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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) Chapter citation(s)	2 VAC 5-405
VAC Chapter title(s)	Regulations for the Application of Fertilizer to Nonagricultural Lands
Action title	Amendments to penalties
Date this document prepared	August 5, 2020

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

The Board of Agriculture and Consumer Services is authorized to adopt regulations necessary to carry out provisions of Virginia's Fertilizer Law (Va. Code § 3.2-3600 *et seq.*). Chapter 413 of the 2020 Acts of Assembly amended the Fertilizer Law, in part, by increasing from \$250 to \$1,000 the civil penalty that the Board of Agriculture and Consumer Services may impose upon any fertilizer contractor-applicator or licensee who fails to comply with provisions of 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands*. The proposed action seeks to conduct a review of the regulation to (i) determine the appropriate increase to the current maximum penalty and (ii) assess the need for additional penalties that will ensure compliance with 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands*.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

“Board” means the Board of Agriculture and Consumer Services.

“Certified fertilizer applicator” means any individual who has successfully completed Board-approved training.

“Contractor-applicator” means any person required to hold a permit to apply any regulated product pursuant to Va. Code § 3.2-3608.

“Licensee” means a person who receives a license to distribute any regulated product under the provisions of the Virginia Fertilizer Law.

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

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

Chapter 413 of the 2020 Acts of Assembly amended the Fertilizer Law to increase from \$250 to \$1,000 the civil penalty the Board may impose upon a contractor-applicator or licensee who fails to comply with provisions of 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands*. Section 110 of 2 VAC 5-405 currently provides that any individual who offers his services as a certified fertilizer applicator or who supervises the application of any fertilizer on nonagricultural land without obtaining prior registration certification as a fertilizer applicator shall be assessed a penalty of \$250.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

Section 3.2-109 of the Code of Virginia (Code) establishes the Board as a policy board with the authority to adopt regulations in accordance with the provisions of Title 3.2 of the Code.

Section 3.2-3602.1 of the Code authorizes the Board to adopt regulations to certify the competence of contractor-applicators; licensees; and employees, representatives, or agents of state agencies, localities, or other governmental entities that apply regulated products to nonagricultural property and to impose civil penalties upon any contractor-applicator or licensee who fails to comply with the regulations.

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

The provisions of 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands*, ensure the proper application of fertilizer to nonagricultural lands (lawn and turf), thereby protecting the environment by requiring that lawn fertilizers applied for commercial purposes or by governmental entities are applied by certified fertilizer applicators or a person under the control and instruction of a certified fertilizer applicator and at rates, at times, and using methods that reduce the runoff of nitrogen and phosphorus into Virginia’s waterways. The Chesapeake Bay Program has identified that an over-abundance of nutrients, primarily phosphorus and nitrogen, can result in runoff and an over-fertilizing of the waters of the Chesapeake Bay, causing excess levels of algae. The excess algae negatively affects the level of dissolved oxygen in the water needed by oysters, fish, crabs and other aquatic animals. Applying lawn and turf fertilizers at proper rates can result in reduced runoff of nitrogen and phosphorus into Virginia’s waters. Compliance with the provisions of this chapter supports the health of Virginia’s waters, which can positively impact the health and economic welfare of Virginia’s citizens.

The Board has determined that an evaluation of the penalties in 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands*, is necessary to determine if increased or additional penalties are necessary to ensure fertilizer applicators are applying fertilizer to non-agricultural lands in compliance with provisions of the regulation.

Substance

Briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

Through this regulatory action, the Board is considering whether to increase the maximum civil penalty that it will assess on contractor-applicators or licensees who offer their services as a certified fertilizer applicator without obtaining such certification from VDACS. In addition, the Board will consider whether other penalties for failure to comply with 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands*, are needed.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.

No alternatives to the proposed regulatory action are available that would meet the essential purpose of the action. In addition, there are no less intrusive or less costly alternatives for small businesses to achieve the purpose of the regulatory change.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and Executive Order 14 (as amended, July 16, 2018)), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the

following text. Modify as necessary for your agency. Otherwise, delete the paragraph below and insert "This NOIRA is not being used to announce a periodic review or a small business impact review."

In addition, pursuant to Executive Order 14 (as amended, July 16, 2018) and § 2.2-4007.1 of the Code of Virginia, the agency is conducting a periodic review and small business impact review of this regulation to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare; (ii) minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The Board is seeking comments on this regulation, including but not limited to: ideas to be considered in the development of this regulation, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The Board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the *Code of Virginia*. Information may include: (i) projected reporting, recordkeeping, and other administrative costs; (ii) the probable effect of the regulation on affected small businesses; and (iii) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at <https://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. Comments may also be submitted by mail, email or fax to:

David Gianino
Virginia Department of Agriculture and Consumer Services
102 Governor Street, Room LL54
Richmond, VA 23219
Phone: (804) 786-3515
Fax: (804) 371-7793
Email: david.gianino@vdacs.virginia.gov.

In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

The Board will not hold a public hearing on the proposed amendments to this regulation.

Public comment is invited as to whether a panel is needed to assist in the development of amendments to this regulation.