



## **Economic Impact Analysis Virginia Department of Planning and Budget**

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### **2 VAC 5-320 – Rules and Regulations for the Enforcement of the Endangered Plant and Insect Species Act**

**Department of Agriculture and Consumer Services**

June 12, 2012

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### **Summary of the Proposed Regulation**

The Virginia Department of Agriculture and Consumer Services (VDACS) proposes to amend its Rules and Regulations for the Enforcement of the Endangered Plant and Insect Species Act to: 1) remove one plant species from listing in these regulations, 2) add one plant species (Millboro Leatherflower) to the threatened list and 3) add two plant species (Valley Doll's Daisy and Virginia Quillwort) and one insect species (Thomas' Cave Beetle) to the endangered list.

### **Result of Analysis**

There is insufficient information to ascertain whether benefits will outweigh costs for this regulatory action.

### **Estimated Economic Impact**

Pursuant to Section 3.2-1002 of the Code of Virginia, the Virginia Department of Agriculture and Consumer Services (VDACS) maintains lists of endangered and threatened plant and insect species in Virginia, and under certain circumstances requires developers of public and private lands to take specified actions to avoid the destruction of the listed endangered and threatened plant and insect species. Any major construction projects conducted on public lands or on private lands for the primary benefit of third party developers (cell phone companies building towers on private land, for example) are subject to review by VDACS to determine whether the proposed construction would take place on land that is within an area that is known to have species on the endangered or threatened lists in the vicinity. VDACS also conducts reviews on private lands where such reviews are required or recommended as part of a larger

review of private land use conducted by the Department of Environmental Quality (DEQ) at the behest of the State Corporation Commission (SCC) or conducted by the federal Fish and Wildlife Service (FWS) primarily at the behest of the Army Corp of Engineers.

According to the agency, less than one percent of the over 1,000 proposed construction projects presented to VDACS annually are deemed to be on land that is within an area that is known to have species on the endangered or threatened lists in the vicinity. For these projects, the developer must hire a qualified individual<sup>1</sup> to conduct a survey for the endangered and threatened species on the site of the proposed construction. These surveys typically cost several hundred dollars.<sup>2</sup> Less than one percent of these surveys detect protected plants or insects that require the developer to incorporate mitigating practices into their project.<sup>3</sup>

According to VDACS, the following are examples of circumstances where mitigating practices are necessary and implemented. A locality or the Virginia Department of Transportation (VDOT) is in the early planning stages concerning the construction of a new road. Several routes are considered. It is determined by the process described above that one of the routes would harm an endangered or threatened species. The locality or VDOT chooses a different route for the road. Or if no viable route avoids the endangered or threatened species, then an accommodation such as an overpass may be built to minimize the harm. Another example would be that of a private developer where it is determined by the process described above that development that primarily benefits a third party developer would harm an endangered or threatened species. In such a circumstance VDACS would likely strike an agreement with the developer so that part of the land would be preserved, while the rest could be developed.<sup>4</sup> For reviews that are conducted on private lands as part of a larger DEQ or FWS review, private land owners would likely be required by the SCC to implement VDACS' recommendations. For instance, a DEQ representative reports that when land use reviews are conducted on private land at the behest of the SCC, it would likely be mandated that the private land owner follow VDACS recommendations for protecting endangered plants and insects in order to get SCC approval for the larger project involved.

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<sup>1</sup> The United States Fish and Wildlife Service (USFWS) and the Virginia Department of Conservation and Recreation, Division of Natural Heritage maintain a list of qualified individuals.

<sup>2</sup> Source: VDACS

<sup>3</sup> Ibid

<sup>4</sup> Ibid

VDACS' proposal to remove one plant species from, and add 4 new species to, the lists of endangered and threatened species may or may not increase the frequency that developers must hire surveyors to determine the presence of endangered or threatened species, and the frequency endangered or threatened species are found on the site proposed for development. There is a large degree of uncertainty on this because, according to the agency, the known populations of the plants and insect that are being added to the lists are located in only five rural counties in the Commonwealth and are either located in national forests or on land that is not easily developed or both. Nevertheless, for any additional developers who must hire surveyors due to the species added to the lists, the proposed list additions will cost several hundred dollars... and potentially significantly more if the survey shows endangered or threatened species on the site to be developed. For example, the private developer would lose the potential profits garnered from developing the land that he must leave undeveloped due to his agreement with VDACS.

In addition to the direct costs that some developers may incur, this regulatory action has the potential to adversely impact other individuals. First, adding species to the endangered and threatened lists makes it a class one misdemeanor for most individuals<sup>5</sup> to possess those species. Although VDACS reports that they know of no cases where an individual has been charged with this crime, individuals can be subject to a fine of up to \$2,000 and/or a jail sentence of up to 12 months. VDACS reports that individuals who have a good reason to want to possess species covered by these regulations, educators or botanists for instance, can get a permit to do so. Second, VDACS reports that listing species on a state level can serve as one factor that may lead to them being listed on the federal endangered or threatened species lists. A federal listing of a plant species does not automatically trigger the level of intervention in the use of private lands, and the perverse results<sup>6</sup>, that a listing of an animal species does. Some individuals may, however, incur costs if this regulatory action leads to a federal listing. Specifically, any development projects on federal land, or on private lands that are funded partly or completely

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<sup>5</sup> Private land owners are allowed to possess endangered species that originate on their land.

<sup>6</sup> Recent empirical studies, *Preemptive Habitat Destruction Under the Endangered Species Act* by Dean Lueck and Jeffrey Michael and *Is the Endangered Species Act Endangering Species* by John List, Michael Margolis and Daniel Osgood, indicate that publication of the intent to list a species in a given area accelerates habitat destruction in that area.

with federal monies, are subject to the provisions of the federal endangered species act which can make development much more costly.

The benefits of adding species to the lists involve the value placed on the preservation of endangered or threatened species, and the species' contributions to their ecosystems. As designed, the program does seem to reduce the likelihood that endangered or threatened species will be driven to extinction or at least may slow that trend. Whether the costs incurred by public and private developers, and potentially passed on to taxpayers and consumers through potentially higher taxes, reduced services, or higher housing or commercial rental costs, exceed the benefits associated with reducing the negative pressures on endangered or threatened species populations depends upon how much value is placed on the preservation of endangered or threatened species. Since little or no data exists concerning the magnitude of the expected costs or benefits, it is not possible to draw any reliable conclusion about the net economic impact of this change.

### **Businesses and Entities Affected**

Since these regulations are only directly enforceable when public lands are developed or when private lands are developed by someone other than the land's owner, the developers of these projects, as well as entities that contract for such development, will be directly affected by the proposed changes. VDACS reports that they review approximately 1,000 requests for information on anticipated impacts on proposed projects per year. To the extent that any such review adds costs to public projects, taxpayers in the Commonwealth will also be affected. Since listing species at a state level is one factor that is considered when the FWS makes decisions about which species are candidates for federal listing, development of federal lands or development projects that are partly or completely paid for with federal monies may be affected at some point in the future.

### **Localities Particularly Affected**

The proposed changes to the endangered and threatened species lists will particularly affect five counties in the Commonwealth: Amelia, Halifax, Prince Edward, Augusta and Scott counties now have, or have had, known populations of the candidate plant or insect species within their borders.

## **Projected Impact on Employment**

Individuals qualified to survey for endangered and threatened plant and insect species may receive a small additional amount of work due to the proposed changes. Even with the net additions to the lists, occurrences where mitigating actions are required appear to still be very infrequent. Thus, beyond the surveyors, employment should not be significantly affected by the proposed changes.

## **Effects on the Use and Value of Private Property**

Individuals qualified to survey for endangered and threatened plant and insect species will likely earn some additional revenue. Developers that will need to employ these surveyors will see their costs rise commensurately. In the rare occasions where developers must take mitigating actions, the commercial net value of their property will be negatively affected.

## **Small Businesses: Costs and Other Effects**

Although VDACS does not collect information on affected entities' small business status, it seems likely that at least some of the affected developers would qualify. Affected developers will likely incur additional costs on account of this regulatory action.

## **Small Businesses: Alternative Method that Minimizes Adverse Impact**

There is likely no alternate method for meeting VDACS' legislative mandate that would further minimize costs.

## **Real Estate Development Costs**

Developers that will need to employ surveyors to assess the effects of their planned development will see their costs increase. In the rare occasions where developers must take mitigating actions, the commercial net value of their property will be negatively affected.

## **Legal Mandate**

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with Section 2.2-4007.H of the Administrative Process Act and Executive Order Number 21 (02). Section 2.2-4007.H requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or

other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, Section 2.2-4007.H requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.