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Final Regulation
Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) citation	2 VAC 5-317
Regulation title	Regulations for Enforcement of the Noxious Weeds Law
Action title	Proposal to establish regulations to eradicate, suppress, and prevent the dissemination of noxious weeds in the Commonwealth
Date this document prepared	December 5, 2013

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual.*

Brief summary

Please provide a brief summary (no more than 2 short 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The proposed regulation seeks to eradicate, suppress, and prevent the dissemination of noxious weeds in the Commonwealth by (i) establishing a list of plants deemed by the Board of Agriculture and Consumer Services (Board) to be noxious weeds, (ii) prohibiting the movement of noxious weeds or articles capable of transporting noxious weeds into or within the Commonwealth, and (iii) identifying eradication activities for certain noxious weeds. This action is necessary to protect Virginia's natural and agricultural resources, including native plants, commercial crops, other desirable plants, livestock, surface waters, etc., from the detrimental impact of noxious weeds. If allowed to become established, noxious weeds can grow rapidly, are typically harmful to the local environment, and can lead to significant economic losses due to associated eradication and control costs.

Following publication of the proposed regulation, the section of the regulation pertaining to the Noxious Weeds Advisory Committee was amended to include additional details about the composition and purpose of the Committee.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency or board taking the action, and (3) the title of the regulation.

On December 5, 2013, the Board of Agriculture and Consumer Services adopted as final *Regulations for Enforcement of the Noxious Weeds Law*, 2VAC5-317 *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.

Section 3.2-109 of the *Code of Virginia* (Code) authorizes the Board to adopt regulations in accordance with Title 3.2 of the Code regarding agriculture, animal care, and food.

The Virginia Department of Agriculture and Consumer Services (VDACS) administers the provisions of the Noxious Weeds Law (Law) (Va Code § 3.2-800 et seq.). Section 3.2-802 of the Law authorizes the Board to establish regulations under which certain plants can be listed as noxious weeds. Moreover, the Board may adopt regulations pertaining to regulated articles and conditions for their movement, under which the Commissioner may proceed to conduct eradication or suppression activities to prevent the dissemination of noxious weeds in the Commonwealth. The Board may also adopt regulations governing the movement of regulated articles entering the Commonwealth from other locations. 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. Detail the specific reasons it 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.

The proposed regulation is necessary to protect the Commonwealth's agricultural and natural resources from the detrimental impact of noxious weeds. Listed noxious weeds are non-native exotic plants with very few or no natural predators or existing environmental conditions to control their rapid rate of growth. As a result, noxious weeds can grow rapidly and displace native plants. In addition, the habitat of wildlife can be altered as these plants invariably change the ecosystem by out-competing and displacing native plants.

Eradication of noxious weeds may not be feasible once populations have become established and widespread. This regulation will allow the Commonwealth to conduct activities to prevent the establishment of listed noxious weeds in Virginia. As the establishment of a noxious weed can lead to significant economic losses due to associated eradication and control costs, this regulation will also assist in protecting the economic welfare of citizens.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The proposed regulation establishes two tiers of noxious weeds. The distinction between the two tiers of noxious weeds is whether eradication of the listed plants is likely. The regulation provides that the Commissioner may conduct eradication or suppression activities to prevent the dissemination of a Tier 1 noxious weed. Tier 2 weeds are those for which successful suppression is feasible, but for which eradication is unlikely.

Under the proposed regulation, the movement of a listed noxious weed or any article known to be infested with a noxious weed is prohibited, unless VDACS issues a certificate or permit for the movement of the noxious weed. The regulation also establishes conditions under which VDACS may issue a certificate or permit.

The regulation provides a list of eradication or suppression activities the Commissioner may conduct to prevent the dissemination of a Tier 1 noxious weed.

The regulation establishes a Noxious Weeds Advisory Committee to advise the Commissioner on those plants it recommends for declaration as noxious weeds or for delisting. Following the publication of the proposed regulation, the section pertaining to the Noxious Weeds Advisory Committee was amended to include additional details about the composition and purpose of the Committee.

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.

The primary advantage of the proposed regulation is the protection of the Commonwealth's agricultural and natural resources from the detrimental impact of noxious weeds. The proposed regulation poses no disadvantages to the public or the Commonwealth.

The agency anticipates implementing a science-based assessment of possible plants for listing as noxious weeds which will facilitate consensus among affected interest groups.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Section	Requirement at	What has changed	Rationale for change

number	proposed stage		
10	Definitions.	Added a definition for the term "Committee".	Subsequent to the publication of the proposed regulation, the agency amended Section 100 to include additional details regarding the composition and purpose of the Noxious Weeds Advisory Committee. The addition of a definition for the term "Committee" is necessary to clarify the use of this term in Section 100.
100	This section established the Noxious Weeds Advisory Committee, prescribed that it shall meet annually, and stated the Committee's purpose.	This section was amended to prescribe the composition of the Noxious Weeds Advisory Committee and provide additional details regarding the Committee's purpose.	The proposed amendments to Section 100 are intended to clarify the role of the Noxious Weeds Advisory Committee.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment	Agency response
Peter Adams	Expressed concern that English ivy, porcelainberry, and oriental bittersweet are not listed as noxious weeds in the proposed regulation.	The agency recognizes the undesirable attributes of the species Mr. Adams mentions. Section 3.2-800 of the Noxious Weeds Law defines a noxious weed as a living plant that is not widely disseminated. As such, the Board only has the authority to declare as noxious weeds those detrimental plants that are not widely disseminated. The species mentioned by Mr. Adams are widely disseminated in the Commonwealth.
Harold A. Logan	Expressed concern over crabgrass and available herbicides.	The agency recognizes the undesirable attributes of the species Mr. Logan mentions. Section 3.2-800 of the Noxious Weeds Law defines a noxious weed as a living plant that is not widely disseminated. As such, the Board only has the authority to declare as noxious weeds those detrimental plants that are not widely disseminated. The species mentioned

		by Mr. Logan is widely disseminated in the Commonwealth. The registration of pesticides available for sale is outside the scope of this regulatory action. Mr. Logan may wish to consult his local Virginia Cooperative Extension agent for information on treating crabgrass.
Justin Roberson	Proposed the addition of a third tier of noxious weeds that would include those species that are widely disseminated in Virginia and proposed the inclusion of the plant species listed on the invasive plant advisory list published by the Department of Conservation and Recreation. Requested information regarding (i) the economic benefits of a healthy ecosystem, (ii) the agency responsible for enforcing the proposed regulation, and (iii) the composition of the Noxious Weeds Advisory Committee.	Section 3.2-800 of the Noxious Weeds Law defines a noxious weed as a living plant that is not widely disseminated. As such, the Board only has the authority to declare as noxious weeds those detrimental plants that are not widely disseminated. The Department of Agriculture and Consumer Services, Office of Plant Industry Services is responsible for administering and enforcing the provisions of the Noxious Weeds Law and this regulation. The agency has amended Section 100 of the regulation to include 15 specific entities that the Commissioner must invite to serve as members of the Noxious Weeds Advisory Committee. The Department of Conservation and Recreation is included on this list. The Committee is tasked with considering the protection of the environment and the impact on affected industries in its evaluation of plant species for listing or delisting as noxious weeds.
Dean Amel, Arlington County Urban Forestry Commission	Expressed concern that the proposed regulation's list of noxious weeds is too limited and does not include species that are typically introduced through retail trade. Expressed concern that the regulation lacks enforcement mechanisms.	The proposed list of noxious weeds was drafted following discussions with stakeholders, many of whom will be represented on the Noxious Weeds Advisory Committee. This Committee will assist the agency in evaluating plants for inclusion on the noxious weeds list in the future. The provisions of this regulation will be enforced pursuant to Va Code § 3.2-804 and Va Code § 3.2-805. Section 3.2-804 prohibits the movement, transport, delivery, shipment, or offer for shipment into or within the Commonwealth of a noxious weed without first obtaining a permit. Section 3.2-805

		authorizes the Commissioner to stop delivery, stop sale, seize, destroy, treat, or order the return of a noxious weed.
Caroline Temmermand, Arlington County Parks and Natural Resources Division	Proposed including in the proposed regulation species that are ranked as highly or moderately invasive on the Department of Conservation and Recreation's Invasive Alien Plant Species list. Proposed a prohibition on the sale of the species included on DCR's list, as well as labeling requirements for those listed species that are currently in production. Proposed authorizing localities to ban the sale and distribution of plant species that the locality determines are invasive. Proposed requiring a review of the noxious weed list every two years by a wide range of stakeholders.	The Department of Conservation and Recreation is included on the list of entities that the Commissioner shall invite to serve on the Noxious Weeds Advisory Committee. The agency does not have the authority under the Noxious Weeds Law to grant localities authority to identify invasive species and ban their sale. The agency amended Section 100 of the regulation to require that the Commissioner convene an annual meeting of the Noxious Weeds Advisory Committee to evaluate the noxious weeds list.
Kimberly Paolucci	Proposed amending the Code of Virginia to remove the phrase "not widely disseminated" from the definition of "noxious weed" in Va Code § 3.2-800. Proposed including a third tier of noxious weeds that includes plant species that are widely disseminated in the Commonwealth. Proposed listing certain invasive vine plants like English ivy, Porcelainberry, and Oriental Bittersweet as noxious weeds in order to protect trees and riparian buffers.	Amendments to the Noxious Weeds Law must be enacted by the Virginia General Assembly. The Noxious Weeds Law cannot be amended through the regulatory process. The agency recognizes the undesirable attributes of the species Ms. Paolucci mentioned. Section 3.2-800 of the Noxious Weeds Law defines a noxious weed as a living plant that is not widely disseminated. As such, the Board only has the authority to declare as noxious weeds those detrimental plants that are not widely disseminated. The species mentioned by Ms. Paolucci are widely disseminated in the Commonwealth.
Barbara Welsh	Proposed restrictions on the availability of plant species such as English ivy, multi-flora rose, Japanese honeysuckle, and bush honeysuckle and suggested educating the public regarding alternative plant species.	The agency recognizes the undesirable attributes of the species Ms. Welsh mentions. Section 3.2-800 of the Noxious Weeds Law defines a noxious weed as a living plant that is not widely disseminated. As such, the Board only has the authority to declare as noxious weeds those detrimental plants that are not widely disseminated. The species mentioned by Ms. Welsh are widely disseminated in the Commonwealth.

		The Virginia Cooperative Extension is an educational outreach program of Virginia's land grant universities and is included on the list of entities that the Commissioner shall invite to serve on the Noxious Weeds Advisory Committee.
Buddy Wilkins	Proposed that the regulation apply to federal, state, and local highways properties, as well as to land cleared or being cleared for development. Expressed concerns with the following plant species: autumn olive, multi-flora rose, Bradford pear, and tree of heaven.	The proposed regulation will be enforced in accordance with the provisions of the Noxious Weeds Law. The agency recognizes the undesirable attributes of the species Mr. Wilkins mentions. Section 3.2-800 of the Noxious Weeds Law defines a noxious weed as a living plant that is not widely disseminated. As such, the Board only has the authority to declare as noxious weeds those detrimental plants that are not widely disseminated. The species mentioned by Mr. Wilkins are widely disseminated in the Commonwealth.
Katie Frazier, Virginia Agribusiness Council (comments made during public hearing)	Proposed that the regulation include provisions regarding the role and membership of the Noxious Weeds Advisory Council. Requested that the Board of Agriculture and Consumer Services authorize staff to develop a Memorandum of Understanding to establish the roles of the Department of Agriculture and Consumer Services, the Department of Conservation and Recreation, and the Department of Forestry as they pertain to the proposed regulation and the Invasive Species Working Group.	Section 100 has been amended to include provisions regarding the composition and role of the Noxious Weeds Advisory Committee. The agency thanks Ms. Frazier for her suggestion regarding the development of a Memorandum of Understanding.
Ruth Douglas, Virginia Native Plant Society (comments made during public hearing)	Expressed concerns with the inclusion of the phrase "not widely disseminated" in the current definition of "noxious weeds" that appears in the Noxious Weeds Law. Expressed support for the proposed regulation.	As Ms. Douglas noted, the Noxious Weeds Law cannot be amended through the regulatory process. The agency appreciates the Virginia Native Plant Society's support for this regulation.

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
N/A	10	N/A	The definitions in this section provide clarification for the use of the terms throughout the regulation.
N/A	20	N/A	This section establishes two tiers of noxious weeds. The distinction between the two tiers of noxious weeds established in this section is whether the eradication of the listed plant species is likely. Tier 1 weeds are those for which successful eradication or suppression is likely. Tier 2 weeds are those for which successful suppression is feasible, but for which eradication is unlikely.
N/A	30	N/A	This section prohibits the movement of any listed noxious weed or any article known to be infested with any listed noxious weed. Movement is permissible if the regulated article is accompanied by a certificate or permit. The prohibition on the movement of any regulated article is intended to protect the Commonwealth's agricultural and natural resources from the detrimental impact of the listed noxious weeds.
N/A	40	N/A	This section provides for the issuance of a certificate or permit which allows the movement of a regulated article into, within, or out of the Commonwealth if certain conditions are met. The provisions of this section will allow for the movement of regulated articles under circumstances that will not result in the spread of the noxious weed.
N/A	50	N/A	This section establishes certain requirements for applying for a permit. The requirements of this section assist with the efficient inspection and safeguarding of regulated articles.
N/A	60	N/A	This section establishes requirements for the attachment of a certificate or permit to the regulated article being moved, as well as requirements for the retention of a copy of the certificate or permit.

			These requirements assist with tracking the movement of a regulated article.
N/A	70	N/A	Inspection and disposal of regulated articles. This section reiterates the Commissioner's authority pursuant to the Virginia Noxious Weeds Law to seize, destroy, or otherwise dispose of regulated articles in order to prevent the introduction or dissemination of noxious weeds.
N/A	80	N/A	This section establishes the activities the Commissioner may conduct in response to the discovery of a Tier 1 noxious weed. Tier 1 noxious weeds are those for which successful eradication or suppression is likely. This section includes specific activities that will assist in facilitating with suppression or eradication of Tier 1 noxious weeds in order to prevent their dissemination.
N/A	90	N/A	This section establishes that the department is not liable for costs incurred by third parties as a result of, or incidental to, inspections required under this regulation. This section is intended to clarify that the department will not be responsible for costs arising from required inspections.
N/A	100	N/A	This section establishes a committee to advise the Commissioner on plants that should be considered by the Board for inclusion on or delisting from the noxious weeds list. A committee comprised of representatives from various state agencies and environmental and industry groups will assist in the science-based analysis of potential plant species for inclusion on or delisting from the noxious weeds list.