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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

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| Agency name | Department of Forensic Science |
| 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 |
| Action title | Amendments to Permit the Approval of Alternative Field Tests and Mobile Instruments |
| Date this document prepared | October 1, 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*.

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 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) 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 or technical definitions used in this form.

“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.

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.”

As a result of its May 2021 periodic review of 6 VAC 40-50, the Forensic Science Board recommended that this regulation be amended. The Forensic Science Board approved the Notice of Intended Regulatory Action (NOIRA) on July 14, 2021.

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

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.

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 are able to 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 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.

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.

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| 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. |
| 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. |

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.

The Department is required to approve marijuana field tests for purposes of law enforcement testimony at trial under Virginia Code § 19.2-188.1(B). The broadening of options that can be considered for approval, whether chemical tests or mobile instruments, allows for all manufacturers, including small businesses, to submit their products to DFS for this purpose. The amendments have been drafted to provide for a simple, effective and cost-efficient procedure for both DFS and interested manufacturers. There is no requirement that marijuana field tests be approved for general use by law enforcement in the Commonwealth, only if a manufacturer wishes to gain approval for the results of the marijuana field test to be utilized by law enforcement for trial testimony in underage possession of marijuana cases.

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."

This NOIRA is not being used to announce a periodic review or a small business impact review.

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 Forensic Science Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts 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://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Amy C. Jenkins, Department Counsel, Department of Forensic Science, 700 N. 5th Street, Richmond, Virginia 23219, amy.jenkins@dfs.virginia.gov, (804) 786-6857 (Facsimile). In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of the Proposed stage of this regulatory action.