

# PROPOSED RULEMAKINGS

## DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

[ 17 PA. CODE CH. 45 ]

### Conservation of Pennsylvania Native Wild Plants

The Department of Conservation and Natural Resources (Department) proposes to amend Chapter 45 (relating to conservation of Pennsylvania native wild plants). The proposed rulemaking moves the beginning of the ginseng harvest season from August 1 to September 1.

#### A. *Effective Date*

This proposed rulemaking will be effective upon final publication in the *Pennsylvania Bulletin*.

#### B. *Contact Persons*

For further information, contact Rebecca H. Bowen, Chief, Ecological Services Section, Bureau of Forestry, Department of Conservation and Natural Resources, P. O. Box 8552, Harrisburg, PA 17105-8552, (717) 787-3444; or Wendy Carson, Assistant Counsel, Office of Chief Counsel, Department of Conservation and Natural Resources, P. O. Box 8767, Harrisburg, PA 17105, (717) 772-4171. Persons with a disability may use (800) 654-5984 (TTY). This proposed rulemaking is available on the Department's web site at <http://www.dcnr.state.pa.us/forestry/plants/vulnerableplants/ginseng/index.htm>.

#### C. *Statutory Authority*

This proposed rulemaking is made under the authority of section 7 of the Wild Resource Conservation Act (WRCA) (32 P. S. § 5307) and sections 305 and 313 of the Conservation and Natural Resources Act (CNRA) (71 P. S. §§ 1340.305 and 1340.313).

It should be noted that the the Department of Environmental Resources was assigned to administer the WRCA. Subsequently, section 305(a)(9) of the CNRA transferred this authority to the Department.

#### D. *Background and Purpose*

The WRCA was enacted in 1982 to enhance the protection of native wild plants and nongame animals in this Commonwealth. Under the WRCA, the Department established a classification system for native wild plants in Chapter 45. The classifications, such as extirpated, endangered, rare, threatened and vulnerable, are defined in § 45.2 (relating to definitions). The lists of species within each classification are in Subchapter B (relating to classified plants).

Vulnerable plants are defined in § 45.2 as plant species "which are in danger of population decline within this Commonwealth because of their beauty, economic value, use as a cultivar or other factors which indicate that persons may seek to remove these species from their native habitats." Ginseng (*Panax quinquefolius*) is one of the three species listed in § 45.15 (relating to Pennsylvania Vulnerable) as a vulnerable plant. Ginseng is a forest plant that is native to the eastern half of the United States and Canada. Parts of the ginseng plant, particularly its root, are valued for their therapeutic qualities

and have been traded commercially, both domestically and internationally, for centuries.

Under the WRCA, the Department is responsible for the protection and management of native wild plants. With respect to vulnerable plants, section 9 of the WRCA (32 P. S. § 5309) provides as follows:

(a) Species classified as vulnerable shall be subject to the following restrictions:

(1) The [Department] upon designation of vulnerable species shall establish regulations over the digging, harvesting, sale and exploitation of said species.

(2) The regulations shall:

(i) consider the distribution, abundance, economic value, growing and reproduction cycle;

(ii) establish seasons for the digging and harvesting of plants or plant parts; and

(iii) provide for the commercial licensing of persons who buy with the intent to sell vulnerable plants within the Commonwealth or export said plants therefrom and to require the licensees to maintain records of their transactions.

(3) The [Department] shall establish the license fee.

Under section 9(a)(1) of the WRCA, the Department has promulgated regulations "over the digging, harvesting, sale and exploitation" of vulnerable plants. These regulations in Subchapter E (relating to vulnerable plants) require persons who buy, trade or barter vulnerable plants with the intent to sell them in, or export them from, this Commonwealth to obtain a commercial license from the Department. The regulations require licensees to submit to the Department records of transactions including information about the licensee's purchase of the plants, sale of the plants, county of origin of the plants, form of plants (for example, whole plant, root, seeds), year of harvest, weight of the plants, destination and date of export and whether the plants are wild or cultivated.

In addition to covering vulnerable plants in general, the Department's regulations establish special requirements for ginseng plants. These are a result of an international trade agreement known as the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES) signed by the United States and many other countries, administered in the United States by the United States Fish and Wildlife Service (USFWS). See <http://www.cites.org/> and <http://www.fws.gov/international/plants/american-ginseng.html>. The relationship between the Department's ginseng harvesting regulation and CITES is discussed as follows.

#### *Purposes of this Proposed Rulemaking*

Section 45.69 (relating to vulnerable plant harvest seasons and conditions) addresses certain activities regarding the harvest of vulnerable plants in general and ginseng in particular. This section establishes a harvest season for ginseng that runs from August 1 to November 30 and prohibits the possession of harvested green ginseng roots between April 1 and the start of harvest season. This rulemaking proposes to move the start of harvest season forward by 1 month to September 1 and, consistent with this proposed amendment, prohibits possessing harvested green roots between April 1 and September 1. The proposed amendment also corrects the terminology in § 45.69(a)(2) for the ginseng berry.

### E. Summary of Regulatory Requirements

The intent of § 45.69(a) is to ensure the sustainability of ginseng. It takes a ginseng plant at least 5 years to mature. Ginseng seeds have the best chance of producing new plants if they come from a mature plant and are planted near the site of the harvested plant. Section 45.69(a), therefore, allows only mature plants to be harvested and requires that the seeds of these plants be planted in the immediate vicinity of the collection site. To ensure that only mature plants are harvested, § 45.69(a) puts collectors on notice of the physical characteristics of a mature ginseng plant—it has at least three leaves of five leaflets each and red “seeds” (the correct term is “berries”). In addition, this section prohibits collection of the plant before the start of the harvest season as defined in the section. Therefore, to comply with the Department’s ginseng harvesting requirements, a collector may harvest ginseng plants only if: 1) they have at least three leaves of five leaflets each; 2) they have red seeds (berries); 3) they are collected during harvest season; and 4) their seeds are planted in the immediate vicinity of the collection site.

The purpose of this proposed rulemaking is to move the start date of the ginseng harvest season from August 1 to September 1. There is general agreement within both the scientific community and the ginseng industry that an August 1 start date is too early to ensure that ginseng plants that meet the description of mature plants in terms of their leaves and berries are fully mature and can safely be harvested without threatening the survival of the ginseng population.

The harvesting of ginseng plants in ginseng-exporting states, such as this Commonwealth, is subject to special restrictions imposed by the USFWS. The USFWS’s involvement is due to the regulation of the export of ginseng from the United States by CITES. The purpose of CITES is to monitor and regulate the international trade of certain plant and animal species to prevent detrimental impacts to their populations so as to ensure the continued existence of the species in their native habitat. The CITES authority in the United States is the USFWS.

CITES requirements, as administered by the USFWS, for permitting the export of species subject to CITES are codified in 50 CFR Part 23 (relating to Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)). Section 23.68 of 50 CFR (relating to how can I trade internationally in roots of American ginseng) contains the specific requirements for the export of ginseng. The USFWS has established an export program for states that export ginseng. Under this program, on an annual basis, before the USFWS will allow export from a state, it must determine that ginseng harvested in that state is legally acquired and that export will not be detrimental to the survival of the species in that state. See 50 CFR 23.68. The USFWS will make a “non-detriment” finding for export of ginseng plants from a state only if it is satisfied that the state has taken measures to ensure the plants were mature when harvested. See <http://www.fws.gov/international/pdf/archive/workshop-american-ginseng-cites-non-detriment-findings.pdf>. The USFWS determined that the survival of ginseng plant populations could be detrimentally affected if a state allows harvesting to begin as early as August 1. Therefore, the USFWS is urging the Commonwealth and the Department to adopt a later harvest season and it is specifically recommending September 1 as the start date. The USFWS made it clear to the Department that unless the change in harvest season is adopted soon, the USFWS

will be unable to make a “non-detriment” finding under CITES with regard to the harvesting of ginseng in this Commonwealth. Copies of correspondence from the USFWS are available from the Bureau of Forestry. The absence of a nondetriment finding would mean that the USFWS would cease issuing export permits for ginseng harvested in this Commonwealth. See the USFWS 2012 findings report on ginseng at [http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr\\_20026618.pdf](http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_20026618.pdf).

Adopting the USFWS’s recommendation of a September 1 harvest date would bring the Commonwealth in line with nearly all of the ginseng-exporting states surrounding Pennsylvania. This Commonwealth is the only ginseng-exporting state with a harvest season date as early as August 1. Variations in the yearly growing seasons and growing conditions in different parts of the state could cause ginseng berries to turn red slightly before or slightly after September 1. However, as is recognized by harvesters, dealers and botanical researchers in this Commonwealth, the clear trend in Pennsylvania and surrounding states is for berries to be red by September 1.

It should be noted that the export of another species of plant classified in Chapter 45 as vulnerable, Golden-Seal (*Hydrastis Canadensis*), is also subject to regulation by CITES as administered by the USFWS. However, unlike ginseng, specific harvest season dates are not required for this species.

Section 45.69(a)(2) states as follows regarding the harvesting of ginseng plants: “Only mature ginseng plants with at least three leaves of five leaflets each may be harvested and only when the seeds are red.” This rulemaking proposes to replace “seeds” with the correct term “berries.” The reason for this proposed amendment is to distinguish between seeds and berries. When a ginseng plant is mature, it has red berries. The red berries contain seeds that are ready to plant.

### F. Benefits, Costs and Compliance

#### Benefits

The benefit of moving the beginning date of the ginseng harvest season from August 1 to September 1 is to help sustain the populations of ginseng in this Commonwealth by allowing the plants to mature so that when their seeds are planted, new plants will grow and the ginseng population will continue to survive. In addition, it would bring this Commonwealth’s harvest season in line with those of the other ginseng-exporting states, thereby discouraging poaching across state borders. Finally, and most immediately, it will allow the USFWS, under CITES, to continue to find that the export of ginseng harvested in this Commonwealth will not be detrimental to the survival of the species and thus avoid a ban on the export of ginseng from this Commonwealth.

The correction of terminology to distinguish between “seed” and “berry” will remove confusion caused by the current language in the harvesting provisions of § 45.69 and consequently support compliance with its provisions.

#### Compliance Costs

This proposed rulemaking will not impose additional compliance costs on the regulated community.

*Compliance Assistance Plan*

This is not applicable.

*Paperwork Requirements*

There will not be an increase in the amount of required paperwork.

*G. Sunset Review*

The regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

*H. Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on March 5, 2013, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

*H. Public comments*

Interested persons are invited to submit comments regarding this proposed rulemaking to Rebecca H. Bowen, Ecological Services, Bureau of Forestry, Department of Conservation and Natural Resources, P. O. Box 8552, Harrisburg, PA 17105-8552 (hand delivery or express mail to Rachel Carson State Office Building, 6th Floor, 400 Market Street, Harrisburg, PA 17101-2301), RA-Ch45WildPlant@pa.gov. A return name and United States

Postal Service mailing address must be included in each transmission. Comments submitted by facsimile will not be accepted. Comments must be received by the Department within 30 days of publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

RICHARD J. ALLAN,  
*Secretary*

**Fiscal Note:** 7B-6. No fiscal impact; (8) recommends adoption.

**Annex A**

**TITLE 17. CONSERVATION AND NATURAL RESOURCES**

**PART I. DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES**

**Subpart D. RESOURCE CONSERVATION**

**CHAPTER 45. CONSERVATION OF PENNSYLVANIA NATIVE WILD PLANTS**

**Subchapter E. VULNERABLE PLANTS**

**§ 45.69. Vulnerable plant harvest seasons and conditions.**

(a) A person may not harvest ginseng except in compliance with applicable law, this chapter and the following restrictions:

(1) A person may harvest ginseng plants only from [ **August** ] **September 1** through November 30.

(2) Only mature ginseng plants with at least three leaves of five leaflets each may be harvested and only when the [ **seeds** ] **berries** are red.

\* \* \* \* \*

(b) A person may not possess harvested, green ginseng roots between April 1 and [ **August** ] **September 1** of a calendar year.

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