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Final Regulation Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) Chapter citation(s)	2 VAC 5-405
VAC Chapter title(s)	Regulations for the Application Fertilizer to Nonagricultural Lands
Action title	Proposed amendments to penalties
Date this document prepared	June 3, 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.

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. 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 regulatory action amends Virginia’s *Regulations for the Application of Fertilizer to Nonagricultural Lands* (2 VAC 5-405) 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 an incremental penalty for repeat offenses, (iii) creating a new incremental 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 acreage report to VDACS, and (iv) creating a new, structured, incremental 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.

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

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

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 May 19, 2022, the Board adopted as a final regulation 2 VAC 5-405 *et seq.*, *Regulations for the Application of Fertilizer to Nonagricultural Lands*.

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

There are no changes to previously-reported information.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Section 3.2-109 of the Code of Virginia (Code) establishes the Board as a policy board with the authority to adopt regulations in accordance with the provisions of Title 3.2 of the Code.

Section 3.2-3602.1 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.

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 in 2 VAC 5-405, *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.

VDACS held a meeting with industry stakeholders to discuss the current penalty and the addition of other penalties for the regulation. The changes, which includes an amendment to the existing penalty and two additional penalties, are supported by the industry stakeholders who participated in the meeting.

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.

Through this regulatory action, the Board is amending the current penalty and adding two new penalties in Section 110 of *Regulations for the Application of Fertilizer to Nonagricultural Lands*. The amendments also (i) change the responsible party from an individual to the contractor-applicator or licensee who employs the individual; (ii) amend the amount of the existing civil penalty that can be assessed on contractor-applicators or licensees who offer their services as a certified fertilizer applicator without obtaining such certification from VDACS; (iii) add a penalty for contractor-applicators or licensees who do not maintain records or fail to submit the annual report for fertilizer applied to more than 50 acres of nonagricultural lands; and (iv) add a penalty for contractor-applicators or licensees who fail 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 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 non-agricultural land into Virginia's waterways. In addition, ensuring the reporting of non-agricultural 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 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 amendments.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

There are no requirements that exceed applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.

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

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.

The agency did not receive any comments during the public comment period for the proposed stage.

Prior to the proposed stage, VDACS held a meeting with industry stakeholders, including representatives of Virginia’s lawn care industry, to discuss the current penalty and the addition of other penalties for the regulation. The amendments are supported by the industry stakeholders who participated in the meeting.

Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. 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. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

No changes have been made to the proposed amendments since the previous stage.

Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this action and the rationale for the changes. 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. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

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.	*The 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. This change makes businesses responsible for ensuring its employees obtain a Certified Fertilizer Applicator

			registration, rather than penalizing the employee.
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 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 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 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 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</p>

			<p>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>
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