

DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY

Statutory Authority: 3 Delaware Code, Chapter 29 (3 **Del.C.** Ch. 29)
3 **DE Admin. Code** 806

FINAL

ORDER

806 Regulations for Invasive Plants

This Order relates to the proposed regulation amendments ("Amendments") to 3 **DE Admin. Code** 806: Regulations for Invasive Plants. The purpose of the amended regulations is to establish exemptions to the Invasive Plant List to match research efforts taken in establishing the sterility of these cultivars. The Delaware Department of Agriculture is approving these exemptions in order to allow the import, export, purchase, sale, transport, distribution, and/or propagation of these cultivars as they have been conditionally determined as noninvasive as they will not propagate and spread throughout the state. The Delaware Department of Agriculture has presented these exemptions to the Delaware Nursery and Landscapers Association (DNLA) and Delaware Native Species Commission (DNSC). These regulatory amendments with additionally assist the Nursery Industry and small business within the state to increase sales.

The Department of Agriculture is issuing these proposed regulations in accordance with Title 3 of the Delaware Code. This notice is issued pursuant to the requirements of Chapter 101 of Title 29 of the Delaware Code

The proposed regulations were published in the August 1, 2023 edition of the *Delaware Register of Regulations*. Copies were also on file in the office of the Delaware Department of Agriculture, 2320 South DuPont Highway Dover, DE and were available for inspection during regular office hours. Copies were also published online at the *Delaware Register of Regulations* website: http://regulations.delaware.gov/services/current_issue.shtml.

Summary of the Evidence and Information Submitted

The Department received one written comment in support of the language and further, no public hearing was held.

Findings of Fact and Conclusions

The public was given notice and an opportunity to provide the Office of the Secretary at the Delaware Department of Agriculture with comments in writing and by testimony on the proposed amendments, or submit written suggestions, data, briefs or other materials to the proposed regulations. There were no public comments provided to the Delaware Department of Agriculture.

In accordance with the state public notice requirements of Title 29, Chapter 101 of the Delaware Code and pursuant to Title 3 of the Delaware Code, Chapter 12 (3 **Del.C.** Ch. 12), the Department has the statutory authority to promulgate rules and regulations.

Having received one supportive public comment, the Department finds no reason to amend the regulations as proposed.

Decision and Effective Date

The Department hereby adopts the changes to regulations as proposed, to be effective 10 days following publication of this Order in the *Delaware Register of Regulations*. The new regulations are attached hereto as Exhibit A.

IT IS SO ORDERED this 9th day of September 2023.

Michael T. Scuse, Delaware Secretary of Agriculture

806 Regulations for Invasive Plants

1.0 Purpose

- 1.1 The purpose of these regulations is to clarify how the Department will eradicate, repress, and prevent the spread of plant pests as authorized in Title 3, Chapter 11 of the Delaware Code.
- 1.2 The Department will work with the Delaware Native Species Commission for expertise and advice on maintaining the Invasive Plant List and Plant Watch list and review of sterility exemption.

- 1.3 The Department will be responsible for enforcement of the Invasive Plant Law during routine inspections of businesses or inspections resulting from a complaint. During inspections, the Department will survey for plants on the Invasive Plant List and ensure businesses' compliance with signage requirements for plants on the Plant Watch List.

2.0 Definitions

The following words and terms, when used in this regulation, have the following meaning:

"**Commission**" means the Delaware Native Species Commission.

"**Cultivar**" means a plant variety that has been produced in cultivation by selective breeding.

"**Department**" means the Delaware Department of Agriculture.

"**Invasive plant**" means any living part, cultivar, variety, species or subspecies not native to Delaware identified by the Secretary having the potential to do all of the following:

- a. Result in widespread dispersal and establishment.
- b. Out-compete other species in the same area.
- c. Exhibit rapid growth or high seed or propagule productions.
- d. Become established in natural areas in the State.

"**Invasive Plant List**" means the list of invasive plants maintained by the Secretary.

"**Plant Watch List**" means the list of potentially invasive plants maintained by the Secretary.

"**Secretary**" means the Secretary of the Delaware Department of Agriculture.

"**Sterility**" means unable to produce reproductive structures.

3.0 The Invasive Plant List and List, Plant Watch List List, and the Exemptions to the Invasive Plant List

3.1 The Invasive Plant List. Conditionally exempt cultivars are listed in subsection 3.3.

- 3.1.1 Amur honeysuckle, *Lonicera maackii*
- 3.1.2 Autumn olive, *Elaeagnus umbellata*
- 3.1.3 Callery pear, *Pyrus calleryana*
- 3.1.4 Chinese wisteria, *Wisteria sinensis*
- 3.1.5 Creeping water primrose, *Ludwigia peploides subsp. glabrescens*
- 3.1.6 English ivy, *Hedera helix*
- 3.1.7 European privet, *Ligustrum vulgare*
- 3.1.8 European reed, *Phragmites australis subsp. australis*
- 3.1.9 European sweetflag, *Acorus calamus*
- 3.1.10 Garlic mustard, *Alliaria petiolata*
- 3.1.11 Hydrilla, *Hydrilla verticillata*
- 3.1.12 Japanese barberry, *Berberis thunbergii*
- 3.1.13 Japanese honeysuckle, *Lonicera japonica*
- 3.1.14 Japanese knotweed, *Fallopia japonica*
- 3.1.15 Japanese pachysandra, *Pachysandra terminalis*
- 3.1.16 Japanese stiltgrass, *Microstegium vimineum*
- 3.1.17 Lesser celandine, *Ficaria verna*
- 3.1.18 Lesser periwinkle, *Vinca minor*
- 3.1.19 Marsh dewflower, *Murdannia keisak*
- 3.1.20 Mile-a-minute weed, *Persicaria perfoliata*
- 3.1.21 Morrow's honeysuckle, *Lonicera morrowii*
- 3.1.22 Multiflora rose, *Rosa multiflora*
- 3.1.23 Norway maple, *Acer platanoides*
- 3.1.24 Orange daylily, *Hemerocallis fulva*
- 3.1.25 Oriental bittersweet, *Celastrus orbiculatus*
- 3.1.26 Parrot-feather, *Myriophyllum aquaticum*
- 3.1.27 Porcelain berry, *Ampelopsis glandulosa*
- 3.1.28 Purple loosestrife, *Lythrum salicaria*
- 3.1.29 Spotted knapweed, *Centaurea stoebe subsp. micranthos*

- 3.1.30 Tatarian honeysuckle, *Lonicera tatarica*
- 3.1.31 Tree of heaven, *Ailanthus altissima*
- 3.1.32 Water hyacinth, *Eichhornia crassipes*
- 3.1.33 Wineberry, *Rubus phoenicolasius*
- 3.1.34 Winged euonymus, *Euonymus alatus*
- 3.1.35 Yam-leaved clematis, *Clematis terniflora*
- 3.1.36 Yellow flag iris, *Iris pseudoacorus*
- 3.2 The Plant Watch List. Plants listed on the Plant Watch List must be identified with a tag, label, or sign on each plant or in the general vicinity of the plants for sale.
 - 3.2.1 Creeping Jenny, *Lysimachia nummularia*
- 3.3 Exemptions to the Invasive Plant List.
 - 3.3.1 The following cultivars of Japanese barberry, *Berberis thunbergia*, are conditionally exempted from subsection 3.1.12 of the Invasive Plant List by the Department:
 - 3.3.1.1 'UCONNBTCP4N'; Trademark Name - Crimson Cutie
 - 3.3.1.2 'UCONNBTCP4N'; Trademark Name - Lemon Cutie
 - 3.3.1.3 'UCONNBTB048'; Trademark Name - Lemon Glow

4.0 Maintenance of the Invasive Plant List and Plant Watch List

- 4.1 The Secretary shall maintain the Invasive Plant List and Plant Watch List with the advice of the Commission, so long as the Commission exists.
 - 4.1.1 Should the Department receive requests for review of plants to be added or removed from the Invasive Plant List or Plant Watch List, the Department shall submit requests to the Commission for advice, within 30 days of the request for review.
 - 4.1.2 The Department and the Commission shall review any plants recommended to be added to or removed from the Invasive Plant List and Plant Watch List. The Department shall seek the advice of the Commission, or any subcommittee as designated by the Commission, to add or remove plants from the Invasive Plant List or Plant Watch List.
 - 4.1.3 Should the Commission receive requests for review of plants to add or remove from the Invasive Plant List or Plant Watch List, the Commission shall provide its recommendations via email to the Secretary or during a Commission meeting within 60 days of the initial request for review. Recommendations must include, at a minimum, a detailed methodology used by the Commission to make a determination about each plant under consideration to be added to or removed from the Invasive Plant List and Plant Watch List.
 - 4.1.4 The Secretary shall respond to the Commission with a decision or a request for additional information within 60 days of the date of the recommendation.
 - 4.1.5 The Secretary shall initiate any required regulatory changes to the Invasive Plant List and Plant Watch List within 30 days of the date that a determination has been made.

5.0 Allowance for Sterility

- 5.1 The Department recognizes that the level of sterility of a plant impacts its potential to:
 - 5.1.1 Result in widespread dispersal and establishment.
 - 5.1.2 Out-compete other species in the same area.
 - 5.1.3 Exhibit rapid growth or high seed propagule productions.
 - 5.1.4 Become established in natural areas in the State.
- 5.2 The Department reserves the right to consider cultivars of plants based on level of sterility at their point of sale or delivery into the State of Delaware. The Department may grant an exemption for cultivars of plants listed on the Invasive Plant List.
- 5.3 Persons requesting that a cultivar be exempted from the Invasive Plant List must petition the Department by submitting a Petition to Exempt a Specific Cultivar form. Persons may request that plant cultivars be exempted from the Invasive Plant List based on sterility level and seed viability and must provide an explanation and references to justify the request.
- 5.4 The Department, with advice of the Commission, will consider submitted cultivars for exemption when there is independent, peer reviewed, scientific research evaluating the invasiveness of the cultivar. Petitions require burden of proof to be held by the breeder or plant representative and leave no responsibility to the State of Delaware.

- 5.4.1 Any requests brought to the Department for a cultivar to be exempted from the Invasive Plant List shall be submitted to the Commission via email within 30 days of the request for advice.
 - 5.4.2 The Commission shall provide recommendations via email to the Secretary within 60 days of receiving the Petition to Exempt a Specific Cultivar form. The recommendations must include, at a minimum, a detailed methodology used by the Commission to make a determination about each cultivar under consideration to be exempted from the Invasive Plant List.
 - 5.4.3 The Secretary shall respond to the Commission with a decision or a request for additional information via email within 60 days of the date of the recommendations.
 - 5.4.4 The Secretary shall initiate any required regulatory changes to the Invasive Plant List within 30 days of the date that a determination has been made, with the advice of the Commission, to exempt a cultivar from the Invasive Plant List.
- 5.5 Exemptions are conditional and subject to revocation by the Department.

26 DE Reg. 171 (09/01/22)

27 DE Reg. 246 (10/01/23) (Final)