

New Mexico Environment Department
Memorandum of Understanding Between the
U.S. Environmental Protection Agency Region 6
and the
New Mexico Environment Department

PURPOSE

1. The purpose of this Memorandum of Understanding (MOU) is to set forth the basic covenants and commitments between the U.S. Environmental Protection Agency (EPA) Region 6 and the State of New Mexico Environment Department (NMED), with respect to management of the Total Maximum Daily Load (TMDL) program.
2. The TMDL program is statutorily authorized by Section 303(d) of the Clean Water Act (CWA), 33 U.S.C. §1313 (d). CWA §303 (d) provides for: 1) identification of waters for which applicable technology-based effluent limitations and other controls are not stringent enough to implement water quality standards; 2) establishment of a priority ranking for water quality limited segments (WQLSs); and 3) establishment of TMDLs as necessary

BACKGROUND

3. As a result of pending litigation regarding the promulgation of TMDLs as required by CWA §303 (d) in the state of New Mexico, Forest Guardians, et al. v. Browner, Civil action No. 96-0826 LH, the EPA Region 6 endeavors to enter into a Consent Decree and Settlement Agreement with Forest Guardians. The State of New Mexico is not a party to the aforementioned litigation and is such is not bound by any settlement or agreement between the litigants or any court order upon the litigants. The Consent Decree, if approved by the Court, establishes a ten-year schedule for TMDL development and completion on certain waterbodies within the State of New Mexico. The Settlement Agreement establishes that TMDLs will be developed and completed by the year 2016 for all remaining segments on the NMED 1996 CWA §303 (d) list.
4. The EPA Region 6 and NMED agree to utilize the above mentioned schedules provided in the proposed Consent Decree and Settlement Agreement between EPA and Forest Guardians as the basis of scheduling work to be done by NMED under this MOU. As such, the schedules are included as Attachment A to this MOU. Attachment A is made part of and is fully incorporated into this MOU. The EPA Region 6 acknowledges the effort and commitment of New Mexico regarding the implementation of the §303 (d) program.

RESPONSIBILITIES OF NMED

5. NMED is the lead Agency for development of the State's CWA §303 (d) list and TMDL development in the State of New Mexico, pursuant to §303 (d) and its implementing regulations. NMED is responsible for collecting formal public input/comment on draft TMDLs, as described in the approved CPP for inclusion into the State's Water Quality Management Plan, and submittal of final TMDLs to EPA Region 6 for review and approval.
6. NMED agrees to the schedules set forth in Attachment A to this MOU, the terms of which are fully incorporated into this MOU. NMED also agrees to develop and propose TMDLs for the WQLSs identified on the 1996 §303 (d) list, as appropriate. NMED understands that there is no obligation to submit TMDLs for any WQLS where it has been established by NMED and approved by EPA Region 6 that a TMDL is unnecessary pursuant to §303 (d) and the implementing regulations at 40 C.F.R. §130.7.
7. NMED understands that, its primary responsibility to develop and propose TMDLs incorporates, when practicable, a watershed/basin approach in accordance with applicable federal regulations and guidance documents. NMED will provide EPA Region 6 with a draft TMDL for EPA's technical review.
8. In the event that NMED fails to meet the schedule included in Attachment A, NMED will meet with EPA Region 6 within one year after any deadline missed. NMED will be prepared to assess with EPA Region 6, the activities which have been undertaken and identification of necessary steps that NMED or EPA need to take to ensure compliance with the schedules in Attachment A.

RESPONSIBILITIES OF EPA REGION 6

9. EPA Region 6 will work in partnership with NMED to attain the schedules established in Attachment A. Region 6 will review and approve/disapprove TMDLs submitted by NMED, and will provide financial assistance, technical guidance, assistance and training as TMDLs are developed. Region 6 will also review and approve/disapprove ' is conducting an ongoing internal review of New Mexico standards, designated uses, probable source(s) of pollutant/threat and probable causes of non-support/threat to determine their scientific validity. If it is determined by NMED that actual conditions of stream reaches are not accurately reflected in the section 303 (d) list, NMED reserves the right to propose changes to the water quality standards, to add or delete invalid designated uses, probable sources(s) of pollutant/threat and probable causes of non-support/threat and provide the science for the decisions to any of the interested parties. Any final decision regarding proposed changes to water quality standards shall be made in accordance with the Clean Water Act.

EPA, with the exception of Willow Creek in the drainage of the Terrero Mine, will be primarily responsible for the domestic water supply bundle as

well as the Santa Fe River. Primary responsibility for the Middle Rio Grande TMDL will be mutually determined at a later date.

10. If NMED fails to establish TMDLs in a manner consistent with the established ten-year Consent Decree schedule provided in Attachment A for any reason, including but not limited to lack of financial assistance from EPA, EPA Region 6 will take steps necessary to complete TMDLs within two years of the missed deadline. EPA Region 6 will meet with NMED within one year after any missed deadline to discuss activities already undertaken and identify necessary steps to ensure compliance with the Consent Decree schedule in Attachment A. In any event, EPA Region 6 assures that all WQLSs still requiring TMDLs will be established by no later than 2016, in accordance with the settlement Agreement schedule.

11. EPA Region 6 will make every effort to provide NMED with funding to support the appropriate level of effort in establishing scheduled TMDLs. In addition, EPA Region 6 will provide contractor support when funds allow, and there is a need for additional technical assistance concerning TMDL development and the involvement of affected persons or entities. EPA contractor-developed TMDLs will be provided to NMED. NMED will complete the formal public review and comment process, and include the contractor developed TMDLs in their proposals. EPA contractor support can include assistance to EPA and the state in outreach and coordination with private and public stakeholders to obtain needed information and build support for recommended TMDL implementation plans.

12. EPA Region 6 will make its best effort to provide sufficient funding to satisfy the schedules for TMDL development in accordance with Attachment A. However, NMED recognizes that EPA Region 6 cannot guarantee funding for the entire schedules included in Attachment A, as Congress provides EPA with funding approval on a yearly basis.

13. If the allocated, yearly funding can no longer sustain the level of quality and scientific performance required to promulgate TMDLs, EPA Region 6 and NMED will work together to determine what additional work EPA Region 6 will need to perform. The additional work and/or TMDL development will be consistent with the goal of satisfying the Attachment A schedules.

JOINT NMED/EPA REGION 6 RESPONSIBILITIES

14. An interagency New Mexico TMDL team will be established with NMED and EPA Region 6 staff representatives, and other Federal/State representatives as necessary. This team will ensure that the schedules provided in Attachment A are completed. Appropriate program representatives will be designated by EPA Region 6 and NMED jointly.

15. NMED and EPA Region 6 will jointly determine who will have primary responsibility for TMDL development for each bundle and stream segment within each bundle.

EPA Region 6 will take primary responsibility during scheduled TMDL development only after a request from NMED. However, if TMDL development has not been completed within the time frames provided in the Consent Decree schedule found in Attachment A, EPA Region 6 will have primary responsibility to complete TMDLs within two years. With respect to the Settlement Agreement schedule, EPA has until 2016 to establish TMDLs for the remaining WQLSs still requiring TMDLs. NMED and EPA Region 6 will jointly determine who will have primary responsibility for TMDL development to meet the Settlement Agreement schedule.

MODIFICATION AND LIMITATION

16. EPA Region 6 and New Mexico recognize that the performance of this MOU is subject to the fiscal and procurement laws and regulations of New Mexico and the United States, such as the Anti-Deficiency Act. Accordingly, this MOU may require modification to assure compliance with applicable law.

17. EPA Region 6 and New Mexico understand that the covenants and commitments made pursuant to this MOU are based upon statutes and regulations currently in effect. Changes to such laws and/or regulations may require modification to this MOU. EPA and New Mexico also understand that this MOU may be modified in accordance with actions taken by courts of law, especially concerning the Forest Guardians et al. v. Browner lawsuit.

18. The EPA Region 6 and the NMED agree that difficulties may arise in implementing the requirements of this MOU. Therefore, both parties agree that the provisions of this MOU may be changed as necessary because of other water quality management priorities, and resource considerations.

19. This MOU creates no cause of action against either party beyond those, if any, that may already exist under state or federal law. In addition, both parties agree that this MOU cannot be used against one another as an enforceable order or contract in any court proceedings. This MOU shall be reviewed and modified as needed.

LEGAL EFFECT

20. This MOU does not create contractual rights, liabilities or responsibilities on the part of NMED, EPA or any other person, party or entity. In addition, the execution and implementation of this MOU does not constitute an explicit or implicit agreement by either EPA or New Mexico to subject itself to the jurisdiction of any federal or state court. Nor shall this MOU be construed as an admission by New Mexico or EPA that either failed to implement the provisions of CWA Sections 303(d). Nor shall this MOU be construed as creating any right or benefit, substantive or procedural, enforceable in law or in equity, by any person or entity against EPA or New Mexico. This MOU shall not create any right to judicial review involving compliance or noncompliance with the MOU. There are no third party beneficiaries to this MOU, including but not limited to the

plaintiffs in Forest Guardians et al. v. Browner.

Nothing in this MOU shall be construed to require actions by EPA, or New Mexico which are inconsistent with local, state or federal laws or regulations or any court order.

TERMINATION

21. This agreement shall become effective as soon as it is signed by the parties and shall continue in force unless terminated by either party upon sixty (60) days notice in writing. Either party may provide written notice of termination to the other party for any reason, including but not limited to factors such as: levels of federal funding that become inadequate to maintain the requires level of effort necessary to properly conduct TMDL field studies and determinations or any court order on change in law which requires termination of this MOU. In addition, either party may submit a written notice of termination when all responsibilities and obligations required by this MOU and the attached schedules have been completed by the parties or any change in the law or issuance of a court order may also give rise to termination of this MOU.

New Mexico Environment Department U.S. EPA - Region 6

Mark E. Weidler William B. Hathaway

Title Title

Cabinet Secretary Director, Water Quality Protection Division

Please send **comments, questions, bug reports** to Gary King at the Surface Water Quality Bureau of the New Mexico Environment Department.

Questions or comments about this Web site? Please send E-mail to the NMED Webmaster.

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