

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

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

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

**Petitioners.**

**THE NEW MEXICO ENVIRONMENT DEPARTMENT'S  
PROPOSED STATEMENT OF REASONS**

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

**I. Procedural Background**

1. On October 1, 2021, Petitioners submitted their Petition to designate surface waters of the Upper Pecos Watershed as ONRWs (“Petition”). Also on October 1, 2021, counsel for the Department filed an entry of appearance.

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

2. The Petition came before the New Mexico Water Quality Control Commission for consideration at its November 9, 2021, regular meeting.

3. On November 30, 2021, the Commission issued its Order for Hearing and Appointment of Hearing Officer (“Order for Hearing”), appointing Gregory Chakalian as Hearing Officer and setting the hearing for April 12, 2022.

4. On December 9, 2021, the Hearing Officer issued a Scheduling Order, which included deadlines for parties filing notices of intent to provide technical testimony, as well as pre-hearing motions.

## **II. Public Notice and the Hearing**

5. Public Notice of the hearing was timely provided in accordance with all relevant state and federal laws. NMED Exhibit 1, pp. 10-13; NMED Exhibits 23-25, 27-31, 33, 35.

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

7. A public hearing was held via the Webex online meeting platform on April 12, 2022. The Commission heard testimony from all the Parties. Hearing Transcript (“Tr.”). Public comments were heard from a number of persons [Tr. 112:17-123:3, 206:5-211:21], only one of whom expressed opposition to the ONRW designation [Tr. 121:19-123:3].

8. The Commission allowed all interested persons a reasonable opportunity to submit data, views, and arguments, and to examine witnesses.

9. The record containing all pleadings, written testimony, exhibits, hearing transcripts, public comments, and Hearing Officer Orders has been submitted to the Commission for review in

compiling the statement of reasons in this matter. The proposed amendments to 20.6.4.9 NMAC, are reflected in NMED Exhibit 36, which are identical to Petitioners' Exhibit 1.

### **III. Authority**

10. The Commission is responsible for adopting water quality standards for surface and ground waters of the state to “protect the public health and welfare, enhance the quality of water and serve the purposes of the [Water Quality Act].” NMSA 1978, § 74-6-4(D). Standards must be based on “credible scientific data and other evidence appropriate under the [Water Quality Act].” *Id.* In adopting standards the Commission “shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes.” *Id.*

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

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

*Id.*

12. Any person, including the Department, may petition the Commission at any time to adopt, amend, or repeal a water quality standard or regulation. NMSA 1978, § 74-6-6(B). The

Commission is required to hold a public hearing in order adopt, modify, or repeal a standard or regulation. NMSA 1978, § 74-6-6(A).

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

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

#### **IV. Statement of Reasons**

15. Petitioners proposed designation of surface waters of the Upper Pecos Watershed as ONRWs as described in the Petition. Petition at pp. 1-2.

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

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

18. 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.

19. A review by the Department's SWQB staff determined that the Petition contained all six elements required of an ONRW petition by 20.6.4.9(A) NMAC. NMED Exhibit 2, pp. 7-11. Tr. 144:8-145:14.

20. The Department's witness, Jennifer Fullam, the Standards, Planning and Reporting Team Supervisor and Water Quality Standards Coordinator within the Department's Surface Water Quality Bureau, provided testimony regarding the protections offered by ONRW designation. NMED Exhibit 1, pp. 4-5. Tr 124:19-137:14.

21. Pursuant to 20.6.4.8 NMAC, which mirrors 40 C.F.R. § 131.12, degradation of water quality is prohibited for waters designated as ONRWs except as provided in 20.6.4.8(A)(3)(a) through (e) NMAC and 20.6.4.8(A)(4)(a) NMAC. These provisions include temporary and short-term degradation if the WQCC determines it to be necessary to accommodate public health or safety; temporary and short-term degradation in response to an emergency action that is necessary to mitigate an immediate threat to public health or safety; pre-existing land use activities allowed by federal or state law prior to designation as an ONRW that are controlled by best management practices and do not pose any new or increased discharges; and activities that result in the restoration or maintenance of the chemical, physical or biological integrity of the water. NMED Exhibit 1, p. 5. Tr. 128:16-130:17.

22. 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.

23. The Department found no federal National Pollutant Discharge Elimination System ("NPDES") permits for discharges to any of the waters nominated in the Petition. The designation

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

24. The Department supports the WQCC designating the nominated waters as ONRWs. NMED Exhibit 1, p. 15; NMED Exhibit 2, p. 12. Tr. 137:12-14; Tr. 145:19-22.

25. Petitioners' witness Rachel Conn, Deputy Director of Amigos Bravos, provided testimony which included an overview of ONRW protections, nomination requirements and criteria, and an explanation of how Petitioners have met the procedural requirements for nomination set forth in 20.6.4.9(A) NMAC and the substantive requirements for designation set forth in 20.6.4.9(B) NMAC. Ms. Conn also testified that Designation of all nominated waters in the Upper Pecos Watershed would be "beneficial to the state" as required by 20.6.4.9(B) NMAC, and how each nominated water meets at least one, and in most instances more than one, of the criteria in 20.6.4.9(B)(1), (2), and (3) NMAC. Petitioners' Exhibit 2. Tr. 68:7-88:6.

26. Petitioners' witness Dr. David Propst provided testimony related to the exceptional ecological significance of the nominated waters. Petitioners' Exhibit 11. Tr. 166:19-180:20.

27. Petitioners' witness Toner Mitchell, who leads Trout Unlimited's Upper Rio Grande Community Initiative, provided testimony as to the nominated waters having exceptional recreational or ecological significance, as well as his opinion that the ONRW designation would be beneficial to the State of New Mexico. Mr. Mitchell also provided Petitioners' Exhibit 13. Tr. 104:10-108:13.

28. Petitioners' witness Lela McFerrin, Vice President of the Upper Pecos Watershed Association, provided testimony as to her opinion that the ONRW designation would be beneficial to the State of New Mexico. Petitioners' Exhibit 15. 64:14-67:10.

29. Petitioners' witness the Honorable Vincent E. Tafoya, 2<sup>nd</sup> Lieutenant Governor of Jemez Pueblo, provided testimony reflecting the Pueblo of Jemez's support for the designation as proposed. Second Lieutenant Governor Tafoya testified as to the cultural importance of these waters to the Pueblo, and that Pueblo members used certain of the nominated waters for ceremonial purposes. Petitioners' Exhibit 18. Tr. 34:14-37:23.

30. Petitioners' witness Frank "Pancho" Adelo provided testimony supported by economic data that the ONRW designation would be beneficial to the State of New Mexico. Petitioners' Exhibit 19. Tr. 53:10-60:15.

31. Petitioners' witness Paula Garcia, Executive Director of the New Mexico Acequia Association ("NMAA"), provided testimony that the ONRW designation would be beneficial to the State of New Mexico, and that the NMAA supported the designation. Petitioners' Exhibit 20. Tr. 162:6-165:22.

32. Petitioners' witness Ralph Vigil, owner of Molina de Isla Organics, LLC and Chair of the New Mexico Acequia Commission, provided testimony that the ONRW designation would be beneficial to the State of New Mexico. Mr. Vigil could not testify at the hearing, but no party objected to the admission of his written testimony, Petitioners' Exhibit 23, into the record. Tr. 21:14-21.

33. Petitioners' Witness Janice Varela, Vice-Chair of the San Miguel County Commission, provided testimony that the ONRW designation would be beneficial to the State of New Mexico. Petitioners Exhibit 25. Tr. 40:1-47:13.

34. Petitioners' witness the Honorable Telesfor "Ted" Benavidez, Mayor of the Village of Pecos, provided testimony in support of the nomination. Petitioners' Exhibit 27. Tr. 49:2-52:11.

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

36. Dennis McQuillan provided testimony regarding activities that might contribute to the reduction of water quality in the proposed ONRWs, as required in 20.6.4.9(A) NMAC, and provided testimony in support of the nomination. McQuillan's Exhibit 2. Tr. 183:8-195:15.

37. No party objected to the designation of waters described in the Petition as ONRWs. Based on the weight of the evidence, the Commission finds Petitioners' proposal to designate perennial and non-perennial streams and wetlands nominated in the Petition and identified in Maps 1 and 2 and Tables 1 and 2 in Section II.B of the Petition, is well-taken and adopts Petitioners' amendments to 20.6.4.9 NMAC as proposed.

Respectfully submitted,

**NEW MEXICO ENVIRONMENT DEPARTMENT  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed with the WQCC Administrator and was served on the following via electronic mail on May 19, 2022:

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