

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

**IN THE MATTER OF THE PETITION FOR
PROPOSED AMENDMENTS TO 20.6.4.9 NMAC,
DESIGNATION OF WATERS WITHIN THE
VALLE VIDAL AS OUTSTANDING NATIONAL
RESOURCE WATERS**



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

WQCC No. 05-04 (R)

Petitioners,

**ORDER AND STATEMENT OF REASONS
FOR AMENDMENTS TO STANDARDS**

THIS MATTER comes before the New Mexico Water Quality Control Commission (“Commission”) upon a petition filed by New Mexico Environmental Department, New Mexico Game and Fish Department and New Mexico Energy, Minerals and Natural Resources Department (collectively “Petitioners”) proposing amendments to 20.6.4.9(D) NMAC. A public hearing was held in Santa Fe, New Mexico on December 13 & 14, 2005, before a hearing officer, with the Commission present during the hearing. The Commission heard technical testimony from Petitioners and the Coalition for the Valle Vidal and admitted exhibits into the record. No other technical testimony was submitted. The Commission also heard and received substantial non-technical testimony. On December 14, 2005, the Commission deliberated and voted 11-1 to adopt the amendments set forth below in relevant part, for the reasons that follow.

I. AMENDMENTS

20.6.4.9.D Waters classified as ONRWs: The following waters are classified as ONRWs:

- (1) Rio Santa Barbara, including the west, middle and east Forks from their headwaters downstream to the boundary of the Pecos Wilderness; and
- (2) The waters within the United States forest service Valle Vidal special management unit including:
 - (a) Rio Costilla, including Comanche, La Cueva, Fernandez, Chuckwagon, Little Costilla, Holman, Gold, Grassy, La Belle and Vidal creeks, from their headwaters downstream to the boundary of the United States forest service Valle Vidal special management unit;
 - (b) Middle Ponil creek, including the waters of Greenwood Canyon, from their headwaters downstream to the boundary of the Elliott S. Barker wildlife management area;
 - (c) Shuree lakes
 - (d) North Ponil creek, including McCrystal and Seally Canyon creeks, from their headwaters downstream to the boundary of the United States forest service Valle Vidal special management unit; and
 - (e) Leandro creek from its headwaters downstream to the boundary of the United States forest service Valle Vidal special management unit.

II. Statement of Reasons

1. Petitioners filed their Petition for a public hearing in this matter on October 3, 2005 and it was docketed on October 6, 2005.
2. A hearing on this matter was scheduled for December 13, 2005.
3. Notice of the Hearing for the proposed amendments was duly published in the New Mexico Register on October 31, 2005. See Petitioners' Exhibit 5.
4. Notice of the Hearing for the proposed amendments was duly published in the Albuquerque Journal on October 29, 2005, Raton Range on November 1, 2005, and Taos News on November 10-16, 2005. See Petitioners' Exhibit 4.
5. Notice of the Hearing for the proposed amendments was duly sent to the WQCC Commission mailing list, WQCC electronic notification list, Surface Water Quality Bureau stakeholder electronic notification list, Oil Conservation Division stakeholder list and Game and Fish stakeholder electronic notification list. See Petitioners' Exhibit 5.

6. Petitioners filed a Notice of Intent to Present Technical Testimony on November 22, 2005. The Notice of Intent listed four potential witnesses: (a) Marcy Leavitt; (b) David Propst; (c) Lynette Guevara; and (d) Mark Fesmire.
7. The Coalition for Valle Vidal filed a Notice of Intent to Present Technical Testimony on November 22, 2005. The Notice of Intent listed five potential witnesses: (a) Alan Lackey, Coalition for the Valle Vidal; (b) William Zeedyk, Wildlife Biologist; (c) Donald Hurst, New Mexico Trout; (d) William Schudlich, New Mexico Council of Trout Unlimited; and (e) Taylor Streit, Streit Fly Fishing.
8. Pursuant to NMSA 1978, Section 74-6-4 (C), “the Commission shall adopt water quality standards for surface and ground waters of the state based on credible scientific data ... [and] in making standards, the commission shall give weight it deems appropriate to all facts and circumstances, including the use and value of water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes.”
9. *There was evidence presented regarding the use and value of water for water supplies.*
10. Ms. Leavitt testified that protecting the Valle Vidal’s water quality would protect the water quality of downstream municipalities, such as Costilla and Springer.
11. Mr. Zeedyk testified that protecting the Valle Vidal’s wetlands is an important link in protecting the area’s overall water quality.
12. Doug Shaw, non-technical testimony, testified that Riparian Council considers that wetlands are important to filter water and improve water quality.

13. The Valle Vidal's water quality is important because it resides at the headwaters of two major drainages basins the Rio Grande/Rio Costilla and Canadian River. See Petitioners' Exhibits 30-38, 43.
14. These drainage basins are key waters needed to fulfill New Mexico's interstate water compact requirements.
15. See Infra Statement of Reasons 82-87.
16. *There was evidence presented regarding propagation of fish and wildlife.*
17. Dr. Propst testified that protecting the Valle Vidal is an important step to protect the habitats of "over fifty mammal species, more than two hundred bird species, and sixteen reptiles and amphibians." See Petitioners Exhibit 49.
18. Dr. Propst testified that three native New Mexico fishes, including the Rio Grande cutthroat trout, the state fish, are found in the water of Valle Vidal." See Petitioners Exhibit 49.
19. Mr. Schudlich testified that protecting the Valle Vidal is an important step to protect the health of the Rio Grande Cutthroat trout.
20. Mr. Oscar Simpson, non-technical testimony, testified about the importance of elk hunting season.
21. There was substantial non-technical testimony regarding the importance of protecting the Valle Vidal because of the abundance of wildlife species that exist there.
22. See Infra Statement of Reasons 52, 60, 69-71, 80.
23. *There was evidence presented regarding recreational purposes.*

24. Dr. Propst testified that “the waters of the Valle Vidal provide about 15,000 angler use days per year.” See Petitioners’ Exhibit 49.
25. There was substantial non-technical testimony about the appeal of recreational activities at the Valle Vidal.
26. There was substantial non-technical testimony that the public comes to the area to see and watch the wildlife.
27. See Infra Statement of Reasons 64, 78.
28. *There was evidence presented regarding agricultural purposes.*
29. Grazing will continue in Valle Vidal and will not be prohibited.
30. Mr. Zeedyk testified that the number of cattle being grazed have increased over the years because of restoration activities at the Valle Vidal.
31. Mr. Lackey testified that there were sixteen current grazing permittees at the Valle Vidal.
32. Ms. Leavitt testified that grazing permittees were aware of the petition but did not object.
33. Mr. Lackey testified in favor of the petition and is a member of New Mexico Cattlegrowers.
34. Mr. Lackey testified that the Valle Vidal Grazing Association was a member of the Coalition for the Valle Vidal.
35. Mr. Bill Sauble, non-technical testimony, testified that the New Mexico Cattlemen Association’s was neutral on the petition.
36. Ms. Denise Martinez, non-technical testimony, supported the petition and testified that her family had used the Valle Vidal for grazing.

37. Ms. Cecilia Abeyta, non-technical testimony, raised the New Mexico Farm and Livestock Bureau's concerns regarding sufficient notice to local areas.
38. There was non-technical testimony that Amigos Bravos provided a fact sheet regarding the proposed designation and circulated it in the local area.
39. Ms. Abeyta raised concerns regarding the sufficient discussion of the risk of preclusion of human activities and rangeland grazing activities.
40. Ms. Guevara addressed the issues of preclusion of human activities and rangeland grazing activities. See Exhibit 50.
41. See Infra Statement of Reasons 55.
42. *There was evidence presented regarding industrial purposes.*
43. Ms. Leavitt testified that the designation would protect the water quality of downstream area users, such as industrial and business organizations.
44. The designation is not an "either or" situation and thus oil and gas exploration has not been prevented.
45. There was an absence of protest from the industry sector regarding the petition.
46. See Infra Statement of Reasons 54, 58-59, 63
47. *Petitioners must show that pursuant to 20.6.4.9(A) NMAC that the procedures for nomination have been met.*
48. There was evidence presented regarding a map of the area. See Petitioners' Exhibit 3.
49. There was evidence presented regarding information on water quality data, discussion of activities, and economic impact.

50. Ms. Guevara testified regarding the impact of water quality. See Petitioners' Exhibits 30-38.
51. Mr. Zeedyk testified regarding greater land management, which can be a benefit to the state (for instance greater riparian and watershed restoration).
52. Dr. Propst testified regarding the impact to fishing, hunting, and camping.
53. Ms. Guevara testified regarding the impact to road development.
54. Mr. Fesmire testified regarding the impact to oil and gas exploration.
55. Ms. Guevara, Ms. Leavitt, Mr. Lackey, and Mr. Zeedyk testified regarding the impact to grazing.
56. There was non-technical testimony regarding the impact to timber harvesting/roads.
57. *Petitioners must show that pursuant to 20.6.4.9(B)(1), (2) or (3) NMAC that the criterion for the designation has been met.*
58. Mr. Fesmire testified that there would be a benefit to designation because it would allow the state Oil and Gas Commission to set better rules and could advance science in setting coal methane exploration regulations.
59. Ms. Leavitt testified that there would be a benefit to designation because it would allow clean water for downstream development.
60. Mr. Schudlich testified that there will be a benefit to designation because it would allow the Rio Grande Cutthroat trout to not have to be potentially "listed" for protection purposes.
61. If the Rio Grande Cutthroat trout is not listed, then other New Mexico lands and waters will not have to be restricted for protection purposes.

62. Mr. Schudlich and Mr. Zeedyk testified that there would be a benefit to designation because it would create an ecological benefit.
63. Mr. Lackey, Mr. Streit and Mr. Fesmire testified that there would be a benefit to designation because it would allow low impact, long term sustained economic development for recreation and fishing in the area.
64. Commissioner Hutchinson stated a concern that the economic benefit testimony was not “credible scientific evidence” and the only reason it was satisfactory was because there was no contrary testimony.
65. There was substantial non-technical testimony that that there would be a benefit to designation because protecting a recreational area is beneficial to New Mexico.
66. The Valle Vidal is a recreational area where all citizens can recreate, including children and mobility impaired.
67. There was non-technical testimony that that there would be a benefit to designation because it would continue to allow educational opportunities for visiting school children.
68. There was evidence that petitioners considered tribal issues.
69. *Petitioners may show pursuant to 20.6.4.9(B)(1) (“Gold medal trout fishery”) NMAC that the criteria for the designation have been met.*
70. Dr. Propst testified that the term “Gold medal trout fishery” is not defined in the standards, but the term “special trout water” is commonly used as the equivalent term. See Petitioners’ Exhibit 49.
71. Dr. Propst testified that the water in the area is a special trout water. See Petitioners’ Exhibits 19, 20, 49.

72. Mr. Hurst, Mr. Schudlich, and Mr. Streit testified that the water is a special trout water.
73. However, New Mexico Game and Fish Department has requested a hearing to temporarily use piscicide to kill non-native species.
74. Commissioner Glass stated a concern that the State Anti-degradation policy prohibits any degradation to ONRW waters. This prohibition may restrict a piscicide treatment.
75. Ms. Leavitt testified that temporary degradation, like piscicide treatment, is recognized as acceptable under the U.S. EPA Water Quality Handbook. See Exhibit 2, 4-10.
76. Ms. Leavitt testified that the State Anti-degradation policy might need to be amended.
77. *Petitioners may show pursuant to 20.6.4.9(B)(2) NMAC (“exceptional recreational or ecological significance”) that the criteria for the designation have been met.*
78. There was significant non-technical testimony that beauty of the Valle Vidal is why they reside nearby the area and in New Mexico.
79. There was significant non-technical testimony that there are exceptional recreational opportunities with a wide variety of uses (fishing, hunting, fly-fishing, bird watching, and angling).
80. Mr. Zeedyk testified that it is an area that is ecologically significant because it contains 4.5 percent wetlands where it is 0.6 percent statewide.

81. There was evidence that there is exceptional ecological significance because the abundance of wildlife species, Rio Grande cutthroat trout, and elk.
82. *Petitioners may show pursuant to 20.6.4.9(B)(3) NMAC (“existing water quality is equal or better than the numeric criteria”) that the criteria for the designation have been met.*
83. There was evidence that the existing water quality is equal or better than the numeric criteria. See Petitioners’ Exhibit 30-38, 50.
84. Ms. Guevara testified that “existing water quality in the Valle Vidal is equal to or better than the vast majority of numerical water quality criteria associated with aquatic life uses, and will benefit from the protections afforded by ONRW designation.” See Petitioners’ Exhibit 50.
85. Ms. Guevara testified that the quality of the surface waters in the Valle Vidal is generally good, based on chemical/physical measurements and chemical laboratory results. See Petitioners’ Exhibit 30-38, 50.
86. Ms. Guevara testified that “existing chemical data indicated the Subsection (B)(3) criterion is met for the vast majority of numeric water quality associated with aquatic life uses. This statement is supported by Exhibit 31, which shows the number of times if any a particular numeric water quality criterion was not met.” See Petitioners’ Exhibit 50.
87. Ms. Guevara acknowledged that “the specific Subsection (B)(3) criterion with regards to numeric criteria was not met for a few parameters at a few stations in the Valle Vidal, determining whether or not aquatic life uses are met is a broader

question that requires consideration of non-chemical data.” See Petitioners’ Exhibit 50.

88. Ms. Guevara also stated: “Incorporation of biological and habitat data indicate that surface waters in the Valle Vidal by and large contain good water quality and healthy aquatic life communities that warrant the additional protection afforded by ONRW designation.” See Petitioners’ Exhibit 50.


89. The Commission hereby CONCLUDES:

- a. The Commission has the authority to approve these amendments.
- b. The Petitioners have the authority to bring this petition.
- c. The petition satisfied all applicable procedural requirements.
- d. The proposed amendments satisfy NMSA 1978, Section 74-6-4 (C).
- e. The proposed amendments satisfy NMSA 1978, 20.6.4.9(A) NMAC.
- f. The proposed amendments satisfy 20.6.4.9(B), (B)(1), (B)(2) and (B)(3) NMAC.

90. The proposal is adopted for any or all of the reasons stated above.

III. ORDER

By a vote for eleven in the affirmative and one in the negative, the petition was approved on December 14, 2005.


On behalf of the Commission
Dated: Jan. 20, 2006

IV. DISSENT

A. Commissioner Murray expressed concern regarding whether Petitioners satisfied 20.6.4.9(B)(3) NMAC.

B. Commissioner Murray expressed concern that Petitioners failed to prove that the water quality was satisfied on all segments on waters (including, not limited to the Costilla Creek). See Petitioners' Exhibits 30-38, 50.

C. Commissioner Murray stated that if the Commission's motion had been for approval based solely on either (B)(1) or (B)(2), he would have supported the petition.