

NOTICE OF PROPOSED RULEMAKING

The State of New Mexico, Energy, Minerals and Natural Resources Department (EMNRD), Forestry Division hereby gives notice of the following proposed rulemaking. EMNRD proposes to amend its rule, 19.21.2 NMAC, Endangered Plant Species List and Collection Permits.

Purpose of Amendment. EMNRD proposes the amendment to add American Hart's-tongue fern, *Asplenium scolopendrium* var. *americanum*, to the list of state endangered plant species; amend the definition of 'take' to include harm, kill, and destroy except for incidental removal, harm, killing, or destruction resulting from agricultural practices or tribal members use for religious purposes; establish an incidental take permitting process; amend the definition of state forester; add definitions of "agricultural practice", "applicant", "endangered plant", "harm", "permittee", "person", and "tribal member"; amend the provisions regarding scientific study and propagation permits for state endangered plants; establish requirements for permit amendment; amend requirements for permit approval and revocation; establish a permit term; and amend the provisions regarding penalties.

EMNRD proposes to add American Hart's-tongue fern as it was discovered at the El Malpais National Monument in 2020 and its identity was recently verified by various species specialists. The fern is a federally listed threatened species previously not known to occur in New Mexico, but it is now known to occur at one site containing 66 individuals. As a result, this plant must be included on the state endangered plant list as required by NMSA 1978, Section 75-6-1 because it federally listed under the Endangered Species Act.

EMNRD proposes to amend the definition of take to include harm, kill, and destroy because the current rule does not reflect the intent of NMSA 1978, Section 75-6-1 to protect and conserve endangered plant species as it only regulates the removal of endangered plants with the intent to possess, transport, export, sell, or offer for sale. The current rule does not regulate the harm, killing, or destruction of endangered plants from other activities or the intentional destruction of endangered plants. The proposed amendments are in response to a decline in New Mexico's endangered plant species over recent decades which indicates that stronger efforts are needed to protect and conserve New Mexico's endangered plant species. The new definition of take more closely tracks the statute but exempts certain agricultural and tribal religious practices. To facilitate implementation EMNRD proposes to establish an incidental take permitting process as it is not always possible to avoid take of endangered plant species in connection with such actions.

EMNRD also proposes to add and amend additional definitions, amend the provisions regarding scientific study and propagation permits, establish requirements for permit amendment, amend requirements for permit approval and revocation, establish a permit term, and amend the penalty provisions for clarity and consistency in implementing NMSA 1978, Section 75-6-1 and 19.21.2 NMAC.

Legal Authority. EMNRD proposes this rule amendment under the authority of NMSA 1978, Section 75-6-1 and NMSA 1978, Section 9-1-5(E).

The full text of the proposed rule amendment is available from Daniela Roth at 505-372-8494 or daniela.roth@state.nm.us or can be viewed on the EMNRD, Forestry Division's website at <https://www.emnrd.nm.gov/sfd/public-meetings/> or at the Forestry Division's offices in Santa Fe, Chama, Cimarron, Las Vegas, Rio Rancho, Socorro, Capitan, and Silver City.

Public Hearing and Comment. EMNRD will hold a virtual public hearing on the proposed rule amendment at 9:00 a.m. on Wednesday, November 10, 2021. The public may join the hearing virtually through WebEx using one of the following:

Join from the meeting link

<https://nmemnrd.webex.com/nmemnrd/j.php?MTID=m182c1e85e603d03065e1914fb59068aa>

Join by meeting number

Meeting number (access code): 2497 449 6948
Meeting password: YbipaVzz665

Tap to join from a mobile device (attendees only)
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Join by phone
+1-408-418-9388 United States Toll
Global call-in numbers

Join from a video system or application
Dial 24974496948@nmemnrd.webex.com
You can also dial 173.243.2.68 and enter your meeting number.

Join using Microsoft Lync or Microsoft Skype for Business
Dial 24974496948.nmemnrd@lync.webex.com

Those wishing to comment on the proposed rule amendment may make oral comments or submit information at the hearing or may submit written comments by November 10, 2021, by 9:00 a.m. by mail or email. Please mail written comments to Wendy Mason, EMNRD, Forestry Division, 1220 South Saint Francis Drive, Santa Fe, New Mexico 87505 or submit comments by email to wendy.mason@state.nm.us.

Technical Information that served as a basis for the proposed rule amendments includes:

Copies of the technical information can be obtained from Daniela Roth at 505-372-8494 or Daniela.Roth@state.nm.us or can be viewed on the EMNRD, Forestry Division's website at <https://www.emnrd.nm.gov/sfd/public-meetings/>.

Bansbach, L., M. Bacigalupa, M. Beitner, N. Redeker, and Z. Davidson. 2019 Monitoring report: Aztec gilia (*Aliciella formosa*). Farmington Field Office, New Mexico. Technical report prepared for the BLM State Office, Santa Fe, NM.

Enquist, C., and D. Gori. 2008. A climate change vulnerability assessment for biodiversity in New Mexico, Part 1: Implications of recent climate change on conservation priorities in New Mexico. Climate Change Ecology & Adaptation Program, The Nature Conservancy in New Mexico.

Goettsch, B., et al. 2015. High proportion of cactus species threatened with extinction. Nature Plants, Article No. 15142. DOI 10.1038/NPlants.2015.142.

Institute for Applied Ecology. 2020. Draft Conservation Strategy for Clover's cactus (*Sclerocactus cloverae*) and Aztec gilia (*Aliciella formosa*). Unpublished draft report prepared for the Bureau of Land Management New Mexico State Office (Agreement L15AC002).

Ladyman, J.A.R. Ph.D. 2004. Status assessment report for *Sclerocactus mesae-verdae* (Mesa Verde cactus). Technical report prepared by JnJ Associates, LLC, Centennial, CO, for the Navajo Natural Heritage Program, Window Rock, AZ.

Nevada Endangered Plant Rule, Chapter 527 – Protection and preservation of timbered lands, trees, and flora. Revised date: 4-12

Roth, D. 2013. Status report – *Cirsium vinaceum* (Sacramento Mountains thistle) Section 6, Segment 27. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM.

Roth, D. and R. Sivinski. 2014. Status report for Zuni fleabane on the Cibola National Forest, New Mexico. Technical report prepared for the Cibola National Forest, Albuquerque, NM.

Roth, D. 2015. Wildfire impacts on species of concern in the Gila National Forest, New Mexico. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM.

Roth, D. 2017a. Ignacio Chavez Grant Special Management Area rare plant survey report. Technical report prepared by the EMNRD-Forestry Division for the Bureau of Land Management, Rio Puerco Field Office, Albuquerque, NM.

Roth, D. 2017b. Swale paintbrush (*Castilleja ornata*). Status survey report. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM.

Roth, D. 2018. Post-fire status report – heartleaf groundsel (*Packera cardamine*), Mogollon death camas (*Anticlea mogollonensis*). Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM.

Roth, D., and B. Sivinski. 2018. Status report – Aztec gilia (*Aliciella formosa*), San Juan County, NM. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM.

Roth, D. 2020a. *Ipomopsis sancti-spiritus* (Holy Ghost Ipomopsis). Recovery Summary report (Section 6, Segment 33) 1996 – 2020. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM (USFWS Grant Award No. F19AP00929).

Roth, D. 2020b. Status report – Mancos milkvetch (*Astragalus humillimus*) BLM Hogback ACEC. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM (USFWS Grant Award No. F19AP00929).

Roth, D. 2020c. *Pediocactus knowltonii* (Knowlton’s cactus). Summary report (Section 6, Segment 34). Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM (USFWS Grant Award No. F19AP00929).

Roth, D. 2020d. Status report, Goodding’s onion (*Allium gooddingii*), Gila and Lincoln National Forest, New Mexico. Technical report prepared by the EMNRD-Forestry Division for the USFWS, R2, Albuquerque, NM (USFWS Grant Award No. F19AP00929).

Roth, D. 2020e. 30-year monitoring report – Mancos milkvetch (*Astragalus humillimus*: *Fabaceae*). BLM Hogback Area of Critical Environmental Concern, San Juan County, NM. 1990-2020. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM (USFWS Grant Award No. F19AP00929).

Roth, D. 2020f. Wright’s marsh thistle (*Cirsium wrightii*). 2017-2020 Monitoring report. Blue Hole and Ballpark Ciénegas, Santa Rosa, NM. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM (USFWS Grant Award No. F19AP00929).

Roth, D. 2020g. Monitoring report – Mesa Verde cactus (*Sclerocactus mesae-verdae*). 1986-2020. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM (USFWS Grant Award No. F19AP00929).

Roth, D. 2020h. Status report, Mesa Verde cactus (*Sclerocactus mesae-verdae*). BLM Hogback ACEC, Waterflow, NM. Technical report prepared by the EMNRD-Forestry Division, Santa Fe, NM, for the USFWS, R2, Albuquerque, NM (USFWS Grant Award No. F19AP00929).

Roth, D. 2021. 2021 Update – *Allium gooddingii*, Lincoln National Forest. Technical report prepared for the EMNRD-Forestry Division, Santa Fe, NM, and the USFWS, Albuquerque, NM.

Talkington, N.E. 2019. Mancos milkvetch (*Astragalus humillimus*) status assessment and monitoring report. Technical report prepared by the Navajo Natural Heritage Program, Window Rock, AZ.

Tonne, P. 2002. Status report for Arizona willow (*Salix arizonica*; *Salicaceae*). Technical report prepared by the NM Natural Heritage Program, Albuquerque, New Mexico, for the NM Forestry and Resources Conservation Division, Santa Fe, New Mexico (NMNHP Report: 02 – GTR-224)

Treher, A., A. Frances, L. Oliver, B.E. Young. 2012. Vulnerability of plants on BLM lands to climate change. Technical Report prepared by NatureServe, Arlington, VA.

USDI – Bureau of Land Management, Farmington District Office. 2014. Instructions Memorandum No. NMF000-2014-010. Manage conservation of Brack’s cactus.

USDI – Bureau of Land Management, Farmington District Office. 2017. Instructions Memorandum No. NMFO1210-2017-003. BLM Special Status Plant Species (SSPS) - Brack’s cactus and Aztec gilia.

USDI-USFWS. 2020. American Hart’s-tongue fern (*Asplenium scolopendrium* var. *americanum*). 5-Year Review. Summary and evaluation. U.S. Fish & Wildlife Service, New York Field Office, Cortland, NY.

Williams, A. P., E.R. Cook, J.E. Smerdon, B. I. Cook, J.T. Abatzoglou, K. Bolles, S.H. Baek, A. M. Badger, and B. Livneh. 2020. Large contribution from anthropogenic warming to an emerging North American megadrought. *Science* 368, 314-318.

Wiley John. 2020. AHTF in NM – Genetics and 5-year review. Email correspondence to Daniela Roth, EMNRD-Forestry Division from John Wiley, USFWS.

If you are an individual with a disability who needs a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact Daniela Roth at 505-372-8494 or through the New Mexico Relay Network at 1-800-659-1779 two weeks prior to the hearing. Public documents can be provided in various accessible formats. Please contact Daniela Roth at 505-372-8494, if a summary or other type of accessible format is needed.

