

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

IN THE MATTER OF:
Petition to Nominate Surface Waters
In Forest Service Wilderness Areas as
Outstanding National Resource Waters

WQCC 10-01(R)

New Mexico Environment Department,
New Mexico Department of Game and Fish and
New Mexico Energy, Minerals and Natural Resources Department,
Petitioners.

AND

IN THE MATTER OF:
Petition to Amend Antidegradation Policy
and
Request to Amend Antidegradation Policy
Implementation Procedures
and
To Issue Guidance for Nonpoint Source
Discharges in Areas Designated as ONRWs

New Mexico Environment Department,
Petitioner.



ORDER AND STATEMENT OF REASONS

THIS MATTER comes before the New Mexico Water Quality Control Commission (“Commission”) upon an amended petition (“amended petition” or “nomination”) jointly filed by the New Mexico Environment Department, New Mexico Game and Fish Department and New Mexico Energy, Minerals and Natural Resources Department (“Petitioners”) proposing to nominate surface waters in United States Forest Service Wilderness Areas as Outstanding National Resource Waters (“ONRW”) and an amended petition filed by the New Mexico Environment Department (“NMED”) to amend: (1) the Antidegradation Policy; (2) the

Antidegradation Policy Implementation Procedures and (3) to issue Guidance for Nonpoint Source Discharges in Areas Designated as an Outstanding National Resource Waters. A public hearing was held in Santa Fe, New Mexico on September 14-17 and October 12-14, 2010, before a hearing officer, with many Commissioners present during the hearing. On November 30, 2010, the Commission deliberated and voted to adopt the amended petition and Antidegradation Policy with its implementing documents, with minor amendments, set forth below in relevant part, for the reasons that follow.

II. STATEMENT OF REASONS

1. The state regulation regarding a petition to nominate a surface water of the State as an Outstanding National Resource Water is found at 20.6.4.9.A NMAC.
2. Petitioners initially prepared a draft proposal in 2008 for public input that included all waters in Wilderness and Inventoried Roadless Areas as ONRWs.
 - (a) The 2009 New Mexico Legislature adopted House Joint Memorial 49.
 - (b) The Petitioners, in an effort to address the concerns in the memorial, scaled back their proposal to exclude Inventoried Roadless Areas and non-perennial streams. See Petitioners' Exhibit #38, p. 11; Tr. vol. 2, p. 372, ll. 9-11.
 - (c) The 2010 New Mexico Legislature did not attempt to convert the 2009 memorial into statute. Tr. vol. 2, p. 372, ll. 12-14.
 - (d) The 2010 New Mexico Legislature did not follow up with another memorial. Tr. vol. 2, p. 372, ll. 11-12.
3. Petitioners held twenty-one public meetings throughout the state and used the sign-up sheets to create interested party mailing lists. Tr. vol. 7, p. 1759, ll. 22-24.

4. Petitioners formalized the draft proposal into a formal petition and submitted it to the Commission's hearing clerk in February 2010. Petitioners' requested review of the petition in one composite hearing. Tr. vol. 1, p. 40, ll. 12-16.
5. The Commission voted to accept the petition at its March 2010 monthly meeting. The Commission voted to assign a Hearing Officer and schedule the matter for hearing for multiple days for September 2010.
6. Petitioners, in response to continued concerns from the public regarding the breadth of the petition and after receiving procedural permission from the Hearing Officer, amended its petition on May 17, 2010 to further limit its scope by excluding intermittent waters and tributaries from the nominated waters. See Petitioners' Exhibit # 38, p. 15.
7. Petitioners' amended petition nominated specifically identified perennial waters, lakes, and wetlands within twelve United States Forest Service Wilderness Areas as ONRWs. Tr. vol. 7, p. 1899, ll. 8-9. The amended petition included approximately:
 - (a) 700 miles of 195 perennial rivers and streams;
 - (b) 29 lakes;
 - (c) 4,930 acres of 1,405 wetlands. Tr. vol. 1, p. 40, ll. 12-16.
8. The twelve Wilderness areas part of the amended petition were Aldo Leopold Wilderness, Apache Kid Wilderness, Blue Range Wilderness, Chama River Canyon Wilderness, Cruces Basin Wilderness, Dome Wilderness, Gila Wilderness, Latir Peak Wilderness, Pecos Wilderness, San Pedro Park Wilderness, Wheeler Peak Wilderness and White Wilderness. See Petitioners' Exhibit #1-SUB.
9. There is precedent for the Commission approving ONRW petitions on a Wilderness basis (Valle Vidal) or on stream segment basis (Rio Santa Barbara).

10. There is precedent in other western states, such as Wyoming, to have ONRWs for waters within multiple Wilderness areas. See Petitioners' Exhibit # 38, p. 9.
11. The Commission's hearing notice requirements for rule-making are found at NMSA 1978, Section 74-6-6(C) and state: "At least thirty days prior to the hearing date, notice of the hearing shall be published in the New Mexico register and a newspaper of general circulation in the area affected and mailed to all persons who have made a written request to the commission for advance notice of hearings and who have provided the commission with a mailing address."
12. Notice of this hearing was published in the New Mexico Register, Albuquerque Journal and newspapers of general circulation in the affected counties sixty days prior to the hearing and sent to those persons on the Commission's interested party list and the New Mexico Environment Department's stakeholder list. See Petitioners' Exhibit #38, p. 15 & Exhibit 51.
 - (a) Notice of the hearing was published in the twelve counties in which the Wilderness areas that were subject to the amended petition are located including Catron, Grant, Lincoln, Mora, Otero, Rio Arriba, Sandoval, San Miguel, Santa Fe, Sierra, Socorro and Taos. See Petitioners' Exhibit # 51.
 - (b) The notices identified the area in which the waters were located and directed the public how to obtain copies of the amended petition. See Petitioners' Exhibits #32, 51.
 - (c) The amended petition included a complete listing of all waters nominated. See Petitioners' Exhibit #1 SUB-2.

- (d) The Cuba News does not qualify as a publication in which a legal notice may be published because it is published monthly. See NMSA 1978, § 14-11-2.
 - (e) Residents of Cuba, New Mexico reside in Sandoval County and notice was timely published in the Rio Rancho Observer and Albuquerque Journal. See Petitioners' Exhibit # 51.
13. Petitioners' notice of the hearing stated: "The proposed amendments ...nominate all perennial waters within United States Forest Service Wilderness Areas as outstanding national resource waters (ONRW)." See Petitioners' Exhibit #51, at 4.
- (a) "This notice also gives notice pursuant to 20.6.4.9.A(6) that the parties have amended their original petition to exclude intermittent waters and tributaries to the waters nominated." See Petitioners' Exhibit #51, at 4.
 - (b) The New Mexico Environment Department's website stated: "The proposal is limited to surface waters within National Forest Wilderness areas...[a]ny future ONRW nomination must, by law, go through a new, full public process including a full public hearing where all parties can participate." See Petitioners' Exhibit #47.
 - (c) The notice represented the culmination of a multi-year process for the amended petition with Petitioners deciding to narrow the boundaries and types of water. See Petitioners' Exhibit #38, p. 21.
14. The Commission held public hearings on September 14, 15, 16 & 17 and October 12, 13 & 14, 2010, with multiple parties providing technical testimony and approximately eighty citizens providing public comment.

15. State Regulation 20.6.4.9.A NMAC states a "petition to classify 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."

- (a) Petitioners provided maps as part of its amended petition on May 17, 2010.
- (b) Petitioners provided maps in its August 9, 2010 submission of its technical testimony.
- (c) Petitioners provided maps of all waters nominated, including the location and proposed upstream and downstream boundaries. See Petitioners' Exhibits # 4 (statewide reference map); ## 5-30 (maps of individual wildernesses); #31 (basin maps within wildernesses), #100-SUB, pp. 4-5; #102 (wetlands maps on CD); #103-SUB (list of wetlands by coordinates).
- (d) The perennial surface waters were identified in a table. See Petitioners' Exhibits #1-SUB; #38, p. 5. Only surface waters that are specifically identified in the table are nominated.
- (e) The United States Forest Service informed Petitioners on August 13 that a number of the features within the interior of the boundaries of the maps did not have perennial waters. Petitioners took this information and excluded these incorrect features from the maps. See Letter to Commission from Mr. Corbin Newman, USFS Regional Forester (Aug. 13, 2010).
- (f) The exterior boundary of the maps did not change based on this information.
- (g) Petitioners presented the maps with the corrected interior features to the parties and Commission on September 14, 2010.

16. State Regulation 20.6.4.9.A NMAC states a “petition to classify a surface water of the state as an ONRW shall include: (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 of this section.”
17. Petitioners provided scientific data to support the nomination based on one or more of the criteria in 20.6.4.9.B NMAC.
18. There was evidence that some of the nominated waters are a significant attribute of Special Trout Waters under 20.6.4.9.B(1) NMAC. See Petitioners’ Exhibits # 72, pp. 3-4; ## 6, 8, 10, 20-23, 109. Seven of the nominated streams, Black Canyon in the Aldo Leopold Wilderness, Iron and Mogollon Creeks in the Gila Wilderness, Jack’s Creek, Pecos River and Rio Valdez in the Pecos Wilderness and Capulin Creek in the Dome Wilderness, are considered “Special Trout Waters.” See Petitioners’ Exhibit #109.
19. There was evidence that all of the nominated waters are a significant attribute of Wilderness under 20.6.4.9.B(1) NMAC. See Petitioners’ Exhibits # 38, pp. 21-23; #57-59.
 - (a) Wilderness areas may only be “designated by an act of Congress.” See Petitioners’ Exhibit #38, pp. 21. This action is rare as Wilderness in Forest Service land in New Mexico has been designated primarily through only three congressional acts in the last fifty years. See Petitioners’ Exhibit #38, p. 22.
 - (b) In 1964, Congress designated the Gila, Pecos, San Pedro Parks, White Mountain and Wheeler Wildernesses. In 1978, Congress designated Chama River Canyon Wilderness. In 1980, Congress designated the Aldo Leopold, Apache Kid, Blue Range, Cruces Basin, Dome and Latir Peak Wildernesses and added to the Gila,

Pecos, Wheeler Peak and White Mountain Wildernesses. See Petitioners' Exhibit #38, p. 22.

(c) The Federal Wilderness Act, 16 U.S.C. Sections 1131-36, states: “[a] wilderness...is further defined to mean...[f]ederal land retaining its primeval character and influence...which is protected and managed so as to preserve its natural conditions....” Petitioners' Exhibits #38, p. 21.

(d) The natural condition of the Wilderness areas named in the amended petition is its rivers, streams, lakes and wetlands. See Petitioners' Exhibit #38, p. 21.

(e) In a study conducted of the values of Wilderness, members of the public were surveyed and asked to rate the importance of various Wilderness benefits. The study showed that maintaining water quality is consistently the highest ranked benefit by the public. See Petitioners' Exhibit #38, p. 23.

20. There was evidence that some of the nominated waters are part of designated wild rivers under Wild and Scenic Act under 20.6.4.9.B(1) NMAC. See Petitioners' Exhibit # 100-SUB pp. 5-6 & 15, 20, 21, 23. The Chama River Canyon Wilderness contains 4.9 miles of the Rio Chama designated as wild. The Pecos Wilderness contains 13.5 miles of the Pecos River designated as wild. See Petitioners' Exhibit # 100-SUB pp. 5-6 & 15 (map of Rio Chama), ## 20, 21, 23 (maps of Pecos River).

21. There was evidence that all of the nominated waters have exceptional recreational value under 20.6.4.9.B(2) NMAC. See Petitioners' Exhibits #100-SUB, pp. 7-26.

(a) Streams and lakes in Wilderness provide visitors with fishing, swimming, canoeing, kayaking, wading and non-motorized boating opportunities, in addition to hiking and camping water. Tr. vol. 1, p. 145, to p. 146, 1.4.

- (b) The Federal Wilderness Act provides “wilderness” as a place “where the earth and its community of life are untrammelled by man...has outstanding opportunities for solitude or... unconfined type of recreation....” Petitioners’ Exhibit #38, p. 21.
- (c) Riparian zones and wetlands in Wilderness provide habitat for plants, birds and other wildlife, which in turn provide hunting and wildlife viewing opportunities. Tr. vol. 1, p. 145, to p. 146, l.4.
- (d) Visitors rely on clean water sources in Wilderness for drinking and cooking. Tr. vol. 1, p. 145, to p. 146, l.4.
- (e) There was public comment throughout the hearing stating that waters in these Wildernesses provide exceptional recreational value.

22. There was evidence that all of the nominated waters have exceptional ecological significance or value under 20.6.4.9.B(2) NMAC. See Petitioners’ Exhibits # 72 pp. 4-19; ##78-99.

- (a) Wilderness waters embody the ecological and scenic values that the Federal Wilderness Act seeks to preserve and protect. See Petitioners’ Exhibit #38, pp. 21-22.
- (b) These waters help support flora—alpine meadows, dark spruce-fir forests, pine-oak woodlands, mixed-conifer forests and open grasslands. See Tr. vol. 1, p. 74, l.21 to p. 77, l.1.
- (c) They provide habitat for a broad array of wildlife—elk, bear and beaver—and to threatened, rare and declining species such as the northern leopard frog, Gila

spring snail, New Mexico spring snail, narrow-headed garter snake and Lilljeborg's peacocks clam. See Tr. vol. 1, p. 75, l. 1 to p. 76, l.10; p 77, ll. 21-24.

(d) These waters provide essential habitat to common and rare fishes—the Rio Grande cutthroat trout, the Gila trout, headwater chub, Sonora sucker, desert sucker, loach minnow and speckled dace. Tr. vol. 1, p.75, l.17 to p. 76, l.4; vol. 1, p. 77 l.2 to p.78, l.6.

23. State Regulation 20.6.4.9.A NMAC states a “petition to classify a surface water of the state as an ONRW shall include: (3) water quality data including chemical, physical or biological parameters, if available, to establish a baseline condition for the proposed ONRW.”

24. Petitioners presented available water quality data for the waters nominated. See Petitioners’ Exhibits #33-34; #100-SUB, pp. 25-30.

(a) 362.9 miles of the 705.5 miles of perennial stream miles have sufficient data for water quality assessment. See Petitioners’ Exhibit #100-SUB, p. 28.

(b) NMED Surface Water Quality Bureau staff does not have the resources to assess all waters but many of the perennial waters in the Wildernesses contribute to larger streams and rivers that already have been assessed. See Petitioners’ Exhibit # 100-SUB, pp. 27-28.

25. State Regulation 20.6.4.9.A NMAC states a “petition to classify a surface water of the state as an ONRW shall include: (4) a discussion of activities that might contribute to the reduction of water quality in the proposed ONRW.”

26. Petitioners provided a discussion of activities that might contribute to the reduction of water quality in the proposed ONRWs. See Petitioners’ Exhibit #100-SUB, pp. 31-32.

27. State Regulation 20.6.4.9.A NMAC states a “petition to classify a surface water of the state as an ONRW shall include: (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 state of New Mexico and the benefit to the state.”
28. Petitioners provided a discussion of the economic impact of the designation on the local and regional economy within the state and the benefit to the state. See Petitioners’ Exhibits #38, pp. 18-21, ## 23-31 and #35.
29. Petitioners presented evidence on the economic and welfare benefits to the state.
- (a) These benefits include hunting, fishing, visitors, recreation and the jobs created by those activities. See Petitioners’ Exhibit # 38, pp. 23-31.
 - (b) The benefits include a clean water supply for human uses, livestock watering, recreational uses, and wildlife habitat within Wilderness areas and for downstream drinking water and domestic, agricultural, industry, and recreational uses will help maintain a clean water supply for human uses, agricultural uses, and wildlife habitat. See Petitioners’ Exhibit #38, p. 18.
 - (c) The benefits include that the protection of these headwaters will maintain healthy ecosystems, preserve habitat, support biodiversity, and protect endangered and vulnerable specific within Wilderness areas and downstream. See Petitioners’ Exhibit #38, p. 18.
 - (d) The benefits include that the ONRW status can help the Forest Service and other entities better access competitive watershed and wetland restoration funds, such as Clean Water Act Section 319 and Section 604.b funding. Tr. vol. 1, p. 53, ll. 18-23.

(e) The benefits include that the designation will give primacy to the state's interests in these waters. If the Wilderness waters are designated, the Forest Service will be required to make the state's water quality a primary consideration in its forest management decisions. Tr. vol. 1, p. 52, l. 14 to p. 53, l.17.

(f) The University of New Mexico's Bureau of Business & Economic Research ("BBER") provided information on the socioeconomic impact on local and regional economy. See Petitioners' Exhibit #35; #38, p. 26.

30. The United States Forest Service provided written support of the goals of the amended petition and that it would work to implement the applicable requirements.

31. Petitioners presented evidence that the ONRW designation will have no adverse economic effect on existing economic activities. See Petitioners' Exhibit #38, p. 24.

(a) Acequia operations are exempted from the ONRW requirements. Tr. vol. 6, p. 1467, l. 24.

(b) All pre-existing users that implement Best Management Practice documents ("BMP") are exempted. See Petitioners' Exhibit #38, p. 24.

(c) This language was "developed in consultation with the Forest Service." Tr. vol. 7, p. 1751, ll. 15-16.

(d) There are approximately 39 grazing allotments in the Forest Service Wilderness covered by the nomination. See Petitioners' Exhibit #38, p. 24; Tr. vol. 1, p. 57, ll. 7-14.

(e) All current grazing permittees are exempt because grazing permits are subject to BMPs under their Forest Service grazing permits. See Petitioners' Exhibits #37; #38, p. 24; Tr. vol. 4, p. 957, ll. 9-16; vol. 6, p. 1580, ll. 4-7.

- (f) There was no evidence presented in the record that the Forest Service will change BMPs as a result of the ONRW designation or lead to more activities being subject to federal court litigation.
- (g) The New Mexico Cattle Growers organization (“Cattle Growers”) provided a witness who did not provide any economic data showing that permittees would suffer a negative effect as a result of designation. Tr. vol. 3, p. 887, ll. 15-21.
- (h) The Cattle Growers witness acknowledged they had no evidence that ONRW designation in New Mexico or other states had resulted in “fence-out” practices, a decrease in the number of cows, or ranching operations being put out of business. Tr. vol. 3, p. 897, l.3 to p. 898, l. 14; vol. 3, p. 900, ll. 19-22.
- (i) The Commission asked: “Are you aware of any aspects of this petition, given the exemptions that are provided, that would drive someone out of business?” Tr. vol. 3, p. 915, ll. 22-24. The Cattle Growers witness stated: “No.” Tr. vol. 3, p. 915, l. 25.
- (j) Another witness for the Cattle Growers acknowledged that they knew of no lawsuits in New Mexico or around the country brought against cattle grazers based on ONRW designation. Tr. vol. 4, p. 958, ll. 11-16; vol. 4, p. 959, ll. 1-8.

32. State Regulation 20.6.4.9.A NMAC states a “petition to classify a surface water of the state as an ONRW shall include: (6) affidavit of publication of notice in a newspaper of general circulation in the affected counties and in a newspaper of general statewide circulation.”

- (a) Petitioners submitted affidavits of publication of notice in a newspaper of general statewide circulation in affected counties. See Petitioners Ex. #32.

33. NMED filed an amended petition to make amendments to: (1) the Antidegradation Policy; (2) the Antidegradation Policy Implementation Procedures and (3) to issue Guidance for Nonpoint Source Discharges in Areas Designated as an Outstanding National Resource Water.
34. NMED petitioned the Commission to amend the Antidegradation Policy and its implementing documents in order to revise the standards framework for protection of surface waters of the state. See Petitioners' Exhibit #38, p. 31. These three documents govern matters beyond just ONRW waters.
35. NMED has been working to update the Antidegradation Implementation Procedures for United States Environmental Protection Agency ("EPA") review, and in 2009 the EPA expressed additional concerns regarding the state's approach of combining watershed restoration projects and temporary and short-term degradation into a single provision. EPA believed the two types of activities should be differentiated. NMED proposed new amendments herein to the Antidegradation Policy in 20.6.4.8.A NMAC and detailed amendments to Antidegradation Implementation Procedures in order to address each of the concerns put forth by EPA. See Petitioners' Exhibit #38, p. 32; Exhibit # 68.
36. Amendments to the Antidegradation Policy and its implementing documents would implement NMED's proposed amendments to 20.6.4.8(A)(3) NMAC, governing for temporary and short-term degradation of ONRWs, and 20.6.4.8(A)(4) NMAC, governing for degradation for watershed restoration projects in surface waters. See Petitioners' Exhibit #38, p. 40.
37. Amendments to the Antidegradation Policy and its implementing documents Implementation Procedures track EPA guidance in its WQS Handbook, allowing

temporary and short-term degradation in ONRWs only in limited circumstances. See Petitioners' Exhibit #38, p. 40.

38. The Nonpoint Source Guidance is intended to provide guidelines for NMED and oversight agencies to implement the Antidegradation Policy as it applies to nonpoint source discharges in ONRW areas. In crafting the Nonpoint Source Guidance, NMED has taken into consideration comments from the Forest Service and forest users, such as grazing permittees and acequia users, and has tried to address all concerns while also ensuring that the Guidance meets all water quality standard requirements. See Petitioners' Exhibit #38, p. 41.
39. The Hearing Officer's Pre-Hearing Procedural Order stated that parties may provide proposed changes to the Petitioners' proposed language in these documents, when they filed their Notice of Intent to Present Technical Testimony, pursuant to the Commission's Rule-Making Procedures, Section 303(A)(5).
40. San Juan Water Commission, WildEarth Guardians and the River Groups submitted technical testimony in their Notice of Intent to Present Technical Testimony regarding concerns with specific wording within the Antidegradation Policy and its implementing documents. Members of the public testified during the hearing regarding concerns with one specific phrase of language in these documents. See, e.g. Tr. vol. 1, p. 118, ll. 21-22; p. 124, ll. 13-14; p. 134, ll. 21-22; p. 137, ll. 5-8; vol. 2, p. 451, ll. 16-17, p. 470, ll. 22-25, p. 471, ll. 1-25, p. 472, ll. 23-25; p. 473, ll. 1-13; p. 507, ll. 24-25; p. 508, ll. 1-9; p. 512, ll. 5-11; p. 513, ll. 11-12.

41. NMED chose to negotiate with parties over possible modified language to the Antidegradation Policy and its implementing documents on October 1, 2010. Tr. vol. 6, p. 1691, ll. 4-7.
42. The Petitioners negotiated with those parties, such as San Juan Water Commission, WildEarth Guardians and River Groups, who had submitted technical testimony in their Notice of Intent to Present Technical Testimony on the Antidegradation Policy and its implementing documents.
43. The Cattle Growers did not submit any proposed language changes to the Antidegradation Policy and its implementing documents in its Notice of Intent to Present Technical Testimony. Tr. vol. 6, p. 1692, ll. 7-8.
44. Since the Cattle Growers did not offer language they were not part of the October 1 negotiations.
45. The negotiated modified language on the Antidegradation Policy and its implementing documents was formalized as three exhibits. See Petitioners' Exhibits 111-A and -B; 112-A and B and 113-A and -B.
46. The negotiated modified language combined the varying proposals into one set of language and was the direct result of the proposals and criticisms of the above-mentioned parties. Tr. vol. 6, p. 1694, ll. 2-4.
47. NMED and the River Groups provided witnesses who testified, including extensive cross-examination from the Cattle Growers, regarding the negotiated modified language and explained how it overlapped between the varying proposals and combined these proposals into one set of language and why it represented a logical outgrowth of the

Petitioners' proposal. Tr. vol. 5, p. 1201, l.2 to p. 1205, l. 11; vol. 5, p. 1217, l.16 to p. 1223, l. 25; vol. 5, p. 1337, l. 4 to 1367, l. 23; vol. 6, p. 1698, l.4 to p. 1729, l. 2.

48. The Commission hereby CONCLUDES:

- (a) The Commission has jurisdiction to hold rule-making hearings on ONRW nominations and proposed changes to the Antidegradation Policy and implementing documents.
- (b) The Petitioners' request for a nomination of specifically identified perennial waters, lakes, and wetlands within twelve Wildernesses in one hearing is allowed within the parameters of 20.6.4.9 NMAC.
- (c) The Cattle Growers' objection in its closing argument is not well founded because there is no regulatory requirement that a petition hearing must be limited to one single Wilderness at a time.
- (d) The Cattle Growers' objection in its closing argument is not well founded because there is no regulatory requirement that a petition hearing must be limited to a stream segment-by-stream segment basis.
- (e) There is substantial evidence that the amended petition satisfies all notice requirements pursuant to 20.6.4.9.A NMAC.
- (f) There is substantial evidence that the amended petition satisfies all requirements pursuant to 20.6.4.9.A NMAC.
- (g) The Cattle Growers' objection in its closing argument regarding the maps is not well founded because: (a) the maps in the amended petition were presented to the parties several months in advance of the September hearing; (b) the August changes were made at the request of the United States Forest Service to features

in the interior of the maps and (c) the August changes did not harm the Cattle Growers or the public's preparation and comment on the amended petition because the changes did not alter the exterior boundaries.

- (h) The Cattle Growers' objection in its closing argument that the amended petition did not contain minimum data requirements is not well founded because: (a) there is no regulatory minimum data requirement and (b) Petitioners provided all available water quality data.
- (i) There is substantial evidence that the amended petition satisfies the requirement that the designation is "beneficial" to the State pursuant to the first sentence of 20.6.4.9.B NMAC.
- (j) A petition has to satisfy just one of three listed criteria pursuant to the second sentence of 20.6.4.9.B(1)-(3) NMAC.
- (k) There is substantial evidence that the amended petition satisfies the requirements of both 20.6.4.9.B(1) and 20.6.4.9.B(2) NMAC.
- (l) All of the waters in the amended petition are a significant attribute of designated Wilderness areas pursuant to 20.6.4.9.B(1) NMAC.
- (m) The plain meaning of the term "significant attribute" is "major characteristic" or "major hallmark."
- (n) The term "designated Wilderness areas" is an official term.
- (o) Only Congress can "designate" a wilderness area. It is a method of labeling a land area by the highest legislative body in this country.

- (p) Congress has only voted on three major designations in Forest Service land in New Mexico the last fifty years. Congress made its last major designation over thirty years ago.
- (q) Congress wanted the natural conditions of these designated Wilderness areas to be maintained.
- (r) The natural condition of the designated Wilderness areas listed in the amended petition is its rivers, streams, lakes and wetlands.
- (s) An ONRW nomination provides that the current status of waters will be maintained and further degradation will be prevented.
- (t) Maintaining the natural condition of these waters is important as water is an extremely precious resource and thus is a major hallmark of designated Wilderness areas, especially in the arid southwest.
- (u) Maintaining the natural condition of these waters is important because they are the headwaters for many of the State's other waters.
- (v) The public views maintaining the water quality as the highest priority in the wilderness and thus is a major hallmark of designated Wilderness areas.
- (w) If rivers, streams and lakes listed in the amended petition were not maintained, then a major hallmark of the designated Wilderness area would be lost.
- (x) The Commission's decision is not arbitrary and capricious because it is based on evidence in the record and provides a well-considered approach because the amended petition maintains a specific type of waters within specific, congressionally designated boundaries. The amended petition does not ask for

nomination of all forms and types of waters within an unknown or undesignated boundary.

- (y) There was substantial evidence that some of waters in the amended petition are a significant attribute of designated Wild Rivers and Special Trout Waters pursuant to 20.6.4.9.B(1) NMAC.
- (z) There was substantial evidence that all of the waters in the amended petition have “exceptional recreational significance” or “exceptional ecological significance” pursuant to 20.6.4.9.B(2) NMAC.
- (aa) There was substantial evidence provided by technical experts and public members regarding how Wilderness waters embody exceptional ecological and recreational significance of designated Wilderness areas and it is important to maintain the quality of these waters.
- (bb) The Commission has authority to modify a petition because “even substantive changes in the original plan may be made so long as they are in character with the original scheme and a logical outgrowth of the notice and comment already given.” BASF Wyandotte Corp., et al. v. Costle, 598 F. 2d 637, 642 (1st Cir. 1979), cert. denied, 444 U.S. 1086 (1980).
- (cc) The test is if “interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period, then the rule is deemed to constitute a logical outgrowth of the proposed rule.” American Coke and Coal Chemicals Inst. v. EPA, 452 F. 3d 930, 938-39 (D.C. Cir. 2006).

- (dd) The negotiated modified language in the Antidegradation Policy and its implementing documents satisfies the “logical outgrowth” standard.
- (ee) There was substantial evidence that the negotiated modified language combined varying proposals into one set of language.
- (ff) The Cattle Growers’ objection in its closing argument is not well founded because: (a) Petitioners’ notice of hearing did provide that the Antidegradation Policy would be subject to review during the hearing and (b) the Cattle Growers should have anticipated that the changes were possible since language changes were presented in WildEarth Guardians, River Groups and San Juan Water Commission’s Notice of Intent to Present Technical Testimony. The Cattle Growers had sufficient time prior to hearing to review and prepare for the material.
- (gg) WildEarth Guardians’ proposal to expand the boundary for Roadless Areas contiguous to the Wilderness Areas does not satisfy the “logical outgrowth” standard.
- (hh) The Cattle Growers’ and San Juan Water Commission’s objection in their closing argument is valid because: (a) Petitioners’ notice of hearing expressly limited the scope of the hearing regarding the boundary; (b) these organizations and other New Mexico citizens could not have anticipated that the change in the boundary was possible and (c) the United States Forest Service objected to the expanded boundary.

- (ii) The River Groups' and WildEarth Guardians' proposal to expand to the nomination to other types of waters, such as non-perennial waters, does not satisfy the "logical outgrowth" standard.
- (jj) The Cattle Growers' and San Juan Water Commission's objection in their closing argument is valid because: (a) Petitioners' notice of hearing expressly limited the scope of the hearing regarding the types of waters; (b) these organizations and other New Mexico citizens could not have anticipated that the change in types of waters was possible and (c) the United States Forest Service objected to the expanded types of hearing.
- (kk) The filing of an ONRW petition requires technical and public review. A party, which did not file a petition with the Commission's hearing clerk, such as WildEarth Guardians, cannot file a Notice of Intent to Present Technical Testimony and achieve the same level of technical and public review.
- (ll) WildEarth Guardians and Rivers Groups needed to file their own ONRW nomination in order to achieve the necessary level of technical and public review.
- (mm) The Commission made several non-substantive amendments to the Antidegradation Policy and implementing documents, based primarily on comments received from the public during the hearing, in order to: (a) reconcile inconsistent language; (b) re-affirm pre-existing use exemptions and (c) provide greater clarity to actions conducted during emergency circumstances.
- (nn) This non-substantive language in the Antidegradation Policy and its implementing documents satisfies the "logical outgrowth" standard.
- (oo) The proposal is adopted for any or all of the reasons stated above.

III. ORDER

By a vote 7-3, the amended petition was approved on November 30, 2010. The proposed Antidegradation Policy and implementing documents were approved on November 30, 2010. The proposed amended petition and Antidegradation Policy and implementing documents, with amendments, and any appropriate corrections of typographical errors, reconciliation of inconsistencies, formatting or other changes necessary to file this rule with the New Mexico State Records Center, are hereby adopted, to be effective in accordance with applicable State Records Center procedures.



On behalf of the Commission

Dated: 12/15/10

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STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF:

Petition to Nominate Surface Waters
In Forest Service Wilderness Areas as
Outstanding National Resource Waters

WQCC 10-01(R)

New Mexico Environment Department,
New Mexico Department of Game and Fish and
New Mexico Energy, Minerals and Natural Resources Department,
Petitioners.

AND

IN THE MATTER OF:

Petition to Amend Antidegradation Policy
and
Request to Amend Antidegradation Policy
Implementation Procedures
and
To Issue Guidance for Nonpoint Source
Discharges in Areas Designated as ONRWs
New Mexico Environment Department,
Petitioner.

Commissioner Hutchinson joined by Commissioner Dominguez and Vigil, dissenting from the
Commission's order and statement of reasons.

1. On September 12, 2008 the New Mexico State University Range Improvement
Task Force (RITF) provided a review and comment on the draft outstanding national
resource waters petition that pointed out serious concerns over the science and the failure
to provide a valid economic impact analysis that considered a cost benefit analysis for the
designation. The comment also noted the concern that third party litigation was a
potential threat and pointed out the statement from WildEarth Guardians signaling their

1 intent for the support of the designation. From that statement, “Once designated, these
2 watersheds cannot be polluted and are thus protected from logging, road building, cattle
3 grazing and off-road vehicles.”¹ [NMED Exhibit 46] WildEarth Guardians are noted
4 for litigious actions seeking removal of livestock and other activities off of the federal
5 lands. This concern was voiced by the public in meetings around the state and by the
6 RITF.

7 2. The 2009 New Mexico Legislature adopted House Joint Memorial 49 (HJM 49)
8 expressing the intent of the New Mexico Legislature that, “.....Governor Richardson be
9 requested to cancel or suspend the outstanding national resource waters designation
10 process; and

11 “BE IT FURTHER RESOLVED that, instead, the governor's administration engage the
12 residents of the state in evaluating, planning and implementing cooperative approaches to
13 improve the state's watersheds, forests and grazing lands and thereby the utility of these
14 areas for recreational and agricultural uses and for the protection of domestic and
15 municipal water sources; and.....”

16 3. Petitioners ignored the plain intent of HJM 49 and pressed forward under the
17 pretext they made “an effort to address the concerns in the memorial.”

18 4. On August 31, 2009 the New Mexico State University Range Improvement Task
19 Force provided a second review and comment on a subsequent draft outstanding national
20 resource waters petition. Page one of the second comments states, “**We have found no**
21 **attempt by the Department to rectify previous shortcomings related to the economic**
22 **analyses.** [Emphasis added] Given the reduction of area considered for nomination as

¹ <http://www.risingtidenorthamerica.org/wordpress/2008/06/04/got-clean-water-protect-wilderness-headwaters-in-the-west/>

1 ONRW from the previous draft, and the reduction in stream miles, it is reasonable to
2 assume the potential economic impact, as well as the potential benefits, have changed as
3 well. However, there is little or no treatment in the Draft Proposal regarding the expected
4 benefits, financial or otherwise, nor the costs associated with those benefits, both direct
5 (i.e., new personnel, equipment, etc. to implement the program) and indirect (i.e.,
6 potential loss of industry, loss to communities). Does the Department intend to pursue
7 the program without this information and understanding?

8 Those comments ended by stating, "In closing, we believe it would be a tragedy if the
9 actions resulting from regulations in the Draft Proposal were to ultimately limit pro-
10 active management and restoration of forested landscapes in New Mexico. In many areas
11 of New Mexico, and wilderness areas in particular, pro-active management is necessary
12 and more likely to produce long-term improvements in water quality and quantity than
13 increased regulations. We believe the Department would be better served by assisting the
14 USFS in making management happen by investing in strategies to reduce fuel loads
15 through thinning and burning. The regulatory and bureaucratic structure already in place
16 is often the reason that appropriate forest management doesn't happen. Increasing the
17 layers of bureaucracy is not the solution. Increasing the bureaucracy is more likely to
18 introduce third party litigation, increase the costs of restoration, and further threaten
19 many areas badly in need of restoration to improve water quantity and quality, improve
20 wildlife and domestic animal habitat, and reduce catastrophic fire danger. These are just
21 some of the unintended consequences likely to result. We believe the regulatory and
22 incentive-based tools already exist to address water quality issues in New Mexico.

1 “The increased regulatory burden placed by the Draft Proposal has great potential to be
2 implemented arbitrarily and capriciously, and is likely to result in the loss of struggling
3 rural activities such as logging and livestock grazing. These pursuits are, in fact, the
4 means through which positive changes can be implemented - the people engaged in these
5 activities can be the partners on the land to make management happen. There is little or
6 no language in the Draft Proposal that puts to rest these concerns or, in fact, makes a
7 direct connection between the process of regulation and the intended results. That is,
8 how will the proposal improve water quality, not to mention water quantity, in New
9 Mexico? If improvements are likely to result, how much improvement is expected over
10 what time period, and at what cost?

11 “In our opinion, the Draft Proposal is myopic. There is a high probability of generating
12 unintended consequences that will hinder, rather than contribute to, solving water quality
13 problems in New Mexico. Further analyses are required to determine what benefits are
14 likely to accrue, if any, and if the costs justify the benefits.”

15 5. On May 17, 2010 the petitioners submitted a petition to the Commission to
16 nominate waters within twelve United States Forest Service Wilderness Areas as
17 ONRWs pursuant to 20.6.4.9.A NMAC.

18 6. It is the burden of the petitioners to present “credible scientific data” to support
19 the adoption of a standard. (74-6-4 B NMSA 1978) There is no burden for opposing
20 parties to enumerate in detail petition deficiencies. The commission on the other hand
21 has statutory mandate to determine if credible scientific data has been presented.

1 7. The petition presented on May 17, 2010 failed items 1, 2, 3, and 5 of 20.6.4.9.A
2 that states, “A petition to classify a surface water of the state as an ONRW shall
3 include: [Emphasis Added]

4 (1) a map of the surface water of the state, including the location and proposed
5 upstream and downstream boundaries;

6 (2) a written statement and evidence based on scientific principles in support of the
7 nomination, including specific reference to one or more the applicable ONRW criteria
8 listed in Subsection B of this section; 20.6.4 NMAC 7

9 (3) water quality data including chemical, physical or biological parameters, if
10 available, to establish a baseline condition for the proposed ONRW;

11 (5) any additional evidence to substantiate such a designation, including a discussion
12 of the economic impact of the designation on the local and regional economy within
13 the state of New Mexico and the benefit to the state; and

14 8. As pointed out in testimony the maps displaying the nominated waters changed on
15 several occasions during the process. There weren't accurate “proposed upstream and
16 downstream boundaries” in the petition so that the commission and the public lacked
17 accurate locations upon which knowledgeable comments could be made. Petitioners
18 admitted this error by amending the petition in their notice of intent. This was too late to
19 satisfy the regulation's plain reading.

20 9. The petition failed to provide the information based on scientific principles
21 required in item (2). The petitioners instead made broad generalized statements about the
22 Congressional requirements for designating wilderness, public surveys on the values of
23 wilderness and economic impact analysis that are negated by the economic conditions of

1 communities adjacent to New Mexico wilderness areas. While there were specific
2 citations on trout waters petitioners nevertheless failed to demonstrate outstanding
3 qualities.

4 10. It was pointed out in testimony on the petition that the vast majority of waters do
5 not have baseline water quality data. This failure will inevitably lead to an increased
6 burden on the U. S. Forest Service and the Environment Department to gather the
7 necessary data when presented by challenges to management practices.

8 11. As stated in the comments from the RITF, the economic analysis provided by the
9 petitioners fails to provide the necessary information for the commission to determine if
10 there is a economic benefit or detriment to the local or regional economy or New Mexico
11 as a whole.

12 12. The regulations do not allow for the commission to approve ONRW petitions on a
13 precedent basis. Each nomination must stand on it's own. To say that because the
14 commission approved the multiple segments designations in the Valle Vidal we should
15 do so now with multiple streams in multiple wilderness areas is a stretch beyond
16 credibility.

17 13. There is no allowance in the regulations for the use of precedent in other western
18 states having ONRWs for waters within multiple Wilderness areas. Other states have
19 differing circumstances and different procedures and rules governing ONRW designation

20 14. Even though petitioners amended their petition to exclude tributaries to the
21 nominated waters all parties understand that actions in a tributary that cause degradation
22 to the designated segment are subject to regulation under the antidegradation clause.

1 15. The regulations contemplate through the use of the singular term as in “A surface
2 water of the state, or a portion of a surface water of the state, may be designated as an
3 ONRW.[20.6.4.9.B NMAC] Each and ever segment nominated should have to stand on
4 it’s own for examination lest the commission diminish the meaning of the term ONRW.
5 Granting this shotgun designation proposed by the petitioners would mean that all waters
6 of the state could be nominated and approved as ONRWs

7 16. Petitioners’ Exhibit # 38 speaks in broad general terms about the significance of
8 wilderness. To say that every one of the petitioners nominated streams are a significant
9 attribute of the particular wilderness where they are found [See 20.6.4.9.B (1) NMAC]
10 requires incredulous linguistic juggling and definitions only George Orwell could
11 appreciate for the words significant and attribute. This also diminishes the whole concept
12 of ONRW designations. These should be truly outstanding waters that are significant
13 attributes in the true meaning of the words.

14 17. The commission must massage the meaning of exceptional beyond commonly
15 accepted definition in order to conclude that all of the nominated waters have exceptional
16 recreational value.

17 18. While there was an attempt to wordsmith the antidegradation clause to insure
18 existing uses in the wilderness areas could continue, authorized users will be left to the
19 mercy of the courts in defining the critical term best management practices and how the
20 U. S. Forest Service is going determine degradation of designated streams. This was the
21 fear expressed on numerous occasions in the public meetings around the state and in
22 testimony before the commission. The commission may be satisfied that best

- 1 management practices are well defined but the closing statement by the U.S. Forest
- 2 Service indicated otherwise.