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Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing. TCA Section 4-5-205

Agency/Board/Commission: Tennessee Department of Agriculture
Division: Plant Certification
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Revision Type (check all that apply):

- Amendments
- New
- Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables.)

Chapter Number	Chapter Title
0080-06-24	Pest Plant Regulations
Rule Number	Rule Title
0080-06-24-.02	Pest Plant List
0080-06-24-.03	Permits for Growing, Collecting and Selling Pest Plants

Chapter 0080-06-24
Pest Plant Regulations

Amendments

Rule 0080-06-24-.02 Pest Plant List is amended by deleting the text of the rule in its entirety and substituting instead the following language so that, as amended, the rule shall read:

0080-06-24-.02 Pest Plant List

- (1) The following plants shall be considered pest plants, and shall not be propagated, sold, offered for sale, or released within the state, except as provided by Rule 0080-06-24-.03:
 - (a) Lythrum salicaria, Lythrum virgatum and related cultivars, Purple Loosestrife
 - (b) Solanum viarum, Tropical Soda Apple
 - (c) Ligustrum sinense, Chinese privet
Retail: January 2010; Wholesale: January 2012

- (d) *Ligustrum vulgare*, Common privet, European Privet
Retail: January 2010; Wholesale: January 2012
- (e) *Imperata cylindrica*, Cogongrass
- (f) *Lonicera maackii*, Shrub honeysuckle, Amur honeysuckle
Retail: January 2010; Wholesale: January 2012
- (g) *Lonicera morrowii*, Morrows bush honeysuckle, Morrow's honeysuckle
Retail: January 2010; Wholesale: January 2012
- (h) *Lonicera x bella*, Bell's honeysuckle
Retail: January 2010; Wholesale: January 2012
- (i) *Rosa multiflora*, Multiflora rose
Retail: January 2010; Wholesale: January 2012
- (j) *Elaeagnus umbellata*, Autumn olive
Retail: January 2010; Wholesale: January 2012
- (k) *Elaeagnus pungens*, Thorny olive
Retail: January 2012; Wholesale: January 2014
- (l) *Salvinia molesta*, Giant Salvinia
- (m) *Commelina benghalensis*, Tropical Spiderwort

Authority: T.C.A. §§ 43-6-104 and 43-6-106(9).

Chapter 0080-06-24
Pest Plant Regulations
New Rules

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0080-06-24-.03 Permits for Growing, Collecting and Selling Pest Plants

0080-06-24-.03 Permits for Growing, Collecting and Selling Pest Plants

Permits for propagating, collecting and selling designated pest plants may be granted by the commissioner under a compliance agreement for research and propagative purposes, as long as the plants are safeguarded from being sold, offered for sale, or released within Tennessee. Pest plants shall not be sold, offered for sale, or released within the state.

Authority: T.C.A. §§ 43-06-104 and 43-06-106(9).

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Department of Agriculture on 01/06/2009, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: September 28, 2007

Notice published in the Tennessee Administrative Register on: October 15, 2007 (Volume 33, No. 10)

Rulemaking Hearing(s) Conducted on: November 19, 2007

Date: Jan. 6, 2009
Signature: Ken Givens
Name of Officer: Ken Givens
Title of Officer: Commissioner

Subscribed and sworn to before me on: Jan. 6, 2009
Notary Public Signature: Joyce M. Jackson
My commission expires on: 09/19/09



All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Robert E. Cooper, Jr.
Robert E. Cooper, Jr.
Attorney General and Reporter
1-20-09
Date

RECEIVED
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Filed with the Department of State on: 1/28/09
Effective on: 4/13/09

Tre Hargett
Tre Hargett
Secretary of State

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which shall be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

Regulatory Flexibility Addendum

Pursuant to Public Chapter 464 of the 105th General Assembly, prior to initiating the rule making process as described in § 4-5-202(a)(3) and § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

Addendum
Regulatory Flexibility Act of 2007
Economic Impact Statement

- (1) Type or types of small business subject to the proposed rule that would bear the cost of, and/or directly benefit from the proposed rule:

Nurseries, garden centers and landscapers will bear the cost of the proposed amendments, if any.

- (2) Identification and estimate of the number of small businesses subject to the proposed rule:

All nurseries, garden centers and landscapers will be subject to the proposed amendments. There are approximately 3,700 certified firms.

- (3) Projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record:

There will not be any additional reporting, recordkeeping or other administrative costs.

- (4) Statement of the probable effect on impacted small businesses and consumers:

The effect on small businesses will be minimal. Businesses that are currently selling pest plants will have the benefit of a phase-in period, which will allow such businesses to make a gradual transition to selling commercially viable, non-invasive plants. Unwary consumers will no longer be faced with the potential expense of trying to control the spread of invasive plants.

- (5) Description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and/or objectives of the proposed rule that may exist, and to what extent, such alternative means might be less burdensome to small business:

There are no less burdensome, less intrusive or less costly alternative methods of achieving the purpose and/or objectives of the proposed rules. The proposed rules contain phase-in periods for retailers and wholesalers that were designed to mitigate the financial burden on businesses. The risk of increased costs is further decreased by a provision that would allow nurseries to sell pest plants as long as they are not distributed in Tennessee.

- (6) Comparison of the proposed rule with any federal or state counterparts:

The USDA maintains a list of noxious weeds at 7 C.F.R. §§ 360 et seq., and requires permits before such plants can be moved in interstate commerce. Several states maintain lists similar to Tennessee's and have similar restrictions on intrastate movement.

- (7) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

There would be no way to exempt small businesses and still achieve the purposes of the proposed amendments, as most businesses covered by the proposed amendments would qualify as small businesses under the Regulatory Flexibility Act. Further, the proposed amendments already contain a kind of exemption, in that nurseries can sell pest plants under a permit as long as such plants are not distributed in Tennessee.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to TCA 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The proposed amendments to Rule 0080-06-24-.02 would add eleven plants to the list of invasive plants regulated by the Department. Separate phase-in periods for retailers and wholesalers have been included to give Tennessee nurseries time to find commercially viable alternatives to the invasive plants just added to the list. New Rule 0080-06-24-.03 would allow Tennessee businesses to collect, grow and sell designated pest plants under a permit, as long as such plants are safeguarded from being offered for sale, sold or released in Tennessee.



- (B)** A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

There is no federal law that mandates the promulgation of these amendments. The Tennessee Plant Pest Act, Tenn. Code Ann. §§ 43-06-101 et seq., imposes a duty on the commissioner "to protect the agricultural, silvicultural and horticultural or other interests of the state from insect pests, pest plants, or plant diseases," and authorizes the commissioner to promulgate rules for these purposes.

- (C)** Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Commercially speaking, nurseries, garden centers and landscapers will be most directly affected by the proposed amendments and new rule. Organizations representing these interests, including the Tennessee Nursery and Landscape Association and the Middle Tennessee Nursery Association, expressed opposition to the expansion of the pest plant list, which has been summarized in the Department's public rulemaking hearing responses. Compromises were built into the proposed amendments that would allow the industry additional time to find commercially viable alternatives to invasive plants just added to the list, and that would allow the industry to collect, grow and sell designated pest plants under a permit as long as such plants are safeguarded from being offered for sale, sold or released in Tennessee.

In the regulatory and conservation areas, the proposed amendments would most directly affect the Department of Agriculture, including the Division of Forestry; the Department of Environment and Conservation; and various non-profit conservation organizations by reducing the threat posed to Tennessee's agricultural, silvicultural, horticultural and environmental interests by invasive plants. While all of these entities support the proposed amendments and new rule, some desired to expand the list further to include a number of other invasive plants. The Department of Agriculture has elected to evaluate these other invasive plants later, at which time it will consider the plants' ecological effect on the landscape and economic impact on the nursery industry. By limiting the movement of plants contained in the proposed list, the State and private citizens will save thousands of dollars that would otherwise be needed to control these invasive pests.

- (D)** Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

The Department's attorneys are not aware of any attorney general opinions or judicial rulings that would directly relate to the proposed amendments and new rule.

- (E)** An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

The fiscal impact of the proposed amendments and new rule will be minimal.

- (F)** Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;
Gray Haun, Plant Certification Administrator, Tennessee Department of Agriculture

- (G)** Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Gray Haun, Plant Certification Administrator, Tennessee Department of Agriculture

- (H)** Office address and telephone number of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Gray Haun, Plant Certification Administrator
Tennessee Department of Agriculture
440 Hogan Road
Nashville, Tennessee 37220
Phone: (615) 837-5338

- (I)** Any additional information relevant to the rule proposed for continuation that the committee requests.

The Department has not received a request for additional information.

**Tennessee Department of Agriculture
Rulemaking Hearing for Proposed Amendments to
0080-6-24 Pest Plant Regulations**

Responses to Comments Received

On November 19, 2007 at 1:30 p.m. (CST), the Tennessee Department of Agriculture (TDA) held a public rulemaking hearing concerning proposed amendments to rules that would add to the list of plants determined to be injurious to the agricultural, silvicultural and horticultural interests of the state. The following record is being provided pursuant to Tenn. Code Ann. § 4-5-222(a)(2).

(1) The Pest Plant Technical Advisory Committee was not balanced, as it only included one representative from the wholesale nursery industry and one representative from the retail nursery industry. The parties that drafted the proposed amendments to begin with were the same ones that selected the members of the committee. No amendments should be adopted until all interested parties, including the nursery industry, receive a fair hearing.

TDA Response:

The committee was formed in an attempt to include all the major stakeholders that might be affected by these proposed amendments. The committee's mission was to develop plant evaluation criteria, perform ecological and economic assessments, and to recommend pest plants and their respective effective dates for inclusion in the Rule. Letters were sent to interested stakeholders asking for nominations. The committee consists of representatives nominated by their stakeholder groups.

The commissioner made the final committee recommendations based on information provided by the stakeholder groups. The composition of the committee was as follows: Two members from academia; one member from a plant producer association; one member from a plant retailer association; one member from non-profit natural areas association; one member from a government agency that regulates natural areas; two members from general agriculture and forestry; one member from the Tennessee Department of Agriculture, Division of Regulatory Services; and one member from the Tennessee Department of Agriculture, Division of Forestry.

(2) The scientific data supporting the inclusion of the plants in the proposed amendments is non-existent, unreliable, or insufficient to warrant their inclusion. Adoption of the proposed amendments should be postponed until more data can be gathered on both sides of the dispute.

TDA Response:

The Department has based the proposed amendments to Chapter 0080-6-24 on the best available data, which has been collected by a variety of noted scientific experts in the field. Data from the southeast is collected and maintained in a database managed by the Bugwood Network. The Bugwood Network is a cooperative working group between the College of Agricultural and Environmental Sciences and the Warnell School of Forestry and Natural Resources at the University of Georgia. The Bugwood Network aims to provide information sources for supporting forestry, natural resources and agriculture with funding from the USDA Forest Service –Forest Health Program, USDA Forest Service – Forest Health Technology Enterprise Team, USDA APHIS PPQ, USDA CSREES, and the NSF Center for Integrated Pest Management.

Professionals who work in areas involving invasive species management and eradication programs collect most of the data, which is then reviewed and verified by the state coordinator, Kevin Fitch, Science Director with the Division of Natural Areas at TDEC.

(3) Apart from a lack of sufficient scientific data to support the inclusion of particular plants on the Department's list, there is a lack of sufficient empirical, "walking-around" evidence to support the notion that such plants are actually invasive.

TDA Response:

These species can be seen along interstate corridors and stream banks, in parks and on farm land all across the state. There are several areas in the Nashville vicinity where they can be easily viewed.

(4) The adoption of the proposed amendments would have a severe economic impact on Tennessee's nursery industry, especially in light of the recent drought and the late freeze. In addition, the adoption of the proposed amendments will create a void in the industry that will be filled by nurseries in other states, thereby giving those nurseries a competitive advantage. For these reasons, the proposed amendments should not be adopted, or their adoption should at least be postponed until hard data concerning the economic impact on Tennessee's nurseries is available.

TDA Response:

The phase-in periods contained in the proposed rules are a built-in compromise that was added at the request of the industry to allow growers sufficient time to produce a different, commercially viable crop.

(5) The Department should not ban plants that are already well-established in Tennessee's ecosystem.

TDA Response:

If the listed species are no longer available to be planted it will stop the influx of new material, which will allow control measures to be more effective and save thousands of dollars in federal and state funding.

(6) What does "invasive" mean, and who has the authority to define it? Just because a plant is exotic and invasive doesn't mean that it is detrimental to a native ecosystem.

TDA Response:

On Feb 3, 1999, Executive Order 13112 (64 Fed. Reg. 6183) was signed, establishing the National Invasive Species Council. The definition of invasive species, which was included in the Order, is as follows:

(f) "Invasive species" means an alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health.

(7) The Department is treating the terms "exotic" and "invasive" as synonyms. By doing so, it might ban some exotic plants that are not invasive, while allowing some native plants that are invasive.

TDA Response:

The plants included on the proposed list are both exotic and invasive. The evaluation protocol is used to determine plants that are invasive.

(8) The scientific evidence is such that the Department should adopt the proposed amendments as is, with consistent effective dates, without granting exemptions for Mimosa (*Albizia julibrissin*) or Variegated Privet (*Ligustrum sinense* 'Variegata'). Sound scientific evidence shows that the latter plant can give rise to the parent species, Chinese Privet (*Ligustrum sinense*), which is

included on the Department's list. In addition, as there are commercially available alternatives to Variegated Privet that are not included on the Department's list, there is no compelling reason to allow an exemption for this plant.

TDA Response:

The dates proposed by the Pest Plant Technical Advisory Committee were calculated to minimize the economic impact of these amendments upon the nursery industry in this state.

(9) The proposed amendments should not have separate effective dates for wholesale and retail nurseries. If a plant is determined to be invasive and injurious to the interests of Tennessee, then it should be banned without giving special accommodations to a particular group. Similarly, if several plants have been determined to be invasive, there is no reason why some should be banned later than others.

TDA Response:

The dates proposed by the Pest Plant Technical Advisory Committee were calculated to minimize the economic impact of these amendments upon the nursery industry in this state.

(10) The proposed amendments should be strengthened by expanding the list of invasive plants to include other invasive plants, including all of the plants in Ranks I and II of the Tennessee Exotic Pest Plant Council's list of invasive plants.

TDA Response:

Recommendations for adding plants to the list will be considered by the Pest Plant Technical Advisory Committee every two years.

(11) The adoption of the proposed amendments would be a "slippery slope," in that it would lead to the unlimited and ill-considered banning of other plants in the future.

TDA Response:

Only the plants listed in the proposed amendments are subject to a ban. Recommendations for adding plants to the list will be considered by the Pest Plant Technical Advisory Committee every two years.

(12) The adoption of the proposed amendments would hurt Tennesseans by stopping the cultivation of plants that might have some beneficial application (medical, commercial, etc.) in the future.

TDA Response:

The cost to the taxpayers of the state to control invasive plants far exceeds the beneficial applications of these plants. There will be a permit provision for the movement and propagation of pest plants for research purposes.

(13) Plants that are invasive in one ecosystem in Tennessee may not be invasive in another ecosystem, whether in Tennessee or outside the state. For this reason, the proposed amendments are overly broad in their application. Unless the proposed amendments are made ecosystem-specific, their adoption will hurt Tennessee nurseries that sell "invasive" plants to ecosystems where such plants do not pose a problem. Some scientific evidence even shows that plants considered "invasive" by the Department may actually be beneficial in other ecosystems. The proposed amendments should be changed to accommodate those Tennessee nurseries that sell "invasive" plants to areas where they would not pose a problem to the native ecosystem.

TDA Response:

No ecosystem in Tennessee was determined to be immune to invasiveness of the listed pest plants by the Pest Plant Technical Advisory Committee. If plants can be propagated in such a way so that they cannot become invasive in Tennessee, then they can be grown under permit and shipped out of state under permit.

(14) The time for written comments to be considered by the Department should be extended.

TDA Response:

The public had the opportunity to submit oral or written comments on the proposed amendments for several weeks prior to the rulemaking hearing, notice of which was published in the Tennessee Administrative Register and sent by letter to over two thousand recipients. The Department feels that the public has had adequate time to comment.

(15) The proposed amendments are inflexible, in that they do not allow for the possibility that sterile cultivars of invasive plants may become available at some time in the future.

TDA Response:

The rules can be amended in the future to include proven sterile cultivars, which may be propagated by permit under the proposed amendments until the rule is amended, if deemed necessary.