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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Board of Agriculture and Consumer Services
<b>Virginia Administrative Code (VAC) citation(s)</b>	2 VAC 5-320
<b>Regulation title(s)</b>	Regulations for the Enforcement of the Endangered Plant and Insect Species Act
<b>Action title</b>	Amend lists of endangered and threatened plant and insect species
<b>Date this document prepared</b>	March 18, 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.*

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 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 proposed 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.*

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"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.

### Mandate and Impetus

*Please identify the mandate for this regulatory change, and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, board decision, etc.). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."*

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The proposed amendments to the regulation are the result of a periodic review completed in 2017. The regulation was last amended in 2013.

### 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.*

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Section 3.2-109 of the Code of Virginia (Code) establishes the Board of Agriculture and Consumer Services (Board) as a policy board within the meaning of Va. Code § 2.2-2100.

Section 3.2-1002(A) of the Endangered Plant and Insect Species Act (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.*

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The proposed 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.*

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The Board proposed to amend the regulation to (i) remove one plant species that is no longer believed to occur in Virginia from the list of threatened species, (ii) add two insect and three plant species that are in danger of extinction to the list of endangered species, and (iii) add 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.*

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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 (VDACS) 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 for the removal, taking, or destruction of a state listed species. 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 proposed amendments to the regulation.

## Requirements More Restrictive than Federal

*Please identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.*

The proposed 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 identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.*

Under a memorandum of agreement, DCR conducts an initial review of proposed projects to determine any impact on listed endangered and threatened plant and insect species. The proposed 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.

**Economic Impact**

*Pursuant to § 2.2-4007.04 of the Code of Virginia, please identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Please keep in mind that this is change versus the status quo.*

**Impact on State Agencies**

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:                  a) fund source / fund detail;                  b) delineation of one-time versus on-going expenditures; and                  c) whether any costs or revenue loss can be absorbed within existing resources</p>	<p>There is no cost to the agency associated with the proposed amendments to the regulation.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>There is no cost to other state agencies associated with the proposed amendments to the regulation.</p>

<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>There are no economic benefits to state agencies associated with the proposed amendments to the regulation.</p>
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**Impact on Localities**

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>There is no cost to localities associated with the proposed amendments to the regulation.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>There are no economic benefits for localities associated with the proposed amendments to the regulation.</p>

**Impact on Other Entities**

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</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, which could result in impacts to such a project if one of the new species included in the proposed amendments is found to be present on the project site.</p>
<p>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. Small business means a business entity, including its affiliates, that:  a) is independently owned and operated and;  b) 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 (many of whom are small businesses) submit fewer than 100 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 DCR, the Virginia Department of Game and Inland Fisheries, and, in some cases, VDACS. Less than one percent of the requests involve projects that are impacted by the existing statute and regulations. Moreover, because of the isolated habitat where the proposed species are located, the imperiled populations would likely not be impacted by any construction or other projects. Therefore, the agency anticipates that no small businesses will be impacted by the proposed amendments to the regulation.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please be specific and include all costs including, but not limited to:  a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses;</p>	<p>As previously indicated, less than one percent of environmental impact requests involve projects that are impacted by the existing statute and regulations. The proposed regulatory changes are not expected to increase costs to businesses or other entities. This regulatory action will not result in costs to landowners or their agents who are exempt from its provisions. Moreover, when</p>

<p>b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change;                  c) fees;                  d) purchases of equipment or services; and                  e) time required to comply with the requirements.</p>	<p>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 statute includes a provision allowing for the removal or destruction of a state listed species.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>The proposed amendments to the regulation seek to provide certain protections for 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 regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.*

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.

## Regulatory Flexibility Analysis

*Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.*

There is no viable alternative regulatory method. The Act and this regulation offer protection for listed threatened or endangered plant species or insect species on all Virginia lands. The regulation is necessary for the protection of globally critically imperiled and imperiled plant and insect species that occur in the Commonwealth of Virginia. The Act provides that 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 Commissioner may issue a permit authorizing the removal, taking, or destruction of a state listed species.

## 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.*

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No comments were received during the public comment period for the Notice of Intended Regulatory Action.

## Public Participation

*Please include a statement that in addition to any other comments on the regulatory change, the agency is seeking comments on the costs and benefits of the regulatory change and the impacts of the regulated community. Also, indicate whether a public hearing will be held to receive comments.*

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In addition to any other comments, the Board of Agriculture and Consumer Services (Board) is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the 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 for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Written comments must include the name and address of the commenter. Comments may also be submitted by mail, email or fax to:

Keith Tignor  
P.O. Box 1163  
Richmond, VA 23218  
Telephone: 804-786-3515  
FAX: 804-371-7793  
Email: [keith.tignor@vdacs.virginia.gov](mailto:keith.tignor@vdacs.virginia.gov)

In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage of this regulatory action.

## Detail of Changes

*Please list all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation.*

*If the regulatory change will be 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 change. Delete inapplicable tables.*

*If the regulatory change is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below. Please include citations to the specific section(s) of the regulation that are changing.*

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For changes to existing regulation(s), please use the following chart:

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 proposed 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 proposed 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 heliopsisidis</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 proposed 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.