

### Detail of changes

*Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please list separately: (1) all differences between the **pre-emergency** regulation and this proposed regulation; and 2) only changes made since the publication of the emergency regulation.*

For changes to existing regulation(s), use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
10	N/A	Currently, the definitions of “Under the direct supervision of” and “Under the direct on-site supervision of” require that supervision be provided by a certified applicator.	Clarifying the definitions of “Under the direct supervision of” and “Under the direct on-site supervision of” by including the word “commercial” in these definitions. “Commercial applicators” may, by definition, supervise the use of pesticides. We are seeking to provide clarification that direct and direct on-site supervision can only be provided by a “certified commercial applicator”, as opposed to an applicator who may only be certified as a registered technician. This was the original intent, and the regulation is currently enforced as such.
10	N/A	Currently, the definition of “registered technician” does not include the certification category number.	Add language regarding the category number in which a “registered technician” is trained and applies pesticides. We seek to add to the regulation the category number used in our administrative process in order to increase compliance and decrease confusion among regulants.
20.D.	N/A	Currently, applicants who fail the examination on their first attempt are eligible to be reexamined for the same category 10 days after the date of their first examination, and applicants who fail the examination on their second or subsequent attempts must wait 30 days from the date of the last examination before being reexamined.	Strike language referencing timeframes and deadlines regarding retaking certification examinations after a failed attempt. We are seeking to allow individuals who fail to pass the examination to immediately reapply for reexamination.



20.G.	N/A	Currently, the regulation states that the department will issue duplicate cards to applicators or technicians for a fee.	Strike the reference to the fee for duplication of certification cards. We are seeking to align the regulation with our agency's policy. Our agency has never charged for duplicate certification cards.
30.B.	N/A	Currently, the word "Under" is capitalized.	Strike the work "Under" and replace with "under". We do not believe this word requires capitalization.
N/A	30.D.	N/A	Add a provision requiring applicants who do not meet the certification requirements within two years of the date of passing the examination to be reexamined. A passing score on a certification exam is only valid for two years from the date the exam was taken. Several exams may be necessary in order for an applicant to become fully certified in more than one category or specialty. If the applicant does not pass all of the exams required to become certified within a two year period, the applicant must retake the required exams. Currently, certified applicators failing to obtain the required number of recertification credits are required to take the certification exam to renew. We are seeking to ensure the same requirements are applied for all pesticide applicators and to align the regulation with our current agency policy.
40.B.	N/A	Currently, persons who cannot read pesticide labels shall not be certified as private applicators until they demonstrate competence to apply restricted use pesticides on their own property by consulting with the appropriate Virginia Cooperative Extension agent who may recommend that the Board of Agriculture and Consumer Services (Board) grant a waiver of the literacy requirement.	Strike language requiring consultation with a Virginia Cooperative Extension agent and add language specifying that persons seeking a waiver of literacy requirements shall petition the Board directly. We have determined that the authority to accomplish such an action lies with the Board based on the statute (Va Code § 3.2-3906).
50.A.	N/A	Currently, the regulation states that registered technicians must receive on-the-job training during the first six month period prior to applying for certification.	Strike the language regarding the six month period prior to applying for certification. We have determined that this statement conflicts with the 90 day requirement referenced in subdivision 4 of subsection A.
50.A.	N/A	Currently, the regulation states that an applicant must retake the examination within 30 days after failing the first attempt.	Strike the language regarding the 30 day deadline to retake the exam after the first attempt. We seek to help expedite an applicant's ability to retake the exam.
50.A.	N/A	Currently, the regulation	Strike the language regarding passing the

		states that individuals failing to take and pass the exam within 30 days of the initial exam may not apply pesticides commercially.	exam within 30 days of the initial exam.
N/A	50.A.	Currently, the regulation allows individuals seeking certification as registered technicians who have previously submitted application forms and either did not take the exam within the 90 days allotted or did not pass the exam to apply pesticides commercially if they are under direct on-site supervision.	Close the unintended loophole that allows individuals who have previously submitted application forms and either did not take the exam within the 90 days allotted or did not pass the exam to apply pesticides commercially if they are under direct on-site supervision. We are seeking to clarify that those who have previously submitted an application and either did not take the exam within 90 days or did not pass the exam may not apply pesticides commercially until they reapply and pass the exam.
N/A	50.A.	Currently, certified applicators failing to get the required number of recertification credits are required to retest to renew. The language of the regulation is vague regarding the certification of applicants who do not complete the certification process within two years of the date of passing the examination.	Add language that will clarify that all certified applicators be recertified every two years and that any prospective applicator has two years from the date of passing the required exam(s) to complete the certification process or the exam(s) must be retaken. Several exams may be necessary in order for an applicant to become fully certified. We seek to clarify the recertification and certification two-year requirements. The added language will ensure that the applicators have the most current knowledge available.
60	N/A	Currently, the word “certified”, used to describe “commercial applicator”, is not applied uniformly throughout the regulation.	Add “certified” to describe “commercial applicator”. We seek to clarify the requirement that the commercial applicator who directly supervises is a “certified commercial applicator”.
60	N/A	Currently, the word “commercial”, used to describe “certified applicator”, is not uniformly applied throughout the regulation.	Add “commercial” to describe “certified applicator”. We seek to clarify the requirement that the certified applicator who directly supervises is a “certified commercial applicator”.
80	N/A	Currently, private applicator categories are numbered one through four and listed by title.	Strike the categories, as they are currently listed, and add categories sequentially by category number. We seek to add the category numbers used in the administrative process in order to increase compliance and decrease confusion among regulants.
90.B.	N/A	Currently, the language of the regulation reflects “mixing/loading”.	Strike “mixing/loading” and replace with “mixing, loading”. We are seeking to clarify that mixing and loading are distinct activities.
130.B.	N/A	Currently, the regulation does not reflect the training requirements to be met by	Add language that states that certified commercial applicators and registered technicians must complete Board-

		commercial applicators and registered technicians seeking recertification.	approved training requirements and state what Board-approved training entails. We seek to add this language to the regulation in order to align the regulation with the official guidance document.
180.A.	N/A	Currently, the regulation is ambiguous in regards to issuance of a certificate on a reciprocal basis.	Add the word “currently” to the statement referring to a person who is certified by another state or federal agency. We are seeking to clarify the fact that persons requesting certification in Virginia on a reciprocal basis must be currently certified in the state or by the federal agency upon which the certification will be issued in order to decrease confusion among regulants.