

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

**IN THE MATTER OF PROPOSED
AMENDMENTS TO 20.6.4 NMAC,
ESTABLISHING A NUTRIENT
TEMPORARY STANDARD**

WQCC No. 19-46 (R)

**New Mexico Environment Department,
Water Protection Division, Surface
Water Quality Bureau,**

Petitioner.

ORDER AND STATEMENT OF REASONS

This matter came before the New Mexico Water Quality Control Commission (“Commission”) on the Petition to Amend 20.6.4 NMAC, Establish a Nutrient Temporary Standard, and Request for Hearing of the New Mexico Environment Department (“Department”) filed on October 29, 2019 (“Petition”). The Department petitioned the Commission to amend the Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC) to create a new regulatory section, 20.6.4.318 NMAC, for Doggett Creek, and to establish a Temporary Water Quality Standard (“TS”) for the City of Raton Wastewater Treatment Plant (“WWTP”), NPDES Permit No. NM0020273. A duly constituted quorum of the Commission met on March 10, 2020, in Santa Fe, New Mexico and conducted a public hearing on the proposed rule change in accordance with the Commission’s rulemaking procedures in 20.1.6 NMAC (“public hearing”). Albuquerque Court Reporting Services made a verbatim transcript of the public hearing, including the subsequent deliberations of the Commission, pursuant to 20.1.6.303 NMAC.

Notice of the public hearing on the proposed amendments was published one time in English and Spanish in the *Taos News* on December 26, 2019, and in the *Santa Fe New Mexican*

on December 30, 2019. (NMED Exhibits 7-10). Notice of the public hearing on the proposed amendments was published in English and Spanish in the *New Mexico Register* on December 31, 2019, in Volume XXX, Issue 24. (NMED Exhibits 11 and 12). Notice of the public hearing on the proposed amendments was posted in English and Spanish on the Public Notice web page of the Department's website on January 7, 2020. (NMED Exhibit 15). Notice of the public hearing on the proposed amendments was posted in English and Spanish on the New Mexico Sunshine Portal on December 17, 2019 (NMED Exhibit 13), and an electronic communication to distribute the notice of hearing on proposed changes to 20.6.4 NMAC in both English and Spanish was sent to the Legislative Council Service on December 6, 2019. (NMED Exhibit 14). All notification requirements under NMSA 1978, Section 14-4-5.2 (2017) of the State Rules Act, NMSA 1978, Sections 14-4-1 to -11 (1967, as amended through 1995); NMSA 1978, Section 74-6-6(C) (1993) of the Water Quality Act, NMSA 1978, Sections 74-6-1 to -17 (1967, as amended through 2019); 20.1.6.201 NMAC; 40 C.F.R. § 25.4 (2020); and the Department's Public Involvement Plan in this matter were met. (NMED Exhibits 17, 18, 22 and 23).

In accordance with the Notice of Intent to Present Technical Testimony filed pursuant to 20.1.6.202 NMAC by the Department on February 19, 2020, during the public hearing the Department presented the technical testimony of two witnesses, Jennifer Fullam and Shelly Lemon. (NMED Exhibits 2 to 5).

Two officials from the City of Raton testified at the public hearing. No member of the general public submitted a written statement for the record, nor did any member of the general public provide oral non-technical testimony at the public hearing.

The hearing officer received NMED Exhibits 1 through 35 into the record.

The Hearing Officer closed the public hearing on March 10, 2020. Pursuant to 20.1.6.300(B)(7) NMAC, the hearing officer determined at the close of the hearing that the record should not be kept open for written submittals in accordance with 20.1.6.304 NMAC.

The Commission chose to deliberate immediately following the close of the hearing. After due deliberation, the Commission voted unanimously by roll call vote to create a new regulatory section for Doggett Creek, 20.6.4.318 NMAC, and to establish a TS for the WWTP, as set forth in NMED Exhibit 1, for the reasons stated below.

STATEMENT OF REASONS

1. Under NMSA 1978, Section 74-6-4(D) (2019) of the Water Quality Act, the Commission is authorized to “adopt water quality standards [including narrative standards and, as appropriate, water quality criteria necessary to protect designated uses] for surface ... waters of the state based on credible scientific data and other evidence appropriate under the [Act] . . . [giving] 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.” *See also*, Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC.

2. NMSA 1978, Section 74-6-4(E) (2019) of the Act authorizes the Commission to adopt regulations to prevent or abate water pollution in any specific geographic area of New Mexico, specifying “a standard of performance for new sources that reflects the greatest reduction in the concentration of water contaminants that the [C]ommission determines to be achievable through application of the best available demonstrated control technology, processes, operating methods or other alternatives,” and in so doing, giving “weight [the Commission] deems appropriate to all

relevant facts and circumstance, including: (a) the character and degree of injury to or interference with health, welfare, environment and property; (b) the public interest, including the social and economic value of the sources of water contaminants; (c) the 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; (d) the successive uses, including domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses; (e) feasibility of a user or a subsequent user treating the water before a subsequent use; and (f) federal water quality requirements.”

3. Under 20.1.6.200 NMAC, “[a]ny person may file a petition with the [C]ommission to adopt, amend or repeal any regulation within the jurisdiction of the [C]ommission.” The Department, as a state governmental entity, is included in the meaning of “person” in 20.1.6.7(N) NMAC.

4. On October 29, 2019, the Department filed its Petition with the Commission requesting, *inter alia*, that the Commission set the date for the public hearing on the date of the next scheduled regular meeting of the Commission. On November 20, 2019, the Commission issued its Notice of Hearing and Appointment of a Hearing Officer: (a) granting the Department’s request that the public hearing be held in Santa Fe, New Mexico, commencing on March 10, 2020 and continuing on subsequent days as necessary; and (b) appointing Commission Chair Jennifer Pruett as the hearing officer in accordance with 20.1.6.100(B) NMAC.

5. On February 17, 2020, the Department filed its Notice of Intent to Present Technical Testimony as required by 20.1.6.202 NMAC.

6. Nutrients from liquid waste systems are a leading cause of surface water quality

impairment in New Mexico waters. According to the *2018-2020 State of New Mexico Clean Water Act Section 303(d)/Section 305(b) Integrated Report (Nov. 1, 2018)*, Appendix B (“Causes and Sources Table”), nutrients are the second leading cause of water quality impairment in New Mexico’s perennial rivers and streams and the fourth leading cause of water quality impairment in lakes and reservoirs, impairing 1,140 miles and 5,750 acres, respectively. Nutrient pollution in waterbodies results in large daily swings of dissolved oxygen, which can change aquatic community dynamics. In some cases, these changes can result in nuisance algal blooms that lead to fish kills and other harmful effects.

7. 20.6.4.13(E) NMAC includes a narrative criterion for distinguishing plant nutrient concentrations from other than natural causes that will produce undesirable aquatic life or result in a dominance of nuisance species in surface waters of New Mexico. The Department interprets this narrative criterion using numeric nutrient threshold values that are based on reference conditions and applied to specific site classes in perennial, wadeable streams.

8. Wastewater facilities discharging to surface waters covered by those threshold values often need water quality-based effluent limits (“WQBELs”) for nutrients. As a result of the limited available dilution in many receiving waters, some wastewater facilities will have WQBELs (whether based on total maximum daily loads or not) that require the threshold concentrations to be met “end-of-pipe.” However, the required WQBELs might not be economically or technologically achievable for many permittees, in which instances adoption of temporary water quality standards may then be appropriate.

9. New Mexico’s regulations on temporary water quality standards at 20.6.4.10(F) NMAC are based on the U.S. Environmental Protection Agency (“EPA”) regulation on Water Quality

Standard variances at 40 C.F.R. § 131.14 (2015). Under 20.6.4.10(F)(12) NMAC “temporary standard” means “a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition (“HAC”) during the term of the temporary standard.”

10. Adoption of a temporary standard applicable to a specific water body segment (Doggett Creek), as provided in 20.6.4 NMAC and applicable sections in 40 C.F.R. Part 131, Water Quality Standards, specifically § 131.14, allows for making progress toward attaining an associated designated use and water quality criterion that are not currently feasible due to one or more factors listed in 40 C.F.R. § 131.10(g) (2015). The adoption of a temporary standard does not exempt dischargers from complying with all other applicable water quality standards or control technologies.

11. The proposed temporary standard represents the highest degree of protection feasible in the short term, limits the degradation of water quality to the minimum necessary to achieve the original standard by the expiration date of the temporary standard, and adoption will not cause the further impairment or loss of an existing use.

12. Under 40 C.F.R. § 131.14(b)(1)(v) (2015), if a temporary standard has a term greater than five (5) years, the HAC must be re-evaluated using all existing and readily available information no less frequently than every five (5) years after EPA approval of the HAC, with a provision specifying how the Department will obtain public input. Further, 20.6.4.10(F)(8) NMAC provides that all temporary standards in New Mexico are subject to a required review during each succeeding triennial review of water quality standards conducted in accordance with 20.6.4.10(A) NMAC.

13. The Commission approved 20.6.4.10(F) NMAC in 2017, thereby creating a framework for adopting temporary standards. The New Mexico temporary standards regulation is based on the EPA regulation on Water Quality Standard variances at 40 C.F.R. § 131.14 (2015). The EPA approved the New Mexico regulation under the Clean Water Act effective as of August 11, 2017.

14. The Department has conducted a substantial and complete economic and social impact and HAC analysis for the WWTP, in accordance with 40 C.F.R. § 131.10(g) and 20.6.4.10(F) NMAC, to determine whether or not attainment of the underlying nutrients standard is feasible now or within a defined period of time, because of one or more of the six factors listed in 40 C.F.R. § 131.10(g).

15. The underlying nutrients Water Quality Standard, including numeric interpretations of narrative criteria, is not attainable by the WWTP because controls more stringent than those required by §§ 301(b) and 306 of the Clean Water Act would result in substantial and widespread economic and social impact to the City of Raton. *See*, 40 C.F.R. § 131.10(g)(6) (2015).

16. The analysis undertaken by the Department identifies the highest attainable interim effluent condition to be achieved during the term of the temporary standard.

17. To implement the nutrient temporary standard for the WWTP, it is necessary to adopt a new water quality segment, “20.6.4.318 NMAC - CANADIAN RIVER BASIN: Doggett Creek,” and to establish a discharger-specific temporary standard for the WWTP.

18. Adoption of the nutrient temporary standard for the WWTP is appropriate because the Department has demonstrated that:

(a) attainment of the associated designated use and criterion, including numeric interpretations of narrative criteria, are not feasible now or in the short term, but may be attainable

within a definite period of time (*see*, 20.6.4.10(F)(1)(a) NMAC; hearing transcript pages 99 and 107-109);

(b) the proposed temporary standard represents the highest degree of protection feasible in the short term, limits the degradation of water quality to the minimum necessary to achieve the original standard by the expiration date of the temporary standard, and adoption of the proposed temporary standard will not cause the further impairment or loss of existing uses or currently attained ambient water quality (*see*, 20.6.4.10(F)(1)(b) NMAC; NMED Exhibit 3 parts II and III; and hearing transcript pages 107-109);

(c) for publicly owned treatment works like the WWTF, there are no technology-based effluent limits (*see* 20.6.4.10(F)(1)(c) NMAC; Section 301(b)(2)(A) of the Clean Water Act; and NMED Exhibit 5 part VII section B; hearing transcript pages 58-59,); and

(d) it is technically feasible to make incremental improvements in the surface water quality of the specific water body segment (Doggett Creek) during the proposed term of the temporary standard (*see*, NMED Exhibits 5 part VII section E, and 33).

19. In considering adoption of the proposed temporary standard, the Commission is required under NMSA 1978, Section 74-6-4(E) (2019) to give, and the Commission has given, weight it deems appropriate to all relevant facts and circumstances, including those enumerated in (1) through (7) of that law.

20. The Commission has considered all relevant facts and circumstances in the record and concludes that the proposed amendment and temporary standard as adopted by the Commission would not cause injury or interference with health, welfare, animal and plant life, property and the environment. The Commission further concludes that the proposed amendment and temporary

standard as adopted by the Commission is technically practical, economically reasonable, and in the public interest.

21. The proposed term of the temporary water quality standard set forth in NMED Exhibit 1 is particular to the WWTP, and does not establish a precedent for any other petition that may come before the Commission under 20.1.6.200 NMAC to amend the Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC) to create a new regulatory section and establish a temporary water quality standard pursuant to NMSA 1978, Section 74-6-4(E) (2019) of the Water Quality Act.

ORDER

Based on the foregoing stated reasons, the Commission, by unanimous roll call vote of its twelve members present at the public hearing adopted the proposed amendments to 20.6.4 NMAC. The Commission amended 20.6.4 NMAC to create a new section, 20.6.4.318 NMAC, for Doggett Creek, and established a Temporary Water Quality Standard for the City of Raton Wastewater Treatment Plant, NPDES Permit No. NM0020273, as set forth in NMED Exhibit 1, with any appropriate format or style corrections or other changes required by rule of the State Records Administrator to file the amendment to 20.6.4 NMAC with the New Mexico State Records Center, as provided in NMSA 1978, Section 14-4-3 (2017).

IT IS SO ORDERED.

Done this 7th day of April, 2020, in Santa Fe, New Mexico.

JENNIFER PRUETT, Chair
Water Quality Control Commission