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Final Regulation Agency Background Document

Agency name	Department of Forensic Science
Virginia Administrative Code (VAC) Chapter citation(s)	6 VAC40-50
VAC Chapter title(s)	Regulations for the Approval of Marijuana Field Tests for Detection of Marijuana Plant Material
Action title	Amendments to Permit the Approval of Alternative Field Tests and Mobile Instruments
Date this document prepared	July 27, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), 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 this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The purpose of this regulatory action is to broaden the definition of “marijuana field test” that may be considered by the Department of Forensic Science (DFS or the Department) to include a combination of chemical tests or a mobile instrument and to establish the criteria and process by which DFS would approve mobile instruments for the identification of marijuana.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the “Definitions” section of the regulation.

“DFS” or the “Department” means the Department of Forensic Science.

“Industrial hemp” means industrial hemp as defined in Virginia Code § 3.2-4112.

“Marijuana” means marijuana as defined in Virginia Code § 4.1-600.

“Marijuana field test” means any chemical test, combination of chemical tests, or mobile instrument used outside of a forensic laboratory environment to detect the presence of marijuana plant material.

Statement of Final Agency Action

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 taking the action; and 3) the title of the regulation.

On July 19, 2023, after consideration and having received no public comment, the Forensic Science Board approved the final amendments to 6VAC40-50, Regulations for the Approval of Marijuana Field Tests for Detection of Marijuana Plant Material.

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

The proposed stage was submitted for review on May 10, 2022. The Office of the Attorney General provided its certification on August 23, 2022. The Governor’s Office approved the action on February 21, 2023, and the proposed amendments were published in the Virginia Register of Regulations on March 13, 2023. The Forensic Science Board held a public hearing on the proposed stage on April 10, 2023, at 9:30 a.m. A public comment period on Virginia’s Regulatory Town Hall closed on May 12, 2023. No public comments were received. The Board approved the final stage on July 19, 2023.

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.

Virginia Code § 19.2-188.1(B) provides that, “[i]n any trial for a violations of § 4.1-1105.1, any law enforcement officer shall be permitted to testify as to the results of any marijuana field test approved as accurate and reliable by the Department of Forensic Science pursuant to regulations adopted in accordance with the Administrative Procedures Act (§ 2.2-4000 et seq.), regarding whether or not any plant material, the identity of which is at issue, is marijuana” Virginia Code § 9.1-1110 grants the

Forensic Science Board the power and duty to adopt the regulations required pursuant to § 19.2-188.1 and “for any provisions of the Code as they relate to the responsibilities of the Department.”

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety, or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.

In 2019, there were changes in federal and state law regarding marijuana and industrial hemp that impacted the use of marijuana field tests. Marijuana and industrial hemp are different strains of the *Cannabis sativa* plant. The only mechanism to distinguish hemp plant material from marijuana plant material is to conduct a quantitative analysis to determine the tetrahydrocannabinol (THC) concentration of the plant material.

As a result, the Department notified its customers and stakeholders on May 23, 2019, that the Duquenois-Levine field tests approved by DFS under 6 VAC 40-50 could only presumptively identify *Cannabis sativa* plant material. These tests could not distinguish marijuana from industrial hemp. The Department subsequently validated and purchased 4-AP (Cannabis Typification) Field Tests for use by law enforcement agencies. The 4-AP test could not be approved because 1) it was not a Duquenois-Levine field test, and 2) when used alone, it cannot presumptively identify *Cannabis sativa* plant material accurately and reliably as is required by the statute. Law enforcement agencies were instructed to utilize the Duquenois-Levine and 4-AP tests in tandem. The Duquenois-Levine field test was used to determine whether plant material was cannabis, and the 4-AP test determined whether the plant material was more likely to be marijuana and, therefore, should be submitted to the laboratory for analysis.

Simple possession of marijuana was then decriminalized by the 2020 General Assembly. In 2021, the General Assembly enacted legislation legalizing the simple possession of marijuana and creating a new statutory framework for offenses related to the possession of over a pound of marijuana and possession by persons under the age of 21. As a result of these changes, and because the Duquenois-Levine field test cannot distinguish between marijuana and hemp, the regulation needs to be amended.

While the Department is still required under the new law to approve marijuana field tests for use at trial by law enforcement officers for the prosecution of some marijuana offenses, there are currently no marijuana field tests that can independently distinguish industrial hemp from marijuana. Accordingly, the Department will need to amend the regulation to allow for the approval of field tests other than Duquenois-Levine field tests and for the possibility of presumptive mobile instruments or other technology that may become available with the ability to identify *Cannabis sativa* plant material and distinguish marijuana from industrial hemp.

The regulation is still necessary for the protection of public health, safety, and welfare, as the Department is still required to approve field tests for the identification of marijuana under Virginia Code § 19.2-188.1(B). It provides necessary guidelines for the approval of marijuana field tests.

Substance

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.

6VAC40-50-10	Definitions added for “cannabis plant material” and “industrial hemp.” Revisions to the definitions of “list of approved marijuana field tests” and “marijuana field test.” Amendment strikes “marijuana field test kit” definition.
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6VAC40-50-20	Amendment to reflect the new Code provision for underage possession of marijuana as Virginia Code § 4.1-1105.1.
6VAC40-50-30	Amendments to establish separate sets of instructions, criteria and procedures for the approval of chemical tests and mobile instruments. The requirements for mobile instruments closely parallel the requirements for approval of presumptive mobile instruments in 6VAC40-30-30. An additional requirement for both type of field tests is that they must be able to distinguish marijuana from industrial hemp.
6VAC40-50-40	Amendments for clarity.
6VAC40-50-50	Amendments to correct a grammatical error and to include firmware and software modifications to the list of changes to a marijuana field test that could require reevaluation by DFS for continued approval under Virginia Code § 19.2-188.1.
6VAC40-50-70	Amendment to strike “or marijuana field test kits.”
6VAC40-50-80	Amendment to increase the fee for chemical tests due to the need for additional testing to determine if the chemical tests can distinguish between marijuana and industrial hemp. Amendment to establish the fee for mobile instruments that are submitted for evaluation, which considers the same required testing, in addition to the review of instructions, training materials, etc. for the instrument.

Issues

Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

- 1) The advantage to the public of this proposed regulatory change is the Department will be able to consider for approval alternative chemical tests or mobile instruments that may become available on the market that are able to distinguish industrial hemp from marijuana. This would allow law enforcement the ability to make such determinations in the field. If suspected plant material tested positive with an approved test, law enforcement officers would be permitted to testify to this result under Virginia Code § 19.2-188.1(B). An accused would still have the ability to request laboratory testing under that same Code section. This supports the goal of public safety. There are no disadvantages for the public.
- 2) As an advantage to DFS, if the officer was able to testify that the suspect plant material was marijuana at trial for certain civil and misdemeanor offenses (underage possession currently), this would allow these cases to go to trial without laboratory analysis unless the accused moved for such analysis. This could potentially reduce cases submitted to the laboratory. There are no disadvantages to DFS.
- 3) As for the Commonwealth, law enforcement officers would have the ability to distinguish marijuana from industrial hemp in the field. In addition, Virginia Code § 19.2-188.1(B) would permit law enforcement officers to testify to those results in the trial of certain civil and misdemeanor cases (currently underage possession). An accused who wished to have laboratory confirmation of the field test result could move for analysis in front of the trial court.
- 4) There are no other pertinent matters related to this regulatory action.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

There are no applicable federal requirements pertaining to marijuana field tests.

Agencies, Localities, and Other Entities Particularly Affected

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.

Other State Agencies Particularly Affected

Virginia State Police
 Other State Law Enforcement Agencies
 Indigent Defense Commission

Localities Particularly Affected

Local law enforcement agencies
 Local Commonwealth’s Attorneys’ Offices

Other Entities Particularly Affected

Criminal Defense Bar

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency’s response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

Commenter	Comment	Agency response
	None Received.	

Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	New requirement from previous stage	Updated new requirement since previous stage	Change, intent, rationale, and likely impact of updated requirements
		N/A	N/A	N/A

Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this action and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
6VAC40-50-10*		Definitions Section*	Additional definitions have been added for “cannabis plant material” and “industrial hemp.” “Duquenois-Levine” was eliminated in the definitions of “List of approved marijuana field tests” and “marijuana field test.” “Mobile instrument” has been added to the definition of “marijuana field test.” As a result of the change to the Code, the proposed regulatory amendments change the statutory cite under the definition of “marijuana” from § 18.2-247 to § 4.1-600. The amendments eliminate the term “marijuana field test kit” as it is redundant.
6VAC40-50-20		Authority for approval. Current cite is to § 19.2-188.1.	The amendment changes the Code section from § 18.2-250.1 to § 4.1-1105.1 to reflect recent amendments to Virginia Code § 19.2-188.1(B).
6VAC40-50-30*		Request for Evaluation. This section sets out the process for manufacturers to submit field tests for approval. It also details the items that DFS should consider in approving any field test.*	The proposed amendments set out different approval submissions and considerations for chemical tests and mobile instruments. The number of chemical tests required for submission has been doubled from 10 to 20 in consideration of the testing that will need to be completed on both marijuana and industrial hemp. Two non-sequentially manufactured instruments shall be submitted for the approval process. The chemical tests will be consumed

			<p>in the evaluation process. The instruments will be returned to the manufacturer upon completion of the evaluation.</p> <p>The Department will consider whether the field test, whether chemical or mobile instrument, can distinguish marijuana from industrial hemp for approval. In addition to performing in accordance with manufacturer’s instructions and claims, the field test must offer convenience and efficiency in operation as determined by DFS.</p>
6VAC40-50-40		<p>Notice of Decision. This section sets out how DFS notifies the manufacturer of its evaluation decision and how the manufacturer may resubmit a field test for reconsideration.</p>	<p>These amendments are technical to clarify this section.</p>
6VAC40-50-50		<p>Maintenance of approved status. This section sets out the Department’s requirements for reevaluations and requirements that DFS be notified by a manufacturer of any modifications to a field test.</p>	<p>These amendments are technical to provide for additional modifications that may be made to mobile instruments.</p>
6VAC40-50-70		<p>Liability. This section clarifies that the Department assumes no liability for the use of any marijuana field test.</p>	<p>This amendment strikes “marijuana field tests kits” as it has been removed from the regulation.</p>
6VAC40-50-80*		<p>Fees. The previous fee for approval of Duquenois-Levine chemical field tests was \$50. This section sets out the process for the payment of that fee by a manufacturer.*</p>	<p>The amendments now require a \$100 fee for chemical tests. The increased fee is a result of the additional testing that will now be required on both marijuana and industrial hemp samples, not just marijuana samples. For mobile instruments, a \$500 fee will be required due to additional DFS staff time needed to evaluate the materials provided and the validation of these instruments, which is more involved than with a chemical test. All manufacturers requesting approval of their marijuana field test will be required to pay the costs, if any, of obtaining any marijuana or industrial hemp samples for the evaluation of the marijuana field test.</p>