

**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,**

No. WQCC 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.

PETITIONERS' PROPOSED STATEMENT OF REASONS

In accordance with 20.6.304 NMAC and order of the Hearing Officer at the close of the hearing, Petitioners Village of Pecos, San Miguel County, Upper Pecos Watershed Association, New Mexico Acequia Association, and Molino de la Isla Organics, LLC (collectively “Petitioners”), file their Proposed Statement of Reasons in support of their proposed amendments to 20.6.4.9 NMAC nominating waters of the Upper Pecos Watershed¹ as Outstanding National Resource Waters (“ONRWs” or “Outstanding Waters”) [Pet’rs Ex. 1].

PETITIONERS' PROPOSED FINDINGS OF FACT

I. PROCEDURAL BACKGROUND

1. On October 1, 2021, Petitioners filed a Petition to Designate Surface Waters of the Upper Pecos Watershed as Outstanding National Resource Waters (“Petition”) with the New Mexico Water Quality Control Commission (“Commission”) Administrator. Tr. 11:22–25.

¹ The term “Upper Pecos Watershed” refers to the perennial and non-perennial streams and wetlands nominated in the Petition filed on October 1, 2021, and identified in Maps 1 and 2 and Tables 1 and 2 in Section II.B. of the Petition. *See also* Pet’rs Ex. 5.

2. On November 9, 2021, Ms. Tannis Fox, attorney for the Western Environmental Law Center, appeared on behalf of Petitioners before the Commission, requesting the scheduling of a hearing and appointment of a Hearing Officer for this matter.
3. By Order dated November 30, 2021, and later amended on December 17, 2021, the Commission scheduled the hearing in this matter to commence on April 12, 2022, and appointed Mr. Gregory Chakalian as the Hearing Officer.
4. By Order dated December 9, 2021, and later amended on December 13, 2021, the Hearing Officer issued a Scheduling Order outlining the procedures and deadlines for pre-hearing filings, including submission of Notices of Intent to Provide Technical Testimony, and outlining the procedures for the hearing.
5. In accordance with 20.1.6.202.A NMAC and the Scheduling Order, on March 10, 2022, the following Parties filed full written technical testimony and exhibits in this matter: (1) Petitioners, (2) the New Mexico Environment Department (“NMED”), and (3) Mr. Dennis McQuillan. Tr. 15:12-17.
6. On April 12, 2022, the hearing in this matter commenced at 9:30 A.M. virtually though the Cisco Webex Meetings video conferencing platform Tr. 1:13–17.
7. The hearing was transcribed by Albuquerque Court Reporting Service, LLC, and a complete transcript of the hearing was filed with the Commission on April 19, 2022.
8. At the outset of the hearing, the Hearing Officer admitted into evidence all exhibits submitted with the Parties’ Notices of Intent to Present Technical Testimony, including Petitioners’ 27 exhibits, Tr. 16:23–25; NMED’s 38 exhibits, Tr. 18:5–9; and Mr. McQuillan’s two exhibits, Tr. 19: 8–12.

9. All Parties in the proceeding support the entirety of the Petition and all witnesses presented at the hearing testified in favor of Petitioners' proposed amendments to 20.6.4.9.D NMAC to designate the waters of the Upper Pecos Watershed as ONRWs [Pet'rs Ex. 1]. Tr. 19:16–20:4.

II. PETITIONERS SATISFIED ALL PUBLIC NOTICE REQUIREMENTS FOR THE PETITION AND THE HEARING

10. Petitioners satisfied all public notice requirements for both the nomination and the hearing in this matter. Tr. 77:12–78:9; Pet'rs Exs. 7, 8.
11. First, Petitioners provided affidavits of publication of notice of the Petition in a newspaper of general circulation in the affected counties and in a newspaper of general statewide circulation in accordance with 20.6.4.9.A(6) NMAC. Tr. 77:12–22; Pet'rs Ex. 7.
12. On September 2, 2021, notice of the Petition was published in *The Albuquerque Journal*. Pet'rs Ex. 7.
13. On September 1, 2021, notice of the Petition was published in *The Las Vegas Optic*. Pet'rs Ex. 8.
14. Second, Petitioners, via NMED, provided notice of the hearing in accordance with 20.1.6.201 NMAC, Section 14-4-5.2 of the State Rules Act, and Section 14-4A-4 of the Small Business Regulatory Relief Act, by publishing the hearing notice in the New Mexico Register and a newspaper of general circulation in the area affected at least 60 days prior to the hearing. Tr. 132:22–135:19, 77:12–78:9; Pet'rs Ex. 8.
15. On January 26, 2022, notice of the hearing was published in the New Mexico Register. Pet'rs Ex. 8

16. On February 5, 2022, notice of the hearing was published in *The Albuquerque Journal*. Pet’rs Ex. 8.

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

III. THE COMMISSION HAS AUTHORITY TO DESIGNATE ONRWS

18. Pursuant to the Water Quality Act, Sections 74-6-1 to -17, and the Standards for Interstate and Intrastate Surface Waters, Section 20.6.4 NMAC, the Commission is authorized to amend Surface Water Quality Standards.

19. Specifically, the Commission has authority to adopt water quality standards for surface and ground waters of the state based on credible scientific data and other appropriate evidence under the Water Quality Act. NMSA 1978, § 74-6-4(D).

20. Standards and amendments must comply with Section 74-6-6 of the Water Quality Act, which sets forth the procedural requirements for such proceedings before the Commission.

21. Section 20.1.6 NMAC governs the procedures to be followed by the Commission, and by participants before the Commission, in connection with all rulemaking hearings before the Commission.

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

23. Pursuant to Section 20.6.4.9.C NMAC, the Commission may classify a surface water of the state or a portion of a surface water of the state as an ONRW if the criteria set forth in Section 20.6.4.9.B NMAC are met.

IV. PETITIONERS' DIRECT CASE

24. Ms. Kelly Nokes and Ms. Fox, attorneys for the Western Environmental Law Center, appeared on behalf of the Petitioners at the hearing for this matter, which commenced on April 12, 2022. Tr. 3:1–9.
25. The Petition nominated the Pecos River from its northern wilderness boundary to its confluence with Dalton Canyon; 16 named tributaries to the Pecos and 96 unnamed tributaries to those 16 waters, constituting nearly 180 miles of streams; and 16 wetlands consisting of almost 43 acres, to be designated as ONRWs. Tr. 28:5–11; Pet'rs Ex. 5.
26. An Outstanding Waters designation protects New Mexico's most exceptional waters and provides the highest level of protection in the state by prohibiting any new degradation to water quality while still respecting and allowing the continuation of preexisting traditional land use activities, such as grazing and acequia operations. Tr. 27:16–22.
27. The Petition reflected a community-driven effort brought forward by a diverse group of local governments and local and statewide community and business organizations. Tr. 27:23–25, 28:1–4.
28. Petitioners' direct case demonstrated that designation of all of the nominated waters is beneficial to the State of New Mexico, as required by 20.6.4.9.B NMAC, and that all of the nominated waters meet both the exceptional ecological and exceptional recreational criteria of 20.6.4.9.B(2) NMAC, and that many waters meet other criteria as well. Tr. 28:25, 29:1–5; *see also* Pet'rs Ex. 4 (chart summarizing ONRW criteria each nominated water meets).

29. Petitioners presented nine witnesses at the hearing. Tr. 30:17–18.
30. First, Petitioners called the Honorable Second Lieutenant Governor Vincent Toya of the Jemez Pueblo. Tr. 30:19–24, 34:11–37:25. Second Lieutenant Governor Toya discussed the cultural significance of protecting the nominated waters to the Jemez and Pecos peoples, protection that is beneficial to the state. *Id.*
31. Second, Petitioners called Ms. Janice Varela, County Commissioner for District 2 of Petitioner San Miguel County, to discuss the ecological and recreational exceptionality of the nominated waters and the economic importance of protecting the nominated waters to San Miguel County and the state. Tr. 30:25, 31:1–4, 39:15–48:8.
32. Third, Petitioners called Mayor Telesfor Benavidez, Mayor of Petitioner Village of Pecos, to discuss the economic importance of protecting the nominated waters to the Village of Pecos and their importance to that community. Tr. 31:5–8, 48:24–53:5.
33. Fourth, Petitioners called Mr. Frank “Pancho” Adelo, the President of Petitioner Upper Pecos Watershed Association, to discuss the abundance of recreational activities in the nominated area, with particular focus on the exceptional trout fishing in the Pecos and its tributaries, which saw over 158,000 angler days during the 2021 license year. Tr. 31:9–18, 53:8–63:14. Mr. Adelo also discussed the importance of protecting the nominated waters to local farmers and ranchers, who depend on these waters for their livelihood, of keeping the watershed clean. *Id.*
34. Fifth, Petitioners called Ms. Lela McFerrin, the Vice-president of Petitioner Upper Pecos Watershed Association, to discuss the extensive community outreach conducted throughout the nomination proceedings and to highlight the broad local, statewide, and national support for the nomination, as shown in Petitioners’ Exhibit

16, which is a compilation of letters of support. Tr. 31:19–25, 64:11–68:2. Ms.

McFerrin explained that since Petitioners’ filing of their Notice of Intent to Present Technical Testimony, over 1,600 other individuals and organizations had written in support of the Petition, including federal, state, and local elected officials, and no Party had filed in opposition. Tr. 31:25–32:4, 66:24–67:6.

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

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

37. Eighth, Petitioners’ called Ms. Paula Garcia, the Executive Director of Petitioner New Mexico Acequia Association, to discuss the acequia association’s support for the nomination, explaining how protecting water quality in the Upper Pecos Watershed will benefit the numerous acequias that divert water from the Pecos River, and how this, in turn, is a benefit to the state. Tr. 32:18–24, 162:9–165:24.

38. Ninth, Petitioners called Dr. David Propst. Tr. 33:24–25, 166:22–180:18. Dr. Propst is a former employee of the New Mexico Department of Game and Fish, where he worked as a project leader in the native fish section of the Department for nearly 27

years. Tr. 33:1–5. Dr. Propst discussed how all nominated waters meet the exceptional ecological significance criterion of Section 20.6.4.9.B(2) NMAC and, in particular, how the non-perennial waters included in the nomination are essential to the ecological health, integrity, and significance of the Upper Pecos Watershed as a whole. Tr. 33:5–10, 166:22–180:18.

39. Petitioners also submitted the written testimony of Mr. Ralph Vigil in their Notice of Intent to Present Technical Testimony as Petitioners’ Exhibit 23. Mr. Vigil was unexpectedly unable to appear at the hearing on April 12, 2022 due to illness, and no Party objected to admission of his written testimony. Tr. 33:11–25. Mr. Vigil is the owner of Petitioner Molino de la Isla Organics, LLC, and his farm relies on the water from the Acequia del Molino, which draws water from the Pecos River immediately downstream of the nominated main stretch. Pet’rs Ex. 23. Mr. Vigil is also Chair of the New Mexico Acequia Commission. *Id.* Mr. Vigil understands as a parciante and state leader the importance of maintaining the overall health of the watershed to the more than 55 downstream acequias that feed directly or indirectly from the Pecos River. *Id.*

40. Through direct testimony and admitted evidence, Petitioners have demonstrated that all nominated waters warrant designation as Outstanding Waters because Petitioners’ Petition met all procedural requirements in Section 20.6.4.9.A NMAC and because designation of all waters will benefit the state pursuant to 20.6.4.9.B NMAC and all waters meet more than one of the substantive criteria for designation pursuant to 20.6.4.9.B(1) - (3) NMAC. *See* Pet’rs Ex. 4.

A. The Nomination Meets the Procedural Requirements of 20.6.4.9.A NMAC

41. Section 20.6.4.9.A NMAC provides:

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

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

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

43. First, Petitioners provided a map of the nominated surface waters of the state, including the location and proposed upstream and downstream boundaries. Tr. 72:20–3:6; Pet’rs Ex. 2 at 7–10; Pet’rs Ex. 5. Petitioners also provided tables listing all nominated waters, the associated miles or acreage of those waters nominated, as well as the proposed upstream and downstream boundaries, and latitudinal and longitudinal coordinates for each water included in the nomination. Tr. 73:7–24;

Pet'rs Ex. 2 at 11–13; Pet'rs Ex. 5. In total, Petitioners nominate 179.93 miles of streams and 42.9 acres of wetlands for designation as ONRWs. Tr. 73:20–21; Pet'rs Ex. 2 at 7–13; Pet'rs Ex. 5.

44. Second, Petitioners provided a written statement and evidence based on scientific principles in support of the nomination, including specific reference to one or more of the applicable ONRW criteria. Tr. 73:25–74:3; Pet'rs Ex. 2 at 13–14.
45. Third, Petitioners provided all available water quality data, including chemical, physical, or biological parameters, where available, to establish a baseline condition. Tr. 74:10–20; Pet'rs Ex. 2 at 14–15; Pet'rs Ex. 6.
46. Fourth, Petitioners provided information regarding activities that may contribute to the reduction of water quality in the nominated waters. Tr. 74:21–76:19; Pet'rs Ex. 2. Activities that may reduce water quality in the nominated waters include: mining, Tr. 74:25–75:5; development and roads, Tr. 75:6–12; climate change, Tr. 75:13–76:1; and poorly managed recreation, Tr. 76:2–4. *See also* Pet'rs Ex. 2 at 15–19.
47. Fifth, Petitioners provided additional evidence to substantiate the proposed designation, including an analysis of the economic impact of the designation on the local and regional economy within the State of New Mexico and the benefit to the state. Tr. 76:20–77:11; Pet'rs Ex. 2 at 19, 33–42. Additional evidence included facts relating to the proposed designation's economic significance, cultural significance, and the national significance of the nomination. *Id.*
48. Sixth, Petitioners provided affidavits of publication of notice of the Petition in a newspaper of general circulation in the affected counties (*The Las Vegas Optic*) and

in a newspaper of general statewide circulation (*The Albuquerque Journal*). Tr. 77:12–22; Pet’rs Ex. 2 at 19–20; Pet’rs Ex. 7.

B. The Nomination Meets the Designation Requirements of 20.6.4.9.B NMAC

49. Section 20.6.4.9.B NMAC provides:

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

(1) the water is a significant attribute of a state special trout water, national or state monument, national or state wildlife refuge or designated wilderness area, or is part of a designated wild river under the federal Wild and Scenic Rivers Act; or

(2) the water has exceptional recreational or ecological significance; or

(3) the existing water quality is equal to or better than the numeric criteria for protection of aquatic life and contact uses and the human health-organism only criteria, and the water has not been significantly modified by human activities in a manner that substantially detracts from its value as a natural resource.

1) Benefit to the State

50. The designation of a nominated water as an ONRW must be beneficial to the State of New Mexico. 20.6.4.9.B NMAC.

51. Petitioners have demonstrated that designation of all of the nominated waters would be beneficial to the state of New Mexico. *See* Pet’rs Ex. 2 at 33–42; Pet’rs Exs. 4, 13, 15, 18, 19, 21, 23, 25, 27; Tr. 34:11–37:25 (testimony of Second Lieutenant Governor Toya); Tr. 39:15–48:8 (testimony of Commissioner Varela); Tr. 48:24 – 53:5 (testimony of Mayor Benavidez); Tr. 53:8–63:14 (testimony of Mr. Adelo); Tr. 64:11–68:2 (testimony of Ms. McFerrin); Tr. 104:8–111:4 (testimony of Mr. Mitchell); Tr. 162:9–165:24 (testimony of Ms. Garcia).

52. There are numerous benefits of the proposed designation to the state, including supporting the state's rich tradition of acequia irrigation and farming, ranching, cultural values, and economic benefits. Tr. 85:7–87:19; Pet'rs Ex. 2 at 33–42. The designation would benefit the state by protecting the Upper Pecos Watershed and the essential ecosystem functions that a healthy watershed provides including sediment control, flood control, and climate change resiliency. Tr.87:11–19; Pet'rs Ex. 2 at 33–42.
53. In sum, designation of the nominated waters as ONRWs would benefit the state of New Mexico 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. Pet'rs Ex. 2 at 33–42; Pet'rs Ex. 4.

2) Significant Attribute Criterion

54. A water may be designated as an ONRW if the water is a significant attribute of a state special trout water, national or state monument, national or state wildlife refuge or designated wilderness area, or is part of a designated wild river under the federal Wild and Scenic Rivers Act. 20.6.4.9.B(1) NMAC.
55. Petitioners have demonstrated that a number of the nominated waters or segments of the nominated waters meet the significant attribute criterion of 20.6.4.9.B(1) NMAC. Tr. 80:22–81:6; Pet'rs Ex. 2 at 21–24; Pet'rs Ex. 4.
56. Seven-miles of the nominated portion of the Pecos River, from the Wilderness boundary downstream to the confluence of Davis Creek, is designated as a Wild and

Scenic River in the National Wild and Scenic Rivers Act. Tr. 80:22–81:1; Pet’rs Ex. 2 at 21–24; Pet’rs Ex. 4.

57. Two segments of the nominated waters are state special trout waters: the Pecos River, from the Rio Mora confluence to Cowles, and Jack’s Creek, from the waterfalls downstream of New Mexico Highway 63 upstream to its headwaters. Tr. 81:2–6; Pet’rs Ex. 2 at 23–24; Pet’rs Ex. 4.

58. In sum, the segments identified above of the Pecos River and Jack’s Creek meet the significant attribute criterion of 20.6.4.9.B(1) NMAC. Pet’rs Ex. 2 at 21–24; Pet’rs Ex. 4.

3) Exceptional Recreational Significance Criterion

59. A water may be designated as an ONRW if the water has exceptional recreational significance. 20.6.4.9.B(2) NMAC.

60. Petitioners have demonstrated that all of the nominated waters meet the exceptional recreational significance criterion of 20.6.4.9.B(2) NMAC. Tr. 81:7–84:9; Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 4.

61. Annually, thousands of visitors recreate at the seven U.S. Forest Service campgrounds in the nominated area, including at Jack’s Creek Campground, which is considered one of the top ten best campgrounds in the state. Tr. 81:9–13; Pet’rs Ex. 2 at 25–32.

62. Recreational activities in the nominated area include camping, hiking, horseback riding, hunting, fishing, bird watching, backpacking, and rafting, among others. Tr. 81:14–22; Pet’rs Ex. 2 at 25–32.

63. There are a number of local outfitters that take clients on tours in the nominated area, and which depend on the clean waters of the Upper Pecos Watershed for their business. Tr. 82:1–4; Pet’rs Ex. 2 at 25–32.
64. The 16 named nominated waters are exceptionally significant recreationally for the fishing opportunities they provide. Tr. 82:5–83:19; Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 4.
65. The 16 named 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, which sees over 158,000 angler days per year. Tr. 82:7–12; Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 4. Fly fishing guides have named the Upper Pecos among the best places to fly fish in the state of New Mexico. Tr. 82:13–15; Pet’rs Ex. 2 at 25–32.
66. Petitioner’s Exhibit 10 includes data on the number of angler days in the nominated 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; Pet’rs Ex. 2 Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 10.
67. The nominated 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 16 named nominated waters provide habitat for trout. Tr. 83:12–19; Pet’rs Ex. 2 at 25–32.
68. All of the nominated waters support species of economic and recreational importance (“SERI”). Tr. 83:20–84:4; Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 9.
69. 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 16 named nominated waters, including SERI identified within one-mile of each bank of

the named stream. Because each identified unnamed nominated non-perennial stream drains into one of the 16 named streams, the species search includes at least one-mile of all 96 unnamed tributaries and all wetlands adjacent to the 16 named streams. Tr. 83:20–84:9; Pet’rs Ex. 2 at 30; Pet’rs Ex. 9. In addition, 64 or two-thirds, of these tributaries are less than one-mile in length, and therefore the entirety of these tributaries are included within the search area. Pet’rs Ex. 11 at 7; Pet’rs Ex. 3 at Table 1.

70. SERI identified in the reports included in Petitioners’ Exhibit 9 include black bear, cougar, elk, mule deer, brown trout, rainbow trout, Rio Grande cutthroat trout, and cutthroat trout. Pet’rs Ex. 2 at 31; Pet’rs Ex. 9.

71. In sum, all of the nominated waters meet the exceptional recreational significance criterion of 20.6.4.9.B(2) NMAC because they support multiple SERI. Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 4.

72. Separately, the 16 named nominated 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. Pet’rs Ex. 2 at 25–32; Pet’rs Ex. 4.

4) Exceptional Ecological Significance Criterion

73. A water may be designated as an ONRW if the water has exceptional ecological significance. 20.6.4.9.B(2) NMAC.

74. 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; Pet’rs Exs. 4, 11.
75. Dr. Propst testified that, in his opinion, the exceptional ecological significance of the nominated waters of the Upper Pecos Watershed is evident when viewed in a holistic perspective that includes all features, perennial and nonperennial. Tr. 169:17–20; Pet’rs Ex. 11.
76. Dr. Propst explained that the loss or impairment of any hydrologic feature of the Upper Pecos Watershed diminishes its ability to provide essential ecosystem services such as key habitat for wildlife, nutrient processing and transfer, flood attenuation, enhanced water quality and recreational opportunities. Tr. 170:20–25; Pet’rs Ex. 11. In Dr. Propst’s opinion, collectively, the nominated waters, perennial and nonperennial, because of their connectivity and interdependence, are worthy of ONRW designation. Tr. 170:25–171:3; Pet’rs Ex. 11.
77. Dr. Propst explained that the nominated waters are home to many species of greatest conservation need (“SGCN”), which is a classification identified by the New Mexico State Wildlife Action Plan for species that are prioritized for conservation. Tr. 172:3–13; Pet’rs Ex. 4, 11.
78. There are 23 SGCN in the Upper Pecos Watershed. Tr. 172:7–13; Pet’rs Ex. 4, 11. Each named nominated stream and the one-mile area surrounding their banks, which include all their tributaries and wetlands, support between 14 and 21 SGCN. *See* Pet’rs Ex. 11 at 11–12.

79. Four birds that inhabit the Upper Pecos Watershed are protected as threatened under federal or state law. Tr. 172:10–13; Pet’rs Ex. 4, 11. These species are peregrine falcon (state threatened species), spotted bat (state threatened species), boreal owl (state threatened species), and Mexican spotted owl (federal threatened species). Pet’rs Exs. 4, 11.
80. New Mexico’s state fish, the Rio Grande cutthroat trout, is present in the nominated waters of the Upper Pecos Watershed. Tr. 172:14–173:3; Pet’rs Ex. 4, 11. The nominated waters of the Upper Pecos Watershed currently support six Rio Grande cutthroat trout conservation populations in Dalton Canyon Creek, Wild Horse Creek, Bear Creek, Jack’s Creek, Macho Canyon Creek, Rio Mora, and Willow Creek. Tr. 172:22–173:3; Pet’rs Exs. 4, 11 at 13–14.
81. Rainbow, brown, and other cutthroat trout are also present in the nominated waters of the Upper Pecos Watershed. Tr. 173:4–9; Pet’rs Ex. 4, 11.
82. There are six plant species recognized as rare or in need of protection in the Upper Pecos Watershed. Tr. 173:10–17; Pet’rs Exs. 4, 11 at 14-16. Three of these species — the mountain lily, yellow lady’s slipper, and hooded ladies’ tresses — occur primarily in moist habitats such as the wetlands associated with the Upper Pecos Watershed’s streams. *Id.* These plant species are found within one-mile of Holy Ghost Creek, Carpenter Creek, Doctor Creek and tributaries 1-4, Macho Canyon Creek and tributaries 1-12, Panchuela Creek and tributaries 1-2, Pecos River and tributaries 1-28, Rio Mora and tributaries 1-4, and Winsor Creek and tributaries 1-2. Pet’rs Ex. 11 at 15–16.

83. The Holy Ghost ipomopsis is listed as an endangered species under the federal Endangered Species Act and the New Mexico Wildlife Conservation Act, and only occurs along a short reach of Holy Ghost Creek. Tr. 173:10–17; Pet’rs Exs. 4, 11.
84. According to Dr. Propst, the exceptional ecological character of the Upper Pecos Watershed is a consequence of it being a functioning ecosystem with all parts contributing, including the network of wetlands and nonperennial tributaries and their contribution to the vitality of the perennial streams in the system and the entire watershed. Tr. 173:18–25; Pet’rs Ex. 11.
85. Dr. Propst explained the physical, chemical, and biological linkages between nonperennial and perennial watercourses and the important contributions of nonperennial tributaries to the ecological functioning of the Upper Pecos Watershed. Tr. 174:1–179:8; Pet’rs Ex. 11.
86. Dr. Propst explained that the unnamed wetlands included in the nomination provide essential habitat for a variety of species, including the northern leopard frog, birds, numerous aquatic insects, and hydrophilic (water-loving) plants. Tr. 179:9–23; Pet’rs Ex. 11.
87. Dr. Propst explained that the relationships between nonperennial watercourses and the perennial streams they feed into are complex and dynamic; much of the energy that supports life in perennial streams is derived from nonperennial watercourses. Tr. 180:24–181:4; Pet’rs Ex. 11. Dr. Propst further explained that if these connections are lost or compromised, the ecological functioning of the entire watershed is compromised. Tr. 180:4–6; Pet’rs Ex. 11.

88. Dr. Propst explained that a vibrant, healthy ecosystem provides numerous services, including clean freshwater and nutrient cycling. Tr. 180:7–10; Pet’rs Ex. 11.

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

90. In sum, all of the nominated 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 based on the interconnected nature of the perennial and nonperennial streams and wetlands that make up a healthy functioning watershed. Pet’rs Ex. 4, 11.

5) Water Quality Criterion

91. A water may be designated as an ONRW if 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. 20.6.4.9.B(3) NMAC.

92. Petitioners’ Exhibit 6 includes all existing water quality data that was available for the nominated waters. Tr. 84:19–20; Pet’rs Ex. 2 at 32–33; Pet’rs Ex. 6.

93. Seven of the nominated named waters and one segment of the nominated portion of the Pecos River, from Jack’s Creek to the Wilderness boundary, meet or exceed water quality criteria associated with the aquatic life and contact uses. Tr. 84:10–18. The

seven waters are Doctor Creek, Holy Ghost Creek, Indian Creek, Jack's Creek, Panchuela Creek, Rio Mora, and Winsor Creek. Pet'rs Ex. 2 at 32–33; Pet'rs Ex. 4.

6) Summary

94. In sum, Petitioners have demonstrated that designation of all nominated waters of the Upper Pecos Watershed is warranted in accordance with 20.6.4.9 NMAC because each of the nominated 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 of New Mexico.

V. NMED'S DIRECT CASE

95. Mr. John Verheul appeared on behalf of NMED at the hearing. Tr. 2:17–25.

96. NMED is a stakeholder in all rulemakings involving the standards and regulations in 20.6.4 NMAC. Tr. 123:15–20.

97. NMED worked collaboratively with Petitioners to refine and improve the Petition, and supports the Commission designating all waters nominated as ONRWs. Tr. 123:21–124:3.

98. NMED presented two witnesses in support of the Petition. Tr. 24:19–20.

99. First, NMED presented Ms. Jennifer Fullam. Tr. 124:19–137:15.

100. Ms. Fullam is an Environmental Scientist Supervisor serving as the Water Quality Standards Coordinator with NMED's Surface Water Quality Bureau. Tr. 125:3–6. Ms. Fullam oversees and facilitates NMED's team responsible for proposing amendments to the state's Surface Water Quality Standards, and participates in hearings related to proposed amendments initiated by parties other than NMED. Tr. 125:11–16.

101. Ms. Fullam’s direct technical testimony was filed as NMED Exhibit 1. Tr. 127:11–12.
102. Ms. Fullam explained that the proposed amendments would designate certain identified ephemeral, intermittent and perennial waters, including wetlands, within the Upper Pecos Watershed from the Dalton Creek day-use area upstream to the Wilderness boundary, as ONRWs. Tr. 127:23–128:4. Ms. Fullam further explained that an ONRW is a designation for waters of the state in which the highest level of antidegradation protection applies, such that no degradation is permitted. Tr. 128:6–8, 17–19.
103. Ms. Fullam explained that ONRWs fall under Tier Three of the state’s water quality standards at 20.6.4.8 NMAC, which is the most protective tier, and prohibits degradation, except for specifically defined time-sensitive activities, such as activities that restore or maintain water quality or activities deemed necessary to accommodate public health or safety. Tr. 129:15–20. Activities associated with public health and safety and emergency response; acequia operation, maintenance, and repair; and preexisting activities that implement best management practices are permitted in ONRWs. Tr. 130:9–17.
104. Ms. Fullam also explained that designating ONRWs is supportive of the goals and objectives of the federal Clean Water Act to restore, maintain, and protect water quality wherever attainable. Tr. 131:16–25.
105. Ms. Fullam stated that NMED fully supports the designation of the waters identified in the Petition as ONRWs. Tr. 137:12–14.
106. Second, NMED presented Ms. Diana Aranda. Tr. 137:18–145:24.

107. Ms. Aranda is an Environmental Scientist in the Standards, Planning, and Reporting Team for NMED's Surface Water Quality Bureau. Tr. 138:12–15. Ms. Aranda is responsible for developing water quality standards for New Mexico surface waters in accordance with the Water Quality Act and the Clean Water Act. Tr. 139:22–15.
108. Ms. Aranda discussed NMED's technical review of the Petitioners' Petition. Tr. 141:9–11.
109. Ms. Aranda explained that NMED evaluated each of the nominated water bodies to ascertain the fulfillment of eligibility criteria and the submittal elements required for an ONRW designation in accordance with 20.6.4.9.A and -B NMAC. Tr. 141:12–18.
110. Ms. Aranda explained that, based on NMED's review, NMED found that the Petitioners demonstrated that all the nominated waters fulfilled at least one of the eligibility criteria for an ONRW consistent with 20.6.4.9.B NMAC. Tr. 141:4–142:7.
111. Ms. Aranda further explained that the Petitioners met all six of the procedural requirements for the Petition in accordance with 20.6.4.9.A NMAC. Tr. 144:8–145:5.
112. In sum, according to Ms. Aranda, NMED found that all nominated water bodies in the Petition met at least one of the eligibility criteria in 20.6.4.9.B NMAC and that the Petitioners met the procedural requirements of in 20.6.4.9.A NMAC. Tr. 145:10–14.
113. Ms. Aranda stated that NMED supports the designation of all waters nominated by Petitioners as ONRWs. Tr. 145:19–22.

VI. MR. McQUILLAN'S DIRECT CASE

114. Mr. Dennis McQuillan appeared in his individual capacity at the hearing. Tr. 3:10–11.
115. Mr. McQuillan is a hydrogeologist, and a former employee of NMED and its predecessor agency, where he worked for over four decades. Tr. 183:13–18.
116. Mr. McQuillan presented testimony in support of ONRW designation of all nominated waters, providing information relating to activities that may reduce the water quality of the nominated waters and the exceptional recreational significance of the nominated waters. Tr. 186:11–16.
117. Mr. McQuillan explained that, in his opinion, designation of the nominated waters as ONRWs would help to ensure the cleanup of historic mining wastes, and would help to ensure any future potential mining in the region would be conducted in a manner that would avoid degradation of the existing high-quality water and the exceptional recreational and ecological significance of the nominated waters. Tr. 187:18–24.
118. Mr. McQuillan explained that while future mining activity would not be prohibited if the nominated waters were designated as ONRWs, any such future mining activity would need to comply with the antidegradation standard that an ONRW designation would provide. Tr. 188:7–11.
119. Mr. McQuillan discussed other threats to the nominated waters' water quality that may arise, including from septic systems, Tr. 188:12–20; recreational overuse, Tr. 188: 21–189:16; waste management, Tr. 189:17–190:2; and wildfires, Tr. 190:3–193:8.

120. Mr. McQuillan discussed the exceptional recreational significance of the nominated waters. Tr. 193:9–194:9.

121. In closing, Mr. McQuillan discussed how, in his opinion, designating the nominated waters as ONRWs would be beneficial to the state of New Mexico, and that the Petitioners had demonstrated ORNW designation of all waters nominated is warranted in accordance with 20.6.4.9 NMAC. Tr. 195:3–15.

VII. THE PROPOSED DESIGNATION IS WARRANTED

122. Based on the foregoing, including all testimony and evidence admitted throughout the proceedings in this matter, Petitioners have demonstrated that ONRW designation of all waters nominated is warranted pursuant to 20.9.4.9.A and –B NMAC.

PETITIONERS' PROPOSED CONCLUSIONS OF LAW

I. THE COMMISSION SHOULD AMEND 20.6.4.9.D NMAC AS PROPOSED, DESIGNATING THE NOMINATED WATERS OF THE UPPER PECOS WATERSHED AS OUTSTANDING NATIONAL RESOURCE WATERS

123. Petitioners have demonstrated compliance with the procedural requirements of 20.6.4.9.A NMAC in nominating the waters of the Upper Pecos Watershed as ONRWs.

124. Petitioners have demonstrated compliance with the substantive requirements of 20.6.4.9.B NMAC for designating waters as ONRWs by providing substantial evidence demonstrating that the proposed designation would be beneficial to the state, and that each of the nominated waters meet at least one of the designation criteria of 20.6.4.9.B(1) – (3) NMAC.

125. All Parties to the rulemaking support the designation, and no party entered an appearance objecting to the proposed amendments to 20.6.4.9.D NMAC, as proposed in Petitioners' Exhibit 1.

126. The Commission finds Petitioners' proposal to amend 20.6.4.9.D NMAC, designating identified waters of the Upper Pecos Watershed as ONRWs, is supported by substantial evidence, and the Commission adopts Petitioners' proposed amendments to 20.6.4.9.D NMAC, as proposed in Petitioners' Exhibit 1.

CONCLUSION

Based on the foregoing, and on the testimony and exhibits presented at the hearing in this matter, Petitioners respectfully request the Commission to adopt their Proposed Findings of Fact and Conclusions of Law and to designate all waters of the Upper Pecos Watershed nominated as ONRWs.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing pleading was emailed to the following counsel and parties on May 19, 2022:

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PETITIONERS' EXHIBIT

1

PROPOSED AMENDMENTS TO 20.6.4 NMAC

20.6.4.9 OUTSTANDING NATIONAL RESOURCE WATERS:

- 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, Powderhouse, Holman, Gold, Grassy, LaBelle 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.
 - (3) the named perennial surface waters of the state, identified in Subparagraph (a) below, located within United States department of agriculture forest service wilderness. Wilderness are those lands designated by the United States congress as wilderness pursuant to the Wilderness Act. Wilderness areas included in this designation are the 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 Parks wilderness, Wheeler Peak wilderness, and White Mountain wilderness.
 - (a) The following waters are designated in the Rio Grande basin:
 - (i) in the Aldo Leopold wilderness: Byers Run, Circle Seven creek, Flower canyon, Holden Prong, Indian canyon, Las Animas creek, Mud Spring canyon, North Fork Palomas creek, North Seco creek, Pretty canyon, Sids Prong, South Animas canyon, Victorio Park canyon, Water canyon;
 - (ii) in the Apache Kid wilderness Indian creek and Smith canyon;
 - (iii) in the Chama River Canyon wilderness: Chavez canyon, Ojitos canyon, Rio Chama;
 - (iv) in the Cruces Basin wilderness: Beaver creek, Cruces creek, Diablo creek, Escondido creek, Lobo creek, Osha creek;
 - (v) in the Dome wilderness: Capulin creek, Medio creek, Sanchez canyon/creek;
 - (vi) in the Latir Peak wilderness: Bull creek, Bull Creek lake, Heart lake, Lagunitas Fork, Lake Fork creek, Rito del Medio, Rito Primero, West Latir creek;
 - (vii) in the Pecos wilderness: Agua Sarca, Hidden lake, Horseshoe lake (Alamitos), Jose Vigil lake, Nambe lake, Nat lake IV, No Fish lake, North Fork Rio Quemado, Rinconada, Rio Capulin, Rio de las Trampas (Trampas creek), Rio de Truchas, Rio Frijoles, Rio Medio, Rio Molino, Rio Nambe, Rio San Leonardo, Rito con Agua, Rito Gallina, Rito Jaroso, Rito Quemado, San Leonardo lake, Santa Fe lake, Santa Fe river, Serpent lake, South Fork Rio Quemado, Trampas lake (East), Trampas lake (West);
 - (viii) in the San Pedro Parks wilderness: Agua Sarca, Cañon Madera, Cave creek, Cecilia Canyon creek, Clear creek (North SPP), Clear creek (South SPP), Corralitos creek, Dove creek, Jose Miguel creek, La Jara creek, Oso creek, Rio Capulin, Rio de las Vacas, Rio Gallina, Rio Puerco de Chama, Rito Anastacio East, Rito Anastacio West, Rito de las Palomas, Rito de las Perchas, Rito de los Pinos, Rito de los Utes, Rito Leche, Rito Redondo, Rito Resumidero, San Gregorio lake;
 - (ix) in the Wheeler Peak wilderness: Black Copper canyon, East Fork Red river, Elk lake, Horseshoe lake, Lost lake, Sawmill creek, South Fork lake, South Fork Rio Hondo, Williams lake.
 - (b) The following waters are designated in the Pecos River basin:
 - (i) in the Pecos wilderness: Albright creek, Bear creek, Beatty creek,

Beaver creek, Carpenter creek, Cascade canyon, Cave creek, El Porvenir creek, Hollinger creek, Holy Ghost creek, Horsethief creek, Jack's creek, Jarosa canyon/creek, Johnson lake, Lake Katherine, Lost Bear lake, Noisy brook, Panchuela creek, Pecos Baldy lake, Pecos river, Rio Mora, Rio Valdez, Rito Azul, Rito de los Chimayosos, Rito de los Esteros, Rito del Oso, Rito del Padre, Rito las Trampas, Rito Maestas, Rito Oscuro, Rito Perro, Rito Sebadillosos, South Fork Bear creek, South Fork Rito Azul, Spirit lake, Stewart lake, Truchas lake (North), Truchas lake (South), Winsor creek;

(ii) in the White Mountain wilderness: Argentina creek, Aspen creek, Bonito creek, Little Bonito creek, Mills canyon/creek, Rodamaker creek, South Fork Rio Bonito, Turkey canyon/creek.

(c) The following waters are designated in the Gila River basin:

(i) in the Aldo Leopold wilderness: Aspen canyon, Black Canyon creek, Bonner canyon, Burnt canyon, Diamond creek, Falls canyon, Fisherman canyon, Running Water canyon, South Diamond creek;

(ii) in the Gila wilderness: Apache creek, Black Canyon creek, Brush canyon, Canyon creek, Chicken Coop canyon, Clear creek, Cooper canyon, Cow creek, Cub creek, Diamond creek, East Fork Gila river, Gila river, Gilita creek, Indian creek, Iron creek, Langstroth canyon, Lilley canyon, Little creek, Little Turkey creek, Lookout canyon, McKenna creek, Middle Fork Gila river, Miller Spring canyon, Mogollon creek, Panther canyon, Prior creek, Rain creek, Raw Meat creek, Rocky canyon, Sacaton creek, Sapillo creek, Sheep Corral canyon, Skeleton canyon, Squaw creek, Sycamore canyon, Trail canyon, Trail creek, Trout creek, Turkey creek, Turkey Feather creek, Turnbo canyon, West Fork Gila river, West Fork Mogollon creek, White creek, Willow creek, Woodrow canyon.

(d) The following waters are designated in the Canadian River basin: in the Pecos wilderness Daily creek, Johns canyon, Middle Fork Lake of Rio de la Casa, Middle Fork Rio de la Casa, North Fork Lake of Rio de la Casa, Rito de Gascon, Rito San Jose, Sapello river, South Fork Rio de la Casa, Sparks creek (Manuelitas creek).

(e) The following waters are designated in the San Francisco River basin:

(i) in the Blue Range wilderness: Pueblo creek;
(ii) in the Gila wilderness: Big Dry creek, Lipsey canyon, Little Dry creek, Little Whitewater creek, South Fork Whitewater creek, Spider creek, Spruce creek, Whitewater creek.

(f) The following waters are designated in the Mimbres Closed basin: in the Aldo Leopold wilderness Corral canyon, Mimbres river, North Fork Mimbres river, South Fork Mimbres river.

(g) The following waters are designated in the Tularosa Closed basin: in the White Mountain wilderness Indian creek, Nogal Arroyo, Three Rivers.

(h) The wetlands designated are identified on the *Maps and List of Wetlands Within United States Forest Service Wilderness Areas Designated as Outstanding National Resource Waters* published at the New Mexico state library and available on the department's website.

(4) The following waters are designated in the headwaters Pecos river watershed:

(a) The Pecos river from Dalton Canyon creek to the Pecos wilderness boundary;

(b) In the Dry Gulch-Pecos river subwatershed, Dalton Canyon creek from the Pecos river upstream to the headwaters, Wild Horse creek from Dalton Canyon creek upstream to the headwaters, Macho Canyon creek from the Pecos river upstream to the headwaters and Sawyer creek from the Pecos river upstream to the headwaters;

(c) In the Indian creek-Pecos river subwatershed, Indian creek from the Pecos river upstream to the headwaters, Holy Ghost creek from the Pecos river upstream to the Pecos wilderness boundary, Doctor creek from Holy Ghost creek upstream to the headwaters, Davis creek from the Pecos river upstream to the headwaters and Willow creek from the Pecos river upstream to the headwaters;

(d) In the Rio Mora subwatershed, Rio Mora from the Pecos river upstream to the Pecos wilderness boundary and Bear creek from the Rio Mora upstream to the Pecos wilderness boundary;

(e) In the Rio Mora-Pecos river subwatershed, Carpenter creek from the Pecos river upstream to the Pecos wilderness boundary, Winsor creek from the Pecos river upstream to the Pecos wilderness boundary and Jack's creek from the Pecos river upstream to the Pecos wilderness boundary; and,

(f) In the Panchuela creek subwatershed, Panchuela creek from the Pecos river upstream to the Pecos wilderness boundary;

(g) Unnamed tributaries to waters in Subparagraphs (a) through (f), Paragraph (4) of this Subsection (D) as identified in the *Maps and Lists for Unnamed Tributaries to Perennial Waters and Wetlands*

in the Headwaters Pecos River Watershed, dated XXXXXX published at the New Mexico state library and available on the department's website;

(h) _____ Unnamed wetlands adjacent to waters in Subparagraphs (a) through (f), Paragraph (4) of this Subsection (D) as identified in the *Maps and Lists for Unnamed Tributaries to Perennial Waters and Wetlands in the Headwaters Pecos River Watershed*, dated XXXXXX, published at the New Mexico state library and available on the department's website.

[20.6.4.9 NMAC - Rn, Subsections B, C and D of 20.6.4.8 NMAC, 5/23/2005; A, 5/23/2005; A, 7/17/2005; A, 2/16/2006; A, 12/1/2010; A, 1/14/2011, A XX/XX/XXXX]