

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

**IN THE MATTER OF PETITION TO  
DESIGNATE SURFACE WATERS OF  
THE UPPER PECOS WATERSHED  
AS OUTSTANDING NATIONAL  
RESOURCE WATERS,**

**WQCC No. 21-51 (R)**

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

**Petitioners.**

**STATEMENT OF REASONS AND DECISION**

A duly constituted quorum of the Water Quality Control Commission (“Commission”) having met on July 12, 2022, in public meeting to deliberate and issue its decision on the Petition to Designate Surface Waters of the Upper Pecos Watershed as Outstanding National Resource Waters (“Petition”) filed on October 1, 2021, by Petitioners Village of Pecos, San Miguel County, Upper Pecos Watershed Association, New Mexico Acequia Association, and Molino de la Isla Organics LLC (collectively, “Petitioners”), the Commission, in accordance with the relevant provisions of 20.1.6.306 NMAC, issues this Statement of Reasons and Decision in the matter.

**STATEMENT OF REASONS**

**I. Jurisdictional Authority and Statutory and Regulatory Requirements**

1. The Commission is authorized under NMSA 1978, § 74-6-4(D) (2019) to adopt and amend water quality standards for surface waters of the State “based on credible scientific data and other evidence appropriate under the Water Quality Act,” in accordance with the Water Quality Act, §§ 74-6-1 to -17 (1967, as amended through 2019), and the Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC.

2. The Water Quality Act does not grant the Commission, or any other entity, the power to take away or modify property rights in water, nor is it the intent of the Water Quality Act to take away or modify such property rights. NMSA 1978, § 74-6-12(A) (1999); 20.6.4.6(C) NMAC.

3. Adoption of amendments to the State's surface water quality standards must comply with the procedural and substantive requirements of NMSA 1978, § 74-6-6 (1993), and with the procedural requirements of 20.1.6 NMAC for rulemaking hearings before the Commission.

4. 20.6.4.9(A) NMAC, setting forth the Commission's procedures for nominating a surface water of the State for designation as an outstanding natural resource water ("ONRW"), in applicable part provides:

Any person may nominate a surface water of the [S]tate for designation as an ONRW by filing a petition with the [C]ommission pursuant to 20.1.6 NMAC ... A petition to designate a surface water of the [S]tate as an ONRW shall include:

- (1) a map of the surface water of the [S]tate, 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 [20.6.4.9(B) NMAC];
- (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 a discussion of the economic impact of the designation on the local and regional economy within the [S]tate of New Mexico and the benefit to the [S]tate; and
- (6) [an] 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.

5. 20.6.4.9(B) and (C) NMAC, setting forth the Commission's criteria for ONRWs, state:

B. A surface water of the [S]tate, or a portion of a surface water of the [S]tate, may be designated as an ONRW where the [C]ommission determines that the designation is beneficial to the [S]tate of New Mexico, and:

- (1) the water is a significant attribute of a state special trout water, national or state park, 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.

C. Pursuant to a petition filed under Subsection A of this section, the commission may classify a surface water of the [S]tate or a portion of a surface water of the [S]tate as an ONRW if the criteria set out in Subsection B of this section are met.

6. The pertinent parts of 20.6.4.8(A) NMAC, concerning the Commission's antidegradation policy, read:

(3) No degradation shall be allowed in waters designated by the [C]ommission as [ONRWs], except as provided in Subparagraphs (a) through (e) of this paragraph and in [20.6.4.8(A)(4) NMAC].

(a) After providing a minimum 30-day public review and comment period, the [C]ommission determines that allowing temporary and short-term degradation of water quality is necessary to accommodate public health or safety activities in the area in which the ONRW is located ... In making its decision, the [C]ommission shall consider whether the activity will interfere with activities implemented to restore or maintain the chemical, physical or biological integrity of the water. In approving the activity, the [C]ommission shall require that:

- (i) the degradation shall be limited to the shortest possible time and shall not exceed six months;
- (ii) the degradation shall be minimized and controlled by best management practices or in accordance with permit requirements as appropriate; all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized;
- (iii) the degradation shall not result in water quality lower than necessary to protect any existing use in the ONRW; and
- (iv) the degradation shall not alter the essential character or special use that makes the water an ONRW.

(b) Prior to the [C]ommission making a determination, the [D]epartment or appropriate oversight agency shall provide a written recommendation to the [C]ommission. If the [C]ommission approves the activity, the [D]epartment or appropriate oversight agency shall oversee implementation of the activity.

(c) Where an emergency response action that may result in temporary and short-term degradation to an ONRW is necessary to mitigate an immediate threat to public health or safety, the emergency response action may proceed prior to providing notification required by Subparagraph (a) of this paragraph in accordance with the following:

(i) only actions that mitigate an immediate threat to public health or safety may be undertaken pursuant to this provision; non-emergency portions of the action shall comply with the requirements of Subparagraph (a) of this paragraph;

(ii) the discharger shall make best efforts to comply with requirements

(i) through (iv) of Subparagraph (a) of this paragraph;

(iii) the discharger shall notify the [D]epartment of the emergency response action in writing within seven days of initiation of the action;

(iv) within 30 days of initiation of the emergency response action, the discharger shall provide a summary of the action taken, including all actions taken to comply with requirements (i) through (iv) of Subparagraph (a) of this paragraph.

(d) Preexisting land-use activities, including grazing, allowed by federal or state law prior to designation as an ONRW, and controlled by best management practices (BMPs), shall be allowed to continue so long as there are no new or increased discharges resulting from the activity after designation of the ONRW.

(e) Acequia operation, maintenance, and repairs are not subject to new requirements because of ONRW designation. However, the use of BMPs to minimize or eliminate the introduction of pollutants into receiving waters is strongly encouraged.

(4) This antidegradation policy does not prohibit activities that may result in degradation in surface waters of the [S]tate when such activities will result in restoration or maintenance of the chemical, physical or biological integrity of the water.

(a) For ONRWs, the [D]epartment or appropriate oversight agency shall review on a case-by-case basis discharges that may result in degradation from restoration or maintenance activities, and may approve such activities in accordance with the following:

(i) the degradation shall be limited to the shortest possible time;

(ii) the degradation shall be minimized and controlled by [BMPs] or in accordance with permit requirements as appropriate, and all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized;

(iii) the degradation shall not result in water quality lower than necessary to protect any existing use of the surface water; and

(iv) the degradation shall not alter the essential character or special use that makes the water an ONRW.

## **II. Petition to Designate Surface Waters of Upper Pecos Watershed as ONRWs**

7. The Petition came before the Commission for consideration during its regularly scheduled meeting on November 9, 2021. The Commission heard from Tannis Fox of the Western Environmental Law Center, as counsel for Petitioners, and John Verheul, as counsel for the New Mexico Environment Department (“Department”). After duly considering the Petition, and being otherwise sufficiently advised in the premises, the Commission determined that a public hearing should be held on the Petition in accordance with 20.1.6.200(C) NMAC.

8. The Order Scheduling Public Hearing and Appointing Hearing Officer filed on November 30, 2021, granted Petitioners’ request for a public hearing, and pursuant to 20.1.6.205 NMAC, set the public hearing during the Commission’s regularly scheduled meeting on April 12, 2022, using a WebEx virtual meeting platform, with the proviso that the public hearing could be continued thereafter if the Commission deemed it necessary.

9. The Order Scheduling Public Hearing and Appointing Hearing Officer provided that the Commission could choose to deliberate immediately following the conclusion of the public hearing or at a subsequent meeting, but required the Commission to reach its decision no later than sixty (60) days following the close of the record or the date the hearing officer’s report was filed, whichever was later, as required by 20.1.6.306(C) NMAC.

10. The Order Scheduling Public Hearing and Appointing Hearing Officer appointed Gregory Chakalian as the hearing officer to conduct the public hearing, and to perform the functions and exercise all powers and duties prescribed under 20.1.6 NMAC.

11. The Order Scheduling Public Hearing and Appointing Hearing Officer required that notice of the public hearing be given as provided in 20.1.6.201 NMAC.

12. In accordance with the stipulation of Petitioners' counsel in open Commission meeting, Petitioners were to pay all costs and expenses of the publication of public notice.

13. The Order Scheduling Public Hearing and Appointing Hearing Officer required that the public hearing be conducted in accordance with the Commission's rulemaking procedures as set forth in 20.1.6 NMAC.

14. The Department and Dennis McQuillan, both non-petitioning parties, entered their appearances and participated in the rulemaking proceeding.

15. Hearing Officer Chakalian entered his Scheduling Order on December 9, 2021 ("Scheduling Order"), which he later amended on December 13, 2021, establishing the procedures for conducting the public hearing and setting forth the relevant deadlines, including (pre)filing of individual Notices to Present Technical Testimony pursuant to 20.6.1.202(A) NMAC.

16. The Department on March 10, 2022, submitted its Notice of Intent to Present Technical Testimony at the public hearing.

17. Dennis McQuillan on March 10, 2022, submitted his Notice of [Intent to Present] Technical Testimony at the public hearing.

18. Petitioners on March 10, 2022, submitted their Notice of Intent to Submit Direct Technical Testimony at the public hearing.

### **III. Public Notice and Public Hearing**

19. Petitioners submitted 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. [Tr. 77:12-22; Petitioners' Exhibit 7].

20. Notice of the Petition was published on September 2, 2021, in the *Albuquerque Journal*. [Petitioners' Exhibit 7].

21. Notice of the Petition was published on September 1, 2021, in the *Las Vegas Optic*. [Petitioners' Exhibit 8].

22. Petitioners, through the Department, provided notice of the public hearing in accordance with 20.1.6.201 NMAC, NMSA 1978, § 14-4-5.2 (2017) of the State Rules Act, and NMSA 1978, § 14-4A-4 (2005) of the Small Business Regulatory Relief Act, by publishing the notice of the public hearing in the *New Mexico Register* and a newspaper of general circulation in the areas affected at least sixty (60) days prior to the public hearing. [Tr. 132:22-135:19, 77:12-78:9; Petitioners' Exhibit 8].

23. Notice of the public hearing was published on January 26, 2022, in the *New Mexico Register*. [Petitioners' Exhibit 8].

24. Notice of the public hearing was published on February 4, 2022, in the *Las Vegas Optic*. [Petitioners' Exhibit 8].

25. Notice of the public hearing was published on February 5, 2022, in the *Albuquerque Journal*. [Petitioners' Exhibit 8].

26. Notice of the public hearing was timely given in accordance with all relevant Federal and State laws and regulations. [Tr. 77:12-78:9; Petitioners' Exhibits 7, 8].

27. The Commission duly heard and considered testimony on behalf of all parties who entered an appearance in the rulemaking proceeding, and allowed members of the general public to testify at the public hearing, and to also offer non-technical exhibits in connection with their testimony. The Commission further allowed any member of the general public who wished to submit a written statement for the record, in lieu of providing oral testimony at the public hearing, to file the written statement prior to the public hearing or submit it at the hearing.

28. Hearing Officer Chakalian conducted the public hearing in a fair and equitable manner, providing a reasonable opportunity for all persons to be heard, and allowing all interested persons a reasonable opportunity to submit data, views or arguments orally and in writing, and to examine the parties' individual witnesses.

29. The record proper, as that term is defined in 20.1.6.7(Q) NMAC, was submitted to the Commission for review in compiling this Statement of Reasons.

30. The Commission administrator, following receipt of the transcript of proceedings, promptly furnished copies of the *verbatim* transcript to the Commission members, Commission counsel and Hearing Officer Chakalian, and copies of the transcript of proceedings were available to any person directly from the court reporter, in accordance with 20.1.6.303 NMAC.

#### **IV. Reasons for Commission's Decision**

31. The Petition nominated the Pecos River from its northern wilderness boundary to its confluence with Dalton Canyon, sixteen (16) named tributaries to the Pecos River and ninety-six (96) unnamed tributaries to those surface waters, constituting in total nearly one-hundred eighty (180) miles of streams; and sixteen (16) wetlands consisting of nearly forty-three (43) acres, all to be designated as ONRWs. [Tr. 28:5-11; Petitioners' Exhibit 5].

32. Petitioners demonstrated that designation of all the nominated surface waters is beneficial to the State, as required by 20.6.4.9(B) NMAC, and that all those waters have exceptional recreational and ecological significance under 20.6.4.9.B(2) NMAC, and that many of those waters meet other ONRW criteria as well. [Tr. 28:25, 29:1-5; *see also* Petitioners' Exhibit 4 (chart summarizing ONRW criteria met by each nominated surface water)].

33. Through direct testimony and admitted exhibits, Petitioners demonstrated that all the nominated surface waters merit designation as ONRWs because the Petition met all procedural



requirements in 20.6.4.9(A) NMAC, and because designation of all those waters will benefit the State pursuant to 20.6.4.9(B) NMAC, and all those waters meet more than one of the substantive criteria for designation under 20.6.4.9(B)(1)-(3) NMAC. [See Petitioners' Exhibit 4].

**A. ONRW Nominations Meet Procedural Requirements of 20.6.4.9(A) NMAC**

34. Petitioners met all procedural requirements of 20.6.4.9(A) NMAC for nominating the ONRWs. [Tr. 72:14-88:6; Petitioners' Exhibits 2, 5, 6, 7 and 8].

35. Petitioners provided a map of the (nominated) surface waters of the State, including the locations and proposed upstream and downstream boundaries for each nominated ONRW, as required by 20.6.4.9(A)(1) NMAC. [Tr. 72:20-25;73:1-5; Petitioners' Exhibit 2 at 7-10; Petitioners' Exhibit 5.] Petitioners further provided tables listing all nominated surface waters, the miles or acreage of those waters, as well as the proposed upstream and downstream boundaries, and latitudinal and longitudinal coordinates for each surface water included. [Tr. 73:7-24; Petitioners' Exhibit 2 at 11-13; Petitioners' Exhibit 5.] In total, Petitioners nominated 179.93 miles of streams and 42.9 acres of wetlands for designation as ONRWs. [Tr. 73:20-21; Petitioners' Exhibit 2 at 7-13; Petitioners' Exhibit 5].

36. Petitioners provided a written statement and evidence based on scientific principles in support of the ONRW nominations, including specific reference to one or more of the applicable ONRW criteria, as required by 20.6.4.9(A)(2) NMAC. [Tr. 73:25-74:1-3; Petitioners' Exhibit 2 at 13-14].

37. Petitioners provided water quality data, including chemical, physical and/or biological parameters, if available, to establish a baseline condition for the proposed ONRWs, as required by 20.6.4.9(A)(3) NMAC. [Tr. 74:10-20; Petitioners' Exhibit 2 at 14-15; Petitioners' Exhibit 6].

38. Petitioners' witnesses discussed activities that might contribute to the reduction of water quality in the proposed ONRWs, as required by 20.6.4.9(A)(4) NMAC. [Tr. 74:21-76:19; Petitioners' Exhibit 2]. Those activities included mining [Tr. 74:25-75:5], development and road construction [Tr. 75:6-12], climate change [Tr. 75:13-76:1], and poorly managed recreation [Tr. 76:2-4], *see also* Petitioners' Exhibit 2 at 15-19.

39. Petitioners provided additional evidence to substantiate the proposed ONRW designations, including an analysis of the economic impact of the designations on the local and regional economy within the State and the benefit to New Mexico, as required by 20.6.4.9(A)(5) NMAC. [Tr. 76:20-77:11; Petitioners' Exhibit 2 at 19, 33-42]. Such additional evidence related to the proposed surface waters designations' economic, cultural and the national significance. *Id.*

40. 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*) as required by 20.6.4.9(A)(6) NMAC. [Tr. 77:12-22; Petitioners' Exhibit 2 at 19-20; Petitioners' Exhibit 7].

#### **B. ONRW Nominations Meets Designation Requirements of 20.6.4.9(B) NMAC**

41. Petitioners demonstrated that designation of all of the nominated waters as ONRWs would be beneficial to the State, as required by 20.6.4.9(B) NMAC. [*See* Petitioners' Exhibit 2 at 33-42; Petitioners' Exhibits. 4, 13, 15, 18, 19, 21, 23, 25 and 27; Tr. 34:11-37:25 (testimony of Witness Toya); Tr. 39:15-48:8 (testimony of Witness Varela); Tr. 48:24-53:5 (testimony of Witness Benavidez); Tr. 53:8-63:14 (testimony of Witness Adelo); Tr. 64:11-68:2 (testimony of Witness McFerrin); Tr. 104:8-111:4 (testimony of Witness Mitchell); Tr. 162:9-165:24 (testimony of Witness Garcia)].

42. There are numerous benefits of the proposed ONRWs designation to the State, including supporting New Mexico's rich tradition of acequia irrigation and farming, ranching, cultural values, and economic benefits. [Tr. 85:7-87:19; Petitioners' Exhibit 2 at 33-42]. The designation will 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; Petitioners' Exhibit 2 at 33-42].

43. In toto, designation of the nominated waters as ONRWs would benefit the State by enhancing the State's ability to mitigate and adapt to climate change, highlighting the historical and cultural significance of the nominated waters, and providing economic benefits associated with outdoor recreation and tourism. [Petitioners' Exhibit 2 at 33-42; Petitioners' Exhibit 4.]

## **2) Significant Attribute Criterion**

44. Petitioners have demonstrated that a number of the nominated surface waters or segments of those waters meet the significant attribute criterion of 20.6.4.9.(B)(1) NMAC. [Tr. 80:22-81:6; Petitioners' Exhibit 2 at 21-24; Petitioners' Exhibit 4].

45. Seven (7) miles of the nominated portion of the Pecos River, from the Wilderness boundary downstream to the confluence of Davis Creek, are designated as a Wild and Scenic River in the National Wild and Scenic Rivers Act. [Tr. 80:22-81:1; Petitioners' Exhibit 2 at 21-24; Petitioners' Exhibit 4].

46. Two segments of the nominated surface waters are New Mexico special trout waters: the Pecos River, from the Rio Mora confluence to Cowles Creek and Jack's Creek, from the waterfalls downstream of New Mexico Highway 63 upstream to its headwaters. [Tr. 81:2-6; Petitioners' Exhibit 2 at 23-24; Petitioners' Exhibit 4].

47. In toto, the segments of the Pecos River and Jack's Creek identified in the previous

paragraph meet the significant attribute criterion of 20.6.4.9.B(1) NMAC. [Petitioners' Exhibit 2 at 21-24; Petitioners' Exhibit 4].

### **3) Exceptional Recreational Significance Criterion**

48. Petitioners demonstrated that all of the nominated surface waters meet the exceptional recreational significance criterion of 20.6.4.9(B)(2) NMAC. [Tr. 81:7-84:9; Petitioners' Exhibit 2 at 25-32; Petitioners' Exhibit 4].

49. Annually, thousands of visitors recreate at the seven U.S. Forest Service campgrounds in the nominated area, including Jack's Creek Campground, considered one of the top ten best campgrounds in the State. [Tr. 81:9-13; Petitioners' Exhibit 2 at 25-32].

50. Recreational activities in the nominated area include camping, hiking, horseback riding, hunting, fishing, bird watching, backpacking and rafting, among others. [Tr. 81:14-22; Petitioners' Exhibit 2 at 25-32].

51. Several local outfitters take their clients on tours and trips in the Upper Pecos Watershed and depend on the clean waters of the area for their business. [Tr. 82:1-4; Petitioners' Exhibit 2 at 25-32].

52. The sixteen (16) nominated waters have exceptional recreational significance for the fishing opportunities they provide. [Tr. 82:5-83:19; Petitioners' Exhibit 2 at 25-32; Petitioners' Exhibit 4].

53. The sixteen (16) nominated waters are renowned for trout fishing, and the nominated stretch of the Pecos River is the second-highest fished stream reach in the State, seeing over 158,000 angler days per year. [Tr. 82:7-12; Petitioners' Exhibit 2 at 25-32; Petitioners' Exhibit 4]. Fly fishing guides have named the Upper Pecos River among the top rated places to fly fish in New Mexico. [Tr. 82:13-15; Petitioners' Exhibit 2 at 25-32].

54. Petitioners' Exhibit 10 includes data on the number of angler days in the nominated surface waters, where such data was 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; Petitioners' Exhibit 2 Petitioners' Exhibit 2 at 25-32; Petitioners' Exhibit 10].

55. The nominated surface waters of the Upper Pecos Watershed are home to the Rio Grande cutthroat trout, rainbow trout, brown trout, and cutthroat trout, and each of the sixteen (16) nominated surface waters provide habitat for trout. [Tr. 83:12-19; Petitioners' Exhibit 2 at 25-32].

56. All of the nominated surface waters support species of economic and recreational importance ("SERI"). [Tr. 83:20-84:4; Petitioners' Exhibit 2 at 25-32; Petitioners' Exhibit 9].

57. Petitioners' Exhibit 9 includes reports from the New Mexico Department of Game and Fish Environmental Review Tool identifying SERI in and around each of the sixteen (16) nominated waters, including SERI identified within one mile of each bank of the named streams. Because each identified unnamed nominated non-perennial stream drains into one those named streams, the species search includes at least one mile of all ninety-six (96) unnamed tributaries and all wetlands adjacent to those streams. [Tr. 83:20-84:9; Petitioners' Exhibit 2 at 30; Petitioners' Exhibit 9].

58. SERI identified in the reports in Petitioners' Exhibit 9 include black bear, cougar, elk, mule deer, brown trout, rainbow trout, Rio Grande cutthroat trout, and cutthroat trout. [Petitioners' Exhibit 2 at 31; Petitioners' Exhibit 9].

59. In toto, all of the nominated surface waters meet the exceptional recreational significance criterion of 20.6.4.9(B)(2) NMAC in that they support multiple SERI. [Petitioners' Exhibit 2 at 25-32; Petitioners' Exhibit 4].

60. Separately, the sixteen (16) named nominated surface waters meet the exceptional

recreational significance criterion 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. [Petitioners' Exhibit 2 at 25-32; Petitioners' Exhibit 4].

#### **4) Exceptional Ecological Significance Criterion**

61. Petitioners have demonstrated that all of the nominated waters meet the exceptional ecological significance criterion of 20.6.4.9(B)(2) NMAC. [Tr. 166:19-180:20; Petitioners' Exhibits 4, 11].

62. There are twenty-three (23) species of greatest conservation need ("SGCN") in the Upper Pecos Watershed. [Tr. 172:7-13; Petitioners' Exhibit 4, 11]. Each nominated stream and the one-mile area surrounding their banks, which include all their tributaries and wetlands, support between fourteen (14) and twenty-one (21) SGCN. [See Petitioners' Exhibit 11 at 11-12].

63. Four (4) birds that inhabit the Upper Pecos Watershed are protected as threatened under Federal or State law. [Tr. 172:10-13; Petitioners' Exhibit 4, 11]. Those species are peregrine falcon (State threatened species), spotted bat (State threatened species), boreal owl (State threatened species), and Mexican spotted owl (Federal threatened species). [Petitioners' Exhibits 4, 11].

64. New Mexico's state fish, the Rio Grande cutthroat trout, is present in the nominated surface waters of the Upper Pecos Watershed. [Tr. 172:14-173:3; Petitioners' Exhibit 4, 11]. The nominated waters of the Upper Pecos Watershed currently support six (6) 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; Petitioners' Exhibits 4, 11 at 13-14].

65. Rainbow, brown, and other cutthroat trout are also present in the nominated surface waters of the Upper Pecos Watershed. [Tr. 173:4-9; Petitioners' Exhibit 4, 11].

66. There are six (6) plant species recognized as rare or in need of protection in the Upper Pecos Watershed. [Tr. 173:10-17; Petitioners' Exhibits 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. [Petitioners' Exhibit 11 at 15-16].

67. 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; [Petitioners' Exhibits 4, 11].

68. Witness Probst testified 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; Petitioners' Exhibit 1].

69. In toto, all of the nominated surface waters meet the exceptional ecological significance criterion of 20.6.4.9(B)(2) NMAC, based on the presence of multiple SGCN and state and federally listed threatened or endangered species, and on the interconnected nature of the perennial and nonperennial streams and wetlands which make up a healthy functioning watershed. [Petitioners' Exhibit 4, 11].

## **5) Water Quality Criterion**

70. Petitioners' Exhibit 6 includes all existing water quality data which was available for the nominated surface waters. [Tr. 84:19-20; Petitioners' Exhibit 2 at 32-33; Petitioners' Exhibit 6].

71. Seven (7) of the nominated surface 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]. Those waters are Doctor Creek, Holy Ghost Creek, Indian Creek, Jack's Creek, Panchuela Creek, Rio Mora, and Winsor Creek. [Petitioners' Exhibit 2 at 32-33; Petitioners' Exhibit 4].

72. In toto, Petitioners have demonstrated that designation of all nominated surface waters of the Upper Pecos Watershed is warranted under 20.6.4.9 NMAC in that each of those waters meets at least one of the designation criteria of 20.6.4.9(B) NMAC and the designation would be beneficial to the State.

### **V. Parties Department and McQuillan**

73. The Department worked collaboratively with Petitioners for over a year on the Petition. [Tr. 30:6-11, 123:21-24].

74. A review by the Department's Surface Water Quality Bureau ("SWQB") staff determined that all procedural and administrative requirements for designating the nominated surface waters as ONRWs had been met. [NMED Exhibit 1, pp. 10-15. Tr. 132:20-135:19].

75. A review by the Department's SWQB 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].

76. A review by the Department's SWQB staff determined that the Petition contained all



six (6) elements required of an ONRW petition under 20.6.4.9(A) NMAC. [NMED Exhibit 2, pp. 7-11. Tr. 144:8-145:14].

77. The Department presented two witnesses in support of the Petition, Jennifer Fullam, the Standards, Planning and Reporting Team Supervisor and Water Quality Standards Coordinator within the Department's Surface Water Quality Bureau, and Diana Aranda, an Environmental Scientist in the Standards, Planning, and Reporting Team for the Department's Surface Water Quality Bureau. [Tr. 138:12-15]. Witness 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.Tr. 137:18-145:24; Tr. 24:19-20].

78. Witness Fullam provided testimony regarding the protections offered by ONRW designation. [NMED Exhibit 1, pp. 4-5. Tr. 124:19-137:14].

79. Witness Aranda explained that the Department evaluated each of the nominated water bodies to ascertain the fulfillment of eligibility criteria and the submittal elements required for an ONRW, and the Department 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 Petitioners met the procedural requirements of in 20.6.4.9.A NMAC. [Tr. 145:10-14].

80. Pursuant to 20.6.4.8 NMAC, which reflect 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. [NMED Exhibit 1, p. 5. Tr. 128:16-130:17].

81. An 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].

82. The Department found no National Pollutant Discharge Elimination System (“NPDES”) permits for discharges to any of the surface waters nominated in the Petition. The designation of an ONRW would not prohibit a permittee from applying to discharge to an ONRW, provided 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. Consequently, the designation of the nominated waters as ONRWs will not impact existing dischargers, because there are none, but such designation may impose restrictions on future point source dischargers. [NMED Exhibit 1, pp. 8-9].

83. The Department supported the Commission’s designation of the nominated surface waters as ONRWs. [NMED Exhibit 1, p. 15; NMED Exhibit 2, p. 12. Tr. 137:12-14; Tr. 145:19-22].

84. Witness McQuillan, a hydrologist, testified regarding activities which might contribute to the reduction of surface 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].

85. Neither of the two parties which entered an appearance and participated in the rulemaking proceeding objected to the proposed amendments to 20.6.4.9.D NMAC, as proposed in Petitioners’ Exhibit 1.

86. The New Mexico Farm & Livestock Bureau (“NMF&LB”), the largest agriculture organization in the State, representing over more than 20,000 members involved in agriculture, through the testimony of Tiffany Rivera - who testified under oath during a public comment period

- opposed the proposal submitted by Petitioners to designate portions of the Pecos River as ONRWs. [Tr. 121:25; 122:1-25; 123:1-2].

87. According to the referenced written statement submitted by Witness Rivera:

... [The] NMF&LB adamantly opposes ONRW designations, these designations have the potential to severely limit economic growth while also placing additional restrictions and regulations on water and land use. In a state as arid and dry as New Mexico, continued access and use of water and our working lands is imperative. Additionally, we oppose the proposal as it includes designated segments located on private land, NMF&LB supports an individual's private property rights and this proposal has the potential to infringe on those rights. Our state's farmers and ranchers are some of the best and most experienced stewards of our natural resources as their very livelihoods depend on land and water. In New Mexico, our state's farmers and ranchers have voluntarily enrolled over 10.5 million acres in the Conservation Reserve Program, Conservation Stewardship Program, and the Environmental Quality Incentives Program. Our state's farmers and ranchers continue to do their part by reducing their carbon footprints, participating in voluntary conservation programs, and working to restore and improve our state's natural resources. 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. We also have concerns with the impacts that the proposed designation could have on traditional uses of the land and water such as rangeland grazing and farming. Ranching plays a significant role in New Mexico's longstanding customs and culture; ranching has been present in the state since the 16th century with many families utilizing lands for beneficial uses for generations. We have specific concerns with the permitting and approval of pre-existing and new activities by the oversight agency. This permitting process has the potential to restrict preexisting activities like grazing if they do not align with best management practices identified to protect ONRWs. The proposal may also hinder conservation and watershed restoration projects again, if they do not align with the administering agencies vision of what best management practices look like. Additionally, we have concerns with the oversight agency and their potential authority and jurisdiction over water and land use. Since the petition includes both federal and private lands will there be multiple oversight agencies? Up to this point all previous ONRW's have been located on federal lands with the U.S. Forest Service serving as the singular oversight agency. If a state agency will also serve as an oversight agency, what agency would that be? 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. Lastly, 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.

[Tr. 122:25; 123:1-2; WQCC No. 21-51(R), Undated Docket Entry “Smart Comment Report: O-1: New Mexico Farm & Livestock Bureau, Tiffany Rivera Submit Date: 04/11/2022 12:00 AM Comment O-1-1”].

88. The NMF&LB failed to show by any evidence that the organization and its members would be adversely affected by the proposed nomination of the surface waters of the Upper Pecos Watershed as ONRWs.<sup>1</sup>

89. For all the foregoing reasons, the Commission finds and concludes that Petitioners’ proposal to amend 20.6.4.9(D) NMAC, classifying the identified surface waters of the Upper Pecos Watershed as ONRWs<sup>2</sup>, is supported by the weight of the evidence in the record, and the Commission adopts Petitioners’ proposed amendments to 20.6.4.9(D) NMAC, as set forth in Petitioners’ Exhibit 1 at page 80 of the Petition, which exhibit is fully incorporated by reference into this Statement of Reasons and Decision.

90. In addition to this Statement of Reasons, the Commission references Hearing Officer Chakalian’s written report for identification of the issues addressed at the public hearing, identification of the parties’ final proposals, and the evidence supporting or opposing those proposals.

**BASED ON THE FOREGOING REASONS, IT IS DECIDED AND ORDERED:**

A. The Commission amends 20.6.4.9(D) NMAC as proposed by Petitioner, classifying the nominated surface waters of the Upper Pecos Watershed as ONRWs.

B. This Statement of Reason constitutes the written decision of the Commission’s actions on the proposed regulatory changes in this rulemaking proceeding, and the reasons for those

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<sup>1</sup> See, *New Mexico Cattle Growers’ Ass’n v. New Mexico Water Quality Control Com’n*, 2013-NMCA-046, ¶ 12, 299 P.3d 436, 440, certiorari granted 300 P.3d 1181, certiorari quashed 313 P.3d 251.

<sup>2</sup> Maps 1 and 2 and Tables 1 and 2 in Section II(B) of the Petition.  
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actions. Other written or oral statements by Commission members are not recognized as part of the Commission's official decision or reasons.

C. The Commission directs the Department to prepare the amendments to 20.6.4.9(D) NMAC in a format acceptable to Records and Archives for filing as part of the New Mexico Administrative Code. This preparation may include re-numbering and re-lettering of existing sections of the standards and correcting any errata consistent with the Statement of Reasons.

Issued this 10 day of August, 2022.

New Mexico Water Quality Control Commission

**Stephanie Stringer**

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By: Stephanie Stringer, Chair

## Certificate of Service

I hereby certify that on August 10, 2022, A copy of the above Statement of Reasons was sent via electronic mail to the persons listed below. A hard copy will be mailed upon request.

### Via Email:

Tannis Fox  
Kelly Nokes  
Western Environmental Law Center  
[fox@westernlaw.org](mailto:fox@westernlaw.org)  
[Nokes@westernla.org](mailto:Nokes@westernla.org)  
*Attorneys for Petitioners Village of Pecos, San Miguel County, Upper Pecos Watershed Association, New Mexico Acequia Association, and Molino de la Isla Organics LLC*

John Verheul  
Deputy General Counsel  
Office of General Counsel  
New Mexico Environment Department  
[John.verheul@state.nm.us](mailto:John.verheul@state.nm.us)  
*Attorney for NM Environment Department*

Dennis McQuillan  
3 S. Hijo de Dios  
Santa Fe, NM 87508  
[geologist@highdesertscience.net](mailto:geologist@highdesertscience.net)

Robert Sanchez  
NM Attorney General's Office  
[Rfsanchez@nmag.gov](mailto:Rfsanchez@nmag.gov)  
*WQCC Counsel*

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Pamela Jones  
Commission Administrator  
505-660-4305  
[Pamela.jones@state.nm.us](mailto:Pamela.jones@state.nm.us)