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Proposed Regulation Agency Background Document

Agency name	Department of Forensic Science
Virginia Administrative Code (VAC) Chapter citation(s)	6VAC40-50
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	May 5, 2022

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 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.

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 or the Department) 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 used in this form, and any technical terms that are not also defined in the “Definitions” section of the regulation.

“DFS” or the “Department” means the Department of Forensic Science.

“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. The NOIRA was approved by the Governor on December 2, 2021 and was published in the Virginia Register of Regulations on January 3, 2022. A period of public comment ensued and was closed on February 2, 2022. No public comments were received. The Forensic Science Board approved this proposed regulatory action at its meeting on April 21, 2022.

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

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.

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, the substantive changes to existing sections, or both. A more detailed discussion is provided in the “Detail of Changes” section below.

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.
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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.

- 1) The advantage to the public of this proposed regulatory change is the Department will be able to consider for approval alternative chemical tests or mobile instruments that may become available on the market that are able to distinguish industrial hemp from marijuana. This would allow law enforcement the ability to make such determinations in the field. If suspected plant material tested positive with an approved test, law enforcement officers would be permitted to testify to this result under Virginia Code § 19.2-188.1(B). An accused would still have the ability to request laboratory testing under that same Code section. This supports the goal of public safety. There are no disadvantages for the public.
- 2) As an advantage to DFS, if the officer was able to testify that the suspect plant material was marijuana at trial for certain civil and misdemeanor offenses (underage possession currently), this would allow these cases to go to trial without laboratory analysis unless the accused moved for such analysis. This could potentially reduce cases submitted to the laboratory. There are no disadvantages to DFS.

As for the Commonwealth, in addition to providing assistance for law enforcement officers as they would have the ability to distinguish marijuana from industrial hemp in the field. In addition, Virginia Code § 19.2-188.1(B) would permit law enforcement officers to testify to those results in the trial of certain civil and misdemeanor cases (currently underage possession). An accused who wished to have laboratory confirmation of the field test result could move for analysis in front of the trial court.

- 3) There are no other pertinent matters related to this 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 applicable federal requirements pertaining to marijuana field tests.

Agencies, Localities, and Other Entities Particularly Affected

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.

Other State Agencies Particularly Affected

Virginia State Police
 Other State Law Enforcement Agencies
 Indigent Defense Commission

Localities Particularly Affected

Local law enforcement agencies
 Local Commonwealth's Attorneys' Offices

Other Entities Particularly Affected

Criminal Defense Bar

Economic Impact

Pursuant to § 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 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 c) whether any costs or revenue loss can be absorbed within existing resources 	<p>DFS would not need any funding to support the approval process for marijuana field tests because of this regulatory change. The regulatory amendments include a fee of \$100 charged to the manufacturer for the evaluation process by the Department for chemical tests and \$500 for each model of a mobile instrument. For chemical tests, this fee would cover the costs of time spent by laboratory staff in reviewing the instructions, precautions, color charts, flow charts, and any foundational validation studies provided by the manufacturer as part of the evaluation process. For mobile instruments, the fee would cover staff time needed for the review of all instructions, training materials, instrument specifications, and foundational validation studies. Each marijuana field test, regardless of whether it is chemical or mobile instrument, must correctly and clearly distinguish marijuana from industrial hemp and perform in accordance with the manufacturer's claims and instructions and offer convenience and efficiency in operation.</p>
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	The Department would also charge the manufacturer the actual cost of obtaining marijuana and industrial hemp samples utilized in the evaluation process.
<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.	The Virginia State Police, or any state funded law enforcement agency, could incur costs associated with the purchase of these chemical tests or instruments if approved by DFS, but an agency would not be required to purchase these marijuana field tests.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	This regulatory change would provide law enforcement officers with the option to test suspected marijuana in the field using either chemical tests or presumptive mobile instruments, which would provide additional knowledge for any investigation. Law enforcement could testify to those results under Virginia Code § 19.2-188.1(B) during the trial of certain civil and misdemeanor offenses (currently underage possession).

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	There are currently no chemical tests or mobile instruments widely available on the market that can distinguish industrial hemp from marijuana. This would allow for the approval of those marijuana field tests once they become readily available. Although any law enforcement agency desiring to use this technology would incur the cost to purchase either chemical tests or presumptive mobile instrument, the regulatory change provides for their use as an option and does not mandate it.
Benefits the regulatory change is designed to produce.	This regulatory change provides law enforcement agencies with the option of utilizing chemical tests or mobile instruments for marijuana field tests once they become widely available on the market.

Impact on Other Entities

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.	As a result of this regulatory change, manufacturers of chemical tests and mobile instruments that can distinguish marijuana from industrial hemp would have a procedure for the approval of those field tests for use by law enforcement agencies under Virginia Code § 19.2-188.1(B).
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	The total number of businesses that intend to manufacturer these types of tests or instruments is unknown, and the Board cannot estimate

<p>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.</p>	<p>which of those manufacturers would be deemed small businesses under the established criteria.</p>
<p>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: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; 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.</p>	<p>Any manufacturer that chose to submit its marijuana field test for the approval process under this regulatory change would incur a \$100 fee for a chemical test or a \$500 fee per mobile instrument model, as well as the actual cost, if any, of obtaining marijuana and industrial hemp samples used by DFS during the evaluation process. Twenty chemical tests or two non-sequentially manufactured instruments and supporting materials would be submitted by the manufacturer as part of the approval process. The chemical tests would be consumed during the evaluation process. The two instruments would be returned to the manufacturer upon completion of the evaluation process by DFS. A manufacturer would only need to submit its field test for approval if it desired to have it considered by law enforcement agencies for use as a field test under Virginia Code § 19.2-188.1(B).</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>A process would be established for the Department’s approval of chemical and mobile instruments as marijuana field tests under Virginia Code § 19.2-188.1(B). The amendments as drafted would permit the Department to consider various forms of chemical and mobile instruments as the technology evolves and improves without further amendments to the regulations.</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.

With the Department’s determination that the current Duquenois-Levine field tests cannot distinguish between marijuana and industrial hemp, there really is no viable alternative to the regulatory change. The Department will no longer approve Duquenois-Levine field tests for use at trial under Virginia Code § 19.2-188.1(B). The proposed amendments let the Department consider alternative tests that may be developed that can distinguish marijuana from industrial hemp, whether chemical tests or mobile instruments. All manufacturers may submit their field test for approval by the Department, but they are not required to do so to market and sell those field tests in the Commonwealth of Virginia.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B 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 regulatory change is the least stringent method of providing for the approval of marijuana field tests under Virginia Code § 19.2-188.1(B), without mandating their use by law enforcement agencies in the Commonwealth. A manufacturer is not required to submit its marijuana field test for approval by DFS under the proposed regulatory amendments unless it seeks to have the test, whether chemical or mobile instrument, approved for use by law enforcement under 6VAC40-50.

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 Executive Order 14 (as amended, July 16, 2018), 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 regulatory change is not the result of a periodic review/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 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.

Commenter	Comment	Agency response
	No public comment was received.	

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 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, (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 Amy C. Jenkins, Department Counsel, Department of Forensic Science, 700 N. 5th Street, Richmond, Virginia 23219, (804) 786-2281 (phone number), (804) 786-6857 (fax number), amy.jenkins@dfs.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 existing VAC Chapter(s) and the proposed regulation. If 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
6VAC40-50-10		Definitions Section	Additional definitions have been added for "cannabis plant material" and "industrial hemp." "Duquenois-Levine" was eliminated in the definitions of "List

			of approved marijuana field tests” and “marijuana field test.” “Mobile instrument” has been added to the definition of “marijuana field test.” As a result of the change to the Code, the proposed regulatory amendments change the statutory cite under the definition of “marijuana” from § 18.2-247 to § 4.1-600. The amendments eliminate the term “marijuana field test kit” as it is redundant.
6VAC40-50-20		Authority for approval. Current cite is to § 19.2-188.1.	The amendment changes the Code section from § 18.2-250.1 to § 4.1-1105.1 to reflect recent amendments to Virginia Code § 19.2-188.1(B).
6VAC40-50-30		Request for Evaluation. This section sets out the process for manufacturers to submit field tests for approval. It also details the items that DFS should consider in approving any field test.	<p>The proposed amendments set out different approval submissions and considerations for chemical tests and mobile instruments. The number of chemical tests required for submission has been doubled from 10 to 20 in consideration of the testing that will need to be completed on both marijuana and industrial hemp. Two non-sequentially manufactured instruments shall be submitted for the approval process. The chemical tests will be consumed in the evaluation process. The instruments will be returned to the manufacturer upon completion of the evaluation.</p> <p>The Department will consider whether the field test, whether chemical or mobile instrument, can distinguish marijuana from industrial hemp for approval. In addition to performing in accordance with manufacturer’s instructions and claims, the field test must offer convenience and efficiency in operation as determined by DFS.</p>
6VAC40-50-40		Notice of Decision. This section sets out how DFS notifies the manufacturer of its evaluation decision and how the manufacturer may resubmit a field test for reconsideration.	These amendments are technical to clarify this section.
6VAC40-50-50		Maintenance of approved status. This section sets out the Department’s requirements for reevaluations and requirements that DFS be notified by a manufacturer of any modifications to a field test.	These amendments are technical to provide for additional modifications that may be made to mobile instruments.

6VAC40-50-70		Liability. This section clarifies that the Department assumes no liability for the use of any marijuana field test.	This amendment strikes “marijuana field tests kits” as it has been removed from the regulation.
6VAC40-50-80		Fees. The previous fee for approval of Duquenois-Levine chemical field tests was \$50. This section sets out the process for the payment of that fee by a manufacturer.	The amendments now require a \$100 fee for chemical tests. The increased fee is a result of the additional testing that will now be required on both marijuana and industrial hemp samples, not just marijuana samples. For mobile instruments, a \$500 fee will be required due to additional DFS staff time needed to evaluate the materials provided and the validation of these instruments, which is more involved than with a chemical test. All manufacturers requesting approval of their marijuana field test will be required to pay the costs, if any, of obtaining any marijuana or industrial hemp samples for the evaluation of the marijuana field test.

If a new VAC Chapter(s) is being promulgated and is not replacing an existing Chapter(s), use Table 2.

Table 2: Promulgating New VAC Chapter(s) without Repeal and Replace

New chapter-section number	New requirements to be added to VAC	Other regulations and laws that apply	Change, intent, rationale, and likely impact of new requirements

If the regulatory change is replacing an **emergency regulation**, and the proposed regulation is identical to the emergency regulation, complete Table 1 and/or Table 2, as described above.

If the regulatory change is replacing an **emergency regulation**, but changes have been made since the emergency regulation became effective, also complete Table 3 to describe the changes made since the emergency regulation.

Table 3: Changes to the Emergency Regulation

Emergency chapter-section number	New chapter-section number, if applicable	Current <u>emergency</u> requirement	Change, intent, rationale, and likely impact of new or changed requirements since emergency stage