

This is an amendment to 19.21.2 NMAC, adding new Sections 10, 11, 16, 18 and 20 and amending Sections 7, 9, 12, 13, 15, 17, and 19, effective x/xx/xxxx.

19.21.2.7 DEFINITIONS:

A. **“Agricultural practice”** means grazing, ditch clearing or burning, planting, applying herbicides to cultivated fields, harvesting, mowing of hay fields or pastures, burning pastures or fields or cultivating, plowing or disking fields or similar activities and the maintenance, repair or replacement of fences, water tanks and troughs, wells and windmills, pumps or solar panels powering wells, loading chutes, corrals and water pipelines.

B. **“Applicant”** means the person applying for a permit required by 19.21.2 NMAC to take endangered plants for scientific study, propagation or collection of voucher specimens or to take an endangered plant(s) where taking is incidental and not the purpose of carrying out an otherwise lawful activity. If a governmental entity is issuing a permit, lease, license, authorization, right-of-way, easement or similar document that allows a person to conduct the lawful activity (drilling, fence installation, pipeline construction, etc.), the applicant for an incidental take permit shall be the person conducting the lawful activity not the governmental entity.

~~[A-]~~ **C.** **“Department”** means the energy, minerals and natural resources department.

D. **“Endangered plant”** means a plant that is a member of the species listed in 19.21.2.9 NMAC.

E. **“Harm”** means physical injury or damage to a plant that results in reduced viability of the plant, including reproductive potential and future health and growth.

F. **“Permittee”** means the person issued a permit by the state forester or a person required to have a permit pursuant to 19.21.2 NMAC. The permittee shall be the person responsible for the scientific study, propagation or collection of voucher specimens of endangered plants or the person undertaking a lawful activity where taking of an endangered plant(s) is incidental and not the purpose of carrying out the otherwise lawful activity. If a governmental entity is issuing a permit, lease, license, authorization, right-of-way, easement or similar document that allows a person to conduct the lawful activity (drilling, fence installation, pipeline construction, etc.), the permittee for an incidental take permit shall be the person conducting the lawful activity not the governmental entity.

G. **“Person”** means an individual or entity including partnerships, corporations, associations or joint ventures and its officers, agents or employees; the state or a political subdivision of the state and its officers, agents or employees; or an agency, department or instrumentality of the United States and its officers, agents or employees.

~~[B-]~~ **H.** **“Population site”** means an area of occurrence of a particular species.

~~[C-]~~ **I.** **“Specimen”** means the physical parts or a plant in its entirety taken from a population site for the purpose of scientific study.

~~[D-]~~ **J.** **“State forester”** means the director of the department’s forestry division and the department secretary’s designated representative for the purposes of administering the department’s authorities and responsibilities under Section 75-6-1 NMSA 1978 including endangered plant investigations and issuance of ~~[collection and transplantation]~~ scientific study, propagation, collection of voucher specimen or incidental take permits.

~~[E-]~~ **K.** **“Taking”** means ~~[the removal, with the intent to]~~ to remove, harm, kill, destroy, possess, transport, export, sell, or offer for sale any of the plants, or parts thereof, listed in 19.21.2.9 NMAC, from the places in the state of New Mexico where they naturally grow. Taking does not include the incidental removal, harm, killing or destruction of endangered plants resulting from agricultural practices or removal, harm, killing, destruction, possession or transport by tribal members for religious purposes.

L. **“Tribal member”** means a member of an Indian nation, tribe or pueblo.

~~[F-]~~ **M.** **“Voucher specimen”** means an identifiable and representative specimen taken by a botanical collector from a population site for the purpose of documenting that site as occupied habitat. It shall be accompanied by pertinent information on location, habitat, collector, date taken and any other notes the collector can present concerning the population site.

[10/29/1985, 12/23/1991, 8/31/1995; 19.21.2.7 NMAC - Rn & A, 19 NMAC 21.2.7, 11/30/2006; A, 7/28/2020; A, x/xx/xxxx]

19.21.2.9 LIST OF NEW MEXICO STATE ENDANGERED PLANT SPECIES: The following list of plants constitutes the New Mexico state endangered plant species list. Listed are the plant's scientific name, its common name and the criterion for inclusion by the subsection in 19.21.2.8 NMAC:

Agalinis calycina (Leoncita false-foxglove)	Subsection B of 19.21.2.8 NMAC
Aliciella formosa (Aztec gilia)	Subsection B of 19.21.2.8 NMAC
Allium gooddingii (Goodding’s onion)	Subsection B of 19.21.2.8 NMAC

Amsonia tharpia (Tharp's bluestar)	Subsection B of 19.21.2.8 NMAC
Argemone pinnatisecta (Sacramento prickly-poppy)	Subsection A of 19.21.2.8 NMAC
Asplenium scolopendrium var. americanum (American Hart's-tongue fern)	Subsection A of 19.21.2.8 NMAC
Astragalus humillimus (Mancos milkvetch)	Subsection A of 19.21.2.8 NMAC
Peniocereus greggii (night-blooming cereus)	Subsection B of 19.21.2.8 NMAC
Castilleja ornata (Swale paintbrush)	Subsection B of 19.21.2.8 NMAC
Castilleja tomentosa (Tomentose paintbrush)	Subsection B of 19.21.2.8 NMAC
Cirsium vinaceum (Sacramento Mountains thistle)	Subsection A of 19.21.2.8 NMAC
Cirsium wrightii (Wright's marsh thistle)	Subsection B of 19.21.2.8 NMAC
Cleome multicaulis (slender spiderflower)	Subsection B of 19.21.2.8 NMAC
Coryphantha robustispina ssp. scheeri (Scheer's pincushion cactus)	Subsection B of 19.21.2.8 NMAC
Cylindropuntia viridiflora (Santa Fe cholla)	Subsection B of 19.21.2.8 NMAC
Cymopterus spellenbergii (Spellenberg's springparsley)	Subsection B of 19.21.2.8 NMAC
Cypripedium parviflorum var. pubescens (golden lady's slipper)	Subsection B of 19.21.2.8 NMAC
Echinocereus fendleri var. kuenzleri (Kuenzler's hedgehog cactus)	Subsection A of 19.21.2.8 NMAC
Erigeron hessii (Hess' fleabane)	Subsection B of 19.21.2.8 NMAC
Erigeron rhizomatus (Zuni fleabane)	Subsection A of 19.21.2.8 NMAC
Eriogonum gypsophilum (gypsum wild buckwheat)	Subsection A of 19.21.2.8 NMAC
Escobaria duncanii (Duncan's pincushion cactus)	Subsection B of 19.21.2.8 NMAC
Escobaria organensis (Organ Mountain pincushion cactus)	Subsection B of 19.21.2.8 NMAC
Escobaria sneedii var. leeii (Lee's pincushion cactus)	Subsection A of 19.21.2.8 NMAC
Escobaria sneedii var. sneedii (Sneed's pincushion cactus)	Subsection A of 19.21.2.8 NMAC
Escobaria villardii (Villard's pincushion cactus)	Subsection B of 19.21.2.8 NMAC
Hedeoma todsenii (Todsens pennyroyal)	Subsection A of 19.21.2.8 NMAC
Helianthus paradoxus (Pecos sunflower)	Subsection A of 19.21.2.8 NMAC
Hexalectris colemanii (Coleman's coralroot)	Subsection B of 19.21.2.8 NMAC
Hexalectris nitida (shining coralroot)	Subsection B of 19.21.2.8 NMAC
Hexalectris arizonica (crested coralroot)	Subsection B of 19.21.2.8 NMAC
Ipomopsis sancti-spiritus (Holy Ghost ipomopsis)	Subsection A of 19.21.2.8 NMAC
Lepidospartum burgessii (gypsum scalebroom)	Subsection B of 19.21.2.8 NMAC
Lilium philadelphicum (wood lily)	Subsection B of 19.21.2.8 NMAC
Linum allredii (Allred's flax)	Subsection B of 19.21.2.8 NMAC
Opuntia arenaria (sand prickly pear)	Subsection B of 19.21.2.8 NMAC
Pediocactus knowltonii (Knowlton's cactus)	Subsection A of 19.21.2.8 NMAC
Pediomelum pentaphyllum (Chihuahua scurfpea)	Subsection B of 19.21.2.8 NMAC
Penstemon metcalfei (Metcalfe's beardtongue)	Subsection B of 19.21.2.8 NMAC
Polygala rimulicola var. mescalerorum (San Andres milkwort)	Subsection B of 19.21.2.8 NMAC
Puccinellia parishii (Parish's alkali grass)	Subsection B of 19.21.2.8 NMAC
Sclerocactus cloverae (Clover's cactus)	Subsection B of 19.21.2.8 NMAC
Sclerocactus mesae-verdae (Mesa Verde cactus)	Subsection A of 19.21.2.8 NMAC
Scrophularia macrantha (Mimbres figwort)	Subsection B of 19.21.2.8 NMAC
Spiranthes magnicamporum (lady tresses orchid)	Subsection B of 19.21.2.8 NMAC
Townsendia gypsophila (gypsum Townsend's aster)	Subsection B of 19.21.2.8 NMAC

[10/29/1985, 12/23/1991, 8/31/1995; 19.21.2.9 NMAC - Rn & A, 19 NMAC 21.2.9, 11/30/2006; A, 01/15/2019; A, 7/28/2020; A, xx/xx/xxxx]

19.21.2.10 PROTECTION: The taking of endangered plants, other than pursuant to a permit issued by the state forester, is prohibited.

[19.21.2.10 NMAC – N, xx/xx/xxxx]

19.21.2.11 INCIDENTAL TAKE PERMIT: The state forester may issue, issue with conditions or deny requests for an incidental take permit to allow a permittee to take endangered plants so long as taking is incidental to

and not the purpose of carrying out an otherwise lawful activity. Such requests shall be subject to the following requirements.

A. The state forester may issue an incidental take permit only if the applicant submits a completed application on a form designated by the state forester that contains the following:

(1) the impact on the species that will likely result from the taking including the number of endangered plants to be taken;

(2) information and analysis that establishes that such taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild including range wide and local species status, number of endangered plants in the activity area, number of endangered plants in the activity area taken, number of endangered plants in the activity area avoided, direct and indirect effects on the species and population resulting from the activity, disturbance frequency and intensity, cumulative effects resulting from the activity and interrelated effects affecting the species' survival and any supporting documentation;

(3) the best management practices and mitigation activities the applicant will use to avoid, minimize and mitigate the impacts to the species from such a taking during the implementation of the proposed activity (e.g., fencing off areas with endangered plants during construction period, saving topsoil layer and returning to site after construction, dust mitigation, seed collection, adjusting or reducing project footprint, biological monitoring on site during construction); and

(4) signed commitment that applicant will implement the best management practices and mitigation activities and submit a written report upon completion of the practices and activities.

B. An application must also include

(1) the applicant's name, address, phone number, email address and, if applicable, name and title of the applicant's authorized representative;

(2) the location of the proposed activity with a map, location coordinates (if available) and size (acreage) of proposed activity;

(3) description of the proposed activity;

(4) property ownership; and

(5) a signed certification by the applicant that states that the applicant assumes complete responsibility for any resulting impacts on endangered plants or the occupied habitat of such plants caused by the activity.

C. An incidental take permit application for an endangered plant that is also listed under federal law, must be accompanied by United States department of the interior, fish and wildlife service consultation response and, if required, biological opinion.

D. The state forester may authorize or require transplantation of endangered plants as a condition of an incidental take permit if the applicant demonstrates the need for transplantation or the state forester otherwise determines it is necessary. Where transplantation is proposed, in addition to the information required by Subsection A of 19.21.2.11 NMAC, the applicant shall:

(1) explain the need for transplantation;

(2) identify the number of plants to be transplanted;

(3) explain the transplantation method/protocol to be employed;

(4) identify the site to which the plants will be taken for transplantation and describe the long-term protections provided at the site;

(5) identify the timeline for the proposed transplantation;

(6) describe the monitoring plan for transplantation; and

(7) include the name and qualifications of the person carrying out the transplantation.

E. If the state forester denies an application for an incidental take permit or issues an incidental take permit with conditions, the state forester shall provide the reasons for the denial or conditions in writing.

F. A permittee may not transfer an incidental take permit without the state forester's written approval.

G. The state forester's issuance of an incidental permit is not authorization to conduct the proposed activity; the incidental take permit only authorizes the incidental take. If the permittee does not own the land where the activity will occur, the permittee shall also possess or obtain the landowner's authorization for the incidental take if the landowner requires. A permittee shall comply with other applicable federal, state or local laws; possess or obtain permits, licenses or other authorizations other entities require; and if not the owner of the land where the activity will occur, possess or obtain the landowner's authorization to conduct the activity or use the land for the activity.

H. The division does not require a person conducting an activity to survey to determine the existence of endangered plant(s), but this does not relieve the applicant to conduct surveys that may be required by federal, other state or local agencies.

I. Emergency response. The following are exempt from the requirement to obtain an incidental take permit: law enforcement or emergency responses or other federal, state or local agency civil actions, whether or not undertaken by or in coordination with the division, that are necessary to prevent or respond to immediate threats to public health, safety or environment, including firefighting and flood management or controlling, containing and capturing releases of hazardous or harmful materials. If the division is not involved in the emergency response, it should be notified of the response as soon as practicable. Any known endangered plant(s) within the area of emergency response should be monitored to the extent practicable so that any adverse effects can be avoided or mitigated.

[19.21.2.11 NMAC – N, xx/xx/xxxx]

[19.21.2.10 — PERMITS:] 19.21.2.12 PERMITS FOR SCIENTIFIC STUDY OR PROPAGATION:

A. ~~[The state forester may issue permits to take state endangered plant species for the purpose of conducting scientific studies that enhance understanding for the distribution of, or conditions required for survival of, endangered plant species; or for propagation or transplantation activities that will enhance the survival of endangered plant species.]~~ The state forester may also issue permits to take specimens for the purpose of conducting scientific studies that enhance understanding of the distribution of an endangered plant species, or will generate new knowledge in the genetic, anatomical, chemical, morphological, life history or in other relevant areas of research enhancing the understanding of the conditions required for survival of an endangered plant species; or for propagation activities that will enhance the survival of endangered plant species. If the state forester denies an application for a permit or issues a permit with conditions, the state forester shall provide the reasons for the denial or conditions in writing.

B. ~~[The state forester shall only issue permits to individuals. No one person may operate under the authority of another's permit.]~~ The state forester may deny applications for scientific study or propagation permits in locations where endangered plant survival is especially precarious.

C. Each person applying for a scientific study or propagation permit must demonstrate sufficient expertise to carry out the permitted activities in a competent manner. The following information may be used to support the request for a permit: education in botany or related area, field experience, collection numbers, accessions into a recognized herbarium, publications and recommendations from recognized authorities.

D. The permittee's or permittee's representative's signature on the permit acknowledges willingness to comply with all applicable laws, rules or regulations and permit conditions.

E. ~~[The permittee shall carry a copy of the permit at all times during the collection and transportation of endangered species.]~~

F. ~~A permit does not authorize the permittee to take federally threatened or endangered plants. Taking of these species also requires a federal permit issued by the U.S. fish and wildlife service.~~

G. ~~A permit does not extend to the permittee the privilege to trespass or enter on lands without the owner's permission. The permittee should contact the appropriate management agency or landowner before beginning studies or taking specimens on federal, state or private lands.~~

H.] A state permit to take [, propagate or transplant the endangered plant species listed in 19.21.2.9 NMAC] endangered plants for scientific study or propagation is not required for federal employees working within the lands of their jurisdiction, nor for activities [within tribal reservations] on tribal trust lands, restricted fee lands or individual trust allotments.

F. A permittee may not transfer a scientific study or propagation permit without the state forester's written approval.

[19.21.2.12 NMAC – Rn & A, 19.21.2.10 NMAC, xx/xx/xxxx]

[19.21.2.11 — SCIENTIFIC INVESTIGATIONS:] 19.21.2.13 GENERAL PROVISIONS FOR SCIENTIFIC STUDY OR PROPAGATION:

A. ~~The state forester may issue a permit to take endangered plants for scientific studies if the studies will generate new knowledge in the genetic, anatomical, chemical, morphological, life history or in other relevant areas of research enhancing the understanding of the conditions required for the survival of the endangered species.~~

B. ~~Known population sites will be provided with the permit when the permittee requires them for the permitted study. The permit will contain any special parameters for the taking.~~

~~C. If a permittee takes any specimens the permittee shall deposit at least one voucher specimen at either the university of New Mexico herbarium or New Mexico state university herbarium.~~

~~D. When possible, the investigator shall take specimens in such a way as to not reduce the population (e.g. take a single stem from an herbaceous perennial, leaving the root intact, or other methods appropriate to the particular species).~~

~~E. The state forester may prohibit taking in known locations where survival is especially precarious.]~~

~~A. When a permittee takes specimens pursuant to a scientific study permit, the permittee shall deposit at least one voucher specimen at either the university of New Mexico herbarium or New Mexico state university herbarium. When possible, the permittee shall take specimens in such a way as to not reduce the population (e.g., take a single stem from an herbaceous perennial, leaving the root intact, or other methods appropriate to the particular species).~~

~~B. The permittee or permittee's representative shall carry a copy of the scientific study or propagation permit at all times during the collection and transportation of endangered plants.~~

~~C. A scientific study or propagation permit for an endangered plant that is also listed under federal law must be accompanied by the United States department of the interior, fish and wildlife service recovery permit.~~

~~D. A scientific study or propagation permit does not extend to the permittee the privilege to trespass or enter on lands without the owner's permission. The permittee should contact the appropriate management agency or landowner before beginning studies or taking specimens on lands the permittee does not own or manage.~~

[19.21.2.13 NMAC – Rn & A, 19.21.2.11 NMAC, xx/xx/xxxx]

[19.21.2.12] 19.21.2.14 VOUCHER SPECIMENS:

A. The state forester may issue a permit to take endangered plant voucher specimens during botanical inventories and environmental surveys for the purposes of species verification and documentation of population sites.

B. Taking specimens for the sole purpose of exchange with other herbaria is prohibited.

C. The collection of voucher specimens shall make no long-term detrimental effect on the population. The permittee may take a maximum of three specimens, if the population is sufficient. If the population is very small and the taking of a single individual is detrimental, then the state forester may condition the permit so that the permittee may take only a fragment of an individual for voucher purposes.

D. The permittee shall deposit at least one specimen of the three taken from each locality at the university of New Mexico herbarium or New Mexico state university herbarium. The permittee may send duplicates to the western New Mexico university herbarium, government agency collections within New Mexico or herbaria in other states that are formally listed in index herbariorum. The label affixed to each specimen shall contain information on collection location, description of the habitat, collector's name, date of collection and estimated size of the population.

E. To assist in the identification and preservation of endangered plant species in New Mexico, permittees shall report all permitted collections of voucher specimens to the state forester by December 31 of each year. The report shall contain the voucher specimen label information and the place or places of deposition of specimens.

[19.21.2.14 NMAC – Rn, 19.21.2.12 NMAC, xx/xx/xxxx]

[19.21.2.13] PROPAGATION AND TRANSPLANTATION:

~~A. The state forester may issue a permit to take endangered plants to propagate or transplant when evidence is presented that the activity will enhance that species' survival capability.~~

~~B. The state forester may issue a permit to transplant endangered species (not including federally listed taxa) when such species occur on areas of land use conversion.~~

~~C. The state forester may issue a permit for transplantation upon approval of a proposal the applicant submits outlining the need for such transplantation, the method to be employed, the site to which the plants will be taken for transplantation and the qualifications of the person carrying out the transplantation.]~~

19.21.2.15 PERMIT APPROVAL: The state forester shall only issue a permit if the application meets the applicable requirements in 19.21.2.11, 19.21.2.12, 19.21.2.13 or 19.21.2.14 NMAC for approval of an incidental take permit, scientific study, propagation or collection of voucher specimen permit. The state forester may not approve an application for a permit if an applicant (a) has taken an endangered plant outside the scope of a prior permit's provisions or without a permit, (b) otherwise failed to comply with a prior permit, (c) provided false information on a permit application or (d) attempted to transfer a prior permit without the state forester's written approval or allow someone else to use a prior permit.

[19.21.2.15 NMAC – Rn & A, 19.21.2.13 NMAC, xx/xx/xxxx]

19.21.2.16 PERMIT AMENDMENT: A permittee shall submit a written application to the state forester to request an amendment to a permit. The application shall describe the amendment requested and explain why the amendment is needed.

[19.21.2.16 NMAC – N, xx/xx/xxxx]

~~[19.21.2.14 PERMIT REVOCATION: Prohibited activities that render a collection permit invalid and may subject the permittee to prosecution include:]~~ **19.21.2.17 PERMIT REVOCATION:**

A. The state forester may revoke a permit for actions or events including taking of ~~[specimens of endangered plant species]~~ endangered plants outside the scope of the permit’s provisions or without a permit, failure to comply with the permit, discovery that any of the reasons that would have resulted in the state forester not approving a permit application exist, failure to deposit a voucher specimen in a designated New Mexico herbarium, taking specimens under a permit for commercial use, providing false information on the permit application, attempting to transfer the permit without the state forester’s prior written approval or allowing someone else to use the permit.

B. The state forester shall provide 30 days’ prior written notice of the permit revocation to the permittee unless such notice will result in long-term detrimental effect on the endangered plant population’s survival. If such notice will result in long-term detrimental effect on the endangered plant population’s survival, the state forester shall provide at least 48 hours written notice.

[19.21.2.17 NMAC – Rn & A, 19.21.2.14 NMAC, xx/xx/xxxx]

19.21.2.18 PERMIT TERM: The permit term shall be for the scope of the activity or five years, whichever is less. If the activity is not completed within five years, the permittee shall apply for a new permit. The scope of the activity does not include subsequent maintenance, repair or replacement, which are considered separate activities.

[19.21.2.18 NMAC – N, xx/xx/xxxx]

~~[19.21.2.15 PROTECTION AND PENALTIES:]~~ **19.21.2.19 PENALTIES:**

A. [The taking, possession, transportation, exportation from the state, processing, sale or offer for sale or shipment within the state of plants listed in 19.21.2.9 NMAC, other than pursuant to a valid permit issued by the state forester, is prohibited.

~~—————~~ B.] Pursuant to Section 75-6-1 NMSA 1978, violation of 19.21.2 NMAC is a misdemeanor punishable by a fine of not less than \$300, nor more than \$1,000 or imprisonment for a term of not more than 120 days or both. Each individual endangered plant taken without a valid permit issued by the state forester is a violation of 19.21.2.10 NMAC; each individual incidence or occurrence is a violation of other provisions in 19.21.2 NMAC (e.g., failing to obtain a required permit, providing false information on a permit application, failing to comply with a permit condition).

~~[C:]~~ B. Any law enforcement officer may seize any endangered plants taken, possessed, transported, exported, processed, sold or offered for sale or shipped in violation of 19.21.2 NMAC.

[19.21.2.19 NMAC – Rn & A, 19.21.2.15, xx/xx/xxxx]

19.21.2.20 TRANSITION: The prohibition on removing, harming, killing or destroying endangered plants without a permit issued by the state forester shall not apply to ground-disturbing activities for which a person received a permit or similar authorization from a federal, state or local government agency prior to _____ {the effective date of amendments to 19.21.2 NMAC} so long as the ground disturbance commences by _____ {within 180 days after the effective date of amendments to 19.21.2 NMAC}.

[19.21.2.20 NMAC – N, xx/xx/xxxx]