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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Board of Agriculture and Consumer Services
<b>Virginia Administrative Code (VAC) Chapter citation(s)</b>	2 VAC 5-405
<b>VAC Chapter title(s)</b>	Regulations for the Application of Fertilizer to Nonagricultural Lands
<b>Action title</b>	Proposed amendments to penalties
<b>Date this document prepared</b>	August 11, 2021

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.*

Section 3.2-3602.1 of the Virginia Fertilizer Law (Va. Code § 3.2-3600 *et seq.*) (i) requires the Board of Agriculture and Consumer Services (Board) to promulgate regulations to certify the competence of contractor-applicators; licensees; and employees, representatives, or agents of state agencies, localities, or other governmental entities who apply regulated products to nonagricultural property and (ii) authorizes the Board to impose civil penalties upon any contractor-applicator or licensee who fails to comply with the regulations. As required by this section, the Board promulgated 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands*, which ensures the proper application of fertilizer to nonagricultural lands (i.e., lawn and turf), thereby protecting the environment 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, at times, and using methods that reduce the runoff of nitrogen and phosphorus into Virginia's waterways. The Chesapeake Bay Watershed Implementation Plan has identified that an overabundance of nutrients applied to nonagricultural lands, primarily phosphorus and nitrogen, can result in excessive

nutrient loading in the Chesapeake Bay. Compliance with the provisions of this chapter supports the health of Virginia’s waters.

Chapter 413 of the 2020 Acts of Assembly amended the Fertilizer Law, in part, by increasing from \$250 to \$1,000 the civil penalty that the Board may impose upon any fertilizer contractor-applicator or licensee who fails to comply with provisions of 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands*.

The Board determined that additional penalties are necessary to ensure fertilizer applicators are applying fertilizer to nonagricultural lands in compliance with provisions of the regulation, thereby protecting Virginia’s natural waterways. The proposed regulatory action seeks to amend *Regulations for the Application of Fertilizer to Nonagricultural Lands* by (i) amending subsection A of Section 110 to require that a contractor-applicator or licensee be responsible for ensuring its employees obtain a Certified Fertilizer Applicator registration, rather than penalizing an employee for not being a Certified Fertilizer Applicator, (ii) amending the current penalty structure from a one-time, \$250 penalty, to a penalty that increases with repeat offenses, (iii) creating a new penalty for a contractor-applicator or licensee who fails to maintain certain records documenting applicator training and each application of fertilizer to nonagricultural land, as required in Sections 90 and 100 of the regulation, or who fails to submit the required annual acreage report to VDACS, and (iv) creating 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.

### 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.

“Certified fertilizer applicator” means any individual who has successfully completed Board-approved training.

“Contractor-applicator” means any person required to hold a permit to apply any regulated product pursuant to Va. Code § 3.2-3608.

“DCR” means the Virginia Department of Conservation and Recreation.

“Licensee” means a person who receives a license to distribute any regulated product under the provisions of the Virginia Fertilizer Law.

“Regulated product” means any product governed by the Virginia Fertilizer Law, including any fertilizer, specialty fertilizer, soil amendment, and horticultural growing medium.

“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 Executive Order 14 (as amended, July 16, 2018), “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”*

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The proposed amendments are not the result of a mandate; however, Chapter 413 of the 2020 Acts of Assembly amended the Fertilizer Law to increase from \$250 to \$1,000 the civil penalty the Board may impose upon a contractor-applicator or licensee who fails to comply with provisions of 2 VAC 5-405, *Regulations for the Application of Fertilizer to Nonagricultural Lands*.

### 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.*

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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 3.2-3602.1 of the Code authorizes the Board to adopt regulations to certify the competence of contractor-applicators; licensees; and employees, representatives, or agents of state agencies, localities, or other governmental entities that apply regulated products to nonagricultural property and to impose civil penalties upon any contractor-applicator or licensee who fails to comply with the regulations. Chapter 413 of the 2020 Acts of Assembly amended the Fertilizer Law to increase from \$250 to \$1,000 the civil penalty the Board may impose upon a contractor-applicator or licensee who fails to comply with the regulations.

### 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.*

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The application of excessive fertilizer nutrients, primarily phosphorus and nitrogen, can result in runoff of these nutrients into Virginia's waterways, including the Chesapeake Bay, causing excess levels of algae. The excess algae negatively affects the level of dissolved oxygen in the water needed by oysters, fish, crabs, and other aquatic animals. Applying lawn and turf fertilizers at proper rates can result in reduced runoff of nitrogen and phosphorus into Virginia's waters. Compliance with the provisions of this regulation supports the health of Virginia's waters, which can positively impact the health and economic welfare of Virginia's citizens.

The Board determined that additional penalties for violations of *Regulations for the Application of Fertilizer to Nonagricultural Lands* are necessary to ensure fertilizer applicators are applying fertilizer to non-agricultural lands in compliance with provisions of the regulation, thereby protecting Virginia's natural waterways.

### 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.*

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Through this regulatory action, the Board is proposing to amend the current penalty and add two new penalties for violations of *Regulations for the Application of Fertilizer to Nonagricultural Lands*. The Board is also proposing to change the person responsible for compliance with the regulation's existing requirement that an individual be certified before offering his services as a certified fertilizer applicator or supervising the application of fertilizer on nonagricultural land.

The proposed amendments (i) change the responsible party from an individual to the contractor-applicator or licensee who employs an individual who must be certified; (ii) replace the existing civil penalty that is assessed when a person offers his services as a certified fertilizer applicator without obtaining such certification from VDACS with a penalty that increases with repeat violations; (iii) establish a penalty for a contractor-applicator or licensee who does not maintain records or fails to submit the annual report for fertilizer applied to more than 50 acres of nonagricultural lands; and (iv) establish a penalty for a contractor-applicator or licensee who fails to apply fertilizer in compliance with DCR's nutrient management standards.

### **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 proposed amendments will increase compliance with provisions of the *Regulations for the Application of Fertilizer to Nonagricultural Lands*, thereby reducing runoff of excess nitrogen and phosphorus from nonagricultural land into Virginia's waterways. In addition, ensuring the reporting of nonagricultural lands to which fertilizer was applied will allow Virginia to receive credit in the Chesapeake Bay Watershed Implementation Plan for properly applying lawn and turf fertilizer.

The proposed amendments will only impact those contractor-applicators or licensees who are not in compliance with the *Regulations for the Application of Fertilizer to Nonagricultural Lands*.

There are no disadvantages to the public or the Commonwealth associated with the proposed amendments.

### **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**

*Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local*

*governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.*

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

### 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"> <li>a) fund source / fund detail;</li> <li>b) delineation of one-time versus on-going expenditures; and</li> <li>c) whether any costs or revenue loss can be absorbed within existing resources</li> </ul>	<p>VDACS is unable to estimate the revenue that will be generated from the proposed penalties; however, it is anticipated that revenues from the proposed penalties will not be significant.</p> <p>VDACS is unable to estimate the projected costs for assessing the proposed penalties; however, it is anticipated that the costs will not be significant.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>Other state agencies will not experience any cost or savings associated with the proposed amendments.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>There is no direct benefit to agencies from this regulatory change.</p>

#### Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>Localities will not experience any cost or savings associated with the proposed amendments.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>There is no direct benefit to localities from this regulatory change.</p>

#### Impact on Other Entities

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>The proposed amendments will impact those contractor-applicators and licensees who are not in compliance with the regulation.</p>
<p>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:</p> <ul style="list-style-type: none"> <li>a) is independently owned and operated and;</li> </ul>	<p>VDACS is unable to estimate the number of contractor-applicators and licensees who do not apply fertilizer or file the required annual report in compliance with the regulation. VDACS estimates that the majority of the entities affected by this regulation are small businesses.</p>

<p>b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</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>The proposed amendments establish penalties for failure to comply with existing provisions of the regulation. The costs from this regulatory change for affected individuals, businesses, or other entities are limited to the assessed penalties for failure to comply with the regulation.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>Benefits of the regulatory change include (i) increased compliance with the regulation, which will potentially reduce nitrogen and phosphorus runoff into Virginia's natural waterways, thereby improving water quality, and (ii) increased credit in the Chesapeake Bay Watershed Implementation Plan for reducing nitrogen and phosphorus runoff into the Chesapeake Bay.</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.*

No alternatives to the proposed regulatory action are available that would meet the essential purpose of the action – increasing compliance with the regulation. In addition, there are no less intrusive or less costly alternatives for small businesses that would achieve the purpose of the regulatory change.

**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 amendments to *Regulations for the Application of Fertilizer to Nonagricultural Lands* are necessary in order to ensure compliance with provisions of the regulation related to certification of fertilizer applicators, reporting of lawn fertilizer acreage to VDACS, and application of fertilizer in

compliance with DCR’s nutrient management standards for lawn fertilizer applications. The proposed amendments do not establish any new requirements for any individual or entity, including small businesses. The proposed changes to the regulation include incremental penalties assessed on a contractor-applicator or licensee who fails to comply with the regulation, including a warning for the first offense for certain violations of the regulation.

**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 action is being used to simultaneously report the result of a periodic review of the regulation.

The agency recommends that the regulation stay in effect without change, other than those amendments proposed in this action, because the regulation provides an important means of ensuring the proper training, certification, and recordkeeping for licensees and contractor-applicators who apply fertilizer for commercial purposes to nonagricultural lands.

This regulation is required by Va. Code § 3.2-3602.1 and protects public health by minimizing the risk of environmental harm that can result from the improper application of fertilizers to nonagricultural land. The regulation is clearly written and easily understandable.

The agency did not received any complaints or comments concerning the regulation. The agency determined the regulation’s requirements are not unnecessarily burdensome and provide an important means of ensuring the proper training, certification, and recordkeeping for licensees and contractor-applicators who apply fertilizer for commercial purposes to nonagricultural lands. The regulation also provides a means of enforcing reporting requirements for certain fertilizer applications and assists in minimizing the risk of environmental harm that can result from the improper application of fertilizers to nonagricultural lands. The regulation does not overlap, duplicate, or conflict with any federal or state law or regulation. The agency has determined that there have been no changes to the regulated industry since this regulation underwent periodic review in 2016 that would necessitate any amendments.

The agency has determined that this regulation is not unnecessarily complex and that the complexity of this regulation is not such that it would have an economic impact on small businesses.

## 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.*

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VDACS did not receive any comments during the public comment period following the publication of the notice of intended regulatory action.

VDACS held a meeting with stakeholders, including representatives of Virginia's lawn care industry, to discuss the current penalty and the addition of other penalties for the regulation. The proposed amendments, which amend the existing penalty and establish two additional penalties, are supported by the industry stakeholders who participated in the meeting.

## 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.*

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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 website at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to:

David Gianino  
Virginia Department of Agriculture and Consumer Services  
102 Governor Street, Room LL54  
Richmond, VA 23219  
Phone: (804) 786-3515  
Fax: (804) 371-7793  
Email: [david.gianino@vdacs.virginia.gov](mailto: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 not be held following the publication of this stage of this regulatory action.

## 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.*

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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
405-110	N/A	This section establishes that any <u>individual</u> 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 \$250.	<p>The proposed amendment shifts responsibility for the penalty for offering services as a certified fertilizer applicator from the individual to a contractor-applicator or licensee that employs the 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.</p> <p>This change makes businesses responsible for ensuring its employees obtain a Certified Fertilizer Applicator registration, rather than penalizing the employee.</p>
405-110	N/A	This section establishes a penalty of \$250 for failing to obtain a Certified Fertilizer Applicator registration before offering services as such or supervising the application of fertilizer on nonagricultural land.	<p>The proposed amendment replaces the existing penalty with a penalty that increases with repeat violations as follows:</p> <p>(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.</p> <p>Establishing an increasing penalty structure is intended to increase compliance with the <i>Regulations for the Application of Fertilizer to Nonagricultural Lands</i> by Virginia lawn care companies.</p>
405-110	405-110 B	N/A	<p>The proposed amendment establishes that a contractor-applicator’s or licensee’s failure to maintain required records or submit the required annual report subjects the person to a penalty that increases with repeat violations as follows:</p> <p>(i) a warning for the first offense, (ii) a penalty of \$250 for the second offense</p>

			<p>within any five year period, (iii) a penalty of \$500 for the third offense within any five year period, and (iv) a penalty of \$1,000 for the fourth offense within any five year period.</p> <p>This change is intended to ensure that contractor-applicators and licensees are maintaining required records and are submitting the required report regarding fertilizer applied to more than 50 acres of nonagricultural lands annually.</p>
405-110	405-110 C	N/A	<p>The proposed amendment establishes that a 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 is subject to a penalty that increases with repeat violations as follows: (i) a warning for the first offense, (ii) a penalty of \$250 for the second offense within any five year period, (iii) a penalty of \$500 for the third offense within any five year period, and (iv) a penalty of \$1,000 for the fourth offense within any five year period.</p> <p>This change is intended to ensure that fertilizer applications are being made at recommended rates listed in the standards and criteria for nutrient management. Applications made in excess of the recommended rates in the standards and criteria for nutrient management can result in runoff of nitrogen and phosphorus into Virginia's waterways.</p>