

From: [Shelleen Smith](#)
To: [Mason, Wendy, EMNRD](#)
Cc: [Randell Major](#)
Subject: [EXTERNAL] COMMENT FOR SUBMITTAL regarding Proposed Rulemaking 19.2.1 NMAC Endangered Plant Species List and Collection Permits Amendment
Date: Tuesday, November 9, 2021 5:39:44 PM
Attachments: [New Mexico Cattle Growers" Association Proposed Rule Change 19.21.2 NMAC.pdf](#)

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Ms. Mason,

Please find attached the New Mexico Cattle Growers' Association comment regarding Proposed Rulemaking 19.2.1 NMAC Endangered Plant Species List and Collection Permits Amendment.

We appreciate the opportunity to provide a comment and look forward to continued communication with your office.

All the best,

Shelleen

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November 8, 2021

Ms. Wendy Mason

wendy.mason@state.nm.us

EMNRD Forestry Division

1220 S St. Francis Dr.

Santa Fe, NM 87505

Dear Ms. Mason:

The New Mexico Cattle Growers' Association (NMCGA), representing over 1200 members in 32 of the state's 33 counties, appreciates the opportunity to comment on The State of New Mexico, Energy, Minerals and Natural Resources Department (EMNRD), Forestry Division proposed rulemaking to amend its rule, 19.21.2 NMAC, Endangered Plant Species List and Collection Permits.

Initially we would like to say public meetings would have been beneficial for public understanding and adequate public input. Also, there is no explanation of why the agency wants to make this proposed change, which is clearly a move toward a more punitive rule with more subjective enforcement discretion. We are unaware of any history of widespread takings or commercial scale theft. However, we can assure the agency and the public that best and most effective protection will come from the ranchers on the land. Those protections would be most enhanced by positive incentives and working with landowners and lessees instead of imposing more threatening punitive consequences.

Requirements in the proposed rule lack clarity for ranchers working on land they manage, including potential legal ramifications that may result even when there is no intent. The determination of when an ITP is necessary is also unclear. Activities such as agricultural practices and emergency responses are limited by the definition and fail to consider a range of probabilities.

The statute currently states that "taking, possession, transportation, exportation from this state, processing, sale or offer for sale or shipment within this state" are all separate actions. In the proposed change, "Taking" would define all of these separate actions as being a taking and remove the "intent." Without the need for "intent," it would be much easier to arbitrarily and subjectively assert accidental or unintentional takes were violations of the law with possible fines and jail time.

Adding the new language, **to remove, harm, kill or destroy**, changes the original intent of the legislation. We would like to have a full explanation of why this is being proposed.

Proposed revision to 19.21.2.7 NMAC

(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.

Additionally, there is a lack of clarity regarding who is affected by this proposed change. How would someone determine if they were required to apply for an incidental take permit? Is a permit required only if there will be extensive ground disturbance within known perimeters of New Mexico endangered plants?

Although "agricultural practice" is exempt from the definition of "Taking," the definition, as written doesn't include all possible practices and if not listed specifically within the definition, an agricultural practice could create a taking by agriculture.

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.

The definition of Agricultural Practice in 19.21.2.7 attempts to provide protections for agriculture but is far too limited in definition and does not address roads, erosion control structures, dirt tanks (earthen impoundments) and very clearly does not exempt large scale range management and brush control projects (mechanical or herbicide or prescribed burning treatments).

Range Management and brush control projects are necessary to improve and enhance water conservation, soil health, watershed function, carbon capture, sustainability and

forage for wildlife and livestock. These proposed rule changes appear to intend to prohibit or severely limit those practices.

The definition allows "maintenance, repair, or replacement," without addressing the establishment of new cultivated fields or new infrastructure improvements. It should include something similar to "and any other typical agricultural practices," because the definition cannot be all inclusive of activities that might be an agricultural practice.

What about normal and necessary animal care management and production practices?

Finally, though the proposal seems to exempt emergency response actions, it is not broad enough to protect wildfire responses, snow removal from roads and pastures in winter storms, flood damage repairs to infrastructure, and does not exempt landowners who are often first emergency responders to fight a fire or clear snow or make temporary road repairs to damaged roads.

Will agency monitoring occur prior to "emergency response" "so that "any adverse effects can be avoided or mitigated?" Who will do this monitoring? How will the agency inform emergency responders that there are "known endangered plant(s) within the area"?

19.21.2.11 INCIDENTAL TAKE PERMIT

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.

This section should also exempt, private citizens, landowners and lessees the same as it does agencies.

NMCGA asks that EMNRD consider an extension of the comment period. The proposed rule change has not been widely circulated for review. We request additional public meetings in rural counties for adequate review and opportunity to comment by counties, schools, utility providers, farmers and ranchers. Again, we appreciate the

opportunity to comment and hope that you will take our requests and suggestions into consideration.

Respectfully,

Randell Major

President, New Mexico Cattle Growers' Association

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