



**Virginia
Regulatory
Town Hall**

Proposed Regulation Agency Background Document

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| Agency Name: | Department of Agriculture and Consumer Services |
| VAC Chapter Number: | 2 VAC 5-320 |
| Regulation Title: | Rules and Regulations for the Enforcement of the Endangered Plant and Insect Species Act |
| Action Title: | Amend |
| Date: | May 1, 2001 |

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The purpose of the present regulatory action is to review the regulation for effectiveness and continued need, including the following: Amending the regulation to (1) remove the currently named plants that are no longer considered globally rare and (2) add those threatened or endangered plant and insect species that are considered rare both globally and in Virginia.

Note: The term "rare" used in this document is a general concept meaning uncommon, infrequently occurring, or thin in density and does not refer to the specific population rarity rankings of plants and insects occurring in the Substance section.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

Section 3.1-1025 of the Code of Virginia (1950), as amended, (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.1-1025>) gives the Board 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.”

Whether the regulation is mandated by state law or not is not clear. There appears to be a conflict in the authorizing statute. §3.1-1025(A) of the Code of Virginia states that:

“the Board may prescribe and adopt regulations including, but not limited to, the listing of endangered or threatened species...” (emphasis added)

However, §3.1-1025(D) states that as a result of investigations by the Commissioner of Agriculture and Consumer Services and recommendations of the Department of Conservation and Recreation:

“...the Board shall approve proposed species to be added to or deleted from the list of endangered species or the list of threatened species, or to be transferred from one list to the other.” (emphasis added)

For the purpose of this statement, deference is given to authority contained in §3.1-1025(D) that the regulation is mandated by state law.

The Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation.

VDACS has reviewed recommendations provided by the Department of Conservation and Recreation and agrees that the regulation should be amended. We concur with the

recommendation to remove three plant species from the regulation. We believe there is merit in listing sixteen of the recommended plant and insect species as threatened or endangered; however, there is not evidence of sufficient global rarity for the remaining eleven plants and insects to be considered for listing at this time even though the species may be rare in Virginia.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

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:

- *Restriction on the take and trafficking in listed species,*
- *Federal aid to state conservation departments with cooperative endangered species agreements for conservation and recovery of the species or for surveys,*
- *Greater recognition of the species' precarious status, encouraging voluntary conservation efforts by other agencies, organizations and individuals,*
- *Establishment of programs for the management and conservation of listed species to help assure survival of the species,*

- *Protects the landowner, on whose property a listed species occurs, from unauthorized collecting, taking, cutting, etc., and*
- *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. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The listed ranking of known biological rarity of plant and insect species was supplied by the Virginia Department of Conservation and Recreation's Natural Heritage Division.

Ranking Key: G=Global Population Rarity S=State Population Rarity T=Subspecies

1=Extremely Rare/Critically Imperiled 2=Very Rare/Imperiled 3=Rare/Uncommon

4=Common/Apparently Secure 5=Very Common/Demonstrably Secure

The following plant species are recommended for removal from the regulation:

| <u>SCIENTIFIC NAME</u> | <u>COMMON NAME</u> | <u>RANKING</u> |
|--------------------------------|---------------------------------|----------------|
| <u>Bacopa stragula</u> | <i>Mat-forming Water Hyssop</i> | <i>G5/S2</i> |
| <u>Buckleya distichophylla</u> | <i>Piratebush</i> | <i>G3/S2</i> |
| <u>Carex polymorpha</u> | <i>Variable Sedge</i> | <i>G3/S2</i> |

The following plant species are recommended for addition to the regulation as endangered:

| <u>SCIENTIFIC NAME</u> | <u>COMMON NAME</u> | <u>RANKING</u> |
|------------------------------|-----------------------------------|----------------|
| <u>Cardamine micranthera</u> | <i>Small-anthered bittercress</i> | <i>G1/S1</i> |
| <u>Trifolium calcaricum</u> | <i>Running glade clover</i> | <i>G1/S1</i> |

The following plant species are recommended for addition to the regulation as threatened:

| <u>SCIENTIFIC NAME</u> | <u>COMMON NAME</u> | <u>RANKING</u> |
|----------------------------------|---------------------------------------|----------------|
| <u>Aeschynomene virginica</u> | <i>Sensitive-joint vetch</i> | G2/S2 |
| <u>Echinacea laevigata</u> | <i>Smooth coneflower</i> | G2/S2 |
| <u>Juncus caesariensis</u> | <i>New Jersey Rush</i> | G2/S2 |
| <u>Lycopodiella margueritiae</u> | <i>Northern prostrate clubmoss</i> | G2/S1 |
| <u>Nuphar sagittifolia</u> | <i>Narrow-leaved spatterdock</i> | G2/S1 |
| <u>Platanthera leucophaea</u> | <i>Eastern prairie fringed orchid</i> | G2/S1 |
| <u>Rhus michauxii</u> | <i>Michaux's sumac</i> | G2/S2 |
| <u>Scirpus flaccidifolius</u> | <i>Reclining bulrush</i> | G2/S1 |

The following insect species are recommended for addition to the regulation as endangered:

| <u>SCIENTIFIC NAME</u> | <u>COMMON NAME</u> | <u>RANKING</u> |
|-------------------------------------|--|----------------|
| <u>Puto kosztarabi</u> | <i>Buffalo Mountain mealybug</i> | G1/S1 |
| <u>Pseudanophthalmus holsingeri</u> | <i>Holsinger's cave beetle</i> | G1/S1 |
| <u>Sigara depressa</u> | <i>Virginia Piedmont water boatman</i> | G1/S1 |

The following insect species are recommended for addition to the regulation as threatened:

| <u>SCIENTIFIC NAME</u> | <u>COMMON NAME</u> | <u>RANKING</u> |
|------------------------------------|--|----------------|
| <u>Cicindela dorsalis dorsalis</u> | <i>Northeastern beach tiger beetle</i> | G4T2/S2 |
| <u>Neonympha mitchellii</u> | <i>Mitchell's satyr butterfly</i> | G2/S1 |
| <u>Pyrgus wyandot</u> | <i>Appalachian grizzled skipper</i> | G2/S2 |

Note: In the case of the Northeastern beach tiger beetle, Cicindela dorsalis dorsalis, while the species is only rated common globally, the subspecies listed is rated very rare globally. Both the species and the subspecies are very rare in Virginia.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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, please include a sentence to that effect.

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 have 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 will be 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 have been notified by certified mail that the potential threatened or endangered species exists on their property.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

The Virginia Department of Agriculture and Consumer Services currently spends approximately \$65,000 in state general funds (Fund 01/Detail 00) to implement the Virginia Endangered Plant and Insect Species Act and this regulation. In Program 535, Subprogram 04, Plant Pest and Disease Control, projected annual expenditures in the Endangered Species Program (Cost Code 820) are \$55,000 in personnel costs and \$5,000 in operational costs. However, this does not include approximately \$5,000 - \$7,000 in annual state/federal cost share payments by the Commonwealth for conservation projects. All of these expenditures are on-going.

There are no specific costs incurred by localities resulting from the existing regulation or the proposed revisions. However, any major construction conducted by public or private construction companies on land that is not owned by the builder is subject to this regulation. Virginia statute requires the review of over 1,000 requests annually for information regarding anticipated impacts of proposed projects to threatened or endangered plant or insect species listed in this regulation. Fewer than 1% of these projects are impacted by the existing statute and regulation. Generally, a cost of several hundred dollars is required by the developer to conduct a survey for the endangered or threatened plants or insects that are known to be in the vicinity of the construction. Fewer than 1% of the surveys detect protected plants or insects that require the developer to incorporate mitigating practices into their project. There is no way to estimate the potential cost of these project changes, but it is rare that a significant change must be made to the project.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

2VAC5-320-10. The status of three currently listed endangered plants has improved. Since these plants are no longer considered globally rare, the agency proposes to remove them from the regulation. In addition, the agency proposes that ten threatened or endangered plant species and six threatened or endangered insect species be added to the regulation, since they are considered rare both globally and in Virginia.

The following illustrates the rarity of the proposed endangered plant and insect species: Small-anthered bittercress was thought to be globally extinct until it was rediscovered in 1985 along the Virginia-North Carolina border; running glade clover is known to exist at only two sites in Virginia and one in Tennessee; Virginia Piedmont water boatman was thought to be globally extinct until it was rediscovered in 1997 in northeastern Virginia; Holsinger's cave beetle is

globally known to exist in one Virginia cave; and Buffalo Mountain mealybug also globally exists in only one location in Floyd County, Virginia.

The proposed threatened plant and insect species are also rare with each species’ populations existing in less than twenty-five sites globally. Northern prostrate clubmoss, narrow-leaved spatterdock, Eastern prairie fringed orchard, and Michaux’s sumac are each known to exist in only one Virginia site; reclining bullrush is found in only two Virginia sites; and smooth coneflower is known in six Virginia sites. As stated previously, the purpose of adding these plants and insects to Virginia’s threatened and endangered list is to protect and prevent these extremely rare populations from becoming extinct in Virginia and in some cases globally.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

Due to the mandate for this regulation in accordance with §3.1-1025(D) of the Code of Virginia (1950), as amended, an alternative measure does not exist. As addressed in the Issues section on page 4, federal protection of threatened or endangered plants or insects is only afforded to federal lands or development utilizing federal funding. Virginia’s Endangered Plant and Insect Species Act and this regulation offer protection of listed threatened or endangered plants or insects on all Virginia public and private lands.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

The agency received no public comment in response to the Notice of Intended Regulatory Action.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The agency, through examination of the regulation, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The agency intends to review this regulation within three years after the amended regulation takes affect.

The specific and measurable goals of this regulation are (1) 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 (2) the affording of protection to endangered and to threatened plant species and insect species in Virginia.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

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