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Fast-Track Regulation Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) Chapter citation(s)	2 VAC 5-318
VAC Chapter title(s)	<i>Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease</i>
Action title	Repeal of 2 VAC 5-318
Date this document prepared	April 19, 2023

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.

This regulatory action will repeal *Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease (2 VAC 5-318 et seq.)*.

Thousand cankers disease (TCD) is a disease complex native to the western U.S. and primarily affects black walnut *Juglans nigra*. This disease is the result of the combined activity of a fungus (*Geosmithia morbida*) and the walnut twig beetle (*Pityophthorus juglandis*). The walnut twig beetle is a known vector of the fungus that causes the damaging cankers inside the walnut trees. The cankers impact the vascular tissue of trees, causing leaf defoliation and overall canopy decline, which can lead to branch dieback and tree mortality. The first occurrence of TCD in the eastern U.S. was in Tennessee in August 2010. In spring of 2011, the Virginia Department of Agriculture and Consumer Services (VDACS) received reports of black walnuts exhibiting symptoms of TCD in Chesterfield County. Surveys conducted by VDACS

confirmed the presence of TCD at this site. Additional delimiting surveys by VDACS revealed that TCD was also present in Henrico County and the City of Richmond.

In July 2011, pursuant to Section 3.2-703 of the Tree and Crop Pests Law, the Commissioner of Agriculture and Consumer Services established *Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease* due to the presence of TCD. The quarantine included the counties of Chesterfield, Goochland, Hanover, Henrico, and Powhatan and the cities of Colonial Heights and Richmond. After additional populations were found in Northern Virginia, the quarantine was expanded in June 2012 to include the counties of Fairfax and Prince William and the cities of Fairfax, Falls Church, Manassas, and Manassas Park. The final expansion of the quarantined area occurred in November 2012, to include the counties of King and Queen, King William, and New Kent. There is no federal quarantine for thousand cankers disease.

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.

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

“USDA” means the United States Department of Agriculture.

“TCD” means the disease complex Thousand Cankers Disease.

“WTB” means the insect vector the walnut twig beetle.

Statement of Final Agency Action

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 March 23, 2023, the Board of Agriculture and Consumer Services (Board) authorized staff to take any and all steps necessary to repeal 2 VAC 5-318, *Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease*, through a fast-track regulatory action.

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.”

Consistent with Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track rulemaking process.

The repeal of this regulation is not the result of a directive from the General Assembly, the federal government, or a court.

Since 2012, there have been no significant TCD detections in the Commonwealth. Over the past four years, more than 220 sites have been surveyed, with traps placed near at-risk sites, such as public parks, rest areas, and nurseries. Since 2018, only one WTB has been detected and only 11 of the 220 sites had trees infested with TCD, and these were sites where TCD had been confirmed in previous years. The positive WTB detection was found in urban settings, not in a forested setting or at a high-risk pathway. No additional areas or spread of the WTB or TCD was observed during this timeframe.

The regulated areas of the *Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease* are urban sites where trees become stressed more easily, given the nature of their plantings. Trees under physiological stress are more susceptible to pests and pathogens and are more attractive to wood-boring beetles, such as the WTB. Research has shown that TCD is less impactful to tree health when the trees are not experiencing environmental stresses such as drought or unusually high temperatures for several years. Virginia has several trees that were positive for TCD that have since recovered from the disease and infections are no longer present.

The repeal of this regulation is expected to be non-controversial because VDACS has been surveying for TCD and WTB since the regulation was established and trapping data indicates that there are limited populations of the insect, minimal levels of the pathogen, and the impact that the disease has on trees is primarily dependent on drought or other environmental stressors. Repealing the quarantine will allow industry to move with no restrictions walnut logs, trees, and other products out of those counties currently under quarantine. Repealing the quarantine is not expected to result in the spread of TCD in Virginia.

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 establishes the Board as a policy board and authorizes the Board to adopt regulations in accordance with the provisions of Title 3.2 of the Code.

Pursuant to Section 3.2-703 of the Code of Virginia, the Board may quarantine the Commonwealth or any portion thereof when it determines that such action is necessary to prevent or retard the spread of a pest into, within, or from the Commonwealth.

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.

In 2021, USDA Export Specialists met with state departments of agriculture to reassess the damages caused by TCD, the rate of spread of the WTB, and the need for state-level quarantines for export purposes. Export specialists solicited information from importing countries regarding their import requirements and whether a quarantine was necessary for trade purposes. It was determined that pest-free status, determined by approved trapping and survey protocols, would be sufficient to allow products to be exported from Virginia (or other states) to other countries. State departments of agriculture also had internal discussions regarding the need for continued regulation of TCD, as it was consistently observed

through surveys that the disease complex did not have the impact on walnut trees that was originally predicted. VDACS will continue surveying for TCD and WTB for accurate reporting of pest status in Virginia.

Since the establishment of the quarantine, there have not been any other significant finds throughout the Commonwealth, and the areas under quarantine are urban sites where trees become stressed more easily. Trees under physiological stress are more susceptible to pests and pathogens and are more attractive to wood-boring beetles, such as the walnut twig beetle. Research has shown that TCD is less impactful to tree health when the trees are not experiencing environmental stresses such as drought or unusually high temperatures for several years. Virginia has locations that were positive for TCD but have since recovered from the disease and infections are no longer present.

Based on survey data, import requirements, and recent research, VDACS believes that the quarantine is no longer necessary to slow the spread of the disease. Repeal of this quarantine, which includes restrictions on the movement of articles capable of spreading TCD, will support the economic welfare of industries transporting such articles from or through a currently quarantined area.

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.

This regulatory action will repeal the *Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease, 2 VAC 5-318 et seq.* Repealing the *Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease* will allow for the unrestricted movement of walnut logs, trees, and other products out of the counties currently under quarantine.

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 primary advantage of this regulatory change is elimination of regulatory requirements placed on those businesses that must currently comply with the *Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease*. Businesses required to comply with *Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease* include those that move walnut trees and logs and other regulated articles out of the quarantined areas. The primary advantage to the Commonwealth is removal of administrative processes related to ensuring compliance with the regulation.

There are no known disadvantages to this regulatory change for businesses, citizens, or the Commonwealth.

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 is no federal regulation for TCD. This regulatory action will repeal *Rules and Regulations for Enforcement of the Virginia Pest Law – Thousand Cankers Disease*, thus there are no requirements more restrictive than 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 agency, locality, or entity is particularly affected by the repeal of this regulation.

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 c) whether any costs or revenue loss can be absorbed within existing resources 	<p>VDACS expenses related to enforcing provisions of the regulation are funded from general fund appropriations (Fund: 01/Fund Detail: 00).</p> <p>VDACS issues permits and compliance agreements to those entities wishing to ship walnut trees, logs, and other regulated articles out of the quarantined localities. The need for these permits and compliance agreements in regulated localities has been minimal; therefore, the cost savings to VDACS will also be minimal. Additionally, VDACS surveys for WTB and performs surveys for the presence of TCD-infected trees in quarantined and surrounding localities to determine if TCD is present. In support of export needs, VDACS will continue to conduct surveys to verify the pest-free status of localities.</p> <p>No revenue is generated by this regulation.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the</p>	<p>None.</p>

regulatory change, including a delineation of one-time versus on-going expenditures.	
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	The repeal of this regulation will eliminate VDACS's administrative responsibilities related to ensuring compliance with the regulation.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	None.
Benefits the regulatory change is designed to produce.	None.

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.	Repeal of the regulation will primarily affect businesses that move walnut trees, walnut logs, and other regulated articles out of the quarantined area.
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.	VDACS currently has two active compliance agreements with businesses that move regulated articles. Although VDACS does not collect data to determine whether these businesses are small businesses, VDACS believes that these entities meet the definition of a small business.
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.	Affected entities will have no costs associated with the repeal of this regulation.
Benefits the regulatory change is designed to produce.	Repeal of the regulation will reduce the costs to individuals, businesses, and other entities associated with ensuring compliance with provisions of the regulation.

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 alternative considered is the continuation of the regulation. The agency considered not repealing this regulation; however, this would be more burdensome than retaining the regulation. The regulation is no longer needed and requires that walnut tree growers and other businesses moving walnut logs comply with requirements of the regulation in order to move regulated articles out of the quarantined areas. There are no other alternatives less intrusive or costly than the proposed repeal of this regulation.

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.

This regulatory action will repeal this regulation; therefore, no less stringent requirements exist.

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.

Consistent with § 2.2-4011 of the Code of Virginia, 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.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of and reason for your objection to using this process.

The Board of Agriculture and Consumer Services is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

The agency will not hold a public hearing on this regulatory proposal. 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 or email to:

David Gianino, Program Manager
VDACS Office of Plant Industry Services

P.O. Box 1163
 Richmond, VA 23218
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.

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
318-10	N/A	This section declares the quarantine restricting the movement of articles capable of transporting TCD.	Repeal. The agency believes the quarantine is no longer necessary to prevent the artificial spread of TCD to uninfested areas of the Commonwealth by regulating the movement of articles that are capable of transporting the disease.
318-20	N/A	This section states the purpose of the quarantine.	Repeal. The agency believes the quarantine is no longer necessary to prevent the artificial spread of TCD to uninfested areas of the Commonwealth by regulating the movement of articles that are capable of transporting the disease.
318-30	N/A	Definitions	Repeal.
318-40	N/A	This section establishes those articles that are subject to the provisions of the regulation.	Repeal. Currently regulated articles will no longer be subject to movement restrictions.
318-50	N/A	This section establishes those areas that are subject to the provisions of the regulation.	Repeal. Items that are currently regulated articles may move from or through localities currently deemed a regulated area without restrictions.
318-60	N/A	This section establishes the conditions governing the intrastate movement of regulated articles.	Repeal. Items that are currently regulated articles will be able to move intrastate without restrictions.

318-70	N/A	This section establishes the conditions under which an inspector may issue or withdraw certificates and limited permits.	Repeal. Certificates and limited permits will no longer be required for intrastate movement of items that are currently regulated articles.
318-80	N/A	This section establishes the conditions under which an inspector may enter into or withdraw a compliance agreement governing the movement of a regulated article.	Repeal. Compliance agreements will no longer be required for intrastate movement of items that are currently regulated articles.
318-90	N/A	This section establishes requirements regarding the inspection necessary to obtain a certificate or limited permit for movement of a regulated article.	Repeal. Items that are currently regulated articles will no longer require inspection.
318-100	N/A	This section establishes a requirement regarding the attachment of the certificate or limited permit to a container that contains a regulated article.	Repeal. Certificates and limited permits will no longer be required to move items that are currently regulated articles, thereby eliminating the need for attachment requirements.
318-110	N/A	This section states the inspector's statutory authority to inspect, seize, or dispose of a regulated article.	Repeal. The repeal of this regulation will eliminate the need for inspectors to inspect or dispose of walnut twig beetles and items that are currently regulated articles.
318-120	N/A	This section prohibits the movement of regulated articles into Virginia from specific states.	Repeal. Items that are currently prohibited from entering Virginia from other states that are known to have TCD or from any other area of the United States where federal or state plant regulatory officials have determined TCD to be present will be able to move freely into Virginia without prior written approval from the Commissioner.
318-130	N/A	This section establishes that VDACS is not liable for a third party's costs associated with an inspection required by this regulation.	Repeal.
318-140	N/A	This section authorizes the Board to revoke this regulation.	Repeal.