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AMENDMENT TO TITLE 13. CONSERVATION AND DEVELOPMENT-- PARKS AND RESERVATIONS CHAPTER 1B. DEPARTMENT OF CONSERVATION AND ECONOMIC DEVELOPMENT ARTICLE IIC. DIVISION OF PARKS, FORESTRY, AND RECREATION

Section One--Name.

This act shall be known and may be cited as the "New Jersey Native Plant Protection Act."

Section Two--Legislative Findings and Declarations.

The Legislature finds and declares that certain native plants and native ecological communities are entitled to protection as a matter of general state concern. Plants and ecological communities native to New Jersey have medicinal, historical, genetic, ecological, educational, recreational, scientific, and aesthetic value.

Many plants and ecological communities native to New Jersey are in jeopardy due to (i) the activities of both individual persons and governmental agencies, and to (ii) the occurrence of certain invasive plants, each of which tends to degrade or destroy native plant populations and native ecological communities in this state. Therefore, it is the policy of the State to ensure the protection of our State's native plants and native ecological communities.

The federal endangered species act of 1973 provides for the protection of wild plants threatened with worldwide extinction by prohibiting the importation of endangered or threatened wild plants and by restricting and regulating interstate and foreign commerce in wild plants taken in violation of state, federal and foreign laws. New Jersey hereby assumes its responsibility for conserving its native plants and native ecological communities to assure their security for future generations. To that end, the legislature hereby restricts the taking, possession or marketing of rare plants in this state, establishes a program for the conservation of rare plants and rare ecological communities, and seeks to control or eradicate invasive plants.

Section Three--Definitions. As used in this act:

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“Artificial population” means any population of rare plants that has been deliberately or accidentally introduced by any person to an area by any means other than an official program of the Department or a private program allowed by special permission of the Department, the intent of which is to further the conservation of the rare plants thus introduced.

"Commissioner" means the Commissioner of the New Jersey Department of Environmental Protection.

"Conservation" means the protection of rare plants and rare ecological communities.

"Critical habitat" means specific areas of the state on which are found the physical or biological features essential to the conservation of rare plants and rare ecological communities.

"Cumulative impacts" means those direct and indirect impacts on a species or its habitat that may result from the proposed action and other past, present, and reasonably foreseeable future actions.

"Department" means the New Jersey Department of Environmental Protection.

"Disturb" in the definition of "take" means an intentional or negligent act or omission which injures or creates the likelihood of injury to a rare plant population or rare ecological community by impacting it to such an extent as to significantly disrupt or alter its normal physiology or required biological patterns, life stages, or cycles, including habitat modification, degradation, or alteration.

“Ecological Community” means any officially recognized unit of distinct vegetation composition.

"Endangered plant" means any native plant taxon whose survival in the State or the nation is in jeopardy, including, but not limited to, any plant native to New Jersey that is designated as listed, proposed, or under review by the federal government as endangered or threatened throughout its range in the United States pursuant to the "Endangered Species Act of 1973," Pub.L.93-205 (16 U.S.C. § 1533), any additional plant known or believed to be rare throughout its worldwide range, and any plant having five or fewer extant populations within the State. The term shall not include any plant determined by the Director to constitute an invasive plant.

"Jeopardize" means to engage in an action that reasonably would be expected, directly, indirectly or cumulatively, to reduce the likelihood of

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recovery or maintenance in the wild of any listed plant or ecological community.

“Maintenance” means the conservation measures implemented for the purpose of protecting a rare plant population or rare ecological community that, for biological or ecological reasons, has never been and/or can never be expected to become securely established in the state, and thus may not qualify for recovery.

“Native” means indigenous to the state as determined by the Department.

“Invasive plant” means any plant that is, or is liable to be, troublesome, aggressive, intrusive, detrimental, harmful or destructive to agriculture, silviculture, rare plants or rare ecological communities, is difficult to control or eradicate, and which has been designated an invasive plant by this State.

"Person" means an individual, corporation, partnership, trust, association or other private entity or any officer, employee, agent, department or instrumentality of the federal government, the State government, or municipality or political subdivision of the State.

"Plant" means any member of the Plant Kingdom, at any officially recognized taxonomic level, including all roots, stems, leaves, flowers, fruits, seeds, spores, gametophytes and other parts thereof.

“Population” means all of the plants of a given taxonomic level that share a distinct geographic area, as determined by the Department.

"Private applicant" means any non-governmental person who has applied for an incidental take permit under this Act.

"Rare Plant" means any endangered or threatened plant as recognized by the state of New Jersey.

“Rare Ecological Community” means an ecological community that is recognized by the state of New Jersey as being of conservation priority. A rare ecological community may or may not include individual rare plants or rare plant populations.

"Reasonable and prudent alternatives" means alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are legal, economically and technologically feasible, and that the department believes would avoid the likelihood of jeopardizing the conservation of rare plants or rare ecological communities.

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"Recovery" means the successful restoration of a rare plant population or rare ecological community, so that the measures provided by this Act on its behalf are no longer necessary.

"Restoration" means the collective activities and measures implemented for the purpose of re-establishing the integrity and security of a rare plant population or rare ecological community that has been degraded.

"Species" means any officially recognized plant designated with a standard binomial name.

"Subspecies" means any officially recognized plant designated with a trinomial name indicating that taxonomic level.

"Survival habitat" means the habitat necessary to support the survival of a listed plant before critical habitat is identified.

"Take" means to disturb, harm, kill, pick, collect, or dig-up, or to attempt to engage in any such conduct.

"Taxon" means any officially recognized species, subspecies, or variety of plant.

"Threatened plant" means any plant that may become endangered if conditions affecting it begin or continue to deteriorate. The term shall not include any plant determined by the Department to be an invasive plant.

"Variety" means any officially recognized plant designated by a trinomial name indicating that taxonomic level.

Section Four--Plant Lists and Rare Ecological Community List.

- A. Within one year of the effective date of this act, the Department, on the basis of research and investigation, and with the benefit of public comment, shall develop and adopt, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), a list of plants occurring in the State which are Endangered or Threatened, and a list of rare ecological communities.
- B. The Department shall further, on the basis of research and investigation, and with the advice of the State Department of Agriculture and the benefit of public comment, develop and adopt, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), a list of invasive plants.
- C. The Department shall further, on the basis of research and investigation, and with the advice of the State Department of Agriculture and the benefit of public comment, develop and adopt, pursuant to the "Administrative

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- Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), a list of rare plants that are allowed to be used for ornamental and landscaping purposes.
- D. The Department shall utilize existing guidelines by which an interested person may petition the department to revise any of the above lists.
 - E. The Department may, in the absence of a petition from an interested party, revise any of the above lists under the same procedure applicable to non-departmental petitions.
 - F. Notwithstanding any other paragraph in this Section, the Department may adopt a regulation which effectively revises any of the above lists:
 - 1) as an emergency regulation if the Department finds that there is an emergency posing a significant threat to the continued existence of a rare plant or rare ecological community; or
 - 2) if a plant or ecological community so closely resembles a listed plant or ecological community that enforcement personnel would have difficulty differentiating between the listed and unlisted plants or communities, and the effect of this difficulty is an additional threat to a listed plant or community; or
 - 3) if such regulation will substantially facilitate the enforcement and further the policy of this Act.
 - G. In any case in which the Commissioner contemplates the revision of any of the lists, he shall consult the Advisory Committee (See Section 16 D).
 - H. The Commissioner shall hold a public hearing prior to any revision of any such list.

Section Five--Rare Plant and Ecological Community General Protection.

- A. The Department may establish such programs as it deems necessary to protect and conserve rare plants and rare ecological communities. Such programs may be established, implemented, or conducted through or in conjunction with other appropriate Department programs.
- B. Without limiting the Department in establishing such programs, the Department may:
 - 1) develop measures, including habitat acquisition, to protect rare plant populations and rare ecological communities;
 - 2) identify measures that each state agency shall implement to conserve rare plant populations and rare ecological communities;
 - 3) develop economic incentives to conserve rare plant populations and rare ecological communities;

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- 4) develop criteria for evaluating the progress of state agencies toward conservation of rare plant populations and rare ecological communities; and
 - 5) develop any other program consistent with the conservation goals of this Act.
- C. The Department is specifically authorized to enter into written agreements with any person to promote the recovery or maintenance of any rare plant populations and rare ecological communities. Any such agreements shall follow existing recovery plans to the extent possible, and shall include, at a minimum:
- 1) objective and measurable recovery or maintenance goals;
 - 2) site-specific and other specific management actions necessary for achieving stated goals; and
 - 3) a monitoring plan and strategy to accommodate changes in circumstances.
- D. The department shall provide for an opportunity for public participation in the development of any conservation agreement under this Section.
- E. It is the intention of the Legislature to promote the voluntary conservation of rare plants and rare ecological communities. Therefore, lands assessed under, or receiving property tax deductions or reductions pursuant to, any forestry, agriculture, open space or other similar use assessment may be the subject of a written species conservation agreement, and unless a higher use or development intensity is made of or on such lands pursuant to the conservation agreement, implementation of the requirements of the conservation agreement shall not cause or be used to justify the loss of a forestry, agricultural or open space assessment or designation.

Section Six--Rare Plant and Ecological Community Conservation Plans.

- A. The Department shall, based on the best scientific information available, develop conservation plans designed to promote the recovery or maintenance of rare plant populations and rare ecological communities.
- B. To the extent scientifically practicable and advisable, the Department may develop conservation plans that include several rare plant populations and/or rare ecological communities that utilize similar habitats or share a common threat or both. A multiple-taxon conservation plan shall address the conservation of each listed taxon as required by this Section.

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- C. The department shall incorporate in each conservation plan: (i) objective and measurable criteria, including habitat needs and population levels consistent with this Act; (ii) a general description of types of actions likely to violate any provision(s) of this Act; (iii) other information as the Department may deem appropriate.
- D. For known populations at the time of designation, the Department shall, based on the best scientific information available, also include a description of the survival habitat or critical habitat of such population, and a description of site-specific management actions, as may be necessary to achieve the plan's goal for the recovery or maintenance of the species.
- E. The proposed development of, or proposed changes to, any conservation plan shall be reviewed by the Advisory Committee (see Section 16 D).

Section Seven--Consultation.

- A. Each state agency shall consult with the Department, in accordance with guidelines developed by the Department after public notice and comment, on any action funded, permitted, licensed, carried out, or in any way authorized by the state agency that might adversely affect the recovery or maintenance of any rare plant population or rare ecological community.
- B. Each state agency shall ensure that its actions are not likely to jeopardize the conservation of any rare plant populations or rare ecological communities.
- C. Whenever a state agency consults with the Department, the Department shall issue a written determination on whether a proposed action is likely to jeopardize the conservation of any rare plant population or rare ecological community.
- D. If a state agency action is likely to jeopardize the conservation of any rare plant population or rare ecological community, the Department shall recommend, if possible, reasonable and prudent alternatives that will not jeopardize the conservation of such populations and communities.
- E. Notwithstanding the prohibition against take contained in Section Eight of this Act, the Department may permit any state agency to take a rare plant, a rare plant population, or a rare ecological community in accordance with the requirements of Section Nine of this Act.
- F. The Department shall adopt regulations providing for public notice and comment on all consultations conducted pursuant to this Section.

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- G. Prior to any required consultation, neither the state agency nor any permit or license applicant, shall make any irreversible or irretrievable commitment of resources with respect to the agency action that has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives or recovery or maintenance measures.

Section Eight--Prohibitions and Exclusions.

- A. No person shall import into this State, export out of this State or take, possess, purchase or sell within this state any plant or part or product thereof, that has been determined to be an endangered plant or threatened plant except as otherwise provided in this chapter.
- 1) This Section does not apply to artificial populations of rare plants.
 - 2) This Section does not apply to rare plants allowed, under Section Four (C), to be used for ornamental and landscaping purposes, so long as the importing, exporting, taking, possessing, purchasing, or selling does not adversely affect any native population of such plants.
 - 3) This Section does not apply to the possession or sale of endangered or threatened plants if the possession or sale is incidental to the possession, sale, acquisition, or transfer of real property, or easements or leases, on which the plant is growing.
 - 4) This Section does not apply to the taking, possession, export or sale of endangered or threatened plants if the taking, possession, export or sale is incidental to the harvest or sale of a planted and managed agricultural crop if the plant grows among that crop.
 - 5) This Section does not apply to the transportation of threatened or endangered plants through the state if (i) the plant originates in another state or jurisdiction, and (ii) the person transporting such plant, as well as the owner of such plant, comply with the terms of any required federal permit or permit issued by the jurisdiction where the plant originated.
 - 6) This Section shall not prohibit the possession of any preserved specimen of a threatened or endangered plant when the owner thereof demonstrates that such preserved specimen was preserved and in that person's possession before the date on which this law was enacted.
- B. [Accidental taking]

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- C. The commissioner may prescribe conditions through specific permitting allowing an act otherwise prohibited by this Section if:
- 1) the act is for the purpose of botanical, educational, or scientific study; or
 - 2) the act enhances the security of the population of the affected plant; or
 - 3) there is a compelling social and economic benefit of the act which significantly outweighs the harm caused by it; and
 - 4) the act will not result in significant harm to the total population of a rare plant population or rare ecological community.

Section Nine--Incidental take.

- A. The Department may permit the taking of any rare plant, rare plant population or rare ecological community if it can be demonstrated that a greater environmental benefit would be derived by the proposed project or action, and:
- 1) such taking is incidental to, and not the purpose of, carrying out of an otherwise lawful activity; and
 - 2) the taking will not impair the conservation of any rare plant population or rare ecological community; and
 - 3) the applicant develops and implements an approved incidental take plan pursuant to Subsection (B).
- B. An incidental take plan under this Section shall include at a minimum the following:
- 1) a description of the specific activities sought to be authorized by the incidental take permit and an analysis of potential alternatives;
 - 2) the individual and cumulative impacts that may reasonably be anticipated to result from the proposed actions covered by the plan;
 - 3) the conservation measures the applicant will implement to prevent, minimize and mitigate the individual and cumulative impacts, and any adaptive management provisions that are necessary to respond to changes in circumstances that are likely to impair the recovery or maintenance of any rare plant population or rare ecological community covered by the plan;
 - 4) procedures for monitoring the effectiveness of the conservation measures in the incidental take plan;

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- 5) reasonably anticipated costs of implementing the plan, and the funding that will be available, throughout the term of the plan, to implement the incidental take plan by a non-governmental applicant;
 - 6) other modifications to the plan or other additional measures, if any, that the Department may require under unforeseen circumstances, and such other matters as the Department determines to be necessary for the conservation of the rare plant population or rare ecological community consistent with this Act;
 - 7) any additional information required by the Department as it deems appropriate.
- C. The Department shall adopt regulations providing for public notice and comment on all incidental take plans and accompanying incidental take permits.
 - D. The Department shall not issue an incidental take permit until the applicant has posted a performance bond or other financial security to ensure adequate funding and implementation for each element of the plan.
 - E. The Department, not the applicant, shall be responsible for conservation measures and costs that are in excess of those identified by the incidental take plan.
 - F. If any person fails to abide by the terms of the permit authorizing an incidental take of a rare plant population or rare ecological community, the Department shall immediately suspend or revoke such permit, whereupon a violation of Section Eight may be found.

Section Ten--Safe Harbor.

- A. The Department may enter into "safe harbor" agreements with governmental and non-governmental applicants to promote the conservation of rare plant populations or rare ecological communities by creating, restoring, improving, or maintaining habitat for such on property owned by the applicant. Under such agreements, the Department shall permit the applicant to take rare plants, rare plant populations or rare ecological communities if the taking is incidental to, and not the purpose of the carrying out of an otherwise lawful activity.
- B. For each agreement under this Subsection, the Department shall establish a baseline requirement that is based upon the best scientific information available obtained from a recent field survey of the property that will, at a minimum, maintain or establish viable conditions for the rare plant

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populations or rare ecological communities covered by the agreement. The baseline shall be expressed in terms of abundance and distribution of the rare plant population or rare ecological community, as well as quantity and quality of habitat.

- C. The Department may not enter into a safe harbor agreement applicable to a geographic area within which an incidental take permit issued pursuant to Section 9 of this Act, or by the federal government, applies.

Section Eleven--Monies.

The Department may cooperate with and accept moneys from the federal government, or any county or municipal government, or any other State or private source to carry out this act. The Commissioner may establish a separate fund from these contributions for the support of programs and policies of this Act.

Section Twelve--Educational and Informational Programs.

Within the limits of funds appropriated or otherwise made available to the Department for this purpose, the Department may develop and implement any educational or informational programs deemed necessary to inform the public as to the status and significance of rare plant populations or rare ecological communities, or of invasive plants in the State.

Section Thirteen--Invasive Plant Control.

- A. The planting, propagation, maintenance or keeping of an invasive plant or plants on any premises without written approval from the Department shall be considered a public nuisance. All remedies which are given by law for the prevention and abatement of a nuisance apply to such a public nuisance. It is unlawful for any person to maintain such a public nuisance.
- B. In order to carry out the intent of this Section, the Department, or another state or local agency acting on its behalf, may abate, suppress, eradicate and prevent, by such means as shall be prescribed and provided by regulation, all invasive plant occurrences which the Commissioner finds to be potentially destructive to the State's agricultural, forestry, horticultural interests, rare plant populations or rare ecological communities, or to the State's general environmental quality. For such purposes:
- C. Except as found to be necessary and appropriate by the Commissioner, no damages shall be paid for the loss or destruction of invasive plants, nor any

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reimbursement made for expenses incurred incident to the application of the prescribed preventive or remedial measures taken to inspect, control, or destroy an invasive plant.

- D. The Department may adopt such regulations as it may deem necessary or appropriate to implement the purposes of this Section and to fully protect the State's agricultural, forestry, horticultural interests, rare plant populations or rare ecological communities, or general environmental quality, from damage caused by invasive plants.

Section Fourteen--Penalties.

A. Criminal Penalties

- 1) Any person who violates any provision of Section Eight of this Act or a regulation promulgated thereunder shall be guilty of a [low-level misdemeanor].
- 2) Any person who knowingly, or through reckless disregard, violates any provision of Section Nine of this Act or a regulation promulgated thereunder, or who knowingly causes, or assists, aids or abets another in such violation, shall be guilty of a [high level misdemeanor].
- 3) Any person who is convicted of a second or subsequent offence under Subsection A (1) of this Section shall be guilty of [a high-level misdemeanor].
- 4) Any person who is convicted of a second or subsequent offence under Subsection A(2) of this Section shall be guilty of a [felony].

B. Civil Penalties

- 1) In addition to the penalties imposed under Subsection A of this Section, or in lieu of any criminal penalty, for each violation of this Act or regulation promulgated thereunder, the Department may assess a civil penalty of up to the greater of One Hundred Thousand Dollars (\$100,000.00) or the value of the project under which, for which or pursuant to which the violation was committed or occurred.
- 2) In addition to the penalties imposed under Subsection A of this Section, or in lieu of any criminal penalty, for each violation of this Act or regulation promulgated thereunder, the Department may assess a civil penalty of up to the greater of Five Hundred Thousand Dollars (\$500,000.00) or the value of the project under which, for which or pursuant to which the violation was committed or occurred,

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for each second or subsequent violation, or for any violation committed knowingly or through reckless disregard.

- C. The commission of a prohibited act with respect to any and each individual plant, or plant population or ecological community may constitute a separate violation.
- D. Any person who, in violation of this Act, damages any individual rare plant, rare plant population or rare ecological community shall be liable to the State for the costs incurred by the State in restoring or replacing the plants or habitat, including reasonable costs of assessing such damage. Such damages shall be in addition to the civil or criminal penalties imposed under this Section. Except in such cases where the violator was unauthorized to access the property on which the violation occurred, all sums due the State for restoration or replacement efforts shall constitute a lien on that property where such violation took place. In all cases, restoration or replacement costs assessed against a violator shall constitute a lien on the real and personal property of the violator.

Section Fifteen--Enforcement.

- A. The Commissioner, each conservation officer, and every law enforcement official throughout the state is authorized to enforce the terms of this Act.
- B. Any person may bring an action for declaratory and equitable relief and money damages against any other person alleged to have violated or to be violation of this Act or its regulations.
- C. A violation of this Act or regulations adopted pursuant thereto shall constitute "impairment or destruction of the environment" as those terms are used in Title 2A, Chapter 35A of the New Jersey Statutes.

Section Sixteen--Miscellaneous.

- A. In addition to any specific charge to adopt regulations, the Commissioner shall adopt such regulations as are necessary to carry out the purposes of this Act.
- B. In carrying out the provisions of this Act, and in order to establish protection efforts across jurisdictions, the Department may enter into agreements that are consistent with this Act with federal agencies, other state agencies, and political subdivisions of the state or other states.

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- C. If any provision of this Act is found to be invalid by a court of competent jurisdiction, such invalidity shall not affect the validity of the remaining provisions of this Act.
- D. The commissioner shall appoint a committee of experts to advise and assist the commissioner in carrying out the intent of this act. Said Advisory Committee shall consist of persons actively involved in the conservation of plants.