

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

**IN THE MATTER OF THE PETITION FOR
PROPOSED AMENDMENTS TO 20.6.4.9 NMAC,
DESIGNATION OF WATERS OF THE UPPER PECOS No. WQCC 21-51 (R)
WATERSHED AS OUTSTANDING NATIONAL
RESOURCE WATERS,**

**Village of Pecos, San Miguel County,
Upper Pecos Watershed Association, New
Mexico Acequia Association, and Molino
de la Isla Organics LLC,
Petitioners.**

HEARING OFFICER’S REPORT

This matter came before the New Mexico Water Quality Control Commission (“Commission”) upon a petition filed by the Village of Pecos, San Miguel County, Upper Pecos Watershed Association, New Mexico Acequia Association, and Molino de la Isla Organics LLC, (collectively “Petitioners”) on October 1, 2021, proposing surface waters of the Upper Pecos Watershed¹ be designated as Outstanding National Resource Waters (“ONRWs”), as codified in Title 20, Chapter 6, Part 4, Section 9 of the New Mexico Administrative Code (20.6.4.9 NMAC).

I. Procedural Background

Note: this is the second attempt to achieve the designation of the surface waters of the Upper Pecos Watershed as ONRWs. Petitioners filed the first petition on April 20, 2020, subsequently docketed as WQCC 20-18, and then withdrawn on April 7, 2021. The second petition (the subject matter of this Report) came before the Commission at the November 9, 2021, regular meeting. The N.M. Environment Department’s Surface Water Quality Bureau (“NMED”) was represented by

¹ The term “Upper Pecos Watershed” refers to the perennial and non-perennial streams and wetlands nominated in the Petition and identified in Maps 1 and 2 and Tables 1 and 2 in Section II.B of the Petition.

John Verheul, Petitioners were represented by Kelly Nokes and Tannis Fox, and Dennis McQuillan appeared pro se.

On November 30, 2021, the Commission issued its Order for Hearing and Appointment of Hearing Officer (“Order for Hearing”), appointing Gregory Chakalian as Hearing Officer and setting the hearing for April 12, 2022. By Order dated December 9, 2021, and later amended on December 13, 2021, the Hearing Officer issued a Scheduling Order outlining the procedures and deadlines for pre-hearing filings, including submission of Notices of Intent to Provide Technical Testimony, outlining the procedures for the hearing, and issued a post-hearing schedule.

II. Public Notice and the Hearing

Public Notice of the hearing was timely provided in accordance with all relevant state and federal laws. NMED Exhibit 1, pp. 10-13; NMED Exhibits 23-25, 27-31, 33, 35. Petitioners provided affidavits of publication of notice of the Petition in a newspaper of general circulation in the affected counties and in a newspaper of general statewide circulation in accordance with 20.6.4.9.A(6) NMAC. Hearing Transcript (“Tr.”) 77:12–22; Pet’rs Ex. 7. On September 2, 2021, notice of the Petition was published in The Albuquerque Journal. Pet’rs Ex. 7. On September 1, 2021, notice of the Petition was published in The Las Vegas Optic. Pet’rs Ex. 8.

Petitioners, via NMED, provided notice of the hearing in accordance with 20.1.6.201 NMAC, Section 14-4-5.2 of the State Rules Act, and Section 14-4A-4 of the Small Business Regulatory Relief Act, by publishing the hearing notice in the New Mexico Register and a newspaper of general circulation in the area affected at least 60 days prior to the hearing. Tr. 132:22–135:19, 77:12–78:9; Pet’rs Ex. 8. On January 26, 2022, notice of the hearing was published in the New Mexico Register. Pet’rs Ex. 8. On February 5, 2022, notice of the hearing was published in The

Albuquerque Journal. Pet’rs Ex. 8. On February 4, 2022, notice of the hearing was published in The Las Vegas Optic. Pet’rs Ex. 8.

On March 10, 2022, Petitioners, NMED, and Dennis McQuillan filed their Notices of Intent to Present Technical Testimony, including the pre-filed written direct testimony of their witnesses.

On April 12, 2022, the hearing in this matter commenced at 9:30 A.M. virtually through the Cisco Webex Meetings video conferencing platform Tr. 1:13–17. The hearing was transcribed by Albuquerque Court Reporting Service, LLC, and a complete transcript of the hearing was filed with the Commission on April 19, 2022. At the outset of the hearing, the Hearing Officer admitted into evidence all exhibits submitted with the Parties’ Notices of Intent to Present Technical Testimony, including Petitioners’ 27 exhibits, Tr. 16:23–25; NMED’s 38 exhibits, Tr. 18:5–9; and Mr. McQuillan’s two exhibits, Tr. 19: 8–12. The Hearing Officer received testimony from all the Parties. Public comments were heard from several persons [Tr. 112:17-123:3, 206:5-211:21], only one of whom expressed opposition to the ONRW designation [Tr. 121:19-123:3]. The Commission allowed all interested persons a reasonable opportunity to submit data, views, and arguments, and to examine witnesses.

The record containing all pleadings, written testimony, exhibits, hearing transcript, public comments, and Hearing Officer Orders and this Report have been submitted to the Commission for review in compiling the statement of reasons in this matter. The proposed amendments to 20.6.4.9 NMAC, are reflected in NMED Exhibit 36, which are identical to Petitioners’ Exhibit 1.

III. Authority

The Commission is responsible for adopting water quality standards for surface and ground waters of the state to “protect the public health and welfare, enhance the quality of water, and serve the purposes of the [Water Quality Act].” NMSA 1978, § 74-6-4(D). Standards must be based on

“credible scientific data and other evidence appropriate under the [Water Quality Act].” *Id.* In adopting standards the Commission “shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes.” *Id.*

The Water Quality Act further requires the Commission to adopt regulations to prevent or abate water pollution in the state. NMSA 1978, § 74-6-4(E). In adopting regulations, the Commission shall give weight it deems appropriate to all relevant facts and circumstances, including:

- (1) character and degree of injury to or interference with health, welfare, environment and property;
- (2) the public interest, including the social and economic value of the sources of water contaminants;
- (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;
- (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;
- (5) feasibility of a user or a subsequent user treating water before a subsequent use;
- (6) property rights and accustomed uses; and
- (7) federal water quality requirements.

Id.

Any person, including the department, may petition the Commission at any time to adopt, amend, or repeal a water quality standard or regulation. NMSA 1978, § 74-6-6(B). The Commission is required to hold a public hearing in order adopt, modify, or repeal a standard or regulation. NMSA 1978, § 74-6-6(A).

“The Commission is the state water pollution control agency for this state for all purposes of the federal [Clean Water Act]” [NMSA 1978, § 74-6-3(E)] and has the duty to “adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Act.” NMSA 1978, § 74-6-4(D). “The department of environment shall provide technical services ... pursuant to the federal [Clean Water] Act.”

NMSA 1978, § 74-6-4(F). A water classified as an ONRW is a “Standard” for purposes of the Water Quality Act. *See* 20.6.4.9.D NMAC; NMSA 1978, § 74-6-4(D).

Further, “Any person may nominate a surface water of the state for designation as an ONRW by filing a petition with the commission.” 20.6.4.9(A) NMAC. The requirements of such a petition are contained in 20.6.4.9 NMAC, while the rulemaking procedures for the Commission are contained in 20.1.6 NMAC.

IV. Procedures for Nominating an ONRW

Under 20.6.4.9.A NMAC,

any person may nominate a surface water of the state for designation as an ONRW by filing a petition with the commission pursuant to the guidelines for water quality control commission regulation hearings. A petition to designate a surface water of the state as an ONRW shall include:

- (1) a map of the surface water of the state, including the location and proposed upstream and downstream boundaries;
- (2) a written statement and evidence based on scientific principles in support of the nomination, including specific reference to one or more of the applicable ONRW criteria listed in Subsection B;
- (3) water quality data including chemical, physical or biological parameters, if available, to establish a baseline condition for the proposed ONRW;
- (4) a discussion of activities that might contribute to the reduction of water quality in the proposed ONRW;
- (5) any additional evidence to substantiate such a designation, including an analysis of the economic impact of the designation on the local and regional economy within the state of New Mexico and the benefit to the state; and
- (6) affidavit of publication of notice of the petition in a newspaper of general circulation in the affected counties and in a newspaper of general statewide circulation.

The October 1, 2021 Petition satisfies the procedural requirements of 20.6.4.9.A NMAC, and Petitioners have satisfied the public notice requirements for the rulemaking hearing. Tr. 72:14–88:6; *See* Pet’rs Exs. 2, 5, 6, 7, 8.

Petitioners provided a map of the nominated surface waters of the state, including the location and proposed upstream and downstream boundaries. Tr. 72:20– 3:6; Pet’rs Ex. 2 at 7–10; Pet’rs Ex. 5. Petitioners provided tables listing all nominated waters, the associated miles or acreage of those waters nominated, as well as the proposed upstream and downstream boundaries, and latitudinal and longitudinal coordinates for each water included in the nomination. Tr. 73:7–24; Pet’rs Ex. 2 at 11–13; Pet’rs Ex. 5. In total, Petitioners nominated 179.93 miles of streams and 42.9 acres of wetlands for designation as ONRWs. Tr. 73:20–21; Pet’rs Ex. 2 at 7–13; Pet’rs Ex. 5. Petitioners provided a written statement and evidence based on scientific principles in support of the nomination, including specific reference to one or more of the applicable ONRW criteria. Tr. 73:25–74:3; Pet’rs Ex. 2 at 13–14. Petitioners provided available water quality data, including chemical, physical, or biological parameters to establish a baseline condition. Tr. 74:10–20; Pet’rs Ex. 2 at 14–15; Pet’rs Ex. 6. Petitioners provided information regarding activities that may contribute to the reduction of water quality in the nominated waters. Tr. 74:21–76:19; Pet’rs Ex. 2. To wit, mining, Tr. 74:25–75:5; development and roads, Tr. 75:6–12; climate change, Tr. 75:13–76:1; and poorly managed recreation, Tr. 76:2–4. *See also* Pet’rs Ex. 2 at 15–19.

Petitioners provided evidence to support the proposed designation, including an analysis of the economic impact of the designation on the local and regional economy within the State of New Mexico and the benefit to the state, Tr. 76:20–77:11; Pet’rs Ex. 2 at 19, 33–42; and the economic significance, cultural significance, and the national significance of the proposed designation. *Id.*

Petitioners provided affidavits of publication of notice of the Petition in a newspaper of general circulation in the affected counties (the Las Vegas Optic) and in a newspaper of general statewide circulation (the Albuquerque Journal). Tr. 77:12–22; Pet’rs Ex. 2 at 19–20; Pet’rs Ex. 7.

V. Petitioners’ Evidence in Support of the ONRW Criteria

20.6.4.9.B NMAC provides:

Criteria ONRWs: A surface water of the state, or a portion of a surface water of the state, may be designated as an ONRW where the commission determines that the designation is beneficial to the state or New Mexico, and:

- (1) the water is a significant attribute of a state special trout water, national or state monument, national or state wildlife refuge or designated wilderness area, or is part of a designated wild river under the federal Wild and Scenic Rivers Act; or
- (2) the water has exceptional recreational or ecological significance; or
- (3) the existing water quality is equal to or better than the numeric criteria for protection of aquatic life and contact uses and the human health-organism only criteria, and the water has not been significantly modified by human activities in a manner that substantially detracts from its value as a natural resource.

a. Benefit to the State

The designation of a nominated water as an ONRW must be beneficial to the State of New Mexico. 20.6.4.9.B NMAC. Evidence in the record supports this criterion that designation of all the nominated waters would be beneficial to the State of New Mexico. *See* Pet’rs Ex. 2 at 33–42; Pet’rs Exs. 4, 13, 15, 18, 19, 21, 23, 25, 27; Tr. 34:11–37:25 (testimony of Second Lieutenant Governor Toya); Tr. 39:15–48:8 (testimony of Commissioner Varela); Tr. 48:24 – 53:5 (testimony of Mayor Benavidez); Tr. 53:8–63:14 (testimony of Mr. Adelo); Tr. 64:11–68:2 (testimony of Ms. McFerrin); Tr. 104:8–111:4 (testimony of Mr. Mitchell); Tr. 162:9–165:24 (testimony of Ms. Garcia).

The evidence suggests that there are numerous benefits of the proposed designation to the state, including supporting the state's rich tradition of acequia irrigation and farming, ranching, cultural values, and economic benefits. Tr. 85:7–87:19; Pet'rs Ex. 2 at 33–42. The designation would benefit the state by protecting the Upper Pecos Watershed and the essential ecosystem functions that a healthy watershed provides including sediment control, flood control, and climate change resiliency. Tr.87:11–19; Pet'rs Ex. 2 at 33–42.

b. Significant Attribute Criterion

Petitioners' evidence supports the finding that several of the nominated waters or segments of the nominated waters meet the significant attribute standard of 20.6.4.9.B(1) NMAC. Tr. 80:22–81:6; Pet'rs Ex. 2 at 21–24; Pet'rs Ex. 4. Seven miles of the nominated portion of the Pecos River, from the Wilderness boundary downstream to the confluence of Davis Creek, is designated as a Wild and Scenic River in the National Wild and Scenic Rivers Act. Tr. 80:22–81:1; Pet'rs Ex. 2 at 21–24; Pet'rs Ex. 4. Moreover, two segments of the nominated waters are state special trout waters: the Pecos River, from the Rio Mora confluence to Cowles, and Jack's Creek, from the waterfalls downstream of New Mexico Highway 63 upstream to its headwaters. Tr. 81:2–6; Pet'rs Ex. 2 at 23–24; Pet'rs Ex. 4.

c. Exceptional Recreational Significance Criterion

Petitioners' evidence admitted in the record supports a finding that all the nominated waters meet the exceptional recreational significance standard of 20.6.4.9.B(2) NMAC. Tr. 81:7–84:9; Pet'rs Ex. 2 at 25–32; Pet'rs Ex. 4. The evidence shows that thousands of visitors recreate at the seven U.S. Forest Service campgrounds in the nominated area, including at Jack's Creek Campground, which is considered one of the top ten best campgrounds in the state. Tr. 81:9–13; Pet'rs Ex. 2 at 25–32.

The evidence further shows that recreational activities in the nominated area include camping, hiking, horseback riding, hunting, fishing, bird watching, backpacking, and rafting, Tr. 81:14–22; Pet’rs Ex. 2 at 25–32, and several local outfitters take clients on tours in the nominated area, and that their business depends on the clean waters of the Upper Pecos Watershed. Tr. 82:1–4; Pet’rs Ex. 2 at 25–32.

Evidence suggests the sixteen named nominated waters are exceptionally significant recreationally for the fishing opportunities they provide, Tr. 82:5–83:19; Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 4 and are renowned for trout fishing (the nominated stretch of the Pecos River is the second-highest fished stream reach in the state, which sees over 158,000 angler days per year). Tr. 82:7–12; Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 4. In fact, fly fishing guides have labeled the Upper Pecos among the best places to fly fish in the State of New Mexico. Tr. 82:13–15; Pet’rs Ex. 2 at 25–32.

Petitioner’s Exhibit 10 supplies data on the number of angler days in the nominated waters (where available) for the Pecos River, Indian Creek, Holy Ghost Creek, Willow Creek, Rio Mora, Winsor Creek, Panchuela Creek, Bear Creek, and Jack’s Creek. Tr. 83:9–11; Pet’rs Ex. 2 Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 10. The nominated waters of the Upper Pecos Watershed are home to the Rio Grande cutthroat trout, rainbow trout, brown trout, and cutthroat trout (Species of Economic and Recreational Importance (“SERI”)), and each of the sixteen named nominated waters provide habitat for trout. Tr. 83:12–19; Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 9.

Reports from the New Mexico Department of Game and Fish Environmental Review Tool identify SERI in and around each of the *sixteen* named nominated waters, including SERI identified within one mile of each bank of the named stream. Because each identified unnamed nominated non-perennial stream drains into one of the *sixteen* named streams, the species search

includes at least one mile of all 96 unnamed tributaries and all wetlands adjacent to the *sixteen* named streams. Tr. 83:20–84:9; Pet’rs Ex. 2 at 30; Pet’rs Ex. 9. In addition, 64 or two-thirds, of these tributaries are less than one-mile in length, and therefore the entirety of these tributaries are included within the search area. Pet’rs Ex. 11 at 7; Pet’rs Ex. 3 at Table 1.

SERI identified in the reports include black bear, cougar, elk, mule deer, brown trout, rainbow trout, Rio Grande cutthroat trout, and cutthroat trout. Pet’rs Ex. 2 at 31; Pet’rs Ex. 9. Petitioners argue, therefore that all the nominated waters meet the exceptional recreational significance criterion of 20.6.4.9.B(2) NMAC because they support multiple SERI. Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 4.

Separately, the evidence supports a finding that the sixteen named nominated waters meet the exceptional recreational significance standard of 20.6.4.9.B(2) NMAC for the fishing opportunities these waters provide: Bear Creek, Carpenter Creek, Dalton Canyon, Davis Creek, Doctor Creek, Holy Ghost Creek, Indian Creek, Jack’s Creek, Macho Canyon, Panchuela Creek, Pecos River, Rio Mora, Sawyer Creek, Wild Horse Creek, Willow Creek, and Winsor Creek. Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 4.

d. Exceptional Ecological Significance Criterion

Petitioners’ evidence supports a finding that the nominated waters meet the exceptional ecological significance criterion of 20.6.4.9.B(2) NMAC. Tr. 166:19–180:20; Pet’rs Exs. 4, 11. Dr. Propst offered the expert opinion that the exceptional ecological significance of the nominated waters of the Upper Pecos Watershed is evident when viewed in a holistic perspective that includes all features, perennial and nonperennial. Tr. 169:17–20; Pet’rs Ex. 11.

He testified that the loss or impairment of any hydrologic feature of the Upper Pecos Watershed diminishes its ability to provide essential ecosystem services such as key habitat for wildlife,

nutrient processing and transfer, flood attenuation, enhanced water quality and recreational opportunities. Tr. 170:20–25; Pet’rs Ex. 11. Collectively, the nominated waters, perennial and nonperennial, because of their connectivity and interdependence, are worthy of ONRW designation. Tr. 170:25–171:3; Pet’rs Ex. 11.

His testimony supports a finding that the nominated waters are home to many Species of Greatest Conservation Need (“SGCN”), which is a classification identified by the New Mexico State Wildlife Action Plan for species that are prioritized for conservation. Tr. 172:3–13; Pet’rs Ex. 4, 11.

Petitioners’ evidence suggests there are 23 SGCN in the Upper Pecos Watershed. Tr. 172:7–13; Pet’rs Ex. 4, 11. Each named nominated stream and the one-mile area surrounding their banks, which include all their tributaries and wetlands, support between 14 and 21 SGCN. *See* Pet’rs Ex. 11 at 11–12. Four birds that inhabit the Upper Pecos Watershed are protected as threatened under federal or state law. Tr. 172:10–13; Pet’rs Ex. 4, 11. These species are peregrine falcon (state threatened species), spotted bat (state threatened species), boreal owl (state threatened species), and Mexican spotted owl (federal threatened species). Pet’rs Exs. 4, 11.

New Mexico’s state fish, the Rio Grande cutthroat trout, is present in the nominated waters of the Upper Pecos Watershed. Tr. 172:14–173:3; Pet’rs Ex. 4, 11. The nominated waters of the Upper Pecos Watershed currently support six Rio Grande cutthroat trout conservation populations in Dalton Canyon Creek, Wild Horse Creek, Bear Creek, Jack’s Creek, Macho Canyon Creek, Rio Mora, and Willow Creek. Tr. 172:22–173:3; Pet’rs Exs. 4, 11 at 13–14. Rainbow, brown, and other cutthroat trout are also present in the nominated waters of the Upper Pecos Watershed. Tr. 173:4–9; Pet’rs Ex. 4, 11.

There are six plant species recognized as rare or in need of protection in the Upper Pecos Watershed. Tr. 173:10–17; Pet’rs Exs. 4, 11 at 14-16. Three of these species — the mountain lily, yellow lady’s slipper, and hooded ladies’ tresses — occur primarily in moist habitats such as the wetlands associated with the Upper Pecos Watershed’s streams. *Id.* These plant species are found within one mile of Holy Ghost Creek, Carpenter Creek, Doctor Creek, and tributaries 1-4, Macho Canyon Creek and tributaries 1-12, Panchuela Creek and tributaries 1-2, Pecos River and tributaries 1-28, Rio Mora and tributaries 1-4, and Winsor Creek and tributaries 1-2. Pet’rs Ex. 11 at 15–16.

The Holy Ghost ipomopsis is listed as an endangered species under the federal Endangered Species Act and the New Mexico Wildlife Conservation Act, and only occurs along a short reach of Holy Ghost Creek. Tr. 173:10–17; Pet’rs Exs. 4, 11.

Petitioners’ evidence supports a finding that the exceptional ecological character of the Upper Pecos Watershed is a consequence of it being a functioning ecosystem with all parts contributing, including the network of wetlands and nonperennial tributaries and their contribution to the vitality of the perennial streams in the system and the entire watershed. Tr. 173:18–25; Pet’rs Ex. 11. This is due in part to the physical, chemical, and biological linkages between nonperennial and perennial watercourses and the important contributions of nonperennial tributaries to the ecological functioning of the Upper Pecos Watershed. Tr. 174:1–179:8; Pet’rs Ex. 11. The unnamed wetlands included in the nomination provide essential habitat for a variety of species, including the northern leopard frog, birds, numerous aquatic insects, and hydrophilic (water-loving) plants. Tr. 179:9–23; Pet’rs Ex. 11.

The relationship between the nonperennial watercourses and the perennial streams they feed into are complex and dynamic; much of the energy that supports life in perennial streams is derived

from nonperennial watercourses. Tr. 180:24–181:4; Pet’rs Ex. 11. If these connections are lost or compromised, the ecological functioning of the entire watershed is compromised. Tr. 180:4–6; Pet’rs Ex. 11. A vibrant, healthy ecosystem provides numerous services, including clean freshwater and nutrient cycling. Tr. 180:7–10; Pet’rs Ex. 11.

Dr. Propst’s credible and uncontroverted expert opinion supports a finding that the wetlands and nonperennial and perennial waters of the Upper Pecos Watershed are ecologically inseparable, and that together, they make the Upper Pecos Watershed an exceptional and ecologically significant water network worthy of designation as ONRWs. Tr. 180:10–16; Pet’rs Ex. 11.

e. Water Quality Criterion

Petitioners submitted into evidence existing water quality data for the nominated waters. Tr. 84:19–20; Pet’rs Ex. 2 at 32–33; Pet’rs Ex. 6. Seven of the nominated named waters and one segment of the nominated portion of the Pecos River, from Jack’s Creek to the Wilderness boundary, meet or exceed water quality criteria associated with the aquatic life and contact uses. Tr. 84:10–18. The seven waters are Doctor Creek, Holy Ghost Creek, Indian Creek, Jack’s Creek, Panchuela Creek, Rio Mora, and Winsor Creek. Pet’rs Ex. 2 at 32–33; Pet’rs Ex. 4.

VI. NMED’S Evidence in Support of the Petition

NMED is a stakeholder in all rulemakings involving the standards and regulations in 20.6.4 NMAC. Tr. 123:15–20. NMED worked collaboratively with Petitioners to refine and improve the Petition and supports the Commission designating all waters nominated as ONRWs. Tr. 123:21–124:3. NMED presented two witnesses in support of the Petition. Tr. 24:19–20.

Ms. Jennifer Fullam is an Environmental Scientist Supervisor serving as the Water Quality Standards Coordinator with NMED’s Surface Water Quality Bureau. Tr. 125:3–6. Ms. Fullam oversees and facilitates NMED’s team responsible for proposing amendments to the

state's Surface Water Quality Standards and participates in hearings related to proposed amendments initiated by parties other than NMED. Tr. 125:11–16. Ms. Fullam's direct technical testimony was filed as NMED Exhibit 1. Tr. 127:11–12.

Ms. Fullam testified that the proposed amendments would designate certain identified ephemeral, intermittent and perennial waters, including wetlands, within the Upper Pecos Watershed from the Dalton Creek day-use area upstream to the Wilderness boundary, as ONRWs. Tr. 127:23–128:4. Ms. Fullam further testified that an ONRW is a designation for waters of the state in which the highest level of antidegradation protection applies, such that no degradation is permitted. Tr. 128:6–8, 17–19.

Ms. Fullam testified that ONRWs fall under Tier Three of the state's water quality standards at 20.6.4.8 NMAC, which is the most protective tier, and prohibits degradation, except for specifically defined time-sensitive activities, such as activities that restore or maintain water quality or activities deemed necessary to accommodate public health or safety. Tr. 129:15–20. Activities associated with public health and safety and emergency response; acequia operation, maintenance, and repair; and preexisting activities that implement best management practices are permitted in ONRWs. Tr. 130:9–17. Ms. Fullam also testified that designating ONRWs is supportive of the goals and objectives of the federal Clean Water Act to restore, maintain, and protect water quality wherever attainable. Tr. 131:16–25.

Ms. Diana Aranda is an Environmental Scientist in the Standards, Planning, and Reporting Team for NMED's Surface Water Quality Bureau. Tr. 138:12–15. Ms. Aranda is responsible for developing water quality standards for New Mexico surface waters in accordance with the Water Quality Act and the Clean Water Act. Tr. 139:22–15. Ms. Aranda testified that NMED evaluated each of the nominated water bodies to ascertain the fulfillment of eligibility

criteria and the submittal elements required for an ONRW designation in accordance with 20.6.4.9.A and -B NMAC. Tr. 141:12–18. Ms. Aranda testified that, based on NMED’s review, NMED found that the Petitioners demonstrated that all the nominated waters fulfilled at least one of the eligibility criteria for an ONRW consistent with 20.6.4.9.B NMAC. Tr. 141:4–142:7.

Ms. Aranda further testified that the Petitioners met all six of the procedural requirements for the Petition in accordance with 20.6.4.9.A NMAC. Tr. 144:8–145:5. Based on Ms. Aranda’s testimony, NMED found that all nominated water bodies in the Petition met at least one of the eligibility criteria in 20.6.4.9.B NMAC and that the Petitioners met the procedural requirements of 20.6.4.9.A NMAC. Tr. 145:10–14.

VII. Dennis McQuillan’s Evidence in Support of the Petition

Mr. Dennis McQuillan appeared in his individual capacity at the hearing. Tr. 3:10–11. Mr. McQuillan is a hydrogeologist, and a former employee of NMED and its predecessor agency, where he worked for over four decades. Tr. 183:13–18. Mr. McQuillan testified that, in his opinion, designation of the nominated waters as ONRWs would help to ensure the cleanup of historic mining wastes and would help to ensure any future potential mining in the region would be conducted in a manner that would avoid degradation of the existing high-quality water and the exceptional recreational and ecological significance of the nominated waters. Tr. 187:18–24.

Mr. McQuillan testified that while future mining activity would not be prohibited if the nominated waters were designated as ONRWs, any such future mining activity would need to comply with the antidegradation standard that an ONRW designation would provide. Tr. 188:7–11. Mr. McQuillan noted other threats to the nominated waters’ water quality that may arise, including from septic systems, Tr. 188:12–20; recreational overuse, Tr. 188: 21–189:16; waste management, Tr. 189:17–190:2; and wildfires, Tr. 190:3–193:8.

VIII. Public Comment

Public comment was received in writing and verbally during the public hearing. Public comment is non-technical or general in nature and does not require submission before the hearing. Public comment is considered evidence when it is relevant to the subject matter. Exhibit A lists the unabridged written comment separated by the citizen's name and date of submission to OPF (exhibits are attached). Exhibit B is a diagram that shows the overall comments in-favor of and opposed to the designation, and Exhibit C shows whether the comments were received on behalf of an organization or an individual.

As the designation received overwhelming support for various environmental reasons, the following two comments in opposition are heretofore broken out. First the N.M. Farm and Livestock Bureau, the largest agriculture organization in New Mexico representing more than 20,000 member families, submitted written and verbal comment adamantly opposing the ONRW designation. Exhibit A, Comment I-17-1. The opposition is based on the "potential to severely limit economic growth while also placing additional restrictions and regulations on water and land use." *Id.* "Additionally, we oppose the proposal as it includes designated segments located on private land." *Id.* "We encourage more voluntary and incentive-based approaches to assist in caring for our environment and natural resources instead of additional mandates, restrictions, and designations." *Id.* "We have specific concerns with the permitting and approval of pre-existing and new activities by the oversight agency...[which] has the potential to restrict pre-existing activities like grazing if they do not align with best management practices identified to protect ONRWs." *Id.* "Since the petition includes both federal and private lands will there be multiple oversight agencies? *Id.* "We would like additional clarity on how these roles will be administered and what type of coordination will be required of the agencies at the state and federal level." *Id.*

Finally, “we would like specific clarity and guidance on how the state oversight agency will work to reduce infringement on private property owners’ rights and ability to utilize their land and water.” *Id.*

Mr. Ernest Torrez submitted a written comment in opposition to the designation because he believes that “adding more restrictions/regulations to New Mexico forest through ONRW does not help alleviate existing conditions of over burden of bio-fuel.” Exhibit A, I-26. “Range improvements over the centuries by ancestors of existing families in New Mexico forests, proves up the survivability of those agriculture groups and their ability to utilize land and water resources to enhance production of livestock and irrigated land.” *Id.* “The failings of mismanagement of the forest, by neglect and the catastrophic outcomes from post fire debris flow, particularly soil and water yield loss, have be[en] quantified and documented by the Range Improvement Task Force.” *Id.*

IX. Proposed Conclusions of Law

1. The Petition complies with the procedural requirements of 20.6.4.9.A NMAC in nominating the waters of the Upper Pecos Watershed as ONRWs.
2. The Petition complies with the substantive requirements of 20.6.4.9.B NMAC in designating waters as ONRWs by substantial evidence showing the designation is beneficial to the state, and that each of the nominated waters meet at least one of the designation criteria of 20.6.4.9.B(1) – (3) NMAC.
3. Based on the foregoing, and the Hearing Record, as defined by 20.1.6.7 NMAC, the Commission adopts Petitioners’ proposed amendments to 20.6.4.9.D NMAC, as proposed in Petitioners’ Exhibit 1.

X. Proposed Statement of Reasons²

² Section 10 - Proposed Statement of Reasons was drafted by the Hearing Officer as an aid to the Commission and its Counsel.

1. The Petition nominated the Pecos River from its northern wilderness boundary to its confluence with Dalton Canyon; *sixteen* named tributaries to the Pecos and 96 unnamed tributaries to those *sixteen* waters, constituting nearly 180 miles of streams; and *sixteen* wetlands consisting of almost 43 acres, to be designated as ONRWs. Tr. 28:5–11; Pet’rs Ex. 5.
2. An Outstanding Waters designation protects New Mexico’s most exceptional waters and provides the highest level of protection in the state by prohibiting any new degradation to water quality while still respecting and allowing the continuation of preexisting traditional land use activities, such as grazing and acequia operations. Tr. 27:16–22.
3. The Petition reflected a community-driven effort brought forward by a diverse group of local governments and local and statewide community and business organizations. Tr. 27:23–25, 28:1–4.
4. Petitioners worked collaboratively with NMED for greater than one year on the Petition. Tr. 30:6-11, 123:21-24.
5. A review by NMED staff determined that all procedural and administrative requirements for designating the nominated waters as ONRWs had been met. NMED Exhibit 1, pp. 10-15. Tr. 132:20-135:19.
6. A review by NMED staff determined that the Petition successfully demonstrated that every surface water nominated met at least one eligibility criterion in 20.6.4.9(B) NMAC for designation as an ONRW. NMED Exhibit 2, pp. 4-7, 10-11.
7. A review by NMED staff determined that the Petition contained all six elements required of an ONRW petition by 20.6.4.9(A) NMAC. NMED Exhibit 2, pp. 7-11. Tr. 144:8-145:14.

8. NMED's witness, Jennifer Fullam, the Standards, Planning and Reporting Team Supervisor and Water Quality Standards Coordinator within the Department's Surface Water Quality Bureau, provided testimony regarding the protections offered by ONRW designation. NMED Exhibit 1, pp. 4-5. Tr 124:19-137:14.
9. Pursuant to 20.6.4.8 NMAC, which mirrors 40 C.F.R. § 131.12, degradation of water quality is prohibited for waters designated as ONRWs except as provided in 20.6.4.8(A)(3)(a) through (e) NMAC and 20.6.4.8(A)(4)(a) NMAC. These provisions include temporary and short-term degradation if the Commission determines it to be necessary to accommodate public health or safety; temporary and short-term degradation in response to an emergency action that is necessary to mitigate an immediate threat to public health or safety; pre-existing land use activities allowed by federal or state law prior to designation as an ONRW that are controlled by best management practices and do not pose any new or increased discharges; and activities that result in the restoration or maintenance of the chemical, physical or biological integrity of the water. NMED Exhibit 1, p. 5. Tr. 128:16-130:17.
10. ONRW designation does not categorically prevent or preclude discharges or anthropogenic activities from occurring. Activities such as these require a demonstration that they will not cause degradation of the ONRW or are one of the permitted short-term and temporary activities identified under 20.6.4.8(A)(3) and (4) NMAC. NMED Exhibit 1, p. 5. Tr. 128:16-130:17.
11. NMED found no federal National Pollutant Discharge Elimination System ("NPDES") permits for discharges to any of the waters nominated in the Petition. The designation of an ONRW would not prohibit a permittee from applying to discharge to an ONRW so long

as it can be demonstrated the discharge would not cause degradation of the water quality as established in baseline conditions or established existing uses, whichever is more stringent. Therefore, the designation of these waters as ONRWs will not impact existing dischargers, because there are none, but may pose restrictions on future point source dischargers. NMED Exhibit 1, pp. 8-9.

12. NMED supports the Commission designating the nominated waters as ONRWs. NMED Exhibit 1, p. 15; NMED Exhibit 2, p. 12. Tr. 137:12-14; Tr. 145:19-22.
13. Petitioners called the Honorable Second Lieutenant Governor Vincent Toya of the Jemez Pueblo. Tr. 30:19–24, 34:11–37:25. Second Lieutenant Governor Toya discussed the cultural significance of protecting the nominated waters to the Jemez and Pecos peoples, protection that is beneficial to the state. *Id.*
14. Petitioners called Ms. Janice Varela, County Commissioner for District 2 of Petitioner San Miguel County, to discuss the ecological and recreational exceptionality of the nominated waters and the economic importance of protecting the nominated waters to San Miguel County and the state. Tr. 30:25, 31:1–4, 39:15–48:8.
15. Petitioners called Mayor Telesfor Benavidez, Mayor of Petitioner Village of Pecos, to discuss the economic importance of protecting the nominated waters to the Village of Pecos and their importance to that community. Tr. 31:5–8, 48:24–53:5.
16. Petitioners called Mr. Frank “Pancho” Adelo, the President of Petitioner Upper Pecos Watershed Association, to discuss the abundance of recreational activities in the nominated area, with particular focus on the exceptional trout fishing in the Pecos and its tributaries, which saw over 158,000 angler days during the 2021 license year. Tr. 31:9–18, 53:8–63:14. Mr. Adelo also discussed the importance of protecting the nominated waters to local

farmers and ranchers, who depend on these waters for their livelihood, of keeping the watershed clean. *Id.*

17. Petitioners called Ms. Lela McFerrin, the Vice President of Petitioner Upper Pecos Watershed Association, to discuss the extensive community outreach conducted throughout the nomination proceedings and to highlight the broad local, statewide, and national support for the nomination, as shown in Petitioners' Exhibit 16, which is a compilation of letters of support. Tr. 31:19–25, 64:11–68:2. Ms. McFerrin testified that since Petitioners' filing of their Notice of Intent to Present Technical Testimony, over 1,600 other individuals and organizations had written in support of the Petition, including federal, state, and local elected officials, and no Party had filed in opposition. Tr. 31:25–32:4, 66:24–67:6.

18. Petitioners called Ms. Rachel Conn, the Deputy Director of Amigos Bravos, a statewide water conservation organization. Tr. 32:5–12, 68:5–103:14. Ms. Conn provided an overview how Petitioners met all procedural and public notice requirements for the designation. *Id.* Ms. Conn also testified how each of the nominated waters met more than one of the designation criteria in Section 20.6.4.9 NMAC. *Id.*

19. Petitioners called Mr. Toner Mitchell, the New Mexico Water and Habitat Program Director for Trout Unlimited, to discuss the exceptional recreational and ecological significance of the nominated waters and how the nomination serves to benefit the state overall. Tr. 32:13–17, 104:8–111:4.

20. Petitioners' called Ms. Paula Garcia, the Executive Director of Petitioner New Mexico Acequia Association, to discuss the acequia association's support for the nomination, explaining how protecting water quality in the Upper Pecos Watershed will benefit the

numerous acequias that divert water from the Pecos River, and how this, in turn, is a benefit to the state. Tr. 32:18–24, 162:9–165:24.

21. Petitioners called Dr. David Propst. Tr. 33:24–25, 166:22–180:18. Dr. Propst is a former employee of the New Mexico Department of Game and Fish, where he worked as a project leader in the native fish section of the Department for nearly 27 years. Tr. 33:1–5. Dr. Propst discussed how all nominated waters meet the exceptional ecological significance criterion of Section 20.6.4.9.B(2) NMAC and how the non-perennial waters included in the nomination are essential to the ecological health, integrity, and significance of the Upper Pecos Watershed as a whole. Tr. 33:5–10, 166:22–180:18.

22. Petitioners also submitted the written testimony of Mr. Ralph Vigil in their Notice of Intent to Present Technical Testimony as Petitioners' Exhibit 23. Mr. Vigil was unable to testify at the hearing, but no Party objected to admission of his written testimony. Tr. 33:11–25. Mr. Vigil is the owner of Petitioner Molino de la Isla Organics, LLC, and his farm relies on the water from the Acequia del Molino, which draws water from the Pecos River immediately downstream of the nominated main stretch. Pet'rs Ex. 23. Mr. Vigil is also Chair of the New Mexico Acequia Commission. *Id.* Mr. Vigil understands as a *parciante* and state leader the importance of maintaining the overall health of the watershed to the more than 55 downstream acequias that feed directly or indirectly from the Pecos River. *Id.*

23. Petitioners provided Resolutions and Letters in Support of the Nomination. Petitioners' Exhibit 16. In addition to the comments provided by Petitioners, many signatures on petitions and letters of support were received by the Commission's Administrator prior to the public hearing.

24. Dennis McQuillan provided testimony regarding activities that might contribute to the reduction of water quality in the proposed ONRWs, as required in 20.6.4.9(A) NMAC and provided testimony in support of the nomination. McQuillan’s Exhibit 2. Tr. 183:8-195:15.
25. Based on the weight of the evidence, the Commission finds Petitioners’ proposal to designate perennial and non-perennial streams and wetlands nominated in the Petition and identified in Maps 1 and 2 and Tables 1 and 2 in Section II.B of the Petition, is well-taken and adopts Petitioners’ amendments to 20.6.4.9 NMAC as proposed.

Respectfully submitted,

OFFICE OF PUBLIC FACILITATION

By: Gregory Chakalian Digitally signed by Gregory Chakalian
Date: 2022.06.13
07:49:15 -06'00'
Gregory Ara Chakalian
Administrative Law Judge
Hearing Officer

Certificate of Service

I hereby certify that on June 21, 2022, A copy of the Hearing Officer's Report was sent via electronic mail to the persons listed below. A hard copy will be mailed upon request.

Via Email:

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