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Proposed Regulation Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) Chapter citation(s)	2 VAC 5-317
VAC Chapter title(s)	Regulations for the Enforcement of the Noxious Weeds Law
Action title	Amend noxious weed list
Date this document prepared	January 10, 2022 Updated on August 15, 2022, to use new TH-02 template

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.

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. Plant species listed as noxious weeds are prohibited from moving into or within the Commonwealth without first obtaining a permit to move such weeds. This effectively prevents further human-assisted dispersal of the plant species into or throughout the Commonwealth. The weed species are classified as Tier 1, Tier 2, or Tier 3. Tier 1 noxious weeds are those plant species 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 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. The regulation currently lists three plant species as Tier 1 noxious weeds, six plant species as Tier 2 noxious weeds, and five plant species as Tier 3 noxious weeds.

The proposed regulatory action seeks to amend Regulations for the Enforcement of the Noxious Weeds Law (2 VAC 5-317) by adding 12 plant species to the current noxious weeds list.

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.

"Board" means the Board of Agriculture and Consumer Services.

"Commissioner" means the Commissioner of Agriculture and Consumer Services.

"Law" means the Noxious Weeds Law (Va. Code § 3.2-800 et seq.).

"Noxious weed" means any living plant, or part thereof, declared by the Board through regulations 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.

"VDACS" means the Virginia Department of Agriculture and Consumer Services.

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 the ORM procedures, "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."

This regulatory action was not prompted by a mandate.

Section 3.2-802 of the Law authorizes the Board to establish, by regulation, those weeds deemed to be noxious weeds. Prior to designating a plant as a noxious weed, the Board must review the recommendations of the Noxious Weeds Advisory Committee established by the Commissioner to assist VDACS in the evaluation of plants that may be declared noxious weeds. The advisory committee may propose weed species for listing and must conduct a scientific risk assessment of such proposed plants. The assessment must 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 Commissioner must consider the recommendations of the advisory committee in preparing the list of plants the Commissioner presents to the Board for listing or delisting as noxious weeds and is required to convene the advisory committee at least annually.

The Noxious Weeds Advisory Committee recommended all of the plant species proposed to be listed in the regulation via this regulatory action. Additionally, the Board has proposed a tier placement for each plant species that reflects the advisory committee's recommended tier placement, with the exception of the tier placement for Siberian elm. The advisory committee recommended that Siberian elm be categorized as a Tier 2 noxious weed, but, given the extent of the spread of Siberian elm throughout the Commonwealth, the Board proposes to categorize this plant species as a Tier 3 noxious weed.

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.

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.

Section 3.2-802 of the Law authorizes the Board to establish by regulation those weeds deemed to be noxious weeds.

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.

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 in 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. Additionally, 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 associated with eradication and control costs, this regulation also assists in protecting the economic welfare of citizens.

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.

The proposed regulatory action adds 12 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 12 plants as noxious weeds is to prevent further introductions or slow the spread of existing populations into the Commonwealth.

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.

The 12 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 these 12 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 permit from VDACS 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 weeds that will prevent the inadvertent spread of these plants. There are no disadvantages to the public or the Commonwealth as a result of this proposed regulatory action.

Requirements More Restrictive than Federal

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

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. “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

Consistent with § 2.2-4007.04 of the Code of Virginia, 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. Keep in mind that this is the proposed 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"> a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and 	<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</p>
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c) whether any costs or revenue loss can be absorbed within existing resources.	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.
<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.	There are no anticipated costs, savings, or revenues for other state agencies resulting from this regulatory action.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	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.

Impact on Localities

The agency is not aware of any impact on local partners. Reported on Table 2 of the ORM Economic Review form.

Projected costs, savings, fees, or revenues resulting from the regulatory change.	There are no anticipated costs, savings, fees, or revenues for localities resulting from this regulatory action.
Benefits the regulatory change is designed to produce.	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 and thereby protect the Commonwealth’s agricultural and natural resources from the detrimental impact of listed noxious weeds.

Impact on Other Entities

The agency is not aware of any impact on families. Reported on Table 3 of the ORM Economic Review form.

Estimated impact to small businesses reported on Table 4 of the ORM Economic Review form.

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.	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.
Agency’s best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated, and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	The agency is unable to estimate the number of landowners or small businesses who will be affected by the prevention of the introduction or spread of noxious weeds onto their land.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:	The agency is unable to determine the costs to affected 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

<p>a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses;</p> <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;</p> <p>c) fees;</p> <p>d) purchases of equipment or services; and</p> <p>e) time required to comply with the requirements.</p>	<p>as a Tier 2 noxious weed and 11 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 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, such as double-bagging plant parts that will be removed from a site, to prevent the spread of the noxious weed.</p>
<p>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 and thereby protect the Commonwealth's agricultural and natural resources from the detrimental impact of listed noxious weeds.</p>

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 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.

Reported on Table 1c of the ORM Economic Review form.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B of the Code of Virginia, 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 12 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 prescribes 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.

**Periodic Review and
Small Business Impact Review Report of Findings**

If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in EO 19 and the ORM procedures, e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable. In addition, 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 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 form is not being used to report the result of a periodic review or a small business impact review.

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.

VDACS received one comment on the Town Hall during the public comment period for the NOIRA.

Commenter	Comment	Agency response
Anonymous	I agree with adding new weeds to the noxious weeds list. Different types of plants and weeds are always being discovered, along with different variants of existing plants. People can always be allergic to these new strains and never know how it will affect them.	The agency appreciates the commenter’s participation in the regulatory process.

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.

The 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, (iii) the potential impacts of the regulation, and (iv) the agency's regulatory flexibility analysis stated in that section of this background document.

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:

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, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.

Detail of Changes

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. 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. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between the existing VAC Chapter(s) and the proposed regulation. If the existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements

<p>317-20 B</p>	<p>N/A</p>	<p>This subsection states the plant species declared to be Tier 2 noxious weeds.</p>	<p>The proposed amendment to this subsection adds <i>Trapa bispinosa</i> (Two horned trapa) to the list of Tier 2 noxious weeds.</p> <p>The proposed amendment is intended to prevent or reduce the artificial spread of this invasive plant species that is present in the Commonwealth and for which successful eradication or suppression is feasible.</p>
<p>317-20 C</p>	<p>N/A</p>	<p>This subsection states the plant species declared to be Tier 3 noxious weeds.</p>	<p>The proposed amendments to this subsection add the following plant species as Tier 3 noxious weeds:</p> <ol style="list-style-type: none"> 1. <i>Alliaria petiolata</i>, Garlic mustard 2. <i>Dioscorea polystachya</i>, Chinese yam 3. <i>Elaeagnus umbellata</i>, Autumn olive 4. <i>Ficaria verna</i>, Lesser celandine 5. <i>Lespedeza bicolor</i>, Bicolor lespedeza 6. <i>Lonicera maackii</i>, Amur honeysuckle 7. <i>Lonicera japonica</i>, Japanese honeysuckle 8. <i>Phragmites australis</i>, Common reed 9. <i>Pueraria montana</i>, Kudzu 10. <i>Reynoutria japonica</i>, Japanese knotweed 11. <i>Ulmus pumila</i>, Siberian elm <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>