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Periodic Review and Small Business Impact Review Report of Findings

Agency name	Forensic Science Board
Virginia Administrative Code (VAC) Chapter citation(s)	6 VAC 40-50
VAC Chapter title(s)	Regulations for the Approval of Marijuana Field Tests for Detection of Marijuana Plant Material
Date this document prepared	May 24, 2021

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**.

Acronyms and Definitions

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

There are no acronyms or technical terms utilized in this Report that are not also defined in the "Definitions" section of the regulation.

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 or 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 “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.”

Alternatives to Regulation

Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

6 VAC 40-50 establishes how manufacturers may request the evaluation of a marijuana field test or marijuana field test kit for use by law enforcement, the process and fees for such an evaluation, how a manufacturer would maintain approval status for such a marijuana field test, and the periodic publication of a list of approved marijuana field tests in the Virginia Register of Regulations and the Department’s website. The regulation is the least burdensome method of accomplishing the Department’s Code-mandated approval of marijuana field tests pursuant to Code § 19.2-188.1(B).

Public Comment

Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Commenter	Comment	Agency response
	None received.	

Effectiveness

Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

In 2019, changes in federal and state law regarding marijuana and industrial hemp required that DFS notify its customers and stakeholders of the impact of those changes on 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 wasn’t 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 or possession by a person 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 will need to be amended.

While the Department is still required under the new law to approved 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 are able to independently distinguish industrial hemp from marijuana. The Department will need to amend the regulation to allow for the approval of field tests that are not 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 also 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. Stakeholders have not indicated any issues with understanding the requirements of the regulation.

Decision

Explain the basis for the promulgating agency’s decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

Noting the issues above and amendments required for the new law effective July 1, 2021, the Forensic Science Board has recommended to amend this regulation.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to the 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. Also, discuss why the agency’s decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

This regulation has no significant economic impact on small businesses. Small businesses are eligible to submit their product for evaluation and approval by the Department of Forensic Science. Current fees for approval are *de minimis*--\$50 for each marijuana field test for which individual evaluation is requested. The Board will consider the impact on small business of any fees that will be assessed for other types of field tests or technology that may be approved under an amended regulation. Marijuana field tests that are approved are periodically published in the Virginia Register of Regulations. Because it is still Code-mandated, even with the legalization of simple possession of marijuana, there is a continued need for the regulation. No comments or complaints have been received concerning this regulation. The regulation meets Code requirements and user agencies’ and manufacturers’ needs. The regulation does conflict with the legislative changes made by Chapters 550 and 551 of the Acts of Assembly -- 2021 Special Session I and will need to be amended as noted above. Amendments should also reflect the changes in technology that may occur by creating mechanisms for the approval of other types of field tests or technology that may be developed with the ability to distinguish marijuana and industrial hemp.