

VIRGINIA ACTS OF ASSEMBLY -- 1995 SESSION

CHAPTER 103

An Act to amend and reenact §§ 3.1-249.27, 3.1-249.51, 3.1-249.53 and 9-6.14:4.1 of the Code of Virginia, relating to pesticide applicators.

[H 1445]

Approved March 8, 1995

Be it enacted by the General Assembly of Virginia:

1. That §§ 3.1-249.27, 3.1-249.51, 3.1-249.53 and 9-6.14:4.1 of the Code of Virginia are amended and reenacted as follows:

§ 3.1-249.27. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Active ingredient" means, in the case of a pesticide other than a plant regulator, defoliant, desiccant, or anti-desiccant, an ingredient which will prevent, destroy, repel or mitigate insects, fungi, rodents, weeds, or other pests.

"Agricultural commodity" means any plant or part thereof, or animal, or animal product, produced by a person, including farmers, ranchers, vineyardists, plant propagators, Christmas tree growers, aquaculturists, floriculturists, orchardists, foresters, nurserymen, wood treaters not for hire, or other comparable persons, primarily for sale, consumption, propagation, or other use by man or animals.

"Board" means the Pesticide Control Board.

"Bond" means a written instrument issued or executed by a bonding, surety, or insurance company licensed to do business in the Commonwealth, or otherwise approved by the Board, guaranteeing the fulfillment of the agreement between the licensee and the customer.

"Certificate" means the document issued to a certified applicator or registered technician who has completed all the requirements of Article 3 (§ 3.1-249.51 et seq.) of this chapter.

"Certification" or "certified" means the recognition granted by the Pesticide Control Board to an applicator upon satisfactory completion of Board approved requirements.

"Certified applicator" means a person who (i) has satisfactorily completed the Board requirements for certification as a commercial applicator, registered technician, or private applicator, and (ii) has been issued a valid certificate.

"Commercial applicator" means any person who has completed the requirements for certification as determined by the Board, ~~including appropriate training and time in service~~, to use or supervise the use of any pesticide for any purpose or on any property other than as provided in the definition of private applicator.

"Commissioner" means the Commissioner of Agriculture and Consumer Services.

"Committee" or "advisory committee" means any advisory committee appointed pursuant to § 3.1-249.29.

"Defoliant" means any substance or mixture of substances intended for causing the leaves or foliage to drop from a plant, with or without causing abscission.

"Department" means the Department of Agriculture and Consumer Services.

"Desiccant" means any substance or mixture of substances intended for artificially accelerating the drying of plant tissue.

"Device" means any instrument or contrivance intended for trapping, destroying, repelling, or mitigating insects or rodents or destroying, repelling, or mitigating fungi, bacteria, or weeds, or such other pests as may be designated by the Commissioner, but not including treated wood products or simple, mechanical devices such as rattraps, or equipment used for the application of pesticide when sold separately therefrom.

"Fumigant" means any substance which by itself or in combination with any other substance emits or liberates a gas or gases, fumes or vapors, which gas or gases, fumes or vapors, when liberated and used, will destroy vermin, rodents, insects, and other pests.

"Fungicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any fungi or plant disease.

"Herbicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any weed.

"Ingredient statement" or "guaranteed analysis statement" means a statement of the name and percentage of each active ingredient, together with the total percentage of the inert ingredients, in the pesticide; and, in addition, in case the pesticide contains arsenic in any form, a statement of the percentages of total and water soluble arsenic.

"Insect" means any of the numerous small invertebrate animals generally having a body more or less obviously segmented, for the most part belonging to the class Insecta, comprising six-legged, usually

winged forms, as, for example, beetles, bugs, bees, flies, and to other allied classes of arthropods whose members are wingless and usually have more than six legs, as, for example, spiders, mites, ticks, centipedes, and wood lice.

"Insecticide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any insects which may be present in any environment whatsoever.

"Label" means the written, printed or graphic matter on, or attached to, the pesticide or device, or the immediate container thereof, and the outside container or wrapper of the retail package, if any, of the pesticide or device.

"Labeling" means all labels and other written, printed, or graphic matter (i) upon the pesticide or device or any of its containers or wrappers, (ii) accompanying the pesticide or device at any time, or (iii) to which reference is made on the label or in literature accompanying the pesticide or device, except when accurate, nonmisleading reference is made to current official publications of the agricultural experiment station, the Virginia Polytechnic Institute and State University, the Department of Agriculture and Consumer Services, the State Board of Health, or similar federal institutions or other official agencies of the Commonwealth or other states when such agencies are authorized by law to conduct research in the field of pesticides.

"Licensed" or "licensee" means those businesses which, upon meeting the requirements established by the Pesticide Control Board, are issued a license to engage in the sale, storage, distribution, recommend the use, or application of pesticides in Virginia in exchange for compensation.

"Misbranded" shall apply to any pesticide or device:

1. If its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;

2. If it is an imitation of or is offered for sale under the name of another pesticide;

3. If its labeling bears any reference to registration under this chapter;

4. If the labeling accompanying it does not contain directions for use which are necessary and, if complied with, adequate for the protection of the public;

5. If the label does not contain a warning or caution statement which may be necessary and, if complied with, adequate to prevent injury to living man and other vertebrate animals, vegetation, and useful invertebrate animals;

6. If the label does not bear an ingredient statement or guaranteed analysis statement on that part of the immediate container and on the outside container or wrapper, if there be one, through which the ingredient statement or guaranteed analysis statement on the immediate container cannot be clearly read, of the retail package which is presented or displayed under customary conditions of purchase; provided, that the commissioner may permit the ingredient statement to appear prominently on some other part of the container, if the size or form of the container makes it impracticable to place it on the part of the retail package which is presented or displayed under customary conditions of purchase;

7. If any words, statement, or other information required by or under the authority of this chapter to appear on the labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

8. If in the case of an insecticide, fungicide, or herbicide, when used as directed or in accordance with commonly recognized safe practice, it shall be injurious to living man or other vertebrate animals or vegetation, to which it is applied, or to the person applying such pesticide, excepting pests and weeds; or

9. If in the case of a plant regulator, defoliant, or desiccant when used as directed it shall be injurious to living man or other vertebrate animals, or vegetation to which it is applied, or to the person applying such pesticide; provided, that physical or physiological effects on plants or parts thereof shall not be deemed to be injury, when this is the purpose for which the plant regulator, defoliant, or desiccant was applied, in accordance with the label claims and recommendations.

"Pest" means any organism that exists under circumstances that make it deleterious to man or the environment if it is: any vertebrate animal other than man; or any invertebrate animal, such as any insect, other arthropod, nematode, or mollusk such as a slug or snail, but excluding any internal parasite of living man or other living animals; or any plant growing where not wanted, such as any moss, alga, liverwort, fungus, or other plant of any higher order, and any plant part such as a root; or any bacterium, virus, or other microorganisms, except for those on or in living man or other living animals and those on or in processed food or processed animal feed, beverages, drugs, as defined in provisions of the Federal Food, Drug, and Cosmetic Act at 21 USC § 321(g) (i), and cosmetics, as defined in provisions of the Federal Food, Drug, and Cosmetic Act at 21 USC § 321(i). Any organism classified as endangered, threatened, or otherwise protected under federal or state laws shall not be deemed a pest for the purposes of this chapter.

"Pesticide" means: (i) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, fungi, bacteria, weeds, or other forms of plant or animal life or viruses or bacterium, except viruses on or in living man or other animals, which the Commissioner

shall declare to be a pest, (ii) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (iii) any substance which is intended to become an active ingredient in any substance defined in clause (i) and (ii).

"Pesticide business" means any person engaged in the business of: distributing, applying or recommending the use of a product; or storing, selling, or offering for sale pesticides directly to the user. The term "pesticide business" does not include (i) wood treaters not for hire; (ii) seed treaters not for hire; (iii) operations which produce agricultural products unless the owners or operators of such operations described in clauses (i), (ii), and (iii) are engaged in the business of selling or offering for sale pesticides, or distributing pesticides to persons outside of that agricultural producing operation in connection with commercial transactions; or (iv) businesses exempted by regulations adopted by the Board.

"Plant regulator" means any substance or mixture of substances, intended through physiological action, for accelerating or retarding the rate of growth or rate of maturation, or for otherwise altering the behavior of ornamental or crop plants or the produce thereof, but shall not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants, and soil amendments.

"Private applicator" means an applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of producing any agricultural commodity on property owned or rented by him or his employer or, if applied without compensation other than trading of personal services between producers of agricultural commodities, on the property of another person.

"Registered technician" means an individual who has satisfactorily completed Board requirements for certification to apply general use pesticides, and to apply restricted use pesticides while under the direct supervision of a certified commercial applicator. Registered technicians render services similar to those of a certified commercial applicator, but have not completed all the requirements to be eligible for certification as a commercial applicator.

"Registrant" means the person registering any pesticide pursuant to the provisions of this chapter.

"Repellent" means a substance, not a fumigant, under whatever name known, which may be toxic to insects and related pests, but is generally employed because of its capacity for preventing the entrance or attack of pests.

"Restricted use pesticide" or "pesticide classified for restricted use" means any pesticide classified as restricted by the Administrator of the United States Environmental Protection Agency.

"Rodenticide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating rodents or any other vertebrate animal which the Commissioner shall declare to be a pest.

"Serious violation" means a violation of this chapter or regulation promulgated by the Board where there is a substantial probability that death or serious physical harm to persons, serious harm to property, or serious harm to the environment could have resulted from the violation unless the person or licensee did not or could not with the exercise of reasonable diligence know of the violation.

"State special use" or "pesticide classified for restricted use in the Commonwealth" means any pesticide that, after special review, is judged by the Board to be so hazardous or injurious to persons, pollinating insects, animals, crops, wildlife, lands, or the environment, other than the pests it is intended to prevent, destroy, control, or mitigate, that additional restrictions on its sale, purpose, use, or possession are required.

"Under the direct supervision of" means the act or process whereby the application of a pesticide is made by a competent person acting under the instructions and control of a certified applicator who is responsible for the actions of that person.

"Unreasonable adverse effects on the environment" means any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.

"Use" means the employment of a pesticide for the purposes of (i) preventing, destroying, repelling, or mitigating any pest, or (ii) regulating plant growth, causing defoliation or desiccation of plants. The term "use" shall include application or mixing, and shall include handling or transfer of a pesticide after the manufacturer's original seal is broken. The term "use" shall also include any act with respect to a particular pesticide which is consistent with the label directions for that particular pesticide.

§ 3.1-249.51. Restricted use pesticides prohibited; exceptions; training required.

A. No person shall use any pesticide classified for restricted use unless that person (i) has first complied with the certification requirements of the Board; (ii) is engaged in the training necessary for certification as a commercial applicator or registered technician, while under the direct on-site supervision of a certified applicator; or (iii) is engaged in the production of an agricultural commodity while under the direct supervision of a private applicator on property owned or leased by that private applicator.

B. *The Board may specify by regulation the amount of training, which may include a period of service, required to qualify a person for each classification or subclassification of certification as a commercial applicator or registered technician.*

§ 3.1-249.53. Agencies or persons exempt or partially exempt.

A. All state agencies, municipal corporations or other governmental agencies shall be subject to the provisions of this article and regulations adopted thereunder concerning the application of pesticides. These agencies shall be exempt from any certification fees prescribed by this article.

B. Individuals, employees or representatives certified pursuant to this section shall be certified as commercial applicators or registered technicians for the use of pesticides covered by the applicant's certification. The certification of such individual shall be valid only when applying or supervising application of pesticides used by such governmental agencies.

C. The provisions of this article, *except those contained in subsection A of § 3.1-249.56*, shall not apply to (i) persons conducting laboratory research involving restricted use pesticides; (ii) doctors of medicine or doctors of veterinary medicine applying pesticides as drugs or medication, or to control pests in corpses during the normal course of their practice; (iii) providers of janitorial, cleaning, or sanitizing services if the providers use no pesticides other than nonrestricted use sanitizers, disinfectants, and germicides; ~~and~~ (iv) persons who apply paints containing pesticides, provided that the *pesticides in the paints contain nonrestricted use are not restricted use pesticides*; (v) *classes of persons, specified by regulations of the Board, who, by virtue of their experience and knowledge regarding the safe use of pesticides, can use or supervise the use of pesticides with minimal risk to the public health and safety*; and (vi) *classes of persons, specified by regulations of the Board, whose use or supervision of the use of pesticides, by virtue of the nature of the pesticides used or method of application of the pesticides, can be accomplished with minimal risk to the public health and safety*.

D. A painter who applies restricted-use marine antifoulant paint only under the direct, on-site supervision of a commercial applicator, is not required to be a commercial applicator or a registered technician. For the purposes of this subsection, one commercial applicator shall provide on-site supervision for no more than eight paint applicators.

E. *Neither the provisions of subsection A of § 3.1-249.52 nor regulations adopted pursuant to this chapter shall require the certification of any person as a commercial applicator who, as part of his job duties only on property owned or leased by his employer, uses or supervises the use of any pesticide that is not a restricted use pesticide. However, this exemption does not apply to (i) any person who uses or supervises the use of any pesticide on any area open to the general public at the following establishments: educational institutions, health care facilities, day-care facilities, and convalescent facilities; (ii) any person who uses or supervises the use of any pesticide within any area where open food is stored, processed or sold at any establishment; (iii) any person who uses or supervises the use of any pesticide on any recreational land over five acres in size; and (iv) any person otherwise specifically required by this article to be certified as a commercial applicator.*

§ 9-6.14:4.1. Exemptions and exclusions.

A. Although required to comply with § 9-6.18 of the Virginia Register Act (§ 9-6.15 et seq.), the following agencies are exempted from the provisions of this chapter, except to the extent that they are specifically made subject to §§ 9-6.14:14.1, 9-6.14:21 and 9-6.14:22:

1. The General Assembly.
2. Courts, any agency of the Supreme Court, and any agency which by the Constitution is expressly granted any of the powers of a court of record.
3. The Department of Game and Inland Fisheries in promulgating regulations regarding the management of wildlife.
4. The Virginia Housing Development Authority.
5. Municipal corporations, counties, and all local, regional or multijurisdictional authorities created under this Code, including those with federal authorities, except for those created under Chapter 27 (§ 15.1-1228 et seq.) of Title 15.1.
6. Educational institutions operated by the Commonwealth provided that, with respect to § 9-6.14:22, such educational institutions shall be exempt from the publication requirements only with respect to regulations which pertain to (i) their academic affairs; (ii) the selection, tenure, promotion and disciplining of faculty and employees; (iii) the selection of students; and (iv) rules of conduct and disciplining of students.
7. The Milk Commission in promulgating regulations regarding (i) producers' license and base, (ii) classification and allocation of milk, computation of sales and shrinkage, and (iii) class prices for producers' milk, time and method of payment, butterfat testing and differential.
8. The Virginia Resources Authority.
9. Agencies expressly exempted by any other provision of this Code.
10. The Virginia Voluntary Formulary Board in formulating recommendations regarding amendments to the Formulary pursuant to § 32.1-81.
11. The Council on Information Management.
12. The Department of General Services in promulgating standards for the inspection of buildings for asbestos pursuant to § 2.1-526.14.
- 13, 14. [Repealed.]
15. The State Council of Higher Education for Virginia, in developing, issuing, and revising

guidelines pursuant to § 23-9.6:2.

16. The Commissioner of Agriculture and Consumer Services in adopting regulations pursuant to subsection B of § 3.1-726.

17. The Commissioner of Agriculture and Consumer Services and the Board of Agriculture and Consumer Services in promulgating regulations pursuant to subsections B and C of § 3.1-106.4, subsection B of § 3.1-126.12:1, § 3.1-271.1, subsections B and C of § 3.1-828.4, and subsection A of § 3.1-884.21:1.

18. The Board of Medicine when specifying therapeutic pharmaceutical agents for the treatment of certain conditions of the human eye and its adnexa by certified optometrists pursuant to § 54.1-2957.2.

19. The Board of Medicine, in consultation with the Board of Pharmacy, when promulgating amendments to the Physician's Assistant Formulary established pursuant to § 54.1-2952.1.

20. The Boards of Medicine and Nursing in promulgating amendments to the Nurse Practitioner Formulary established pursuant to § 54.1-2957.01.

21. The Virginia War Memorial Foundation.

22. The Virginia Medicaid Prior Authorization Advisory Committee in making recommendations to the Board of Medical Assistance Services regarding prior authorization for prescription drug coverage pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.

23. The State Board of Education, in developing, issuing, and revising guidelines pursuant to § 22.1-280.3.

B. Agency action relating to the following subjects is exempted from the provisions of this chapter:

1. Money or damage claims against the Commonwealth or agencies thereof.
2. The award or denial of state contracts, as well as decisions regarding compliance therewith.
3. The location, design, specifications or construction of public buildings or other facilities.
4. Grants of state or federal funds or property.
5. The chartering of corporations.
6. Customary military, naval or police functions.
7. The selection, tenure, dismissal, direction or control of any officer or employee of an agency of the Commonwealth.
8. The conduct of elections or eligibility to vote.
9. Inmates of prisons or other such facilities or parolees therefrom.
10. The custody of persons in, or sought to be placed in, mental, penal or other state institutions as well as the treatment, supervision, or discharge of such persons.
11. Traffic signs, markers or control devices.
12. Instructions for application or renewal of a license, certificate, or registration required by law.
13. Content of, or rules for the conduct of, any examination required by law.
14. The administration of a pool or pools authorized by Article 7.1 (§ 2.1-234.9:1 et seq.) of Chapter 14 of Title 2.1.
15. Any rules for the conduct of specific lottery games, so long as such rules are not inconsistent with duly adopted regulations of the State Lottery Board, and provided that such regulations are published and posted.
16. Orders condemning or closing any shellfish, finfish, or crustacea growing area and the shellfish, finfish or crustacea located thereon pursuant to Article 2 (§ 28.2-803 et seq.) of Chapter 8, Title 28.2.

C. The following agency actions otherwise subject to this chapter and § 9-6.18 of the Virginia Register Act are excluded from the operation of Article 2 (§ 9-6.14:7.1 et seq.) of this chapter:

1. Agency orders or regulations fixing rates or prices.
2. Regulations which establish or prescribe agency organization, internal practice or procedures, including delegations of authority.
3. Regulations which consist only of changes in style or form or corrections of technical errors. Each promulgating agency shall review all references to sections of the Code of Virginia within their regulations each time a new supplement or replacement volume to the Code of Virginia is published to ensure the accuracy of each section or section subdivision identification listed.
4. Regulations which:
 - (a) Are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved;
 - (b) Are required by order of any state or federal court of competent jurisdiction where no agency discretion is involved; or
 - (c) Are necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation, and the Registrar has so determined in writing; notice of the proposed adoption of these regulations and the Registrar's above determination shall be published in the Virginia Register not less than thirty days prior to the effective date thereof.
5. Regulations which an agency finds are necessitated by an emergency situation. For the purposes of this subdivision, "emergency situation" means (i) a situation involving an imminent threat to public health or safety or (ii) a situation in which Virginia statutory law or the appropriation act or federal law

or federal regulation requires that a regulation shall be effective in 280 days or less from enactment of the law or the appropriation act or the effective date of the federal regulation, and the regulation is not exempt under the provisions of subdivision C 4 of this section. In such cases, the agency shall state in writing the nature of the emergency and of the necessity for such action and may adopt such regulations with the prior approval of the Governor. Such regulations shall be limited to no more than twelve months in duration. During the twelve-month period, an agency may issue additional emergency regulations as needed addressing the subject matter of the initial emergency regulation, but any such additional emergency regulations shall not be effective beyond the twelve-month period from the effective date of the initial emergency regulation. If the agency wishes to continue regulating the subject matter governed by the emergency regulation beyond the twelve-month limitation, a regulation to replace the emergency regulation shall be promulgated in accordance with Article 2 (§ 9-6.14:7.1 et seq.) of this chapter. The Notice of Intended Regulatory Action to promulgate a replacement regulation shall be published within sixty days of the effective date of the emergency regulation, and the proposed replacement regulation shall be published within 180 days after the effective date of the emergency regulation.

6. [Repealed.]

7. Preliminary program permit fees of the Department of Environmental Quality assessed pursuant to subsection C of § 10.1-1322.2.

8. *Regulations of the Pesticide Control Board adopted pursuant to subsection B of § 3.1-249.51 or clause (v) or (vi) of subsection C of § 3.1-249.53 after having been considered at two or more Board meetings and one public hearing.*

Whenever regulations are adopted under this subsection C, the agency shall state as part thereof that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision. The effective date of regulations adopted under this subsection shall be in accordance with the provisions of § 9-6.14:9.3, except in the case of emergency regulations, which shall become effective as provided in § 9-6.14:9 A.

D. The following agency actions otherwise subject to this chapter are excluded from the operation of Article 3 (§ 9-6.14:11 et seq.) of this chapter:

1. The assessment of taxes or penalties under the tax laws.
2. The award or denial of claims for workers' compensation.
3. The grant or denial of public assistance.
4. Temporary injunctive or summary orders authorized by law.
5. The determination of claims for unemployment compensation or special unemployment.
6. The award or denial of individual student loans by the Virginia Education Loan Authority.
7. The determination of applications for guaranty of individual student loans or the determination of default claims by the State Education Assistance Authority.

E. The Marine Resources Commission, otherwise subject to this chapter and § 9-6.18 of the Virginia Register Act, is excluded from the operation of subsection C of this section and of Article 2 (§ 9-6.14:7.1 et seq.) of this chapter; however, the authorization for any general permit or guidelines for activity undertaken pursuant to Title 62.1 by the Marine Resources Commission shall be in accordance with the provisions of this chapter.

F. A regulation for which an exemption is claimed under this section and which is placed before a board or commission for consideration shall be provided at least two days in advance of the board or commission meeting to members of the public that request a copy of that regulation. A copy of that regulation shall be made available to the public attending such meeting.

G. The Joint Legislative Audit and Review Commission shall conduct a review periodically of exemptions and exclusions authorized by this section. The purpose of this review shall be to assess whether there are any exemptions or exclusions which should be discontinued or modified.

H. Minor changes to regulations being published in the Virginia Administrative Code under the Virginia Register Act, Chapter 1.2 (§ 9-6.15 et seq.) of this title, made by the Virginia Code Commission pursuant to § 9-77.10:1 shall be exempt from the provisions of this chapter.