

Transmittal Form

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Issuing agency name and address: NEW MEXICO DEPARTMENT OF GAME AND FISH Agency DFA code: 516

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Type of rule action: New [checked] Amendment [] Repeal [] Repeal/Replace [] Renumber [] Emergency [] (ALD Use Only) Most Recent Filing Date:

Title number: 19 Title name: NATURAL RESOURCES AND WILDLIFE

Chapter number: 31 Chapter name: HUNTING AND FISHING

Part number: 22 Part name: LANDOWNER CERTIFICATION OF NON-NAVIGABLE WATER

Amendment Description (If filing an Amendment): Amendment's NMAC Citation (If filing an Amendment):

Are there any materials incorporated by reference? Yes [] No [] Please list attachments or Internet sites if applicable.

If materials are attached, has copyright permission been received? Yes [] No [] Public domain []

Concise Explanatory Statement for rulemaking adoption:

Notice date(s): November 14, 2017 Hearing date(s): December 20, 2017 Rule Adoption date: 12/20/2017 Rule Effective date: 01/22/2018

Specific statutory or other authority authorizing rulemaking: Sections 17-1-14, 17-1-26 and 17-4-6 NMSA 1978

Findings required for rulemaking adoption. Please attach and sign additional page(s) if necessary. The purpose of 19.31.22 NMAC is to establish a certification process by which landowners can register their legally-posted property with the department that will identify portions of non-navigable waters that run through privately owned property.

Issuing authority (If delegated, authority letter must be on file with ALD): Name: Alexandra Sandoval Check if authority has been delegated []

Title: Director

Signature: (BLACK Ink only) Alexandra Sandoval Date signed: 12/21/17

**TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 31 HUNTING AND FISHING
PART 22 LANDOWNER CERTIFICATION OF NON-NAVIGABLE WATER**

19.31.22.1 ISSUING AGENCY: New Mexico State Game Commission.
[19.31.22.1 NMAC - N, 01-22-2018]

19.31.22.2 SCOPE: Department, staff, and landowners whose private property contains within its boundary, a segment of non-navigable public water.
[19.31.22.2 NMAC - N, 01-22-2018]

19.31.22.3 STATUTORY AUTHORITY: Section 17-1-14 NMSA 1978, Section 17-1-26 NMSA 1978, and Section 17-4-6 NMSA 1978, provide that the New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species.
[19.31.22.3 NMAC - N, 01-22-2018]

19.31.22.4 DURATION: Permanent.
[19.31.22.4 NMAC - N, 01-22-2018]

19.31.22.5 EFFECTIVE DATE: January 22, 2018, unless a later date is cited in the history note at the end of a section.
[19.31.22.5 NMAC - N, 01-22-2018]

19.31.22.6 OBJECTIVE: To establish rules, requirements, definitions and regulations implementing the process for a landowner to be issued a certificate and signage by the director and the commission that recognizes that within the landowner's private property is a segment of a non-navigable public water, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner.
[19.31.22.6 NMAC - N, 01-22-2018]

19.31.22.7 DEFINITIONS:

A. "Certified non-navigable public water" shall mean a segment of watercourse or river submitted to the department by a landowner which has met all requirements described in 19.31.22.8 NMAC and has been issued a certificate by the director, and approved by the commission.

B. "Commission" shall mean the New Mexico state game commission.

C. "Department" shall mean the New Mexico department of game and fish.

D. "Director" shall mean the director of the department of game and fish or designee.

E. "Landowner" shall mean any person or entity that has legal, record title to private property within the state of New Mexico.

F. "Navigable-in-fact" shall mean that a watercourse or river is navigable-in-fact when it was used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel on water. A navigable-in-fact determination shall be made on a segment by segment basis.

G. "Non-navigable public water" shall mean a watercourse or river which, at the time of statehood, was not navigable-in-fact. A watercourse or river is not navigable-in-fact when it was not used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel on water. The certification on non-navigable public water shall be made by the director and approved by the commission on a segment by segment basis.

H. "Segment" shall mean the watercourse or river located within the boundaries of a landowner's private property.

[19.31.22.7 NMAC - N, 01-22-2018]

19.31.22.8 LANDOWNER NON-NAVIGABLE PUBLIC WATER SEGMENT CERTIFICATION REQUIREMENTS:

A. Application: An application by a landowner for certification of non-navigable public water on a segment by segment basis shall be made on a form or in a manner provided by the department as prescribed by the

director. The form or manner shall be available to the public on or before February 2, 2018, via the department's website.

B. Contents: A landowner requesting certification of a non-navigable public water segment shall provide the following information:

(1) name of owner, address, telephone number, name of property or ranch, name of contact person authorized to grant written permission to access property;

(2) current recorded property deed(s) or other written, recorded instruments of title and a complete legal description of property(s); county; name(s) of non-navigable public water, stream or river on property; a map of sufficient size and detail to allow the identification of potential access points to water and access roads to be located by someone unfamiliar with the area shall be included;

(3) proof of publication of notice of application for certification for three consecutive weeks in a newspaper of general circulation in the county where the property is located.

(4) substantial evidence which is probative of the waters, watercourse or river's being non-navigable at the time of statehood, on a segment-by-segment basis. This may include any reports to the US department of interior from the territorial governor(s) of New Mexico, any pre-statehood cases discussing the navigability or non-navigability of New Mexico's watercourses or rivers, any title opinion or other expert opinion, and any other evidence that may be probative.

C. Application acceptance: An application shall be accepted for further consideration if it includes the required contents without regard to the merits of the application. An application shall not be refused for technical reasons. Refused applications may be amended, supplemented, and resubmitted and then reconsidered by the department and director in accord with the deadlines set forth herein for an original application. Refused applications can be appealed.

D. Application deadline: A landowner may engage in the certification process at any time by completing and submitting the proper application form. A refused application is without prejudice. [19.31.22.8 NMAC - N, 01-22-2018]

19.31.22.9 WRITTEN DETERMINATION AND RECOMMENDATION BY DIRECTOR AND DESIGNATION OF NON-NAVIGABLE PUBLIC WATER STATUS:

A. An accepted application shall be forwarded by the department to the director so that a determination can be made by the director whether the application meets the requirements set forth in 19.31.22.8 NMAC.

B. The director shall have 60 days to make a written determination and recommendation or a written rejection to the commission.

(1) If the director determines that the application meets the requirements set forth in 19.31.22.8 NMAC, the director's shall issue a written determination and recommendation to the commission that the segment in the application shall be designated a "non-navigable public water," stating the reasons for written determination and recommendation, and the matter shall be heard at a future regular meeting or special meeting, subject to availability of time and time constraints on the agenda, but in no event more than 180 days after the director issues a written determination and recommendation to the commission, for final vote of approval by the commission.

(2) If the director determines that the application does not meet the requirements set forth in 19.31.22.8 NMAC, the director shall issue a written rejection of the application stating the reasons for rejection, and the matter shall be heard at a future regular meeting or special meeting, subject to availability of time and time constraints on the agenda, but in no event more than 180 days after the director issues a written rejection, for final vote of approval by the commission.

C. The department shall post on its website, the director's recommendation to the commission at least 21 days before regular or special meeting at which the application will be presented to the commission.

[19.31.22.9 NMAC - N, 01-22-2018]

19.31.22.10 NOTICE OF WRITTEN DETERMINATION AND RECOMMENDATION OF NON-NAVIGABLE PUBLIC WATER STATUS: The posting of the written determination and recommendation by the director of proposed certification of non-navigable public water on the commission's agenda or written rejection for final vote and approval shall serve as notice of the commission's intent to take final action on the application and written determination and recommendation or written rejection of the director.

[19.31.22.10 NMAC - N, 01-22-2018]

19.31.22.11 MEETING PROCEDURES:

- A. The commission shall make and preserve a record of the meeting.
- B. 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.
- C. The comment period closes 14 days before the meeting at which the application will be considered for final action by the commission.
- D. Final action may be postponed or continued at the discretion of the commission but in no event shall a final determination as required in Subsection B of 19.31.22.9 NMAC exceed the 180 day deadline.
- E. The director shall provide copies of the application and supporting documentation and all comments and proposed documentary evidence to the commission members at least seven days before the meeting at which the application will be considered for final action by the commission. The same information shall be posted on the department website at least seven days before the meeting at which the application will be considered for final action by the commission.
- F. In a meeting held under this section, the chairman may admit any evidence, in his or her sole discretion, which is probative of the issues. The chairman may exclude, in his or her sole discretion, incompetent, irrelevant, immaterial and unduly repetitious evidence. Proposed documentary evidence may be received in the form of copies or excerpts. The commission may take notice of well-known, cognizable facts.
- G. The commission may take final action on the application by approving or rejecting the written determination and recommendation or written rejection of the director but is not limited to those options. The commission may take such other final action as necessary to resolve the application, including but not limited to determining and finding that a segment be designated a non-navigable public water.
- H. Within 60 days of the meeting, the commission shall issue its written final agency action and decision with the factual and legal basis for that decision. A copy of that decision will be given to all persons who were a party in the proceeding and every person who has filed a written request for notice of the final decision of that specific application.

[19.31.22.11 NMAC - N, 01-22-2018]

19.31.22.12 JUDICIAL REVIEW: A landowner having made application under this rule or a person with standing may appeal to the district court for relief in accordance with Section 39-3-1.1 NMSA 1978. Any appeal may not be filed more than 30 days after issuance of the written final agency action and decision. Any appeal filed outside that 30 day period is untimely. Upon appeal, the district court shall set aside the action and decision only if it is found to be:

- A. fraudulent, arbitrary, or capricious;
- B. not supported by substantial evidence in the record; or
- C. otherwise not in accordance with the law.

[19.31.22.12 NMAC - N, 01-22-2018]

19.31.22.13 FINAL VOTE AND APPROVAL BY COMMISSION AND EFFECT THEREOF:

- A. If the commission votes to approve the director's determination that a segment be designated a non-navigable public water or otherwise votes to determine and find that a segment be designated a non-navigable public water and issues a written final agency action and decision indicating the segment identified in the application or any portion thereof is now a "certified non-navigable public water", a certificate shall be issued by the director immediately following the issuance of the written final agency action and decision indicating the segment identified in the application, or any portion thereof identified by the commission, is now a "certified non-navigable public water". The certificate shall include sufficient information for recording purposes with the various county clerks of the state of New Mexico and shall be in a format sufficient for recording purposes with the various county clerks of the state of New Mexico. The certificate and certification shall run with the segment, the land, and the real property.
- B. The certificate formally recognizes that the segment and certain waters found on the private property are non-navigable public waters and therefore trespass on private property through non-navigable public water or via accessing public water via private property is not lawful unless prior written permission is received from the landowner in accordance with Section 17-4-6 NMSA 1978.

C. Landowners that receive an actual certificate are eligible to receive a sufficient number of signs for a reasonable fee. The fee is to fully compensate the department for the cost of sign production. The posting of signs and the addition of contact information written or adhered to the sign will be the responsibility of the applicant.

D. Sign requirements:

- (1) Signs shall be at least 144 square inches (12 inches by 12 inches)
- (2) Signs shall be printed in English and Spanish.
- (3) Signs shall state the following prohibitions in accord with Subsection C of Section 17-4-6

NMSA 1978, Hunting and fishing on private property; posting; penalty: No person engaged in hunting, fishing, trapping, camping, hiking, sightseeing, the operation of watercraft or any other recreational use shall walk or wade onto private property through non-navigable public water or access public water via private property unless the private property owner or lessee or person in control of private lands has expressly consented in writing.

- (4) Signs shall have the name and address of a person authorized to grant permission.

E. Sign posting requirements:

- (1) Signs shall be posted in at least six conspicuous places on the property.
- (2) Signs shall be posted along all the exterior boundaries of the property.
- (3) Signs shall be posted at each roadway or other way of access in conspicuous places.
- (4) Signs shall be posted where water line crosses all property boundaries.
- (5) Signs shall be posted every 500 feet along the exterior boundaries if property is not

fenced.

(6) Signs shall not be posted on any public land or any easements that the department or commission has acquired.

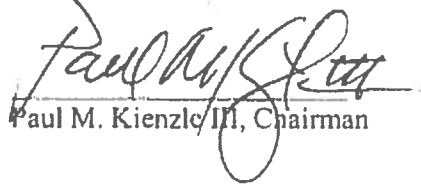
F. Effect of signage: A sign issued in accordance with this rule and meeting the requirements of this rule is prima facie evidence that the property subject to the sign is private property, subject to the laws, rules, and regulations of trespass and related laws, rules, and regulations.

[19.31.22.13 NMAC - N, 01-22-2018]

HISTORY OF 19.31.22 NMAC: [RESERVED]

Dated at Albuquerque, New Mexico, this 20th Day of December, 2017.

State Game Commission


Paul M. Kienzle III, Chairman

ATTEST:


Alexandra Sandoval, Secretary

CERTIFICATION OF AUTHENTICATION

State of New Mexico)
) ss
County of Bernalillo)

I, ALEXANDRA SANDOVAL, Director of the Department of Game and Fish of the State of New Mexico, do hereby certify that the foregoing new rule 19.31.22 NMAC, is a true copy of said regulation of the State Game Commission of the State of New Mexico; that said rule has been adopted, signed, and filed in the office of the Director in accordance with Section 17-2-5, New Mexico Statutes Annotated, 1978 Compilation and in the office of the State Records Center of the State of New Mexico in accordance with Section 14-4-1, New Mexico Statutes Annotated, 1978 Compilation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Director at Albuquerque, New Mexico, this 20th day of December, 2017.


Alexandra Sandoval, Director

