Ms. Mason,

On behalf of the New Mexico Oil & Gas Association, please find attached to this email a cover letter summarizing comments and requested modifications to the Department’s draft proposed rule amending 19.21.2 NMAC, along with NMOGA’s proposed redlines to the draft rule.

NMOGA appreciates the opportunity to provide comment and feedback and to participate in the public comment at tomorrow’s hearing.

Very best,

Adam

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November 9, 2021

Wendy Mason
Energy, Minerals and Natural Resources Department
Forestry Division
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505
wendy.mason@state.nm.us

Re: Proposed Amendment of 19.21.2 NMAC, Endangered Plant Species List and Collection Permits

Dear Ms. Mason:

I am writing to submit comments to the Energy, Minerals and Natural Resources Department’s proposed draft amendments to 19.21.2 NMAC on behalf of the New Mexico Oil and Gas Association (”NMOGA”). NMOGA appreciates the opportunity to comment on the proposed rule and participate in the rulemaking.

The proposed amendments would add American Hart’s-tongue fern, *Asplenium scolopendrium var. americanum*, to the list of state endangered plant species; amend the definitions section to modify certain defined terms and include additional defined terms; establish an incidental take permitting process; and amend provisions regarding penalties, among other changes.

NMOGA is a trade association whose members account for 97% of the oil and gas produced in New Mexico, primarily in the southeastern and northwestern portions of our state. The association’s members also include midstream sector companies in New Mexico. NMOGA is including herewith comments and red-lined suggestions to the text with the aim of giving the proposed rule more clarity and regulatory certainty. NMOGA wishes to particularly highlight four provisions of the proposed rule:

- **Applicability to Federal Lands.** It is unclear whether, under the proposed amendments, the Forestry Division intends to require compliance with the rule on federal lands.

- **Definition of Harm.** To provide greater clarity and regulatory certainty, we request that the definition be modified to specify that “Harm” means direct physical injury or damage to a plant.
• **Consultation with U.S. Fish & Wildlife Service (USFWS).** Under 19.21.2.11.C, NMOGA requests that EMNRD modify the proposed rule to clarify that applicants for an incidental take permit are expected to initiate consultation with the USWFS concurrently with the state incidental take permit application to streamline the process and timing.

• **Take Permit Approval Timeframe.** Under 19.21.2.15 NMAC, NMOGA requests that EMNRD modify the proposed rule to provide a timeline for incidental take permit approvals to 14 days and provide for an expedited approval when circumstances justify an accelerated review and approval.

Thank you for the opportunity to provide these comments. Should you wish to discuss any of the suggested edits or our comments further, please do not hesitate to contact me.

Sincerely,

Adam G. Rankin
Partner
of Holland & Hart LLP

AGR:csg

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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 diskling 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.

C. “Collector” 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.

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

E. “Harm” means direct 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.

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; an agency, department or instrumentality of the United States and its officers, agents or employees.

H. “Population site” means an area of occurrence of a particular species.

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

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.

K. “Taking” means the removal, with the intent to remove, harm, kill, destroy, possess, transport, export, sell, or offer for sale any of the plants, or parts of plants, 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.

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.


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:

<table>
<thead>
<tr>
<th>Scientific Name</th>
<th>Voucher Specimen</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allium gooddingii (Goodding’s onion)</td>
<td>Subsection B of 19.21.2.8 NMAC</td>
</tr>
<tr>
<td>Agalinis calycina (Leoncita false-foxyglove)</td>
<td>Subsection B of 19.21.2.8 NMAC</td>
</tr>
</tbody>
</table>

Commented [A1]: General comment:
- It is unclear whether Forest Division will require compliance with the plant rule on federal land.
Amsonia tharpii (Tharp's bluestar)  Subsection B of 19.21.2 NMAC
Argemone pinnatisecta (Sacramento prickly-poppy)  Subsection A of 19.21.2 NMAC
Asplenium scolopendrium var. americanum (American Hart's-tongue fern) Subsection A of 19.21.2 NMAC
Astragalus humilimus (Mancos milkvetch) Subsection A of 19.21.2 NMAC
Peniocereus greggii (night-blooming cereus)  Subsection B of 19.21.2 NMAC
Castilleja ornata (Swale paintbrush)  Subsection B of 19.21.2 NMAC
Castilleja tomentosa (Tomentose paintbrush)  Subsection B of 19.21.2 NMAC
Asplenium scolopendrium var. americanum (American Hart's-tongue fern) Subsection A of 19.21.2 NMAC
Astragalus humilimus (Mancos milkvetch) Subsection A of 19.21.2 NMAC
Peniocereus greggii (night-blooming cereus)  Subsection B of 19.21.2 NMAC
Castilleja ornata (Swale paintbrush)  Subsection B of 19.21.2 NMAC
Castilleja tomentosa (Tomentose paintbrush)  Subsection B of 19.21.2 NMAC
Cirsium vinaceum (Sacramento Mountains thistle) Subsection A of 19.21.2 NMAC
Cirsium wrightii (Wright's marsh thistle) Subsection B of 19.21.2 NMAC
Cleome multicaulis (slender spiderflower) Subsection B of 19.21.2 NMAC
Coryphantha robustispina ssp. scheeri (Scheer's pincushion cactus) Subsection B of 19.21.2 NMAC
Cylindropuntia viridiflora (Santa Fe cholla) Subsection B of 19.21.2 NMAC
Cymopterus spellenbergii (Spellenberg's springparsley) Subsection B of 19.21.2 NMAC
Cypripedium parviflorum var. pubescens (golden lady's slipper) Subsection B of 19.21.2 NMAC
Echinocereus fendleri var. kuenzleri (Kuenzler's hedgehog cactus) Subsection A of 19.21.2 NMAC
Erigeron hessii (Hess' fleabane)  Subsection B of 19.21.2 NMAC
Erigeron rhizomatus (Zuni fleabane) Subsection A of 19.21.2 NMAC
Eriogonum gypsophilum (gypsum wild buckwheat) Subsection A of 19.21.2 NMAC
Escobaria duncanii (Duncan's pincushion cactus) Subsection B of 19.21.2 NMAC
Escobaria organensis (Organ Mountain pincushion cactus) Subsection B of 19.21.2 NMAC
Escobaria snediti var. leen (Lee's pincushion cactus) Subsection A of 19.21.2 NMAC
Escobaria snediti var. snediti (Sneed's pincushion cactus) Subsection A of 19.21.2 NMAC
Escobaria villardii (Villard's pincushion cactus) Subsection A of 19.21.2 NMAC
Hedeoma todsenii (Todsen's pennyroyal) Subsection B of 19.21.2 NMAC
Helianthus paradoxus (Pecos sunflower) Subsection A of 19.21.2 NMAC
Hexalectris colemani (Coleman's coralroot) Subsection B of 19.21.2 NMAC
Hexalectris nitida (shining coralroot) Subsection B of 19.21.2 NMAC
Hexalectris arizonica (crested coralroot) Subsection B of 19.21.2 NMAC
Ipomopsis sanctispiritus (Holy Ghost ipomopsis) Subsection A of 19.21.2 NMAC
Lepidospartum burgessii (gypsum scalebroom) Subsection B of 19.21.2 NMAC
Linum alfredi (Alfred's flax) Subsection B of 19.21.2 NMAC
Opuntia arenaria (sand prickly pear) Subsection B of 19.21.2 NMAC
Pediocactus knowltonii (Knowlton's cactus) Subsection A of 19.21.2 NMAC
Pediomelum pentaphyllum (Chihuahua scurfpea) Subsection B of 19.21.2 NMAC
Penstemon metcalfei (Metcalfe's beardtongue) Subsection B of 19.21.2 NMAC
Pseudopteridium rivulare var. mescalorum (San Andres milkwort) Subsection B of 19.21.2 NMAC
Puccinellia parshii (Parshii's alkali grass) Subsection B of 19.21.2 NMAC
Sclerocactus cloverae (Clover’s cactus) Subsection A of 19.21.2 NMAC
Sclerocactus mesae-verdae (Mesa Verde cactus) Subsection A of 19.21.2 NMAC
Scrophularia macrantha (Mimbres figwort) Subsection B of 19.21.2 NMAC
Spartanium magnicamporum (lady tresses orchid) Subsection B of 19.21.2 NMAC
Sternularia gyspophila (gypsum Townsend's aster) Subsection B of 19.21.2 NMAC

19.21.2.10 PROTECTION: The taking of endangered plants, other than pursuant to a permit issued by the state forester, is prohibited.  
19.21.2.11 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. Applicants are expected to initiate consultation with US Fish and Wildlife Service in sufficient time for biological opinion availability prior to incidental take permit being issued.

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]

[19.21.2.12 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.

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


[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.
PROPAGATION AND TRANSPANTATION:

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.

PERMIT APPROVAL: The state forester shall only issue a permit, within 14 days or expedited for just cause, 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 specimens 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.

19.21.2.16 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.

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

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.

19.21.2.18 PERMIT TERM: The permit term shall be for the scope of the activity for 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.

19.21.2.19 PENALTIES: 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 19.21.2.19 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).

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.

19.21.2.20 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).