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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Board of Agriculture and Consumer Services
<b>Virginia Administrative Code (VAC) citation(s)</b>	2 VAC 5-317
<b>Regulation title(s)</b>	Regulations for Enforcement of the Noxious Weeds Law
<b>Action title</b>	Amend noxious weeds list
<b>Date this document prepared</b>	March 18, 2019

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 (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

### Brief Summary

*Please 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.*

Section 3.2-802 of Virginia's Noxious Weeds Law provides authority to the Board of Agriculture and Consumer Services to establish, by regulation, those weeds deemed to be noxious weeds.

Virginia's *Regulations for the Enforcement of the Noxious Weeds Law* (2 VAC 5-317) classifies noxious weed species based on populations of such weed species and the degree to which the weed species can be suppressed or eradicated in Virginia. The weed species are categorized as Tier 1, Tier 2, or Tier 3, with Tier 1 weeds being those weeds that are not known to occur in Virginia and are therefore more easily eradicated. Tier 2 noxious weeds are those that are present in the Commonwealth and for which successful eradication or suppression is feasible. Tier 3 noxious weeds are those that are more prevalent in the Commonwealth. The regulation currently lists three plant species as Tier 1 noxious weeds and five species as Tier 2 noxious weeds. No plant species is currently listed as a Tier 3 noxious weed. Prior to the 2016 Session of the General Assembly, only those plant species that were "not widely disseminated" in Virginia could be listed as a noxious weed. Chapter 171 of the 2016 Acts of Assembly amended the

definition of “noxious weed” by removing the “not widely disseminated” condition and excluding from eligibility for declaration as a noxious weed those living plants or parts thereof for which in-state production is commercially viable or that are commercially propagated in Virginia, thereby allowing the listing of certain plant species that are prevalent in Virginia.

The proposed regulatory action seeks to amend *Regulations for the Enforcement of the Noxious Weeds Law* (2 VAC 5-317) by adding six plant species to the current noxious weed list and by amending the definition of a “Tier 3 noxious weed” to “any noxious weed (i) that is present in the Commonwealth, (ii) whose spread may be slowed by restrictions on its movement, and (iii) for which successful eradication or suppression is not feasible.”

### Acronyms and Definitions

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.*

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

“Noxious weeds” means any living plant, or part thereof, declared by the Board through regulations adopted under the Noxious Weeds Law to be detrimental to crops, surface waters, including lakes, or other desirable plants, livestock, land, or other property, or to be injurious to public health, the environment, or the economy, except when in-state production of such living plant, or part thereof, is commercially viable or such living plant is commercially propagated in Virginia.

### Mandate and Impetus

*Please 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, board decision, etc.). 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.”*

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Section 3.2-802 of the Noxious Weeds Law authorizes the Board of Agriculture and Consumer Services (Board) to establish, by regulation, those weeds deemed to be noxious weeds. Prior to designating a plant as a noxious weed, the Board shall review the recommendations of an advisory committee established by the Commissioner of Agriculture and Consumer Services (Commissioner) to assist the agency in the evaluation of plants that may be declared noxious weeds. The advisory committee may propose weed species for listing and shall conduct a scientific risk assessment of such proposed plants. The assessment shall include the degree to which a plant species is considered a noxious weed, an analysis of the current and potential in-state viability, and the economic impact on industries affected by the designation of the plant as a noxious weed. The advisory committee is to make recommendations to the Commissioner regarding weed species for consideration by the Board.

Chapter 171 of the 2016 Acts of Assembly amended the definition of “noxious weed” by removing the “not widely disseminated” condition and excluding from eligibility for declaration as a noxious weed those living plants or parts thereof for which in-state production is commercially viable or that are commercially propagated in Virginia. Following the enactment of this amendment, the advisory committee assessed multiple plant species for listing as noxious weeds. This regulatory action follows the Board’s consideration of the advisory committee’s and the Commissioner’s recommendations.

### Legal Basis

*Please identify (1) the agency or other promulgating entity, 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 entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity'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.

VDACS administers 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. *Regulations for the Enforcement of the Noxious Weeds Law*, 2 VAC 5-317-100, establishes a Noxious Weed Advisory Committee to assist in the evaluation and risk-assessment of plant species that may be declared noxious weeds.

### Purpose

*Please 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's intended to solve.*

The intent of the regulatory action is to slow the spread of noxious weeds established in Virginia and prevent the introduction of those listed weed species that are not known to occur into the Commonwealth.

The proposed regulatory action is necessary to protect the Commonwealth's agricultural and natural resources from the detrimental impact of noxious weeds. Listed noxious weeds are non-native invasive 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 may be altered as these plants invariably change the ecosystem by out-competing and displacing native plants. As the spread of a noxious weed can lead to significant economic losses due to associated eradication and control costs, this regulation also assists in protecting the economic welfare of citizens.

### Substance

*Please 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.*

The proposed regulatory action adds six plant species deemed by the Board to meet the definition of "noxious weed" to Section 20 of 2 VAC 5-317. The intent of listing these six plants as noxious weeds is to prevent further introductions or slow the spread of existing populations into the Commonwealth. In addition, the definition of "Tier 3 noxious weed" in Section 10 has been amended to clarify the current definition.

### Issues

*Please 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.*

The six plant species recommended for listing as a noxious weed are all invasive plant species; they are highly adaptable to their environment, are copious seed producers, and have an ability to displace native plant species through aggressive and rapid growth. Controlling invasive plants is costly and long term once they become established. Adding the six plants provides an advantage to citizens, as the regulation will serve to prevent the introduction of noxious weeds to un-infested areas or slow the spread from areas that are currently infested. Movement of a listed noxious weed will require that citizens obtain a VDACS permit to minimize the risk associated with moving a listed noxious weed. Through the issuance of this permit, VDACS will provide suggested best practices for the movement of the Tier 3 noxious weed that will prevent the inadvertent spread of these plants. There are no disadvantage to the public or the Commonwealth as a result of this proposed regulatory action.

**Requirements More Restrictive than Federal**

*Please identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.*

There are no requirements that exceed applicable federal requirements.

**Agencies, Localities, and Other Entities Particularly Affected**

*Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.*

No state agency, locality, or other entity will be particularly affected by the proposed amendments.

**Economic Impact**

*Pursuant to § 2.2-4007.04 of the Code of Virginia, please identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Please keep in mind that this is change versus the status quo.*

**Impact on State Agencies**

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:</p> <ul style="list-style-type: none"> <li>a) fund source / fund detail;</li> <li>b) delineation of one-time versus on-going expenditures; and</li> <li>c) whether any costs or revenue loss can be absorbed within existing resources</li> </ul>	<p>The cost to VDACS to implement the proposed amendments is expected to be minimal, as amendments to the regulation add new noxious weed species to the existing list and, therefore, do not require the establishment of a new program or modification to the agency's current processes. The issuance of the permit for movement of the newly listed species can be handled with current agency staff and at a minimal cost.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>There are no anticipated costs, savings, or revenues for other state agencies resulting from this regulatory action.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>The intent of the regulatory action is to prevent the introduction or slow the spread of these noxious weed species into and within the Commonwealth.</p>

**Impact on Localities**

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>There are no anticipated costs, savings, fees, or revenues for localities resulting from this regulatory action.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>The proposed regulation is intended to protect the Commonwealth's agricultural and natural resources from the detrimental impact of listed noxious weeds.</p>

**Impact on Other Entities**

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>Landowners will benefit from the proposed addition of plant species to the noxious weeds list, as the restrictions on the movement of noxious weeds will reduce the potential that a noxious weed will become established on their land and consequently impact the use of their land or its value.</p>
<p>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that:</p> <ul style="list-style-type: none"> <li>a) is independently owned and operated and;</li> <li>b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</li> </ul>	<p>The agency is unable to estimate the number of landowners or small businesses who will benefit from preventing the introduction or spread of noxious weeds onto their land.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please be specific and include all costs including, but not limited to:</p> <ul style="list-style-type: none"> <li>a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses;</li> </ul>	<p>The agency is unable to determine the costs to individuals and businesses of the proposed regulatory action; however it is anticipated that such costs will be minimal. The proposed regulatory action is adding one species as a Tier 2 noxious weed and five weed species as Tier 3 noxious weeds. Anyone desiring to move a noxious weed is required to obtain a permit issued by VDACS. The permit will not include</p>

b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	specific requirements for movement of the Tier 3 noxious weed but will contain suggested best management practices to prevent the inadvertent spread of the noxious weed. The permit for the movement of Tier 1 and Tier 2 noxious weeds will require compliance with specific best management practices to prevent the spread of the noxious weed.
Benefits the regulatory change is designed to produce.	The proposed regulation is intended to protect the Commonwealth's agricultural and natural resources from the detrimental impacts of noxious weeds.

## Alternatives

*Please 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 agency has determined that no alternative regulatory method will better accomplish the objectives of the Law and that exceptions for small businesses are not appropriate. The restriction of the movement of a listed noxious weed, as established in the Law, is necessary to prevent its dissemination in the Commonwealth, and the regulation establishing a list of noxious weeds is necessary to protect the Commonwealth's agricultural and natural resources from the detrimental impact of these plants. As the establishment of a noxious weed can lead to significant economic losses due to associated eradication and control costs, this regulation also assists in protecting the economic welfare of citizens.

## Regulatory Flexibility Analysis

*Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.*

The proposed amendments to the *Regulations for the Enforcement of the Noxious Weeds Law* add six additional plant species to the noxious weeds list and do not change the objective of the Law, which is to restrict the movement of a listed noxious weed in order to prevent its dissemination in the Commonwealth. The Law already imposes permit requirements for the movement of noxious weeds and, together with the proposed regulation, represents the minimum requirements necessary to ensure that permitted movement of noxious weeds will result in reduced spread of the noxious weeds, thereby protecting citizens of the Commonwealth from economic loss associated with noxious weed eradication and control costs.

## Public Comment

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

Committer	Comment	Agency response
Eleanor Coddington, Fairfax County Land Development Services (comment received via Town Hall)	Fairfax County supports the listing of running bamboo as a noxious weed because it spreads invasively into neighbors' yards and is a threat to native biodiversity. Specifically, we support the listing of golden bamboo ( <i>Phyllostachys aurea</i> ), which is the most common non-native invasive bamboo causing loss of property and ecosystem value in Fairfax County.	Phyllostachys aurea is grown commercially in Virginia and, therefore, is not eligible for listing as a noxious weed.
William Hamersky, Blue Ridge Partnership for Regional Invasive Species Management (comment received via Town Hall)	Where can I find a list of the plants proposed for the noxious weed law changes?	VDACS clarified that the list was not available during the NOIRA stage.

## Public Participation

*Please include a statement that in addition to any other comments on the regulatory change, the agency is seeking comments on the costs and benefits of the regulatory change and the impacts of the regulated community. Also, indicate whether a public hearing will be held to receive comments.*

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the Board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: 1) projected reporting, recordkeeping, and other administrative costs; 2) probable effect of the regulation on affected small businesses; and 3) description of less intrusive or costly alternative methods of 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://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, Program Manager  
 Office of Plant Industry Services  
 Virginia Department of Agriculture and Consumer Services  
 P.O. Box 1163  
 Richmond, VA 23218  
 Telephone: (804) 786-5525  
 Fax: (804) 371-7793  
 E-mail: 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.

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

### Detail of Changes

*Please list all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation.*

*If the regulatory change will be a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory change. Delete inapplicable tables.*

*If the regulatory change is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below. Please include citations to the specific section(s) of the regulation that are changing.*

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
10	NA	The current definition of a Tier 3 noxious weed is “any noxious weed that is present in the Commonwealth and not listed as a Tier 1 or Tier 2 noxious weed.”	The proposed definition for the term “Tier 3 noxious weed” is “any noxious weed (i) that is present in the Commonwealth, (ii) whose spread may be slowed by restrictions on its movement, and (iii) for which successful eradication or suppression is not feasible.” The intent of the change is to clarify the current definition.
20 B	NA	This section states the plant species declared to be noxious weeds and places the weeds in one of two tiers.	The proposed amendments add <i>Corydalis incisa</i> (Incised fumewort) to the list of Tier 2 noxious weeds  The proposed amendments are intended to prevent or reduce the artificial spread of these invasive plant species that are present in the Commonwealth and for which successful eradication or suppression is feasible.



20 C	NA	<p>While the current regulation establishes a third tier for noxious weeds, currently, no plant species is declared a Tier 3 noxious weed.</p>	<p>The proposed amendments declare the following plant species as Tier 3 noxious weeds:</p> <ol style="list-style-type: none"> <li>1. Ailanthus altissima, Tree of heaven</li> <li>2. Ampelopsis brevipedunculata, Porcelain berry</li> <li>3. Celastrus orbiculatus, Oriental bittersweet</li> <li>4. Hydrilla verticillata, Hydrilla</li> <li>5. Persicaria perfoliata, Mile-a-minute weed”.</li> </ol> <p>The proposed amendments are intended to prevent or reduce the artificial spread of these invasive plant species (i) that are present in the Commonwealth, (ii) whose spread may be slowed by restrictions on their movement, and (iii) for which successful eradication or suppression is not feasible.</p>
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