



November 8, 2021

PUBLIC COMMENT VIA ONLINE SUBMISSION

Laura McCarthy
State Forester
New Mexico EMNRD, Forestry Division
1220 S. St. Francis Drive
Santa Fe, NM 87505

Re: The Independent Petroleum Association of New Mexico's Comments on the State Forestry Division's Proposed Endangered Plant Rule Amendment

Dear Ms. McCarthy,

On behalf of its members, the Independent Petroleum Association of New Mexico (IPANM) timely submits the following comments on the Proposed Endangered Plant Rule Amendment (Proposed Rule) prepared by the State Forestry Division of the New Mexico Energy, Minerals, and Natural Resources Department (Forestry Division). IPANM appreciates this opportunity to comment and respectfully requests that the New Mexico Forestry Division take the following practical, legal, and policy comments into consideration, and make appropriate revisions to the Proposed Rule during finalization. As detailed below, IPANM has concerns regarding the portion of the Proposed Rule that requires its members to obtain an incidental take permit (ITP) for activities that occur entirely on federal lands within the State of New Mexico. Our comments below focus primarily on these concerns.

II. INTRODUCTION

B. The Independent Petroleum Association of New Mexico and its Members

Founded in 1978, IPANM consists of members from various sectors of the oil and gas industry ranging from small, independent oil and gas producers (upstream) to small, independent pipeline workers and production site transportation employees (midstream), to independent marketers, consultants, and bankers (downstream). IPANM advances and preserves the interests of independent oil and gas producers while educating the public regarding the importance of oil and gas to New Mexico and all our lives. In the spirit of that tradition, IPANM continues to grow and provide the services that protect, defend, and promote the industry that is the very foundation of our way of life.

Many IPANM members operate on federal public lands within the State of New Mexico, which are administered by federal land management agencies, such as the Bureau of Land Management (BLM). The Proposed Rule seeks to directly regulate activities that occur on these federal public lands. As such, IPANM and its members have a vested interest in the outcome of

the Proposed Rule, particularly as it applies to the federal lands on which IPANM's members currently operate and may seek to operate in the future. IPANM's members have a long history of close coordination with both the BLM New Mexico office and BLM field offices on endangered species, environmental issues, parks/natural resources, cultural/archeological matters, and surface/groundwater protections. IPANM also works in cooperation with various state and federal agencies, including the New Mexico Oil Conservation Division, the New Mexico Environment Department, the New Mexico State Engineer, the New Mexico State Land Office, the U.S. Fish and Wildlife Service, and the U.S. Environmental Protection Agency to ensure oil and gas development is accomplished in a way that protects the environment and other resource values.

We also recognize that maintaining lands for multiple use purposes, protecting areas of critical cultural or environmental significance, and minimizing and mitigating impacts to sensitive plant and animal species is important. Companies are working to reduce their environmental footprint and to mitigate impacts to New Mexico's valuable environmental and wildlife resources. As a result of developments in drilling, completion, and production technology, less land is needed to produce more oil, multiple wells can make use of the same well pad, and the time it takes to drill and complete a well is getting shorter. The result is a more efficient oil and gas industry that minimizes impacts on the land and the environment. We pride ourselves on being good stewards of the public resources and being contributing members of our communities.

III. IPANM'S COMMENTS ON THE PROPOSED RULE

For the reasons detailed below, IPANM requests that the Forestry Division seek input from federal land management agencies prior to finalizing the Proposed Rule in recognition of the federal government's broad, plenary authority over federal lands. For the same reason, and for the practical reasons discussed herein, the Forestry Division should incorporate an exemption from the ITP requirement for activities occurring solely on federal lands where: (1) those activities are already authorized by a federal plan or approval; and (2) the federal plan or approval addresses the New Mexico endangered plant species at issue. We encourage the Forestry Division to adopt our additional comments concerning the timeframe for issuing a decision on ITP applications, as well as incorporating regulations that specify the duration of ITPs and the circumstances under which a permittee must obtain an ITP amendment.

A. The Proposed Rule Should Include an Exemption from the ITP Requirement for Activities on Federal Lands Covered by Federal Mitigation Plans

In finalizing the Proposed Rule, the Forestry Division should consult with federal land management agencies to ensure that proper deference is afforded to the federal government in the regulation of activities on federal lands. As specified in 19.21.2.9 of the New Mexico Administrative Code, many species on the State of New Mexico's endangered plants list are either listed as endangered or threatened under the federal Endangered Species Act (ESA) or are being considered for protection under the ESA. Even more species are on BLM's sensitive

species list. In some cases, the federal land management agency may have entered into an agreement with the project proponent to address impacts to New Mexico endangered plant species and their habitat. For these situations, the Proposed Rule should include an exemption from the ITP requirement that would apply to activities occurring on federal land when those activities are covered by an agreement with the relevant federal agency and the approved federal agreement addresses impacts to the New Mexico endangered plant species and its habitat. Such an exemption is not only practical and efficient, but also avoids the potential for conflicts that can result from the application of state regulation on public lands. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580-81 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (holding that when “state laws conflict with . . . [federal laws] passed pursuant to the Property Clause, the law is clear: [t]he state laws must recede”).

As an example, the State of Nevada’s regulations, on which New Mexico has ostensibly based its own rules, exempt an applicant from the requirement to submit a project plan and mitigation activities plan when the applicant has an existing plan approved by a federal management agency, so long as the project will be implemented solely on federal lands and the approved plan addresses the plants on Nevada’s list of fully protected plant species. Nev. Admin. Code § 527.300. The State of Nevada’s practical justification for such an exemption is sensible: “it reasonably can be concluded that the review of the plan by the federal agency was substantially equivalent to the review the [Nevada Forestry] Division would give a plan submitted with an application pursuant to NAC 527.280.” *Id.* § 527.300(1)(b). While the State of Nevada’s regulation only exempts an applicant from submitting a project plan and mitigation activities plan, the same logic can be extended to submission of the application for an ITP itself. We believe the New Mexico Proposed Rule should be expanded to exempt applicants from obtaining an ITP altogether when the project applicant has an approved federal plan addressing impacts to the New Mexico endangered plant species. Such an approach would further the purposes of the Proposed Rule to address incidental takings of endangered plant species, while promoting efficiency and deferring to federal agencies over the management of public lands.

Requested Change:

Add a Section to the Proposed Rule, N.M. Code R. § 19.21.2.11, to state:

The requirement to obtain an incidental take permit pursuant to N.M. Code R. § 19.21.2.11 will be deemed to be satisfied when a person has a mitigation or conservation plan approved by the Bureau of Land Management, United States Forest Service or another federal land management agency if:

- (a) the activities that would otherwise require an incidental take permit will be implemented solely on land administered by the federal land management agency that approved the plan; and

(b) the plan includes reasonable avoidance, minimization, or mitigation measures for plants on the New Mexico state endangered plant species list and the habitat of such plants that will be affected by the proposed project.

B. The Forestry Division Must Ensure that Implementation of the Proposed Rule for Activities on Federal Lands Does Not Conflict with Federal Law

In implementing the Proposed Rule on federal lands, the Forestry Division must ensure that it does not take any action that conflicts with federal law, either by unreasonably denying ITPs, and therefore attempting to control the use of federal lands, or by imposing overly burdensome conditions on ITPs. *See* Proposed Rule, N.M. Code R. § 19.21.2.11(A) and (E) (providing state forester discretion to *deny* ITPs). As currently drafted, the Proposed Rule states that “[t]he 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.” Proposed Rule, N.M. Code R. § 19.21.2.11 (emphasis added).

As the Supreme Court has noted, “[I]and use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.” *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987); *see also S. Dakota Mining Ass’n v. Lawrence Cty.*, 155 F.3d 1005, 1011 (8th Cir. 1998) (“[a] local [or state] government cannot prohibit a lawful use of the sovereign’s land that the superior sovereign itself permits and encourages” because “[t]o do so offends both the Property Clause and the Supremacy Clause of the federal Constitution”). For activities occurring wholly on federal lands, any action by the Forestry Division to deny an ITP in contravention of a federal authorization on federal land would amount to an impermissible exercise of veto power over federally approved projects. Such an overreach of the state’s authority to deny access to federal lands is impermissible under the law. Similarly, imposition of unreasonably restrictive ITP conditions that thwart the federal approval of activities on federal land would constitute unreasonable environmental regulations on federal lands.

IPANM’s members have important interests in the development of oil and gas, both now and in the future, on federal lands in the State of New Mexico. These public lands are governed by comprehensive federal statutory schemes such as the Federal Land Policy and Management Act, 43 U.S.C. § 1701 et seq., and the Mineral Leasing Act, 30 U.S.C. § 181 et seq., which authorize and govern the use of federal lands for oil and gas development. *See Granite Rock*, 480 U.S. at 585-86 (assuming, without deciding, that comprehensive federal land use statutes preempted state land use regulation on federal lands). Specifically, IPANM objects to the Forestry Division’s implementation of the Proposed Rule to the extent it authorizes the State to deny ITPs or impose overly burdensome conditions of approval, which would effectively amount to an attempt to determine the use (or non-use) of federal land.

Requested Change:

Proposed Rule, N.M. Code R. § 19.21.2.11 should be amended to state:

The state forester may issue, issue with reasonable conditions, or deny requests for an incidental take permit to allow a permittee to take endangered plants so long as the taking is incidental to and not the purpose of carrying out an otherwise lawful activity, except that an incidental take permit cannot be denied where doing so would effectively deny access to or penalize otherwise lawful activity on federal land.

C. The Proposed Rule Should Include Specific Timeframes for State Forestry Review of Incidental Take Permit Applications

IPANM requests that the Forestry Division set forth in the Proposed Rule a reasonable timeframe within which the Forestry Division must act on an ITP permit, otherwise the permit will automatically be deemed to be approved. The inclusion of a reasonable timeframe for the Forestry Division to review and issue a decision on an ITP application will prevent open-ended and unnecessary project delays and provide certainty for permittees, while still providing the Forestry Division ample opportunity to review ITP applications and ensure adequate protection of endangered plant species. Specifically, IPANM proposes that the Forestry Division review and issue a decision on ITP applications within **three weeks** after receiving the application and, if no decision is issued within that time period, then the ITP permit is deemed to be granted and the permittee can lawfully proceed with the activities specified in the application.

Similar protocols have been used to establish timeframes for making determinations related to other resources in the state of New Mexico. For cultural resources, the State Protocol between the New Mexico BLM and the New Mexico State Historic Preservation Officer (SHPO) specifies ten- and thirty-day time frames for the SHPO to review and concur with BLM decisions. *See* State Protocol between New Mexico BLM and New Mexico SHPO Regarding the Manner in Which BLM Will Meet its Responsibilities Under the National Historic Preservation Act in New Mexico, <https://www.blm.gov/sites/blm.gov/files/NM%20Protocol.pdf> (last visited on July 7, 2021). Under the terms of the State Protocol, if the SHPO fails to respond within the specified timeframe, “BLM may assume concurrence.” *Id.* at 21, 25, 30, 33, 35.

A similar approach is warranted here to protect the rights and expectations of permittees to conduct their federally approved activities on federal lands without the uncertainty and delay associated with an ITP process of indeterminate length. At a minimum, IPANM suggests the Forestry Division to follow the State of Nevada’s regulations. Those regulations contain a 30-day time period within which Nevada’s Forestry Division must grant the permit, grant the permit subject to conditions, or deny the permit. Nev. Admin. Code § 527.340(1).

Requested Change:

Add language to Proposed Rule, N.M. Code R. § 19.21.2.11, to state:

Upon receiving an application for an incidental take permit, the state forester will have three weeks to review and issue a decision on the incidental take permit. If the state forester has not issued a decision at the expiration of the three-week period, the incidental take permit will automatically be deemed to be approved.

D. Once Approved, ITPs Should Remain in Effect for the Life of the Project, and the Proposed Rule Should Specify a Process for Amendments

The Proposed Rule should also make clear that, once a permit has been issued, it will remain in effect for the life of the project. The State of Nevada’s regulations contain a similar provision: “Unless a permit is revoked, or the permittee receives notice to cease activity pursuant to NAC 527.420, **a permit is valid for the life of the project** or until the termination date provided in the permit, if any, whichever occurs first.” Nev. Admin. Code § 527.320(1) (emphasis added). However, unlike the State of Nevada’s regulations, we do not believe that a termination date in the ITP is necessary or appropriate for project activities that have already been approved under the existing ITP, especially where surface disturbance (and associated potential impacts to plant species) are completed during project construction. Therefore, we encourage the Forestry Division to specify in the Proposed Rule that: (1) a permit, once approved, remains in effect for the life of the permittee’s project; and (2) permittees will not be required to obtain periodic ITP renewals. The Proposed Rule should also set forth the circumstances under which a permittee would be required to obtain an ITP amendment and the process for obtaining one. *See, e.g.*, Nev. Admin. Code § 527.360.

Requested Change:

Add language to the Proposed Rule, N.M. Code R. § 19.21.2.15, to state:

Unless a permit issued under 19.21.2.15 NMAC is revoked pursuant to 19.21.2.16 NMAC, the permit is valid for the life of the project. Permit renewals will not be required.

Add a Section to the Proposed Rule entitled “Permit Amendments” with the following language:

1. A permittee desiring to modify any condition of his or her permit must submit to the state forester: (a) A request for amendment; (b) A written statement that describes the facts

supporting the requested amendment; and (c) Any relevant information supporting the granting of the requested amendment.

2. The state forester shall notify the permittee concerning the granting or denial of the requested amendment, in part or in full, and the reasons therefor, within three weeks after receiving the information required pursuant to subsection 1.

See Nev. Admin. Code § 527.360 for potential additional regulatory language.

IV. CONCLUSION

IPANM appreciates the opportunity to submit comments on the Proposed Rule. We look forward to continuing to work cooperatively with both federal and state agencies, including the Forestry Division, to promote responsible and balanced mineral development on all lands within the State of New Mexico. Accordingly, IPANM respectfully requests that the Forestry Division take the foregoing comments under consideration when revising the Proposed Rule.

Sincerely,

A handwritten signature in black ink that reads "Jim Winchester". The signature is written in a cursive, flowing style.

Jim Winchester
Executive Director
Independent Petroleum Association of New Mexico