



## Final Regulation Agency Background Document

<b>Agency name</b>	Department of Agriculture and Consumer Services (Board of)
<b>Virginia Administrative Code (VAC) citation</b>	2 VAC 5 -320-10
<b>Regulation title</b>	<b>Regulations for the Enforcement of the Endangered Plant and Insect Species Act</b>
<b>Action title</b>	<b>Amend</b>
<b>Document preparation date</b>	

This information is required for executive review ([www.townhall.state.va.us/dpbpages/apaintro.htm#execreview](http://www.townhall.state.va.us/dpbpages/apaintro.htm#execreview)) and the Virginia Registrar of Regulations ([legis.state.va.us/codecomm/register/regindex.htm](http://legis.state.va.us/codecomm/register/regindex.htm)), pursuant to the Virginia Administrative Process Act ([www.townhall.state.va.us/dpbpages/dpb\\_apa.htm](http://www.townhall.state.va.us/dpbpages/dpb_apa.htm)), Executive Orders 21 (2002) and 58 (1999) ([www.governor.state.va.us/Press\\_Policy/Executive\\_Orders/EOHome.html](http://www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html)), and the *Virginia Register Form, Style, and Procedure Manual* ([http://legis.state.va.us/codecomm/register/download/styl8\\_95.rtf](http://legis.state.va.us/codecomm/register/download/styl8_95.rtf)).

### Brief summary

*In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.*

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The proposed amendments remove the currently named plants that are no longer considered globally rare and add those threatened or endangered plant and insect species that are considered rare both globally and in Virginia.

### Statement of agency final action

*Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.*

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On September 26, 2003, the Virginia Board of Agriculture and Consumer Services approved the removal of three plant species, addition of twenty plant and insect species, and change in status of one plant

species contained in the Regulations for the Enforcement of the Endangered Plant and Insect Species Act (2 VAC 5 -320-10).

### Legal basis

*Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

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Section 3.1-1025 of the Code of Virginia gives the Board of Agriculture and Consumer Services the authority to "prescribe and adopt regulations including, but not limited to, the listing of endangered or threatened species, their taking, quotas, seasons, buying, selling, possessing, monitoring of movement, investigating, protecting, or any other need in furtherance of the purposes of the Virginia Endangered Plant and Insect Species Act."

### Purpose

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.*

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The goal of this regulation is twofold. First, the protection of the public's health, safety, and welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth, and second, the affording of protection to endangered and to threatened plant species and insect species in Virginia.

Listing a species as threatened or endangered under the regulation offers protection to plants and insects that are of aesthetic, ecological, educational, scientific, economic, or other value to the Commonwealth of Virginia. Listing a species provides for the development and implementation of biologically sound and economically feasible protection, recovery, and conservation measures to ensure the survival of listed species while allowing citizens and businesses to conduct building projects in the most economically feasible manner with the least disruption to projects that potentially impact threatened or endangered species. More specifically, listing the species as endangered or threatened offers the following benefits for the species:

1. Restriction on the take and trafficking in listed species,
2. Federal aid to state conservation departments with cooperative endangered species agreements for conservation and recovery of the species or for surveys,
3. Greater recognition of the species' precarious status, encouraging voluntary conservation efforts by other agencies, organizations and individuals,
4. Establishment of programs for the management and conservation of listed species to help assure survival of the species,
5. Protects the landowner, on whose property a listed species occurs, from unauthorized collecting, taking, cutting, etc., and
6. Allows for the legal harvest and export of threatened species under an approved management plan.

## Substance

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.*

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The amendments to the regulation include the removal of three plant species from the regulation, addition of nine plant and insect species as endangered, addition of eleven plant and insect species as threatened, and change in status of one plant species from endangered to threatened.

## Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

*If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.*

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The primary advantage of the proposed amended regulation is to protect designated threatened or endangered plant and insect species that are considered rare both globally and in this Commonwealth. This regulation truly protects the rarest of the rare. Once plants or insects are listed, the regulation allows the department to work with land developers in minimizing the impact on protected populations while allowing the development to proceed in most instances. This impact on land development is considered necessary to protect rare plants and insects. When developed, the Virginia Endangered Plant and Insect Species Act and Regulation were specifically designed to ensure a balance between economic agricultural production and species conservation. A procedure was included in the statute for the removal or destruction of a state listed species, when good cause is shown and when necessary, to alleviate damage to property, impact on progressive development, or to protect human health.

Often, species protected by the Virginia Endangered Plant and Insect Species Act are also subject to federal guidelines if federal funds or federal lands are involved in land development. The developer must work with the United States Fish and Wildlife Service to mitigate impacts on listed species. Whereas federal protection of threatened and endangered plant and insect species is limited to federal lands or development utilizing federal funds, the Virginia Endangered Plant and Insect Species Act protects listed plants and insects on all Virginia public and private lands while exempting the landowner from its provisions. This exemption to Virginia's statute offers protection to landowners by protecting designated species on their property from other individuals while not restricting the rights of the landowner.

To ensure landowners had every opportunity to comment on the proposed changes to the threatened and endangered plant and insect species list and in accordance with directions from the Virginia Department of Agriculture and Consumer Services' Board, no plant or insect species was considered for addition to Virginia's threatened or endangered species list unless all known property owners of sites containing known populations of any candidate species were notified by certified mail that the potential threatened or endangered species exists on their property.

**Changes made since the proposed stage**

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement in proposed regulation	Proposed change in final regulation and rationale
2 VAC 5-320-10	<p><b>Listing of endangered and threatened plant and insect species.</b></p> <p>A. The Board of Agriculture and Consumer Services hereby adopts the following regulation in order to protect designated plant and insect species that exist in this Commonwealth. All designated species are subject to all sections of the Virginia Endangered Plant and Insect Species Act (§§ 3.1-1020 through 3.1-1030 of the Code of Virginia).</p> <p>B. The following plant and insect species are hereby declared an endangered species:</p> <ol style="list-style-type: none"> <li>1. <i>Arabis serotina</i>, shale barren rock cress.</li> <li>2. <i>Cardamine micranthera</i>, small-anthered bittercress.</li> <li>3. <i>Fimbristylis perpusilla</i>, Harper's fimbristylis.</li> <li>4. <i>Helenium virginicum</i>, Virginia sneezeweed.</li> <li>5. <i>Helonias bullata</i>, swamp-pink.</li> <li>6. <i>Ilex collina</i>, long-stalked holly.</li> <li>7. <i>Iliamna corei</i>, Peter's mountain mallow.</li> <li>8. <i>Isotria medeoloides</i>, small whorled pogonia.</li> <li>9. <i>Nestronia umbellula</i>, nestronia.</li> <li>10. <i>Puto kosztarabi</i>, Buffalo Mountain mealybug.</li> <li>11. <i>Pseudanophthalmus holsingeri</i>, Holsinger's cave beetle.</li> </ol>	<p><i>Arabis serotina</i>, shale-barren rockcress, is moved from section B to section C.</p> <p><i>Neonympha mitchellii</i>, Mitchell's satyr butterfly, is moved from Section C to Section B.</p> <p>The following plant species are added to section B:</p> <ol style="list-style-type: none"> <li>1. <i>Carex juniperorum</i>, juniper sedge.</li> <li>2. <i>Corallorhiza bentleyi</i>, Bentley's coralroot.</li> <li>3. <i>Ptilimnium nodosum</i>, harperella.</li> </ol> <p><i>Amaranthus pumilus</i>, seabeach amaranth, is added to section C.</p>

	<p>12. <i>Scirpus ancistrochaetus</i>, Northeastern bulrush.</p> <p>13. <i>Sigara depressa</i>, Virginia Piedmont water boatman.</p> <p>14. <i>Spiraea virginiana</i>, Virginia spiraea.</p> <p>15. <i>Trifolium calcaricum</i>, running glade clover.</p> <p>C. The following plant and insect species are hereby declared a threatened species:</p> <p>1. <i>Aeschynomene virginica</i>, sensitive-joint vetch.</p> <p>2. <i>Cicindela dorsalis dorsalis</i>, Northeastern beach tiger beetle.</p> <p>3. <i>Echinacea laevigata</i>, smooth coneflower.</p> <p>4. <i>Juncus caesariensis</i>, New Jersey rush.</p> <p>5. <i>Lycopodiella margueritiae</i>, Northern prostrate clubmoss.</p> <p>6. <i>Neonympha mitchellii</i>, Mitchell's satyr butterfly.</p> <p>7. <i>Nuphar sagittifolia</i>, narrow-leaved spatterdock.</p> <p>8. <i>Platanthera leucophaea</i>, Eastern prairie fringed orchid.</p> <p>9. <i>Pyrgus wyandot</i>, Appalachian grizzled skipper.</p> <p>10. <i>Rhus michauxii</i>, Michaux's sumac.</p> <p>11. <i>Scirpus flaccidifolius</i>, reclining bulrush.</p>	
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**Public comment**

*Please summarize all comment received during the public comment period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.*

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Commenter	Comment	Agency response
Diana Salmon	The landowner questioned why she received a certified letter regarding endangered species.	A certified letter containing the proposed changes to the regulation was sent to property owners of known locations for candidate species in accordance with directions from the VDACS Board to ensure all landowners had an opportunity to comment on the proposed changes.
Sheila Moore	Ms. Moore questioned why she was contacted by registered mail. She expressed concern that the agency is soliciting money to enforce the regulations.	A certified letter containing the proposed changes to the regulation was sent to property owners of known locations for candidate species in accordance with directions from the VDACS Board to ensure all landowners had an opportunity to comment on the proposed changes. VDACS is not soliciting funds from private property owners to support its efforts in enforcing EPISA or rules and regulations.
M. Bagley Walker	Mr. Walker requested further information on the rare species located on his property. He did not voice objection or approval of the proposed changes to the regulation	Information on species and their habitats was forwarded to the landowner.
David Basham	The landowner expressed concern that additional expenses and restrictions will be imposed on landowners through this regulation.	The regulations will not prohibit landowners from developing or otherwise using their property as desired. Landowners are not required to complete an environmental study regarding state listed endangered and threatened plant and insect species prior to undertaking activities detrimental to the species.
James Campbell	Mr. Campbell did not feel qualified to comment on the changes to the regulation.	No Response.
J.E. Speth	<p>Mr. Speth expressed several concerns with the regulations and its enforcement. The title and responsibilities of the Office of Plant and Pest Services is confusing. He questioned the motives and agenda of an office that deals with eradication of plant and insect pests and the preservation of endangered species.</p> <p>He requested information as to how a candidate species was determined to be on his property, who identified its location, what date the species was found, which candidate species occurs on his</p>	<p>The Office of Plant and Pest Services is responsible for the protection of Virginia's agricultural and horticultural economic interests by overseeing and ensuring compliance with numerous plant and insect related statutes. Protection of plants of environmental, agricultural, and horticultural interest often requires control of pest plant and insect species.</p> <p>The selection of candidate species was determined from information provided by the Department of Conservation and Recreation, Division of Natural Heritage (DNH). DNH maintains an inventory of natural heritage resources in Virginia, which includes rare plant and insect species. The inventory contains</p>

	<p>property, and what percentage of neighboring landowners received similar notifications of the changes to the regulations. Pursuant to the adoption of the proposed changes, the landowner requested that the Board of Agriculture and Consumer Services “undesigned” his property from the purview of EPISA.</p> <p>Mr. Speth was concerned that the regulation indicates that while there are no restrictions on the landowner in the use of their property, a neighbor’s assistance to landowners in activities prohibited by the statute would require government approval.</p> <p>The landowner feels the placement of a “no trespassing” sign would be more efficient and cost effective in preserving rare species. Government control of private land will relegate small landowners to the status of caretakers. Wealthier individuals and entities are better able to absorb costs imposed by “Species Acts”. The regulation and criteria for listing a candidate species could subject landowners to confiscation of property rights.</p> <p>Uncontrolled population growth and immigration are impeding efforts to preserve endangered species.</p>	<p>records of flora and fauna that date back to the earliest records of Virginia history. The list may be used by state and federal agencies, organizations, and individuals to assist in the determination of actions in protection and development decision-making. The Board of Agriculture and Consumer Services does not designate an individual’s property under the EPISA, but designates a species of plant or insect. An inventory of where such species are located is provided to VDACS by the Department of Conservation and Recreation, U.S. Fish and Wildlife Services, and other state and federal agencies. In this case, 13 landowners in the vicinity of this property were notified of the proposed changes to these regulations.</p> <p>Individuals employed by or in direct supervision of the landowner are regarded as agents of the property owner and not subject to the prohibitions of the regulations.</p> <p>The intent of EPISA is to provide protection to endangered and threatened plant and insect species while allowing citizens and businesses to conduct projects in the most economically feasible manner. The statute and rules or regulations provide additional landowner protection, beyond civil litigation, from harmful action by non-property owners. The regulations do not impose preservation requirements or management duties on property owners. The Commissioner may establish programs necessary for the management of endangered or threatened species in cooperation with private persons or groups. However, such programs are voluntary cooperative efforts between property owners and VDACS. The statute does not authorize the regulation or limitation of landowner property rights.</p> <p>The enforcement of immigration statutes is beyond the purview of these regulations and VDACS.</p>
<p>Margaret McMillan</p>	<p>Ms. McMillan asked if the U. S. Fish and Wildlife Service acknowledge the occurrence Mitchell’s or St. Francis’ satyr (<i>Neonympha mitchellii mitchellii</i> or <i>N. m. francisci</i>) in Virginia</p>	<p>St. Francis’ satyr is known to occur in southwest Virginia. The local office of USFWS does list it as an endangered species in the Commonwealth.</p>
<p>Nicky Staunton</p>	<p>As president of the Virginia Native Plant Society, Ms. Staunton is</p>	<p>In determining which species to consider for inclusion in the regulations, VDACS reviews</p>



	<p>pleased to learn that plant and insect species are being considered for addition to the state-listed endangered and threatened species. She expressed support for the listing of plants and insects that are endangered and threatened. The intrinsic value of these species is priceless. Any of the rare plants recommended for listing by the VDACS Board could provide valuable medical products, habitat for other species, or benefits to the environment. The increasing demand of land for agriculture, housing and business needs is diminishing many plant communities to the point of extinction. Positive actions on these proposals by the Board will protect the diversity of Virginia's natural resources.</p> <p>She commented that the recommendation to remove three plant species indicates more plants of these species have been documented. Eleven plant and insect species recommended by DNH are not being considered for inclusion in the regulations. The evidence of global status is inappropriate in determining candidate species. Virginia should "stonewall" losing any species and contributing to its global rarity. These species should remain in the list under consideration.</p> <p>Ms. Staunton is concerned with the substantial cost of notification by certified mail. The notification to landowners also sends a mixed message. The notification gives notice of the opportunity to comment on the proposed changes. However, the method of notification could increase landowner concern regarding how the species would affect use of property. Perhaps a less intimidating form of notification could be used to involve landowners in the process. The notice to landowners should state that this regulation would not restrict</p>	<p>the status of each recommended species and considers advice from individuals, organizations and other agencies. A species' status is determined from a suite of factors, including the number of occurrences, number of individuals, and severity of threats. The primary concern of VDACS regarding endangered and threatened species is the protection of very and extremely rare plant and insect species that occur in Virginia. In its determination on candidate species, VDACS considers the state and range-wide status of the species and current protection provided the species through other statutes or rules and regulations. VDACS desires to assist in the preservation of Virginia's natural resources. Listing in the regulation is sought for rare plant and insect species that are, or are likely to be, in danger of extinction throughout its native range.</p> <p>On occasion, state and federal agencies have notified specific individuals of changes in rules and regulations. It is unknown if such notification has been employed by other states or federal agencies regarding changes to regulations for endangered and threatened plant and insect species. A certified letter containing the proposed changes to the regulation was sent to property owners of known locations for candidate species in accordance with directions from the VDACS Board and to ensure all landowners have every opportunity to comment on the proposed changes. The letter of notification emphasized the proposed regulations will provide protection to these plants and insect species, while ensuring the rights of landowners where the species are found.</p> <p>VDACS works closely with landowners and other state and federal agencies to promote and ensure the preservation of endangered and threatened plant and insect species. Management programs and cooperative agreements are developed for the conservation of endangered and threatened species. However, the Endangered Plant and Insect Species Act does not regulate the rights of property owners in regard to the protection of endangered and threatened plant and insect species. VDACS, in cooperation with other state and federal agencies, monitors the distribution and protection of regulated species. Inspectors in VDACS monitor the sale and</p>
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	<p>landowner rights or impede development, while affording property owners an opportunity of being protective stewards of rare species.</p> <p>She questioned what assurances VDACS has that recommended plant and insect species will be protected from adverse action by a landowner? Specifically, does VDACS have the resources to monitor species survival and protection?</p> <p>Ms. Staunton further asked if the taking of a species can be distinguished between man-made destruction and animal herbivory? What would VDACS do if the loss of a species were attributed to man-made destruction?</p>	<p>distribution of listed endangered and threatened plant and insect species. Law enforcement personnel throughout the state also enforce the law. The inventory of Virginia’s natural heritage resources is the purview of the Department of Conservation and Recreation.</p> <p>In most circumstances the extent of habitat alteration will allow distinguishing between man-made and herbivore destruction. Violation of the Endangered Plant and Insect Species Act rules and regulations are a Class 1 misdemeanor enforceable by any game warden or law enforcement officer. In addition, the Commissioner of Agriculture and Consumer Services or his assistants may issue a stop sale, seize, or return to the point of origin any species or part thereof found to be in violation of the Act or rules and regulations.</p>
<p>Thomas Smith</p>	<p>The Department of Conservation and Recreation, Division of Natural Heritage (DNH) stated that while some of their suggestions have been incorporated into the proposed regulation, several recommended changes were not evident. DNH feels that the list of protected species is appropriate. However, they felt the following changes should also be included in the regulation:</p> <p>Shale barren rockcress – currently listed as endangered and recommends change to threatened.</p> <p>Juniper sedge and Bentley’s coralroot – not included in the proposed regulations and recommends listing as endangered.</p> <p>Creeping St. John’s- wort, Rare skipper, and Regal fritillary – not included in the proposed regulations and recommends listing as endangered or threatened.</p> <p>Virginia Piedmont water boatman – proposed to be listed as endangered and recommends as threatened.</p>	<p>The agency agrees with the suggested change in status for shale-barren rockcress. The Nature Conservancy and Division of Natural Heritage currently designates Shale barren rockcress (<i>A. serotina</i>) populations as very rare globally and in the Commonwealth of Virginia. VDACS normally recommends a threatened designation for species with such population levels.</p> <p>The juniper sedge and Bentley’s coralroot are recent discoveries in the Commonwealth. The agency did not receive recommendations for these two species in prior reviews. The agency agrees with the suggested addition of juniper sedge and Bentley’s coralroot to the regulation. Populations of both species are considered very rare globally and extremely rare in the Commonwealth of Virginia.</p> <p>Creeping St. John’s wort, rare skipper, and Regal fritillary do not meet the requirement of being globally very or extremely rare; therefore, the agency does not recommend inclusion of these species in the regulation at this time.</p> <p>The agency disagrees with a recommended change in status for the Virginia Piedmont water boatman (<i>Sigara depressa</i>). The population rank of Virginia Piedmont water boatman is currently listed between rare but locally known to critically imperiled in the 2001</p>

	<p>Mitchell's/St. Francis satyr – proposed to be listed as threatened and recommend change to endangered.</p>	<p>edition of “Natural Heritage Resources of Virginia: Rare Animal Species” published by the Department of Conservation and Recreation. The wide range of the species status would indicate uncertainty as to population levels of this species. In conversations with Department of Natural Heritage zoologists, the species is more vulnerable to extinction than earlier determined. The status of this species will be narrowed to imperiled or critically imperiled in future publications of the Natural Heritage document. Such a decline in status would justify listing the species as endangered.</p> <p>The agency agrees with the recommended listing of Mitchell's/St Francis satyr as endangered.</p>
<p>Karen Mayne</p>	<p>The U.S. Department of Interior /Fish and Wildlife Service recommends that Seabeach amaranth (<i>Amaranthus pumilus</i>) be added to the threatened plant species list and Harperella (<i>Ptilimnium nodosum</i>) be added to the endangered plant species list. She further clarified that in the Federal Endangered Species Act, insects receive the same level of protection as all other animals.</p>	<p>The agency agrees with both recommended additions. The seabeach amaranth is globally rare and only occurs in three populations on Virginia’s eastern shore. This plant has recently been rediscovered after having been thought to be extinct in Virginia. The harperella is globally rare and exists in a single population in Stafford County. This plant species has just recently been documented in Virginia.</p>
<p>Ruth Douglas</p>	<p>As the coordinator of the alien species project for the Virginia Native Plant Society, Dr. Douglas commented on the need to protect the biodiversity of Virginia. Citizens of Virginia value the plants and animals of the Commonwealth and want to see them preserved. The Board was requested to approve the proposed plants and animals for addition to the state list of threatened and endangered species and to consider further additions to this list as appropriate.</p>	<p>VDACS supports the request.</p>

**All changes made in this regulatory action**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
2 VAC 5-320-10	<p>Section A.</p> <p>Section B.</p> <p>Section C.</p>	<p>Adoption of endangered and threatened plant and insect species by the Board of Agriculture and Consumer Services under authority of the Endangered Plant and Insect Species Act (§§3.1-1020 through 3.1-1030 of the Code of Virginia).</p>	<p>New Section A replaces first two sentences of regulation which was revised for clarification.</p> <p>New Section B lists endangered plant and insect species. Three plant species, mat-forming water-hyssop, piratebush, and variable sedge, are removed from the current list of endangered and threatened species. Nine plant and insect species, small-anthered bittercress, juniper sedge, Bentley’s coralroot, Mitchell’s satyr butterfly, Holsinger’s cave beetle, harperella, Buffalo Mountain mealybug, Virginia Piedmont water boatman and, running glade clover, are added to the list of endangered species. The status of one species, shale barren rockcress, is changed from endangered to threatened. The list includes plant and insect species that are considered to be extremely rare and critically imperiled both globally and in the Commonwealth of Virginia.</p> <p>New Section C lists threatened plant and insect species. Twelve plant and insect species, sensitive-joint vetch, seabeach amaranth, shale-barren rock cress, Northeastern beach tiger beetle, smooth coneflower, New Jersey rush, Northern prostrate clubmoss, narrow-leaved spatterdock, Eastern prairie fringed orchid, Appalachian grizzled skipper, Michaux’s sumac and, reclining bulrush, are listed as threatened species. The list includes plant and insect species that are considered to be very rare and imperiled globally and extremely rare and critically imperiled in the Commonwealth of Virginia.</p>

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**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability.*

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Unless otherwise discussed in this report, the amendments to this regulation will have no impact upon families.