



(505) 299-5404
6100 Seagull St. Suite B-105
Albuquerque, NM 87109
nmwildlife@nmwildlife.org

June 4, 2021

***“ . . . any language in 19.31.22 NMAC which attempts to prohibit access to the public waters of New Mexico is unconstitutional and unenforceable.”
Attorney General Memorandum to NM State Game Commission,
September 2019***

Ms. Sharon Salazar Hickey
Chair, New Mexico Game Commission

Dear Chair Salazar Hickey,

Please accept the following comments from the New Mexico Wildlife Federation (the Federation) on the five pending applications to certify portions of the public waters of New Mexico as “non-navigable” and closed to public entry under the Landowner Certification of Non-Navigable Water Rule, 19.31.22 NMAC.

The applicants are Chama III, LLC; Fenn Farms; Rancho del Oso Pardo; River Bend Ranch and Three Rivers.

The New Mexico Wildlife Federation again stands in opposition to the certification of stream segments through private lands as “non-navigable” and therefore closed to public anglers, paddlers or other recreationists without permission from the landowner.

As the New Mexico Supreme Court is currently reviewing the constitutionality of the rule, the Federation respectfully requests the commission to postpone action upon or in the alternative reject the five applications for non-navigable certification on the agenda for the commission’s June 18, 2021 meeting.

This organization has closely examined and accepted as accurate the numerous Attorney General and other legal advisories regarding public access to streams and streambeds through private lands. Those advisories consistently agree that the Supreme Court decision in the 1945 “State vs. Red River Valley” case assured the public the use of public waters (and their streambeds) flowing through or along private properties. They also consistently reject “navigability” and “non-navigability” as germane to the public’s constitutional rights to access to public waters.

Despite that, commission rule 19.31.22 NMAC relies upon the irrelevant “non-navigability” as key to certification. The rule itself was deliberately crafted to produce a preordained outcome of certification and is a disgraceful outlier within the commission’s otherwise transparent rule- and decision-making process. The Federation also contends that the previous commission exceeded its statutory authority in enacting and enforcing this rule.

Some background to this years-long and ongoing issue:

The New Mexico Wildlife Federation is the oldest group in the state representing the interests of hunters, anglers and wildlife. Since its founding by pioneering conservationist Aldo Leopold in 1914, the NMWF has pushed for public access to public waters and lands. Its leadership, including the undersigned president and executive director,

other staff and board members and of course its public members hunt and fish around the state. Among them, they have an established history of using the public waters on the Rio Chama, Rio Pecos and other rivers and streams at issue now, as well as other streams for which the commission previously issued certifications of non-navigability.

We are attaching an affidavit from our Executive Director establishing NMWF's standing and interest in these proceedings.

The Federation's long-standing position favoring public access to public waters came into full force in April 2014, when the Attorney General issued Opinion 14-4.

That opinion interpreted our state Supreme Court's 1945 "Red River" ruling to mean the New Mexico Constitution allows the public to fish, float or otherwise recreate in streams flowing through private property as long as the public user does not trespass across or onto private land. The opinion expressly noted the Supreme Court rejected navigability as a test for public access and that the public's right to fish includes activities incidental and necessary to that – including wading in and standing upon the streambed.

The Federation immediately informed its membership and the general public that those rights were at long last clarified and confirmed; consulted with landowner representatives on possible ways to implement the AG's findings but found no common ground; successfully entreated the Attorney General to advise the commission to acknowledge the public's rights and lead a thoughtful, regulated transition to public use of public waters; and by correspondence and oral testimony in public meetings similarly petitioned the commission to lead the transition. The commission was unresponsive.

In 2015, the Federation fully engaged in all legislative debates and rallied its membership in strong opposition to SB 226 and the identical HB 235, both aimed at obviating AG Opinion 14-4. SB 226 became law as an amendment to trespass statute 17-4-6 NMSA 1978, but only after the Legislature deleted all references to "navigability" and any language that would have given the commission the specific authority it needs to adopt and enforce 19.31.22 NMAC.

The commission ignored the Legislature's inconvenient deletion and, the Federation contends, illegally gave itself that authority when it adopted the

rule in late 2017. Under that assumed authority, the commission a year later issued certifications of non-navigability on segments of five streams.

To do so, the commission also had to ignore:

- AG Opinion 14-4 on navigability's irrelevance, also over the written and oral opposition of the Federation and its membership as well as the ongoing opposition from other sportspersons' and paddlers' organizations.

- An Attorney General's advisory letter of August 2016 that concurred with the 2014 AG opinion regarding the public's right to use the streams and the irrelevance of navigability to that use.

- A long-standing State Parks & Recreation guide for boaters quoting an April 1997 AG advisory letter based on the Red River decision that reached the same conclusions as the subsequent advisories.

- A May 2017 Federation-commissioned analysis of the 2014 and 2016 AG opinions by eminent water law attorney John Utton, who also concurred with both.

In spite of that cumulative, compelling evidence, the commission called a special meeting for November 2018 to issue certifications of non-navigability for segments of five streams. The Federation uses the phrase "to issue certifications" deliberately, as the rule's wording clearly aims to achieve a predetermined conclusion, stifle public comment and tie the hands of the department and commission.

We understand that the commission and Department of Game and Fish are not subject to the Administrative Procedures Act. We submit that the commission and department should, as a matter of practice in the public interest, nevertheless follow the APA's excellent protocols for rule- and decision-making. As summarized below, Rule 19.31.22 NMAC fails on every count.

During that first certification process, there would not be the usual prior public meetings with Game and Fish Department staff to solicit public input, no debate or discussion among the commissioners, no public examination of the applications' contents, questioning of the applicants, opportunity for

amendment, little opportunity to examine interested parties' comments, no opportunity to rebut or support those comments, no oral public input from any party or parties' expert witnesses, and no opportunities for cross-examination of witnesses – all of which should be available to an adjudicatory decision-making process such as the non-navigable certification hearings coming on June 18.

Obviously, the previous commission crafted the rule to allow only the barest minimum of public input, meaningful debate by commissioners or close examination by Game and Fish Department staff.

What little scrutiny department staff is known to afford an application is simply a four-item checklist under Section 19.31.22.8 B of the rule: basics such as the applicant's name and address, current deeds and legal descriptions, proof of public notice of the application, and evidence regarding a stream section's non-navigability status at statehood.

If those four boxes are checked, the rule dictates that “the director **shall** issue a written determination and recommendation to the commission that the segment in the application **shall** be designated a “non-navigable” public water. (emphasis added).

The rule does not obligate the department to validate the applicants' claims of non-navigability. And to the best of the Federation's knowledge, the agency does not attempt to do so. Neither is it known to search for any evidence of historic commercial uses or activities that would demonstrate navigability contrary to the applicants' claims, but simply accepts the “proof” as presented.

That such activities took place is readily inferred from a statute dating to statehood in 1912: 17-4-29 NMSA 1978: “Floating logs in fish stream; restocking; penalty. ‘All persons floating logs, timber, lumber, ties or poles in any stream containing game fish shall, for each mile of the streams used, annually deposit one thousand trout fry or fingerlings at times and places designated by the department of game and fish. Any person failing to comply with the provisions of this section is guilty of a misdemeanor.’”

The current commission, comprised of all new members appointed by a different governor, is faced with repeating the previous commission's errors. To do so, it must hold itself hostage to a rule written to reach a foreordained

conclusion under a uniquely opaque process and unjustifiably condensed timeline.

To repeat the previous commission's errors, this commission must also ignore all of the above legal advisories plus a subsequent, September 2019 memorandum from the Attorney General's Office to the new commission. That memo not only concurs with the previous ones as to public rights and navigability's irrelevance, it also firmly states, "*Additionally, any language in 19.31.22 NMAC which attempts to prohibit access to the public waters of New Mexico is unconstitutional and unenforceable.*" (emphasis added)

The Federation believes the New Mexico State Game Commission's Non-Navigable Rule is not only violative of the New Mexico State Constitution and an illegal rule made without statutory authority, but also is contrary to the commission's other statutory authorities and long-standing legislative mandates.

The commission exists to carry out New Mexico's game and fish policies as spelled out in state law. State statute says those policies are, "to provide an adequate and flexible system for the protection of the game and fish of New Mexico and for their use and development for public recreation and food supply, and to provide for their propagation, planting, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the state of New Mexico."

The Commission's Non-Navigable Rule is directly contrary to the commission's statutory authorities. The rule would have the commission violate the letter and spirit of the state's game and fish statutes and the commission's and department's own policies. The rule seeks to force the game commission itself to deprive the people of New Mexico of their constitutional right to access public waters for public recreation and food supply.

Rule 19.31.22 NMAC is remarkable for its cavalier dismissal of standards the New Mexico Administrative Procedures Act lays out in 12-8-10 NMSA 1978, which states: "In conducting adjudicatory proceedings, agencies shall afford all parties an opportunity for full and fair hearing."

The commission's self-granted permission to limit comment to written input, with no follow-up by any interested party, extremely limited opportunities

for any party to review others' input and no opportunity to rebut or support it, does not meet the most minimal standards for "a full and fair hearing." That's particularly the case for persons in opposition to a proposed decision-making hearing such as the one scheduled for June 18.

The statute goes on to say that agencies:

- "shall allow any person showing that he will be substantially and specifically affected by the proceeding to intervene." The certification process makes no provision for intervention. It is a legal privilege the Federation would have exercised beginning in 2017 had the rule allowed it.

- "may allow any other interested person to participate by presentation of argument orally or in writing;" The rule, with no justification proffered, limits public input to written comment submitted during a short timeline, with no opportunity to speak either for or against a proposed decision in an open forum. This is particularly galling to members of the public such as the undersigned Federation officers who regularly publicly testify before the Legislature, game commission and other rule- and decision-making bodies, and also rally Federation members to weigh in, as well.

- "shall upon demand by any party require any or all parties, including the agency involved, to advise the names of witnesses it proposes to call at any adjudicatory hearing, together with the gist of testimony or type of testimony expected to be elicited from each witness." The rule flagrantly violates the spirit of this section. There is no

allowance for witnesses at all, nor a means for anyone to demand an opportunity to present witnesses. This is another area where the Federation would like to exercise its rights. We would especially like to invite attorneys as expert witnesses in pertinent water law, as well as, for example, traditional users such as members of the Tierra Amarilla Land Grant who are personally being shut out of Rio Chama segments they historically fished and would like to fish again.

The Non-Navigable Rule also clearly violates the spirit of the New Mexico Administrative Procedures Act by setting unreasonably restrictive deadlines and prohibitions on public comment and participation.

The rule states, “Comments and proposed documentary evidence of the landowner, persons with standing, and the general public shall only be taken in writing and in a written format; this format will allow for comments and proposed documentary evidence to be submitted electronically as stated in the notice of meeting or the agenda. There shall be no oral or verbal comment from the landowner, persons with standing, and the general public at the meeting. There shall be no exception to this rule except upon good cause shown and at the sole discretion of the chairman.”

This language is contrary to the letter and spirit of the New Mexico and United States constitutions and to our national traditions of open government. It seeks to deprive the staff and membership of the NMWF and all other citizens of their right to petition the government for redress of grievances.

In regard to the specific applications, members of the NMWF and their families have fished, boated, traveled and recreated on the Rio Chama and Rio Pecos for generations. Fencing the rivers with virtually impassable barriers, prohibiting public use of public waters or otherwise seeking to prohibit public access violates the New Mexico Constitution. The Commission has an obligation under its statutory charter to prevent such violations from happening and must postpone action upon or deny the pending applications.

We are attaching for your convenience a copy of our letter opposing the commission’s adoption of 19.31.22 NMAC in December 2017. The reasoning behind the Federation’s opposition then remains and has only been strengthened by subsequent legal opinions and commission acts and failures to act.

Thank you for the opportunity to comment.

John Crenshaw,

Chairman, NMWF Board

Jesse Deubel,

NMWF Executive Director

Attachments:

Attachment 1: Sworn affidavit of Jesse Deubel, Executive Director, New Mexico Wildlife Federation, attesting to significant impairment of New Mexico anglers' constitutional and customary rights to fish on the waters proposed for non-navigable certification.

Attachment 2: The New Mexico Wildlife Federation's Dec. 19, 2017 letter to the State Game Commission in opposition to adoption of rule 19.31.22 NMAC, "Landowner Certification of Non-Navigable Water"

Attachment 3: A New Mexico fisherwoman blocked by a PVC pipe strainer across the upper Pecos River where it flows from the NM Game and Fish Department's Mora Campground into private property, counter to the NM Supreme Court's ruling that the exclusion is unconstitutional. The black PVC pipe strainer in the background marks the property line of the Hersh Family Trust, whose application for non-navigable certification was granted by the State Game Commission in November 2018. The property bordered in the foreground by white PVC is not certified as non-navigable.