

Responsiveness Summary

PROPOSED AMENDMENTS TO VERMONT AGENCY OF AGRICULTURE, FOOD AND MARKETS QUARANTINE #3 - NOXIOUS WEEDS

February 3, 2012

During the public comment period, the Agency received commentary on the proposed amendments from 97 people, either in person or in writing. All of the comments were supportive of the spirit of the rule, but several took specific issue with elements of the proposed changes.

The commentary can be summarized as addressing the following topics: 1) length of the “grace period” for sale of existing stock, 2) composition and membership of the advisory committee, 3) exemptions and variances, 4) definition of “distribute” and 5) housekeeping. All but 3 of the commentators expressed an interest in reducing the amount of time allowed for depletion of existing inventories of regulated plants. To the extent a comment is not specifically addressed in this responsiveness summary or a specific recommended change is not incorporated into the final proposed rule, it is rejected.

1) Length of the “grace period” for the sale of existing stock

94 commentators who strongly support the rule advocated for shorting the “grace period” from the proposed date of January 1, 2015. Of these 94, 56 were received via identical “form letter.” These form letter commentators requested immediate prohibition. The other 38 supporting commentators suggested a range of dates for shorting the “grace period”, from immediately to specific dates earlier than January 1, 2015.

The 3 comments opposing reducing the “grace period”, including one submitted by the President of the trade organization representing the nursery industry and its members, suggested that the 2015 proposed deadline was necessary to deplete existing stock in a manner that would not cause undue economic hardship to smaller growers and nurseries. One of the three commentators opposing reduction of the “grace period” suggested that it would be unfair to reduce this period in light of the representations made during the extensive pre-filing discussions and stake-holders’ public participation activities.

“There have been comments recommending that the period of compliance be shortened to one year – we disagree on the grounds that shortening this period to one year might set a precedent for future additions to the Noxious Weed Rule, and one year is not enough time for nurseries to purge their stock of banned species without significant economic loss.”

“As a former nursery retailer, I agree that the industry needs at least until 2015 to purge the stock of existing plants of the big three. If I were a grower, I’d probably look for 5 growing seasons, especially for the Norways.”

“As of June 2011 we growers were informed that these rules were going into effect according to the original 2015 timetable; to change the timetable suddenly without warning is both

unethical and an economic penalty to growers who thought they still had three more years to comply. There is no reason to rush into the penalty phase of this program, as all growers I know have been voluntarily in compliance for years...In conclusion I support the work of the Committee, that in the main its conclusions are correct, but I hope that the decision making process remains flexible enough to accommodate varieties that are valuable and interesting plants yet pose little threat to the environment."

AAFM Response: The "grace period" provided by rule will be shortened from January 1, 2015 to July 1, 2013.

There are valid arguments on both sides of this issue. If a species is deemed noxious, regulation and enforcement is warranted. Immediate prohibition, however, will cause economic hardship to Vermont's growers. Existing stock, although it has diminishing in recent years due to educational and voluntary efforts, represents a substantial investment by small businesses and producers in Vermont. The "grace period" conceived by the pre-filing stakeholders group is an effort to balance the economic hardships with the long term goal of reducing the number of these plants that are intentionally introduced. Although there should be a "grace period" as negotiated during the pre-filing activities, on balance and in light of the over-whelming public comment on the proposed date, it should be no more than two planting seasons from the date of the prohibition. This provides adequate time for existing stock to be marketed and sold or shipped to locations out-of-state where the species are not likewise prohibited. It also provides adequate time for education and outreach to inform the public as a means of influencing choice.

2. Composition and membership of the advisory committee

Three commentators in support of the rule questioned the lack of specific criteria for membership on the Secretary's advisory committee. Each advocated for "a seat at the table" to be specified in the rule.

AAFM Response: The proposed rule will not be changed to include specifically listed advisors.

The historical invasive plant advisory committee has operated successfully for years on a voluntary and collaborative basis as an ad hoc committee of the Secretary, representing all stakeholders. Its meetings have been conducted in open, public forum with all input welcome. The rule continues to recognize the Secretary's legal responsibility to manage invasive species according to statute and entrusts the Secretary with discretion to appoint members who have expertise in this specialized work. Should the Vermont Legislature see a need to consider a legally prescriptive committee, notice in the form of proposed legislation and greater opportunity for public and stakeholder input on the composition of a prescriptive committee is warranted.

3. Exemptions and variances.

A few commentators questioned the exemptions, how exemptions, including monitoring of "grace period" stock, would be tracked and enforced, or questioned the process for classifying and listing a cultivar, variety, or subspecies as an exemption. One commentator suggested that that the

state immediately seize and destroy all noxious plants and reimburse growers for their costs rather than allow the “grace period” exemption for existing stock.

AAFM Response. No substantive change to language will be made.

This issue of exemption was addressed in 2002 during the original rulemaking process. The provision for allowing exemptions provides flexibility for plant breeders, and encourages breeding and genetic manipulation of species to produce useful plants for landscaping and ornamental purposes that pose a reduced invasive threat to our native ecosystems. To eliminate these existing and potential varieties or cultivars is counter to the goals of promoting innovation and agricultural viability in Vermont. The provision for providing exemptions for non-viable (sterile or nearly sterile cultivars) will remain in the rule as written in order to provide opportunities for breeders and developers to produce demonstrably non-invasive cultivars for use in our ornamental and landscape plantings. If growers or sellers of plants wish to apply for exemptions for specific existing cultivars, they are encouraged to contact the Agency with petitions for exemption.

The Agency thoroughly reviews each request for exemption of cultivars, varieties, and subspecies claimed to be effectively sterile. Although independent field based research is not conducted by the Agency, its review includes study and interpretation of all available scientific literature, with assistance from academic researchers and other experts as necessary. The Agency, with the advice of the committee, retains authority to rescind an exemption and remove a cultivar, variety or subspecies from the exempt list.

There is no authority or funding to reimburse growers for existing stock added to the list of noxious weeds by these amendments. The Agency will implement confiscation or destruction of prohibited nursery stock after the “grace period” deadline for those plants that were obtained prior to adoption of this revised rule. Plants acquired after the adoption date will be confiscated immediately.

Tagging of existing stock which benefit from the “grace period” can be accomplished by the Agency during annual inspection. It is impractical and cost-prohibitive, however, to produce and require special tags for the existing stock that contain educational material for consumers. The rule strikes an appropriate balance. It is anticipated that the Agency, advocacy groups, producers and sellers will continue education and outreach efforts. Consumer choice can be influenced during the “grace period.”

Other comments related to operational issues will be addressed through minor changes in language as described in the house-keeping section of this summary.

4. Definition of the term “distribute”

One commentator was concerned that use of the term “knowing violation” in the definition of “distribute” might undermine enforcement efforts.

AAFM Response: No change will be made.

The Agency does not believe the rule should automatically make offenders of those persons who are unknowingly moving or distributing the prohibited species through activities otherwise unrelated to purposeful noxious weed dissemination (e.g. – cleaning out ditches along town roadways, storm recovery efforts). The definition appropriately places a burden on the Agency to inform and educate. Should individuals or organizations be discovered unknowingly moving noxious weeds, education will take place and warnings will be issued. Following the initial warning and educational process, a claim that subsequent movement was unintentional would not be considered valid. Administrative or other enforcement action will be pursued if the movement is intentional and deliberate.

5. Housekeeping

A few commentators made suggestions on choice of language in order to avoid potential confusion on the interaction of this rule with provisions in Title 10, clarify when a permit was needed, and other minor housekeeping.

AAFM Response: **Minor changes in language will be made to clarify, including:**

Add to VI (E): *“Except as described in (B) above, permits for movement and disposal of listed weeds...”*

Section II: Definitions: Add “on the date of listing” to the definition of a Class A Noxious Weed. The definition will read, “...not currently known to occur in the State on the date of listing, and...”

Add: *‘Prohibitions on possession, cultivation, movement and distribution of plants addressed in V.S.A. titles other than Title 6 remain applicable.’*