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Regulatory  
Town Hall

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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Department of Agriculture and Consumer Services
<b>Virginia Administrative Code (VAC) citation</b>	2 VAC 5-320
<b>Regulation title</b>	Rules and Regulations for the Enforcement of the Endangered Plant and Insect Species Act
<b>Action title</b>	Amend
<b>Date this document prepared</b>	December 9, 2011

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.*

The purpose of the present regulatory action is to amend the regulation to (1) remove the species that are no longer considered globally rare and (2) add those threatened or endangered plant and insect species that are considered to be globally rare.

### 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.*

As used in this background document, the term "rare" means uncommon, infrequently occurring, or thin in density, and does not refer to the specific population rarity rankings of plant and insect species.

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.*

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Section 3.2-1002 of the Code of Virginia authorizes the Board of Agriculture and Consumer Services to adopt regulations listing threatened or endangered plant and insect species, their taking, quotas, seasons, buying, selling, possessing, monitoring of movement, investigating, protecting, or any other related action. As a result of research conducted by the Commissioner of Agriculture and Consumer Services, recommendations received regarding candidate species from the Director of the Department of Conservation and Recreation, and from other sound, scientific data, the Board may approve proposed plant or insect species to be added to, or deleted from, the list of threatened and endangered species, or to be transferred from one list to the other.

### 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, the environmental benefits, and the problems the proposal is intended to solve.*

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This regulation seeks to protect those plants and insects found in Virginia that are of aesthetic, ecological, educational, scientific, economic, or other value and whose global populations are imperiled. The regulation also provides for the development and implementation of biologically sound and economically feasible protection, recovery and conservation measures that seek to ensure the survival of listed species while at the same time allowing citizens and entities to conduct their business or pursue construction projects in the most economical and least disruptive manner.

Benefits of this regulation include (1) the establishment of science-based, reasonable restrictions on the take and trafficking of listed species, (2) promotion of greater voluntary conservation efforts through recognition of a species' imperiled status, (3) providing impetus for the establishment of programs for the management and conservation of listed species, and (4) providing for the lawful harvest and export of listed species through approved management plans.

### Substance

*Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)*

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VDACS recommends the regulation be amended by 1) removing one plant species from the regulation and 2) adding three plant species and one insect species to the threatened or endangered lists.

The following species is recommended for removal from the regulation:

<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>
<i>Nestronia umbellula</i>	nestronia

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

<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>
<i>Boltonia montana</i>	valley doll's-daisy
<i>Isoetes virginica</i>	Virginia quillwort
<i>Pseudanophthalmus thomasi</i>	Thomas' cave beetle

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

<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>
<i>Clematis viticaulis</i>	Millboro leatherflower

**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 indicate.*

The primary advantage of the proposed regulatory action is the protection of threatened or endangered plant and 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 regulation enables the Virginia Department of Agriculture and Consumer Services 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, impact on progressive development, or to protect human health, the Virginia Endangered Plant and Insect Species Act includes a provision allowing for the removal or destruction of a state listed species.

**Requirements more restrictive than federal**

*Please identify and describe any requirements of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

This regulatory proposal is not more restrictive than applicable federal requirements. Species protected by the Virginia Endangered Plant and Insect Species Act may also be subject to federal guidelines regarding federally listed species when particular projects involve the use of federal funds used or when federal lands are involved. In those cases, the landowner is already required to consult with the United States Fish and Wildlife Service to

mitigate impacts on federally listed species, so this regulatory action will not result in an additional compliance burden.

**Localities particularly affected**

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

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

**Public participation**

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email or fax to:

Erin Williams  
Policy & Planning Coordinator  
VDACS, Division of Consumer Protection  
P.O. Box 1163  
Richmond, VA 23218,  
[Erin.Williams@vdacs.virginia.gov](mailto:Erin.Williams@vdacs.virginia.gov)  
FAX: 804-371-7479

Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last date of the public comment period.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirements creates the anticipated economic impact.*

<b>Projected cost to the state to implement and enforce the proposed regulation, including</b>	Currently, the Virginia Department of Agriculture and Consumer Services spends approximately \$89,000 in
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<p><b>(a) fund source, and (b) a delineation of one-time versus on-going expenditures.</b></p>	<p>General Funds annually on personnel, travel, and conservation grants related to the Endangered Plant and Insect Species Program. The proposed regulation is not expected to result in additional costs.</p>
<p><b>Projected cost of the <i>new regulations or changes to existing regulations</i> on localities.</b></p>	<p>No additional costs to localities are anticipated.</p>
<p><b>Description of the individuals, businesses or other entities likely to be affected by the <i>new regulations or changes to existing regulations</i>.</b></p>	<p>Landowners and their agents, including construction companies undertaking work at the direction of the landowner on the landowner’s property, are exempt from the regulations regarding threatened and endangered plant and insect species occurring on or within their property. Any major construction project conducted by public or private construction companies on land that is not owned by the builder or developer will be subject to this regulation.</p>
<p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>On average, developers and environmental consultants submit approximately 1,000 requests a year seeking information about the anticipated impact of various construction projects on threatened or endangered plant or insect species. The requests are typically filed with the Department of Conservation and Recreation, the Department of Game and Inland Fisheries, the Department of Motor Vehicles, and, in some cases, the Department of Agriculture and Consumer Services. Less than 1% of the requests involve projects that are impacted by the existing statute and regulations. Moreover, because of the isolated environs where the proposed species are located, the imperiled populations would not be impacted by any construction or other projects. No small businesses will be impacted, either.</p>
<p><b>All projected costs of the <i>new regulations or changes to existing regulations</i> for affected individuals, businesses, or other entities. Please be specific and include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</b></p>	<p>As previously indicated, less than 1% of the requests involve projects that are impacted by the existing statute and regulations. Because of the isolated environs where the proposed species are located, this regulatory action is not expected to result in costs to landowners or their agents who are exempt from its provisions. Moreover, when good cause is shown and when necessary to alleviate damage to property, impact on progressive development, or to protect human health, the statute already includes a provision allowing for the removal or destruction of a state listed species.</p>
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>This regulation seeks to protect those plants and insects found in Virginia that are of aesthetic, ecological, educational, scientific, economic, or other value and whose global populations are imperiled.</p>

**Alternatives**

*Please describe any viable 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. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

There are no other viable alternatives to the proposed regulatory actions.

**Regulatory flexibility analysis**

*Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

Due to the mandate for this regulation in accordance with § 3.2-1002(B) of the Code of Virginia (1950), as amended, an alternative regulatory measure does not exist. Federal protection of threatened or endangered plants or insects extends only to federal lands or to development projects that utilize federal funding. Virginia’s Endangered Plant and Insect Species Act and this regulation offer protection for listed threatened or endangered plants or insects on all Virginia lands.

**Public comment**

*Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.*

<b>Commenter</b>	<b>Comment</b>	<b>Agency response</b>
Melanie Smith	1. The proposed list does not contain plants and insects UNIQUE to Virginia. Unless all other states join in, why should Virginia be responsible for these bugs and weeds?	1. Species contained in the Regulations for the Endangered Plant and Insect Species Act (EPISA) are not required to be unique to the Commonwealth of Virginia. Such species must be in danger of extinction or likely to become an endangered species in the foreseeable future throughout all or a significant part of its range unless otherwise determined by the Commissioner (Va Code § 3.2-1000). Several protected species are found only in Virginia. Others may be found in only a few locations outside of the State. Candidate species are

	<p>2. Until such time that the economy improves, it is unlikely that citizens are going to go out to purchase plant and insect killer at the levels they may have in the past.</p> <p>3. During this bad economy, people get angry when the state wastes time and money on NON-URGENT issues. Virginia lawmakers should try to reduce government and UNNECESSARY regulation when families are struggling to feed their families. Preserving these things should be left to the 4H clubs, Boy Scouts, etc.</p>	<p>likewise required to be, or likely to become, an endangered species throughout all or a significant portion of its native range in order to be included in the regulation.</p> <p>2. Threats to regulated species include, but are not limited to, harvesting for collection or sale, roadway construction, housing development, power-line installation, bridge construction, and pest control. Inclusion in the regulations provides necessary protection for plant and insect species in jeopardy of extinction from adverse activities that could result in its removal, take, or loss of habitat (Va Code § 3.2-1003).</p> <p>3. Periodic review of these regulations is a required activity. Review of the regulations is beneficial in determining the status of plant and insect species for listing, transfer from one list to another, or delisting.</p>
<p>David E. Lee</p>	<p>I am not for expanding the list of endangered species. Too many regulations now. Cut back.</p>	<p>Consideration by the Board of Agriculture and Consumer Services includes reduction or elimination of this regulation. Where adequate information is available to determine if management measures are necessary to assure continued ability to sustain successfully plant and insect species which are likely to become endangered or in danger of extinction throughout all or a significant part of its range, the Board is directed in the Code of Virginia to approve proposed species to be added to or deleted from the list of threatened species or the list of endangered species, or to be transferred from one list to the other (Va Code § 3.2-1002).</p>

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent 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.

The amendments to this regulation will have no impact upon the institution of the family or family stability.

**Detail of changes**

Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all differences between the **pre-emergency** regulation and this proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulation(s), use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
2 VAC 5-320-10	N/A	Establishes lists of endangered and threatened species.	<p>The proposed amendments to this regulation add the following three species to the list of endangered species: (1) <i>Boltonia montana</i>, (2) <i>Isoetes virginica</i>, and (3) <i>Pseudanophthalmus thomasi</i>. This amendment is proposed due to globally rare status of these species. Inclusion in this regulation is intended to prevent the extinction of these species in Virginia.</p> <p>The proposed amendments remove <i>Nestronia umbellula</i> from the regulation. This amendment is proposed due to the secure status of this species.</p> <p>The proposed amendments add <i>Clematis viticaulis</i> to the list of threatened species. This amendment is proposed due to globally rare status of this species. Inclusion in this regulation is intended to prevent the extinction of this species in Virginia.</p>