

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #2

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2006 JUN 16 P 2:58

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: WEST VIRGINIA DEPARTMENT OF AGRICULTURE TITLE NUMBER: 61

RULE TYPE: LEGISLATIVE CITE AUTHORITY: W.Va Code 19-12

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: WEST VIRGINIA PLANT PEST ACT RULE

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 17, 2006 AT 2:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia Dept. of Agriculture

Plant Industries Division

1900 Kanawha Blvd., East

Charleston, WV 25305-0191

Attention: Gary W. Gibson

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

FISCAL NOTE FOR PROPOSED RULES

Rule Title: WEST VIRGINIA PLANT PEST ACT RULE

Type of Rule: Legislative Interpretive Procedural

Agency: WEST VIRGINIA DEPARTMENT OF AGRICULTURE

Address: Plant Industries Division
1900 Kanawha Blvd., East
Charleston, WV 25305-0191

Phone Number: 558-2212 Gary W. Gibson Email: ggibson@ag.state.wv.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

Approximately \$17,000.00 in state revenues will be generated.

There will be no cost to state government other than that required to reprint applications for registration and hard copies of the law.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	24,700.00	41,300.00	41,300.00

Rule Title: _____

Rule Title: WEST VIRGINIA PLANT PEST ACT RULE

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

The proposed increase in Nursery Registration Fees will generate approximately \$4,500.00 per year.

The proposed increase in Nursery Dealer Registration Fees will generate approximately \$36,700.00 per year.

The combined total of these fee increases will be approximately \$17,000.00.

The additional funding generated by this action will be used to pay for laboratory testing of insect and plant disease samples collected during inspections of nurseries and nursery dealerships and to help support the operations of the Plant Pest Regulatory Program.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

None

Date: 6-16-04

Signature of Agency Head or Authorized Representative

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State of West Virginia
DEPARTMENT OF AGRICULTURE
Gus R. Douglass, Commissioner

Janet L. Fisher
Deputy Commissioner

Steve Hannah
Deputy Commissioner

TITLE 61
SERIES 14
WEST VIRGINIA PLANT PEST ACT RULE
STATEMENT OF CIRCUMSTANCES REQUIRING THIS RULE

The introduction of serious foreign insects and plant diseases into the United States has increased the amount of regulatory and survey work needed to protect West Virginia's forests and agricultural crops.

Additional funding is necessary to maintain the nursery and nursery dealer inspection program at a level that will protect the State's agricultural interests from foreign and native plant pests. Much of the added pressure on the program is the result of potentially infected plant material being marketed at nursery dealerships.



State of West Virginia
DEPARTMENT OF AGRICULTURE
Gus R. Douglass, Commissioner

Janet L. Fisher
Deputy Commissioner

Steve Hannah
Deputy Commissioner

TITLE 61
SERIES 14
WEST VIRGINIA PLANT PEST ACT RULE
BRIEF SUMMARY OF PROPOSED RULE

Increases the annual registration fees charged to nurseries and nursery dealers in the following manner:

Nursery registration fees will increase by ten dollars (\$10.00) to thirty dollars (\$30.00) annually.

Nursery dealer registration fees will increase from forty (\$40.00) to sixty dollars (\$60.00) per dealership for the first five (5) dealerships registered, and those firms operating more than five (5) dealerships will be charged eighty dollars (\$80.00) per dealership for each dealership above five (5) that they register.

**TITLE 61
LEGISLATIVE RULES
DEPARTMENT OF AGRICULTURE**

FILED

**SERIES 14
WEST VIRGINIA PLANT PEST ACT RULE**

2006 JUN 16 P 2: 58

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§61-14-1. General.

1.1. Scope. -- This legislative rule establishes general operating procedures for the Plant Industries Division.

1.2. Authority. -- W. Va. Code §19-12-3, 5, 6, and 16

1.3. Filing Date. --

1.4. Effective Date.

§61-14-2. Definitions.

2.1 "Act" means the West Virginia Plant Pest Act (West Virginia Code 19-12-1 et seq.).

2.2 "Administrative Hearing Officer" means a person contracted by the Commissioner to preside over a formal hearing.

2.3 "Commissioner" means the Commissioner of the West Virginia Department of Agriculture or his authorized representative.

2.4 "Compliance Officer" means a person appointed by the Commissioner to preside over an informal hearing arising as a result of this Rule.

2.5 "Consent Agreement" means a document executed between the Commissioner and another party affirming the level of a proposed penalty for an alleged violation or violations.

2.6 "Enforcement Officer" means a person appointed by the Commissioner to carry out the review of alleged violations, assessment of the penalty and the procedure contained in this Rule.

2.7 "Infected" or "Infested" means contaminated with a pest, or so exposed, that it would be reasonable to believe that infection or an infestation exists.

2.8 "Insect, Noxious Weed and Plant Pest Dissemination Violation" means any violation of West Virginia Code 19-12-14, which requires that a permit be issued for the introduction or distribution of live insects, noxious weeds or plant pests.

2.9 "Inspection Violation" means any violation of West Virginia Code §§19-12-11, 19-12-8 or 19-12-10 or Section 8 of this Rule related to the discharge of an inspector's duties.

2.10 "Plant Certification Violation" means any violation of Sections 9 or 10 of this Rule that relate to the certification of plant material.

2.11 "Quarantine Violation" means any violation of the White Pine Blister Rust Quarantine, Black Stem Rust Quarantine, West Virginia Gypsy Moth Quarantine, or any other plant protection quarantine or administrative order established under authority of West Virginia Code 19-12-6.

2.12 "Registration Violation" means any violation of West Virginia Code 19-12-9 or Sections 2, 3, 4, 5, or 9 of this Rule related to the requirements for registering a nursery or nursery dealer.

2.13 "Violator" means the person who is alleged to have violated West Virginia Code 19-12-1 et seq., or any rule, order or permit condition imposed pursuant to West Virginia Code 19-12-1 et seq..

§61-14-3. Sale of Nursery Stock.

3.1. No nurseryman within the State shall sell or offer for sale any nursery stock or deliver any nursery stock within or without the State until it has been inspected and a certificate issued.

3.2. The commissioner shall for each certificate of registration issued and for each renewal thereof, collect an annual registration fee in the amount of thirty dollars (\$30.00) for each nurseryman and sixty dollars (\$60.00) for each dealership up to and including five (5) dealerships and eighty dollars (\$80.00) for each dealership thereafter. All certificates of registration shall expire on the thirtieth day of June next after issue.

§61-14-4. Display of Certificates.

4.1. The certificate of registration issued to any nursery that has been inspected and found to be apparently free of dangerously injurious insects and plant diseases shall be conspicuously displayed to the public at the location where the nursery stock is being offered for sale.

§61-14-5. Multiple Sales Locations.

5.1. A registered nursery with one or more sales locations separated from the parent nursery is not required to register each sales location, but shall have a copy of the registration displayed at each separate sales location.

§1-14-6. Revealing of Sources and Posting Certificates.

6.1. All dealers in nursery stock must inform the Commissioner of the sources of his or her nursery stock and the Commissioner must be satisfied that nursery stock obtained from these sources is free of dangerously injurious insects and plant diseases before a dealer's certificate is issued. The dealer may make amendments to the original list of sources at any time prior to the purchase of stock.

6.2. It is unlawful for any dealer in nursery stock within the State to offer for sale any nursery stock unless a copy of the current dealer's certificate of registration is conspicuously displayed to the public at the place of business and unless the certificate of inspection or tag which accompanied the order from the registered nursery is available for inspection upon request.

§61-14-7. Reciprocal Registration.

7.1. All nurserymen, dealers, or other persons residing or doing business outside of West Virginia who desire to ship nursery stock into the State must be registered with the department of agriculture in the state in which their business is located. The West Virginia Department of Agriculture will accept as proof of registration the directory of certified nurseries and dealers published by their resident state department of agriculture, provided their state accepts West Virginia's directory on a reciprocal basis. In those instances where there is no reciprocity, the out-of-state business must file a copy of their current, valid certificate of registration with the Commissioner, prior to shipment.

§61-14-8. Hinderance To Nursery Inspection.

8.1. When such conditions as the presence of trash, weeds, crowding of stock or other conditions prevent a thorough examination of a nursery, the Commissioner shall provide the nurseryman with a written statement describing the procedures necessary to correct the problem which prevented a thorough examination of the nursery. After receiving a written response from the nurseryman that the corrective procedures have been carried out, the Commissioner shall cause an inspection to be made.

§61-14-9. Collection Of Native Nursery Stock.

9.1. Any person collecting native nursery stock in West Virginia shall apply for and receive a dealer's certificate of registration prior to actually digging and/or selling any collected stock, unless that person is already certified as a nurseryman.

9.2. Any person who anticipates the digging and/or offering for sale of collected native nursery stock shall make proper application to the Commissioner for inspection, prior to collecting each individual shipment. The Commissioner shall designate a time or times and a place or places where the dug plants are to be assembled for inspection. Uninspected plants shall not be moved from the property where they are collected without a specific written directive from the Commissioner designating the place to which the plants are to be moved for inspection. Notice shall be given to the Commissioner when the plants

are assembled. It is a violation to transport native nursery stock without first obtaining a written directive from the Commissioner making provisions for inspection.

9.3. The Commissioner shall issue a certificate of inspection to the collector for the movement and sale of each shipment of collected plants found to be free of plant pests. This certificate shall cover only the plants inspected and passed at the time of inspection. Plants not passing inspection shall be destroyed or treated as directed by the Commissioner.

§61-14-10. Vegetable Plants.

10.1. All vegetable plants shipped into the State of West Virginia must be certified to have been grown under an official certification program of the State of origin, or to have been inspected and certified to be apparently free of injurious insects, nematodes, and plant diseases on the basis of an inspection no more than three (3) days prior to removal from the soil.

§61-14-11. Assessment of Civil Penalties and Procedures for Consent Agreements and Negotiated Settlements.

11.1. Procedure

11.1.a. The civil penalty assessment procedures in this section are designed to include most violations of West Virginia Code 19-12-1 et seq. committed by nurseries and nursery dealers. However, there may be situations which arise that are not adequately covered by this section. In such cases, the enforcement officer shall determine an appropriate course of action and make a recommendation for that action to the Commissioner. After review of the circumstances, the Commissioner may concur with the recommendation or give direction for other appropriate action as prescribed under the authority of West Virginia Code 19-12-1 et seq.

11.1.b. The time interval between the first offense and each repeated offense, beyond which the Commissioner will take no enforcement action and clear the violator's records, will be limited to two years for all inspection and plant certification violations. There is no time limit for registration, quarantine, administrative order, and insect, noxious weed and plant pest dissemination violations.

11.1.c. The enforcement officer reviewing a case shall prepare a finding of facts surrounding any discovered violation of West Virginia Code 19-12-1 et seq. Once a violation is discovered the enforcement officer shall determine:

11.1.c.A. The appropriateness of a civil penalty or criminal enforcement action; and

11.1.c.B. The character of the violation and the appropriate enforcement level as stated in the schedule of penalties contained in Table 61-14-A of this Rule. The violations are categorized into the following types:

- 11.1.c.B.(a) Registration Violations;
- 11.1.c.B.(b) Inspection Violations;
- 11.1.c.B.(c) Plant Certification Violations;
- 11.1.c.B.(d) Quarantine Violations; and
- 11.1.c.B.(e) Insect, Noxious Weed and Plant
Pest Dissemination Violations.

11.1.d. Upon establishing a level of violation, the enforcement officer shall refer to the schedule of penalty levels contained in Table 61-14-A of this rule to determine a monetary assessment. In determining the level of penalty, the enforcement officer shall consider the following factors:

- 11.1.d.A. The gravity of the violation;
- 11.1.d.B. The degree of the violator's culpability;
- 11.1.d.C. The degree of effort put forth by the violator to comply with West Virginia Code 19-12-1 et seq. and Rules promulgated under the Act; and
- 11.1.d.D. The violator's history of prior violations.

11.1.e. Any denial, suspension, revocation or modification by the Commissioner of a permit, compliance agreement or certificate of registration shall be based on satisfactory evidence that the action taken will help protect the State's agricultural interests from plant pests and/or noxious weeds or that any of the provisions of the permit, compliance agreement, West Virginia Code 19-12-1 et seq., or its Rules have been violated.

11.1.f. Any consent agreement or negotiated settlement agreed upon and signed by the violating party and the duly appointed representative of the Commissioner is a penalty levied through an administrative hearing for the purpose of collection and for the purposes of such other action as determined proper and included in the consent agreement or negotiated settlement.

11.2 Consent Agreements and Negotiated Settlements.

11.2.a. Consent agreements or negotiated settlements are intended as a mechanism to settle violations without expensive costs to both parties for administrative or criminal hearings. The violations cited in the notice of violation are capable of being recognized by the violator and the penalty settlement can be accomplished without a hearing. The enforcement officer shall provide the violator a written notice of violation, by

certified mail or personal service, which includes a finding of fact and a proposed level of enforcement action. If the violator agrees with the proposed level of action, he or she shall sign a consent agreement form and return it with payment of the assessed penalty.

11.2.b. **Negotiated Settlement - Right to informal hearing.** In the event that the violator disagrees with the findings of the investigation and/or the level of enforcement action, the violator has twenty (20) calendar days from receipt of the notice of civil penalty to request a hearing. The violator has the option of requesting an informal hearing or may request a formal hearing as prescribed under Sub-division 11.2.g. of this rule. During an informal hearing the violator may submit to the compliance officer any mitigating circumstances as to why the compliance officer should alter the investigative findings or level of enforcement action.

11.2.c. **Notice and Scheduling of Informal Hearing.** If the violator requests an informal hearing within the twenty-day period, the compliance officer shall schedule a hearing in accordance with the following procedures:

11.2.c.A. The compliance officer shall notify any authorized representative of the Commissioner who was involved in the investigation of the violation bringing about the informal hearing, and the violator of the time and place of the informal hearing. In scheduling the location of the informal hearing, the compliance officer shall consider the location of the violation and the violator. The compliance officer may schedule the hearing anywhere in the State of West Virginia;

11.2.c.B. The compliance officer shall notify the parties at least fifteen (15) calendar days prior to the time of the hearing; and

11.2.c.C. The compliance officer may continue the informal hearing only for good cause shown.

11.2.d. **Informal Hearing Procedures.** An informal hearing, as provided by this Rule, is intended to be an informal discussion of the facts which gave rise to the issuance of a notice of violation. The compliance officer shall conduct the hearing in the following manner:

11.2.d.A. The compliance officer shall not strictly apply The West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence;

11.2.d.B. The compliance officer shall not discuss the case "ex parte" with either the enforcement officer or other department employees involved in the case;

11.2.d.C. A record of the informal hearing is not required, but any party may request that a record be made at that party's expense. Any other party to the hearing may obtain copies of the record at their expense; and

11.2.d.D. At any formal review proceedings which may occur later, no evidence, as to any statement made by one party at the informal hearing, may be

introduced as evidence by another party, nor may any statement be used to impeach a witness, unless the statement is or was available as competent evidence independent of its introduction during the informal hearing.

11.2.e. **Negotiated Settlement** - Any settlement of the alleged violation based on agreement between the compliance officer and the violator is a negotiated settlement. The violator and the compliance officer shall sign the negotiated settlement document.

11.2.f. **Written Decision**

11.2.f.A. If the violator and the compliance officer are unable to reach an agreement, the compliance officer shall recommend a penalty to the Commissioner.

11.2.f.B. Within thirty (30) calendar days following the informal hearing, the Commissioner shall issue and furnish to the violator a written decision affirming, decreasing, or dismissing the initial civil administrative penalty assessment and give the reasons for his or her decision.

11.2.g. **Contested Cases, Right to a Formal Hearing.**

11.2.g.A. As provided in Sub-division 11.2.B. of this Rule or within thirty (30) calendar days after notification of a written decision rendered as a result of an informal hearing, the violator may request a formal hearing before the Commissioner. An administrative hearing officer shall conduct the hearing and the hearing shall comply with the Administrative Procedures Act, West Virginia Code §29A-5-1 et seq.

11.2.g.B. If no hearing is requested, the compliance officer's decision becomes a final order after the expiration of the thirty-day period and the civil administrative penalty is due and payable.

TABLE 61-14-A

SCHEDULE OF PENALTIES

Registration Violations

Violation - Exposing or offering for sale, selling, delivering, or giving away plants or parts of plants commonly known as nursery stock without having first secured from the Commissioner a certificate of registration. Nursery - (West Virginia Code 19-12-9 and Section 3 of this Rule). Nursery Dealer - (West Virginia Code 19-12-9).

Level of Violation	Level of Penalty
First Offense, No Prior Knowledge	Written Notice
First Offense, Prior Knowledge	\$50 - \$100
Second Offense	\$100 - \$250
Third offense and each repeat offense thereafter.	\$500

Violation - Failure to post the certificate of registration in a conspicuous location at the place of business. Nursery - (Section 4 of this Rule). Nursery Dealer - (Section 6 of this Rule).

Level of Violation	Level of Penalty
First Offense	Written Notice
Second Offense	\$25 - \$50
Third Offense and each repeat offense thereafter.	\$50 - \$100

Violation - Failure of a Nursery Dealer to inform the West Virginia Department of Agriculture about the source(s) of their nursery stock. (Section 6 of this Rule).

Level of Violation	Level of Penalty
First Offense. Adverse effects not probable.	Written Notice
First Offense. Adverse effects probable or demonstrated.	\$100 - \$250
Second offense and each repeat offense thereafter. Adverse effects not probable.	\$100 - \$250
Second Offense and each repeat offense thereafter. Adverse effects probable or demonstrated.	\$500 - \$1000

Inspection Violations

Violation - Interfering with an inspector's ability to perform their duties. (West Virginia Code 19-12-8).

Level of Violation	Level of Penalty
First Offense	Written Notice
Second Offense	\$100 - \$250
Third Offense and each repeat offense thereafter.	\$500 - \$1000

Violation - Failure to comply with a plant pest control order. (West Virginia Code 19-12-10).

Level of Violation	Level of Penalty
First Offense. Adverse effects not probable.	Written Notice
First Offense. Adverse effects probable or demonstrated.	\$100 - \$250
Second Offense and each repeat offense thereafter. Adverse effects not probable.	\$250 - \$500
Second Offense and each repeat offense thereafter. Adverse effects probable or demonstrated.	\$500 - \$1000

Violation - Maintaining conditions which prevent a thorough plant pest examination. (Section 8 of this Rule).

Level of Violation	Level of Penalty
First Offense	Written Notice
Second Offense	\$50 - \$100
Third Offense and each offense thereafter.	\$100