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Fast-Track Regulation Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) citation(s)	2 VAC 5-317
Regulation title(s)	Regulations for the Enforcement of the Noxious Weeds Law
Action title	Amendments to reflect Chapter 171 of the 2016 Acts of Assembly and to provide clarification to existing provisions
Date this document prepared	June 6, 2017

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

2 VAC 5-317, *Regulations for the Enforcement of the Noxious Weeds Law*, seeks to eradicate, suppress, and prevent the dissemination of noxious weeds in the Commonwealth by (i) establishing a list of plants deemed by the Board of Agriculture and Consumer Services to be noxious weeds, (ii) prohibiting the movement of noxious weeds or articles capable of transporting noxious weeds into or within the Commonwealth, and (iii) identifying eradication activities for certain noxious weeds.

The proposed changes to 2 VAC 5-317 are necessary in order to align the language of the regulation with amendments the General Assembly made to the Noxious Weeds Law in 2016 and to clarify some of the existing regulatory language.

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.

“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.*).

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

Statement of final agency action

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

On May 25, 2017, the Board of Agriculture and Consumer Services (Board) adopted amendments to 2 VAC 5-317, *Regulations for the Enforcement of the Noxious Weeds Law*.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.

Section 3.2-109 of the Code of Virginia (Code) establishes the Board as a policy board.

Section 3.2-802 of the Law authorizes the Board to establish regulations under which certain plants can be listed as noxious weeds. Moreover, the Board may adopt regulations pertaining to regulated articles and conditions for their movement, under which the Commissioner may proceed to conduct eradication or suppression activities to prevent the dissemination of noxious weeds in the Commonwealth. The Board may also adopt regulations governing the movement of regulated articles entering the Commonwealth from other locations.

On May 25, 2017, the Board adopted amendments to 2 VAC 5-317, *Regulations for the Enforcement of the Noxious Weeds Law*.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The proposed amendments to 2 VAC 5-317 are necessary in order to align the language of the regulation with changes the General Assembly made to the Law in 2016 and to clarify some of the existing regulatory language.

Rationale for using fast-track process

Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

The proposed changes to the regulation are intended to align the regulation with changes the General Assembly made to the Law in 2016 and will clarify some of the existing regulatory language. The Noxious Weeds Advisory Committee, which the existing regulation establishes, has discussed and reached consensus on the proposed changes to the regulation.

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.

Prior to the 2016 Session of the General Assembly, the Noxious Weeds Law defined "noxious weed" as "any living plant, not widely disseminated, or part thereof, declared by the Board through regulations under this chapter, 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." 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. In response to the new statutory definition for "noxious weed," the agency proposes to amend the definitions for "Tier 1 noxious weed" and "Tier 2 noxious weed" in the regulation. The proposed amendments also move two weeds from Tier 1 to Tier 2 as a result of the change in definitions. Tier 1 noxious weeds are those noxious weeds not known to be present in the Commonwealth; therefore, the agency proposes to move Beach vitex and Wavyleaf basketgrass from Tier 1 to Tier 2, which is defined as any noxious weed that is present in the Commonwealth and for which successful eradication or suppression is feasible. Additionally, the proposed amendments establish a definition for "Tier 3 noxious weed," but the agency is not prepared to declare any Tier 3 noxious weeds in this regulatory action.

To address the concerns that nurseries and landscapers expressed regarding their ability to continue selling commercially viable plants already in the trade, in 2016, the General Assembly also added the following requirement to § 3.2-802 of the Law, which establishes the Board's authority to declare a weed noxious: "Prior to designating a living plant or part thereof as a noxious weed, the Board shall review the recommendations of an advisory committee established by the Commissioner to conduct a scientific risk assessment of the proposed plant. The assessment shall include the degree to which the plant is detrimental to crops; surface water, including lakes; other desirable plants; livestock; land or other property; public health; the environment; and the economy. The advisory committee shall also include in its recommendations to the Board an analysis of the current and potential in-state commercial viability of the specific plant species and the economic impact on industries affected by the designation of the plant as a noxious weed." The proposed amendments to the regulation will add the items that the Law requires the advisory committee to assess to the regulation. The advisory committee is currently working on completing the scientific risk assessment process for plants to be proposed for listing as noxious weeds.

Issues

Please identify the issues associated with the proposed regulatory action, 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, please indicate.

Aligning the language of the regulation with the Law and clarifying existing provisions will make the regulation easier to understand and interpret. Additionally, the proposed changes will allow for more flexibility in enforcement, which will benefit the agency and the public. There are no disadvantages to the public or the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include 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 statement to that effect.

There are no applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

No locality will bear a disproportionate impact from the proposed changes.

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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.

The agency has determined that no alternative regulatory method will better accomplish the objectives of the Law. The restriction of the movement of a listed noxious weed is necessary to prevent its

dissemination in the Commonwealth, and the regulation is necessary to protect the Commonwealth’s agricultural and natural resources from the detrimental impact of noxious weeds. 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.

The proposed amendments to 2 VAC 5-317 are necessary in order to align the language of the regulation with the amendments to the Law enacted by the General Assembly in 2016 and to clarify some of the existing regulatory language. The proposed amendments do not establish any new requirements for any individual or entity, including small businesses.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

<p>Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures</p>	<p>This regulatory action does not designate any new plant as a noxious weed, nor does it change the requirements for any individual or entity desiring to move a noxious weed. As such, there will be no cost to the state as a result of this regulatory action.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>Localities will not incur any additional costs as a result of the proposed amendments to this regulation.</p>
<p>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>This regulatory action does not designate any new plant as a noxious weed, nor does it change the requirements for any individual or entity desiring to move a noxious weed. As such, there will be no cost to any individual, business, or entity as a result of this regulatory action.</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: 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>This regulatory action does not designate any new plant as a noxious weed, nor does it change the requirements for any individual or entity desiring to move a noxious weed. As such, there will be no cost to any individual, business, or entity as a result of this regulatory action.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>The proposed amendments will not affect the operations of regulated entities and, as such, the regulated entities will not incur any costs associated with the proposed amendments.</p>
<p>Beneficial impact the regulation is designed</p>	<p>The proposed changes will clarify the intent of the</p>

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Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

The proposed changes to 2 VAC 5-317 are necessary in order to align the language of the regulation with the amendments to the Law enacted by the General Assembly in 2016 and to clarify some of the existing regulatory language. There are no other viable alternatives that will meet the essential purpose of the Law. The proposed amendments do not place any burdens on small businesses.

Public participation notice

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Family impact

Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulatory action will not impact the institution of the family or family stability.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is 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 action. If the proposed regulation is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below.

For changes to existing regulation(s), please use the following chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
10	N/A	This section defines the words and terms of the regulation.	These proposed changes align the definitions of the regulation with those in the Law. The definitions of “certificate,” “move,” and “regulated article” were amended to align with the definitions in the Law. The term “limited permit” was replaced with the term “permit,” which appears in the Law. The definitions of “Tier 1 noxious weed” and “Tier 2 noxious weed” were amended and a definition of “Tier 3 noxious weed” was added to reflect the amendments to the Law enacted by the 2016 Session of the General Assembly.
20	N/A	Tier 1 and Tier 2 noxious weeds. This section establishes two tiers of noxious weeds.	The proposed amendments move two weeds from Tier 1 into Tier 2 as a result of the proposed amendment to the regulation’s definitions for “Tier 1 noxious weed” and “Tier 2 noxious weed.” Tier 1 noxious weeds are those noxious weeds not known to be present in the Commonwealth; therefore, the agency proposes to move Beach vitex and Wavyleaf basketgrass from Tier 1 to Tier 2, which is defined as any noxious weed that is present in the Commonwealth and for which successful eradication or suppression is feasible.
30	N/A	Conditions governing the intrastate movement of regulated articles. This section prohibits the movement of any listed noxious weed or any article known to be infested with any listed noxious weed. Movement is permissible if the regulated article is accompanied by a certificate or limited permit.	The word “intrastate” has been removed from the catchline to provide clarity. Additionally, the reference to “limited permit” has been replaced by “permit” throughout the regulation to provide clarity, as only the term “permit” appears in the Law.
40	N/A	Issuance and cancellation of certificates and permits. This section provides for the issuance of a certificate or permit that allows the	The reference to “limited permit” has been replaced by “permit” throughout the regulation to provide clarity, as only the term “permit” appears in the Law. The term “inspector” has been replaced with “Commissioner,” as “Commissioner”

		<p>movement of a regulated article into, within, or out of the Commonwealth if certain conditions are met.</p>	<p>better aligns with the Law and provides the program with more flexibility.</p>
50	N/A	<p>Assembly and inspection of regulated articles.</p> <p>This section establishes certain requirements for applying for a permit.</p>	<p>The reference to “limited permit” has been replaced by “permit” throughout the regulation to provide clarity, as only the term “permit” appears in the Law.</p>
60	N/A	<p>Attachments and disposition of certificates and permits.</p> <p>This section establishes requirements for the attachment of a certificate or permit to the regulated article being moved, as well as requirements for the retention of a copy of the certificate or permit.</p>	<p>The reference to “limited permit” has been replaced by “permit” throughout the regulation to provide clarity, as only the term “permit” appears in the Law. The term “intrastate” has been removed to provide clarity.</p>
80	N/A	<p>Eradication and suppression activities for Tier 1 or Tier 2 noxious weeds.</p> <p>This section establishes the activities the Commissioner may conduct in response to the discovery of a Tier 1 noxious weed.</p>	<p>The proposed amendment adds Tier 2 noxious weeds to those for which the Commissioner may conduct eradication or suppression activities.</p>
100	N/A	<p>Noxious Weeds Advisory Committee.</p> <p>This section established a committee to advise the Commissioner on plants that should be considered by the Board for inclusion on or delisting from the noxious weed list.</p>	<p>Two additional entities have been added to the makeup of the Noxious Weeds Advisory Committee.</p> <p>The proposed amendments also include the items that the Law requires the advisory committee to assess when evaluating a plant for listing or delisting as a noxious weed.</p>