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Notice of Intended Regulatory Action (NOIRA) 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	Amendments to the lists of endangered and threatened plant and insect species
Date this document prepared	March 23, 2018

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Subject matter and intent

Please describe briefly the subject matter, intent, and goals of the planned regulatory action.

The proposed 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 globally rare, 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 proposed amendments will also stimulate conservation programs to preserve and protect the affected species.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and(2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should 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's overall regulatory authority.

Section 3.2-109 of the Code of Virginia (Code) established the Board of Agriculture and Consumer Services (Board) as a policy board.

Section 3.2-1002(A) of the Code 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 Virginia Endangered Plant and Insect Species 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 Department of Conservation and Recreation 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 describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.

The proposed action is essential to the preservation of rare 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 building projects that could potentially 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 that are being considered, the substantive changes to existing sections that are being considered, or both.

The Board will consider amendments to the current lists of threatened and endangered plant and insect species and any additional amendments it deems relevant to the revised lists.

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.

No alternative action is available to afford equivalent protection from the taking or destruction of those plant and insect species that are in danger of extinction or that are likely to become endangered in the foreseeable future.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency’s contact if you’re interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

A regulatory advisory panel will not be used to assist in the development of the proposed amendments.

Periodic review and small business impact review report of findings

If this NOIRA is the result of a periodic review/small business impact review, use this NOIRA to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

The agency did not receive any comments during the public comment period that followed the publication of the Notice of Periodic Review on October 2, 2017. 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 agency has determined that this regulation is clearly written, easily understandable, and not unnecessarily complex. Additionally, the agency has also determined that this regulation’s listing of a species as threatened or endangered continues to offer protection to plants and insects that are of aesthetic, ecological, educational, scientific, economic, or other value to the Commonwealth.

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 a public or private construction company on land that is not owned by the builder or developer will be subject to this regulation. According to agency documentation, 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 and less than one percent of the requests involve projects that are impacted by the Virginia Endangered Plant and Insect Species Act and the regulation. Small businesses will be minimally impacted due to the fact that the environs where many of the proposed species are located are isolated and largely on private property.

Since the agency last amended this regulation, it has not received any complaints regarding the regulation. This regulation does not conflict with federal law. The agency has determined that, since the regulation was last amended, it is likely that changes have occurred that necessitate the proposed regulatory action 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 globally rare, 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.