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Final Regulation Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) citation(s)	2 VAC 5-320
Regulation title(s)	Regulations for the Enforcement of the Endangered Plant and Insect Species Act
Action title	Amend lists of endangered and threatened plant and insect species.
Date this document prepared	December 13, 2019

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

This regulatory action seeks to amend the lists of endangered and threatened plant and insect species by (i) removing from the regulation a plant species that is no longer believed to occur in the Commonwealth and (ii) adding to the endangered and threatened lists certain plant and insect species that are considered in danger of extinction or that are likely to become endangered in the foreseeable future throughout all or a significant portion of their native range. This action reflects the imperiled status of the various species, and it seeks to protect them from take and destruction. The amendments will also stimulate conservation programs to preserve and protect the listed species.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

"Board" means the Board of Agriculture and Consumer Services.

"Critically imperiled" means any population typically having five or fewer occurrences or 1,000 or fewer individuals.

"Imperiled" means any population typically having 6 to 20 occurrences or 1,001 to 3,000 individuals.

"Rare" means uncommon, infrequently occurring, or thin in density. "Rare" does not mean the specific population rarity rankings of plant and insect species.

"Endangered species" means any species or variety of plant life or insect life determined by the Board of Agriculture and Consumer Services to be in danger of extinction throughout all or a significant part of its range other than a species determined by the Commissioner of Agriculture and Consumer Services not to be in the best interest of the welfare of man.

"Threatened species" means any species determined by the Board of Agriculture and Consumer Services to be likely to become an endangered species within the foreseeable future throughout all or a significant portion of its native range.

Statement of Final Agency 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.

On December 12, 2019, the Board of Agriculture and Consumer Services (Board) adopted as final amendments to 2 VAC 5-320 *et seq.*, *Regulations for the Enforcement of the Endangered Plant and Insect Species Act*.

Mandate and Impetus

Please list all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously-reported information, include a specific statement to that effect.

There are no changes to previously-reported information.

Legal Basis

Please identify (1) the agency or other promulgating entity, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity's overall regulatory authority.

Section 3.2-109 of the Code of Virginia (Code) establishes the Board as a policy board. Section 3.2-1002(A) of the Virginia Endangered Plant and Insect Species Act (Va. Code § 3.2-1000 et seq.) (Act) authorizes the Board to adopt regulations including the listing of threatened or endangered species, their taking, quotas, seasons, buying, selling, possessing, monitoring of movement, investigating, protecting, or any other need in furtherance of the purposes of the Act. Section 3.2-1002(B) states that based upon investigations by the Commissioner of Agriculture and Consumer Services, recommendations from the Director of the Virginia Department of Conservation and Recreation (DCR) regarding candidate species, and from other reliable data, the Board shall approve proposed species (i) to be added to or deleted from the list of threatened species or the list of endangered species or (ii) to be transferred from one list to the other.

Purpose

Please explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

The regulatory action is essential to the preservation of critically imperiled and imperiled natural resources in Virginia, which, in turn, protects and promotes the public's health, safety, and welfare. Listing a species as threatened or endangered offers protection to plants and insects that are of aesthetic, ecological, educational, scientific, economic, or other value to the Commonwealth. It also provides for the development and implementation of protection, recovery, and conservation measures to ensure the survival of listed species while allowing projects that could impact those species to proceed in the most economical, biologically-sound, and environmentally-sensitive manner.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

This regulatory action removes (i) one plant species that is no longer believed to occur in the Commonwealth from the list of threatened species, (ii) adds three plant species and two insect species to the list of endangered species, and (iii) adds five plant species that are likely to become an endangered species within the foreseeable future throughout all or a significant portion of their native range to the list of threatened species.

Issues

Please identify the issues associated with the regulatory change, 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 there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

The primary advantage of the regulatory action is the protection of threatened or endangered plant or insect species that are of aesthetic, ecological, educational, scientific, economic, or other value and whose global populations are rare and imperiled. Once plants or insects are listed as threatened or endangered, the Virginia Department of Agriculture and Consumer Services

(VDACS) is able to collaborate with landowners, at the landowner’s discretion, to develop management plans that would support construction projects and other economic development activity on the landowner’s property while minimizing the impact on these valuable, imperiled natural resources. Moreover, when good cause is shown and when necessary to alleviate damage to property, to alleviate the impact on progressive development, or to protect human health, the Act includes a provision allowing the Commissioner to issue a permit authorizing the removal, taking, or destruction of a state listed species, provided that such action does not violate federal laws or regulations. The regulation does not apply to the owner of the property where listed species occur. There is no disadvantage to the landowner, public, or the Commonwealth associated with the amendments to the regulation.

Requirements More Restrictive than Federal

Please list all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously-reported information, include a specific statement to that effect.

The amendments to the regulation are not more restrictive than applicable federal requirements. Species protected by the Act may also be subject to federal guidelines regarding federally listed species when particular projects involve the use of federal funds or when federal lands are involved. In those cases, the landowner is already required to consult with the U.S. Fish and Wildlife Service to mitigate impacts on federally listed species. This regulatory action will not result in an additional compliance burden.

Agencies, Localities, and Other Entities Particularly Affected

Please list all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously-reported information, include a specific statement to that effect.

There are no changes to previously-reported information.

Under a memorandum of agreement, DCR conducts an initial review of proposed projects to determine any impact on listed endangered or threatened plant or insect species. The changes to the regulation will affect which species DCR investigates during such reviews but will not impact the number of reviews conducted.

No locality or other entity will bear a disproportionate material impact from the proposed amendments to this regulation.

Public Comment

Please summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Ensure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency or board. If no comment was received, enter a specific statement to that effect.

No comments were received during the public comment period covering July 8, 2019 to September 6, 2019. Additionally, no comments were received during the public hearing held on July 23, 2019.

Detail of Changes Made Since the Previous Stage

Please list all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Please put an asterisk next to any substantive changes.

No changes were made to the proposed amendments since the previous stage.

Detail of All Changes Proposed in this Regulatory Action

Please list all changes proposed in this action and the rationale for the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Please put an asterisk next to any substantive changes.

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
2 VAC 5-320-10	N/A	Currently, the regulation declares 20 species to be endangered.	The amendments to this regulation add the following five species to the list of endangered species because these species have been determined to be globally critically imperiled: (i) <i>Clematis addisonii</i> , (ii) <i>Ludwigia ravenii</i> , (iii) <i>Phemeranthus piedmontanus</i> , (iv) <i>Bombus affinis</i> , and (v) <i>Pseudanophthalmus parvicollis</i> .* Inclusion in this regulation is intended to prevent the extinction of these species in Virginia.
2 VAC 5-320-10	N/A	Currently, the regulation declares 13 species to be threatened.	The amendments to this regulation add the following five species to the list of threatened species because these species have been determined to be globally imperiled: (i) <i>Houstonia purpurea</i> var. <i>montana</i> , (ii) <i>Paxistima canbyi</i> , (iii) <i>Phlox buckleyi</i> , (iv) <i>Pycnanthemum torreyi</i> , and (v) <i>Rudbeckia heliopsidis</i> .* Inclusion in this regulation is intended to prevent these species from becoming endangered within the near future.
2 VAC 5-320-10	N/A	Currently, the regulation declares <i>Lycopodiella margueritiae</i> to be a threatened species	The amendments remove <i>Lycopodiella margueritiae</i> * from the list of threatened species because this plant species is no longer believed to occur in Virginia and, therefore, does not need to be included in the regulation.