



Virginia Department of Planning and Budget **Economic Impact Analysis**

2 VAC 5-405 Regulations for the Application of Fertilizer to Nonagricultural Lands
Department of Agriculture and Consumer Services
Town Hall Action/Stage: 5578 / 9395
December 21, 2021

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). The analysis presented below represents DPB's best estimate of these economic impacts.¹

Summary of the Proposed Amendments to Regulation

The Board of Agriculture and Consumer Services (Board) proposes to: (i) require that a contractor-applicator² or licensee³ be responsible for ensuring its employees obtain a Certified Fertilizer Applicator registration, rather than penalizing an employee for not being a Certified Fertilizer Applicator,⁴ (ii) amend the current penalty structure from a one-time, \$250 penalty, to a penalty that increases with repeat offenses, (iii) create a new penalty for a contractor-applicator or licensee who fails to maintain certain records documenting applicator training and each

¹ Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

² "Contractor-applicator" is defined in the regulation as "any person required to hold a permit to apply any fertilizer pursuant to § 3.2-3608 of the Code of Virginia." The Code essentially defines that as any person, other than a licensee or an agent of a licensee, who intends to apply fertilizer, specialty fertilizer, soil amendment, or horticultural growing medium for profit.

³ "Licensee" is defined in the regulation as "the person who receives a license to distribute any fertilizer under the provisions of § 3.2-3606 of the Code of Virginia." The Code, § 3.2-3600, defines "distribute" as "to import, consign, manufacture, produce, compound, mix, blend, or in any way alter, the chemical or physical characteristics of a regulated product, or to offer for sale, sell, barter, warehouse or otherwise supply regulated product in the Commonwealth."

⁴ "Certified fertilizer applicator" is defined in the regulation as "any individual who has successfully completed board-approved training."

application of fertilizer to nonagricultural land, or who fails to submit the required annual acreage report to Virginia Department of Agriculture and Consumer Services (VDACS), and (iv) create a new penalty for failure to apply lawn or lawn maintenance fertilizers in compliance with the Department of Conservation and Recreation's (DCR) nutrient management standards for lawns.

Background

VDACS states that the Board promulgated 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands* (regulation) to ensure the proper application of fertilizer to nonagricultural lands (i.e., lawn and turf), thereby protecting the environment. Specifically, the regulation accomplishes this by requiring that lawn fertilizers applied for commercial purposes or by governmental entities are applied by a certified fertilizer applicator or a person under the control and instruction of a certified fertilizer applicator and at rates, times, and methods that reduce the runoff of nitrogen and phosphorus into Virginia's waterways.

In order to become a certified fertilizer applicator, the applicant must successfully complete Board-approved training. The current Board-approved training is an online course (with a \$10 fee) that is a joint effort of the Virginia Cooperative Extension, VDACS, and DCR.⁵ There are ten self-paced training modules and each are accompanied by a test that must be passed at a minimum 70 percent level. Certification helps ensure that the fertilizer applicator understands the rates, times, and methods that reduce the runoff of nitrogen and phosphorus. An online recertification course (also with \$10 fee) must be taken every four years.

Chapter 413 of the 2020 Acts of Assembly amended the Fertilizer Law, in part, by increasing from \$250 to \$1,000 the maximum civil penalty that the Board may impose upon any fertilizer contractor-applicator or licensee who fails to comply with provisions of the regulation.⁶

Failure to Obtain Certification

Under the current regulation, "Any individual who offers his services as a certified fertilizer applicator or who supervises the application of any fertilizer on nonagricultural land without obtaining prior registration certification from the commissioner shall be assessed a

⁵ See <https://ext.vt.edu/agriculture/commercial-horticulture/greenhouse-nursery/fertilizer-application.html>

⁶ See <https://leg1.state.va.us/cgi-bin/legp504.exe?201+ful+CHAP0413>

penalty of \$250.” The Board proposes to amend that sentence to the following, with new language in bold:

Any **contractor-applicator or licensee that employs an** individual who offers his services as a certified fertilizer applicator or who supervises the application of any fertilizer on nonagricultural land without obtaining prior registration certification from the commissioner shall be assessed a penalty of **(i) \$250 for the first offense, (ii) \$500 for the second offense within any five year period, and (iii) \$1,000 for the third offense within any five year period.**

Failure to Maintain Records or Send Report

The regulation requires that licensees and contractor-applicators maintain records of each application of fertilizer to nonagricultural land for at least three years following the application.⁷ Contractor-applicators and licensees who apply lawn fertilizer and lawn maintenance fertilizer to more than a total of 50 acres of nonagricultural lands must submit an annual report on or before February 1 indicating the total acreage or square footage by zip code of the land receiving lawn fertilizer and lawn maintenance fertilizer in the preceding calendar year.

Currently, no penalties are assessed for a contractor-applicator or licensee who fails to maintain records or submit annual reports. In § 3.2-3625, the Virginia Fertilizer Law provides that a person convicted of a violation of a provision of the law or a regulation adopted thereunder is subject to a Class 3 misdemeanor; however, in practice VDACS has not pursued a criminal charge against anyone for failing to maintain the records required by the regulation or for failing to submit the required annual report.

The Board proposes to add the following text to the regulation:

Any contractor-applicator or licensee who does not maintain records as required by this chapter or submit the required annual report to the commissioner in accordance with 2 VAC 5-405-100 shall be (i) issued a warning for the first offense, (ii) assessed a penalty of \$250 for the second offense within any five year period, (iii) assessed a penalty of \$500 for the third offense within any five year period, and (iv) assessed a penalty of \$1,000 for the fourth offense within any five year period.

⁷ The records must contain: 1. Name, mailing address, and telephone number of customer, as well as address of application site if different from customer's mailing address; 2. Name of the person making or supervising the application; 3. Day, month, and year of application; 4. Weather conditions at the start of the application; 5. Acreage, area, square footage, or plants treated; 6. Analysis of fertilizer applied; 7. Amount of fertilizer used, by weight or volume; and 8. Type of application equipment used.

Violating Standards and Criteria for Nutrient Management

The regulation requires that licensees and contractor-applicators apply fertilizer at rates, times, and methods that are consistent with standards and criteria for nutrient management promulgated pursuant to § 10.1-104.2 of the Code of Virginia (DCR's lawn nutrient management standards). Currently, though, no penalties are assessed for a contractor-applicator or licensee who applies lawn fertilizer at rates, times, or methods that are inconsistent with DCR's lawn nutrient management standards. As stated above, § 3.2-3625 of the Virginia Fertilizer Law provides that a person convicted of a violation of a provision of the law or a regulation adopted thereunder is subject to a Class 3 misdemeanor; however, in practice VDACS has not pursued a criminal charge against anyone for applying lawn fertilizer at rates, times, or methods that are inconsistent with DCR's lawn nutrient management standards.

The Board proposes to add the following text to the regulation:

Any contractor-applicator or licensee who applies lawn fertilizer or lawn maintenance fertilizer at a rate, time, or method inconsistent with the standards and criteria for nutrient management promulgated pursuant to § 10.1-104.2 of the Code of Virginia shall be (i) issued a warning for the first offense, (ii) assessed a penalty of \$250 for the second offense within any five year period, (iii) assessed a penalty of \$500 for the third offense within any five year period, and (iv) assessed a penalty of \$1,000 for the fourth offense within any five year period.

Estimated Benefits and Costs

All of the proposed amendments are intended to make it more likely that licensees and contractor-applicators comply with the requirements of the regulation. Making the businesses responsible (and punishable) for ensuring their employees obtain a Certified Fertilizer Applicator registration prior to applying fertilizer, and increasing the fines, may make it less likely that uncertified individuals do this work. This could reduce occurrences where there is excessive runoff of nitrogen and phosphorus due to the applicator's lack of knowledge on how to minimize runoff.

Establishing financial penalties for contractor-applicators or licensees who apply lawn fertilizer at rates, times, or methods that are inconsistent with DCR's lawn nutrient management standards may encourage compliance with the standards, which would reduce nitrogen and phosphorus runoff. Establishing financial penalties for contractor-applicators or licensees who

fail to maintain records or submit annual reports may encourage these firms to comply with these requirements. This information is needed to help understand how much and where fertilizer is being applied in the Commonwealth.

Reducing runoff of nitrogen and phosphorus is beneficial for Virginia's waterways. According to the U.S. Environmental Protection Agency, too much nitrogen and phosphorus in the water causes algae to grow faster than ecosystems can handle. Significant increases in algae harm water quality, food resources and habitats, and decrease the oxygen that fish and other aquatic life need to survive. Large growths of algae are called algal blooms and they can severely reduce or eliminate oxygen in the water, leading to illnesses in fish and the death of large numbers of fish. Some algal blooms are harmful to humans because they produce elevated toxins and bacterial growth that can make people sick if they come into contact with polluted water, consume tainted fish or shellfish, or drink contaminated water.⁸

Businesses and Other Entities Affected

The proposed amendments potentially affect the 408 fertilizer contractor-applicators and the 739 licensed fertilizer distributors in the Commonwealth.⁹

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.¹⁰ An adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined. Contractor-applicators and licensees who do not comply with the regulation would encounter higher costs. Thus, an adverse impact is indicated.

⁸ See <https://www.epa.gov/nutrientpollution/issue>

⁹ Data source: VDACS

¹⁰ Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

Small Businesses¹¹ Affected:¹²Types and Estimated Number of Small Businesses Affected

VDACS believes that the majority of affected firms would qualify as small businesses, but a specific number is not available.

Costs and Other Effects

The proposed amendments increase costs for small lawn care/fertilizer firms that do not comply with the regulations.

Alternative Method that Minimizes Adverse Impact

There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

Localities¹³ Affected¹⁴

The proposed amendments are not expected to disproportionately affect any particular localities or substantively affect costs for local governments.

Projected Impact on Employment

The proposed amendments are unlikely to substantively affect total employment.

Effects on the Use and Value of Private Property

The proposed amendments would not affect the use and value of private firms that comply with the requirements of the regulation. The proposal would increase costs for firms that do not comply, and may moderately reduce their value. For firms that comply with the regulation's requirements when creating lawns for developing real estate, costs would not increase.

¹¹ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

¹² If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

¹³ "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

¹⁴ § 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.