External Stakeholder Meeting
for the
Endangered Plant Species Program Rules
March 15, 2011 at 10:00 AM
501 East State St., 4th Fl. Lg. Conference Room

Attendees: Les Alpaugh, Tom Auffenorde, Walter Bien, Emile DeVito, Katherine Duran, Elizabeth George-Cheniara, Sussanna Gonzalez, Amy Karpati, Joshua Levy, Carleton Montgomery, David Pringle, Wendy Walsh

DEP staff: Robert Cartica, Lynn Fleming, Madhu Guru, Judy Jengo, Donna Mahon, Kerry Pflugh, David Snyder, Elena Williams

The meeting convened at 10:07 AM. R. Cartica asked that everyone first introduce themselves and then distributed the meeting agenda and the Summary of Potential Amendments to N.J.A.C. 7:5C-5.1 (attached). Everyone was asked to sign-in. R. Cartica indicated that he would first make a few introductory statements regarding the rule, deliver a brief Power Point presentation, and then open the meeting for comments and suggestions from attendees. He stated that the purpose of the meeting was for the Department to obtain stakeholder input prior to publishing a proposal in the New Jersey Register. He also indicated that attendees would be afforded the opportunity to provide any additional suggestions or comments for one week following the meeting (by March 22, 2011).

The following summary was provided by R. Cartica. The Endangered Plant Species Program rules (EPS rules) are scheduled to sunset on May 12, 2011. These rules provide criteria for listing of plant species as endangered, and also include the Endangered Plant Species List (List), which currently includes 339 native plant species. The rule was extended for one year in January 2010 as part of the Red Tape Review process. The List has not been amended or updated in 11 years. The Department considered options for rulemaking in September 2010 and decided to explore readoption with amendments to bring the List up to date. The rules specify that information in the Natural Heritage (or Biotics) Database be applied against criteria for listing of plant species as endangered in the rules to propose species as endangered. As a result, at this time the Department is contemplating the following revisions to the rules: add 37 species to the List; remove 20 species from the List (net addition of 17 species, bringing the List to 356 species); make nomenclature revisions to 63 species based on current plant taxonomy; and update the address of the Office of Natural Lands Management.

R. Cartica indicated that the rules and the List do not, in themselves, protect or regulate anything. However, other DEP rules include language that may regulate or protect these species. These include: the Coastal Permit Program rules (N.J.A.C. 7:7); Coastal Zone Management rules (N.J.A.C. 7:7E); Flood Hazard Area Control Act rules (N.J.A.C. 7:13); Highlands Water Protection and Planning Act rules (N.J.A.C. 7:38); State's Executive Order 215 (1989); Water Quality Management Program rules (N.J.A.C. 7:15) (indirectly through the Natural Heritage Priority Sites, which fall within the definition of “environmentally sensitive areas”); and the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50).

R. Cartica then delivered a Power Point presentation which included the following: statutory purpose of the program; summary of plant species rarity in New Jersey; diversity of endangered

plant species by county; locations of state endangered plants indicating that approximately one-quarter of all occurrences are entirely on state-owned land; examples of some state endangered and globally rare plants including swamp pink, bog asphodel, Hammonds's yellow spring beauty and spreading globe flower; listing criteria for endangered plant species at N.J.A.C. 7:5C-2.2 and justification for the 37 proposed species additions and 20 proposed species deletions; estimated area of species additions (1,027 acres) and deletions (1,520 acres); number of occurrences of precisely-known populations on federal and state (23) and non-public (28) lands; county distribution of the occurrences for the 37 species proposed for Listing; DEP Division of Land Use Regulation applications involving endangered plant species between April 1, 2009 and December 31, 2010; and September 2010 posting of the updated Natural Heritage Grid Map GIS, depicting generalized locations of occurrences of endangered plants as well as attribute data on occurrences, on the Department's NJ GeoWeb application.

W. Bien asked how acreage was calculated for the 145 occurrences for proposed endangered species. E. Williams explained how average acreage values were calculated for S-precision occurrences and then by extrapolation applied to the less precise M- and G-precision occurrences. W. Bien clarified that he was more interested in whether buffers were applied to the documented occurrences. For example, would upland buffers be applied to occurrences found in wetlands? E. Williams and D. Snyder replied that such buffers were not applied.

C. Montgomery asked how effective the Department's rules had been in protecting plants to date, and did ONLM plan to address this issue? R. Cartica replied that N.J.A.C. 7:5C is a listing rule and that the statute dictates that the rule is limited to preparing a list of endangered plant species. However, the effectiveness of the rule could be looked at in more detail. C. Montgomery followed up to say that he had no additional suggestions at this time regarding the rule or amendments because of the limited nature of the rules.

E. George-Cheniara asked if ONLM could expand on the relation between Listed plant species and the Land Use rules. M. Guru explained that the impact is usually due to the application of buffers. For example, with the Flood Hazard Area Control Act rules, the presence of a Listed plant species results in the application of a larger buffer to the stream, although not to the plant population. E. George-Cheniara commented that she would like to see economic impact of rule revisions addressed in these kinds of forums and impact statements. R. Cartica replied that this is a complex issue because each Land Use rule is different.

E. George-Cheniara then asked about the process for proposing plant species for listing. If there is no Delphi process like that used for proposing animal species for listing, what is the procedure for proposing plant species? R. Cartica explained that the Biotics database is the main source of information. Much work is also done by D. Snyder, Heritage Program botanist, to determine if Biotics data supports the listing or delisting of plant species. D. Snyder noted that much of the process is based on NatureServe methodology, which involves species ranking at the state and global level, and various data sources including the literature, experts and surveys by staff. NatureServe is the international umbrella organization for Natural Heritage Programs throughout the United States, Canada and Latin America. E. George-Cheniara replied that it would also be useful to have this background information in the rule proposal.

R. Cartica then requested D. Snyder summarize his field work over the past several years in support of the rule proposal. D. Snyder gave a brief overview of his fieldwork since 2005, and R. Cartica noted that there was much more information in the database now than in the past. T.

Auffenorde asked why the Heritage data reviews often include data for very old occurrences, including pre-1900 records, and asked if the Department has considered a process for removing these historical records from the database. D. Snyder explained that these older records are often based on herbarium specimens, and that the most imprecise (G-precision) records are not included as part of Heritage data reviews. R. Cartica added that these older records are also valuable as leads for field work, and that the Heritage Program has proven that many can be relocated. D. Snyder mentioned that the occurrences are ranked, and in many cases, these older occurrences are determined to be extirpated.

E. DeVito questioned how it was known that species proposed for delisting due to extirpation had no chance of being relocated. D. Snyder described the process for ranking species as extirpated, and indicated that since the program was created in 1984 only about 30-35 species have been ranked as extirpated. R. Cartica said that, in fact, there are cases where species ranked as extirpated have later been rediscovered in the state. E. DeVito then commented that this would mean these species would have no protection if they are delisted only to be rediscovered at a later time. R. Cartica agreed and indicated that there is no emergency listing process which could be used to quickly add such species back onto the List. E. DeVito then inquired why these species need to be removed from the List at all. D. Snyder said that this could be attributed to decisions made in the past for updates to the rules at N.J.A.C. 7:5C which excluded the listing of extirpated plant species. R. Cartica concurred that our current procedure is no different than the procedure used for previous rule readoptions. D. Snyder described examples of several species now ranked as extirpated, including Goodyera tesselata, Eleocharis minima and Juncus elliottii, and why they are so ranked.

K. Pflugh asked if E. DeVito was recommending an emergency listing procedure in the event such species are relocated. E. DeVito noted that he hadn't thought this through, but it might not be a bad idea. D. Snyder mentioned that once a species is ranked as extirpated, it must be removed from the List when the List is amended. R. Cartica asked if the group was recommending development of an emergency listing procedure. E. DeVito and W. Bien agreed that this would be a good idea.

J. Levy wanted to discuss such an option from the opposite perspective. For example, if the US Fish & Wildlife Service determines that a species should no longer be federally listed, will it also be removed from the state endangered list? D. Snyder replied that it would be removed if none of the other criteria for state listing apply. J. Levy posed the question of what would happen if such a species was determined to be too common to be on either the federal or state lists. Would such a species still be regulated until the next update to the State list? D. Mahon stated that, yes, this was the case, because there is no emergency delisting procedure.

E. DeVito returned to this issue and speculated whether this was a possibility for any of the New Jersey species that are currently listed by the Fish & Wildlife Service. W. Walsh described the federal process for listing and delisting species. One of the delisting criteria is that mechanisms other than the federal regulatory process must remain in place to protect such species. There was then a discussion between J. Levy and W. Walsh about whether and how this process applies to federal candidate species, which are also referred to as species "under review" by the Fish & Wildlife Service. W. Walsh noted that the two New Jersey species which currently have federal candidate status are largely located on publicly-owned lands.

E. George-Cheniara asked how and whether the rule readoption process followed Gov. Christie's mandate that state rules/regulations should not exceed federal standards. R. Cartica noted that there is a clear NJ statutory authority to allow for the listing of state endangered species.

L. Alpaugh wanted to make three observations for the record: 1) The Natural Heritage Grid Map and the approach of making more information available to the public is commendable; 2) He asked about education or outreach efforts the Department has concerning rare plants. R. Cartica noted that the vast majority of data collected by the Natural Heritage Program concerns the location and abundance of rare plant populations, and indicated that information on the biology, ecology and life history of these species is generally lacking; 3) L. Alpaugh then asked about the status on the list of several tree species including butternut, loblolly pine, and hemlock. D. Snyder indicated that butternut and loblolly pine are tracked by the Natural Heritage Program and are considered "plant species of concern" as defined in the EPS rule, while hemlock is declining statewide, but is not yet categorized by the Natural Heritage Program as a plant species of concern. L. Alpaugh also asked what plant information Heritage withholds. R. Cartica responded that the identity and locations of highly collectable species, such as orchids, are obscured in the Natural Heritage Grid Map.

M. Guru then commented on the implication of adopting an emergency listing procedure and how it would apply to the 5-year effective life of letters issued by the DLUR for Flood Hazard verification. Adding species through such a process would have regulatory implications that need to be resolved first.

E. DeVito commented on the status of plant species of concern, which are tracked by the Heritage Program but are not rare enough to list as endangered. This is a large group of very rare species comprising a sizeable portion of the State's native flora. He mentioned the Green Acres Program diversion rules which reference threatened as well as endangered plant species, yet the Department does not have a formal list of such species. Is there a way to raise the visibility of these plant species of concern to ensure they receive the attention needed to prevent them from declining further and becoming endangered species? A. Karpati concurred, and suggested that these be referred to as threatened species.

Amy Karpati then asked if more detailed information could be made available describing why each species proposed for removal from the List is being delisted. R. Cartica replied that this species-specific information would be included in the Department's proposal that is published in the NJ Register.

C. Montgomery stated that the rule proposal is an opportunity for public education, especially as it applies to explaining why species are becoming extirpated from the state and then removed from the List. R. Cartica explained that this level of detail is usually not provided. D. Pringle agreed with C. Montgomery's position, especially in light of the Governor's proclamation that NJ regulations should not exceed federal standards. It is therefore especially important to document why species are being proposed for addition to and deletion from the List.

D. Pringle also asked why plant species of concern shouldn't just be referred to as threatened species. R. Cartica replied that the name applied to these species could be changed, but the species that fall within the category of threatened would not be placed on a codified list as the endangered plant species are. This is because there would be no public process consistent with the Administrative Procedure Act for this threatened species list. M. Guru also suggested that it

was important to do research before implementing any such change. This is because different regulatory programs use various terms for these species, and it is important to ensure regulatory consistency and consider the implications of any revisions to terminology. C. Montgomery agreed that other regulations use different terminology when referring to these species, and it is important to bring clarity to the different rules. K. Pflugh asked if there was a better way to handle the plant species of concern to provide additional weight to these species. R. Cartica said that the rules do not provide protection for endangered species, so even less could be expected for the species of concern. There are different standards of protection for plant species when compared to animal species, both in NJ and federally. K. Pflugh mentioned to E. DeVito that the appropriate forum for commenting on this issue might be the upcoming stakeholder meetings for the coastal and freshwater wetland rules.

W. Walsh stated that the Fish & Wildlife Service supports the List revisions as proposed. Strong state protection can preclude the necessity of federal listing for species. She then asked the group to consider the nationwide status of plant species proposed for delisting because they are extirpated from the state. Should any of these species be considered for Federal listing? The Service welcomes any comments concerning this issue.

W. Walsh also noted that it might be helpful for ONLM to display the distribution of occurrences for species proposed for listing based on region (Pinelands, Highlands, etc.). This, as well as press releases by the Department, might provide the public with additional information about rare plants and the possible regulatory implications of listing.

D. Pringle supported the idea of providing more information to the public in the listing proposal to describe why species are being listed and delisted.

R. Cartica asked if anyone had any additional comments, and then reiterated that attendees can provide comments to him within one week of today's meeting.

W. Bien complimented the ONLM staff for the amount of work involved in preparing the rule updates.

Meeting adjourned at approximately 11:30 am.

Addendum
Comments received in writing after the March 15, 2011 Stakeholder meeting

Ronald Farr, consulting forester, asked in a March 15, 2011 email if any thought had been given to adding the American chestnut to the endangered plant list? He indicated that he is aware of less than 10 fruit producers at this time and maybe 30 trees throughout the state.

Carleton Montgomery (Pinelands Preservation Alliance) and Emile DeVito (New Jersey Conservation Foundation) provided the following comments in a letter dated March 25, 2011:

1. The rules should protect plant species believed to be extirpated in case of rediscovery. We believe the Endangered Plant Species list should include species which the Program believes have been extirpated from the state. Though a rare occurrence, experience shows that plant species believed to be extirpated from New Jersey are occasionally

rediscovered. If such an event was to occur, the lag time between the rediscovery and the re-addition of this species to the Endangered Plant Species List is too long for adequate protection measures to be effectively initiated. If such species are to be removed from the endangered list, then, at minimum, there should exist in the rules a streamlined system for emergency re-listing, especially given that these species have already been through the regulatory notice and comment regarding their rarity. Too much time between the rediscovery of a species and its re-listing could result in actual extirpation.

2. Incorporation of a Threatened Plant Species Designation. Plant species considered to be "species of concern" (N.J.A.C. 7:5C-3.1), which are monitored by the Natural Heritage Database but are not listed as "Endangered" at N.J.A.C. 7:5C-5.1, should be identified in the rules as "Threatened" in order to ensure consistency and validity in the application of the term "Threatened" in state regulations, like the Pinelands CMP, which use that term. The rules could include a statement of criteria accepted in the scientific community and literature which correlates with the Program's rarity designations. We believe that this change in language will create a better public understanding of the conservation status of these species as well as afford other regulatory rules more accuracy in referring to this list of species.

3. Information on NJ Rare Plant Species Conservation. The rule proposal should also include the following:

   a. An explanation of the importance of New Jersey's botanical heritage;
   b. An evaluation of the trends in conservation of rare plants in the state;
   c. A description of causal factors contributing to the loss of each species proposed for deletion from the Endangered Plant Species List which the Program believes to be extirpated; and
   d. An evaluation of how effective the Program believes the current regulations have been in protecting rare plants in New Jersey.

   Such information will contribute to greater public understanding of the state's extraordinary botanical riches and the threats to rare and endangered plant species, as well as provide useful data to institutions and researchers.