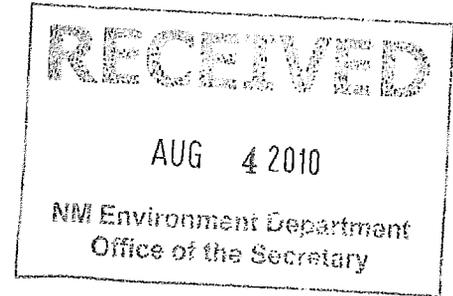




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

JUL 29 2010



Ron Curry, Chair
State of New Mexico Water Quality Control Commission
P.O. Box 26110
Santa Fe, New Mexico 87502

Dear Mr. Curry:

Thank you for submitting New Mexico's 2010 § 303(d) List of Water Quality Limited Segments. The Environmental Protection Agency (EPA) has conducted a complete review of the submissions received; April 22, 2010 and supporting documentation and supplemental information provided at EPA's request. During this review, we worked closely with staff from the New Mexico Environment Department to ensure that the Final 2010 § 303(d) List accurately reflected impaired water bodies in New Mexico based on available data. I would like to acknowledge that this could not have been possible without the close cooperative efforts by the staff of both agencies.

Based on this review, EPA has determined that New Mexico's 2010 § 303(d) List of Water Quality Limited Segments still requiring Total Maximum Daily Loads meets the requirements of § 303(d) of the Clean Water Act and EPA's implementing regulations. By this final action, EPA is taking an approval action regarding the State's decisions to list all the water bodies and associated pollutants identified in the Final 2010 § 303(d) List of the State's listing submission and associated priority rankings. The statutory and regulatory requirements, and summary of EPA's review of New Mexico's compliance with each requirement, are described in the enclosed Record of Decision document.

Thank you for your efforts to develop the Final New Mexico 2010 § 303(d) List. If you have questions on any of the above information, feel free to give me a call at (214) 665-7101 or call Forrest John of my staff at (214) 665-8368.

Sincerely,

Miguel I. Flores, Director
Water Quality Protection Division

cc: Glenn Saums, Acting Bureau Chief, New Mexico Environment Department

Enclosure

RECORD OF DECISION DOCUMENT FOR THE APPROVAL OF NEW MEXICO'S CLEAN WATER ACT 2010 § 303(d) LIST

The statutory and regulatory requirements, and the Environmental Protection Agency's (EPA's) review of the State of New Mexico's compliance with each requirement, are described in detail below. Today, by this final action, EPA is taking an approval action regarding the State's decisions to list all the water bodies and associated pollutants identified in the Final 2010 § 303(d) List of the State's listing submission and associated priority rankings.

Administrative Records Cited

1. Letter from State of New Mexico Water Quality Control Commission to Miguel Flores, Water Quality Protection Division, Region 6, EPA. Receipt Date Stamp 22 April 2010.
2. State Of New Mexico Procedures For Assessing Standards Attainment For The Integrated § 303(d) /§ 305(b) Water Quality Monitoring And Assessment Report: Assessment Protocol, Revised June 19, 2009. Available at <ftp://ftp.nmenv.state.nm.us/www/swqb/MAS/Protocols/AssessmentProtocol+Appendices.pdf>
3. Guidance for Water Quality Based Decisions: The TMDL Process. EPA 440/4-91-001. April 1991. Available at <http://www.epa.gov/waterscience/library/modeling/SASD0109.pdf>.
4. EPA 2002 Integrated Water Quality Monitoring and Assessment Report Guidance. November 19, 2001. Available at <http://www.epa.gov/owow/tmdl/2002wqma.html>
5. State of New Mexico 2010 – 2012 State of New Mexico Clean Water Act § 303(d)/ § 305(b) Integrated Report, Appendix C, Response to Comments. April 13, 2010. Available at <ftp://ftp.nmenv.state.nm.us/www/swqb/303d-305b/2010/AppendixC-ResponseToComments.pdf>
6. Water Quality Limited Segments-Pollutant Combinations (Category 5 Waters)/State of New Mexico 2010 § 303(d) List

Purpose

The purpose of this review document is to describe the rationale for EPA's approval of New Mexico's 2010 § 303(d) List of Water Quality Limited waters requiring Total Maximum Daily Loads (TMDLs). The following sections identify those key elements to be included in the list submission based on the Clean Water Act (CWA) and EPA regulations. See 40 CFR § 130.7. EPA reviewed the methodology used by the State in developing the § 303(d) list and the State's description of the data and information it considered. EPA's review of New Mexico's 2010 § 303(d) List is based on whether the State reasonably considered all existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

Statutory and Regulatory Background

Identification of WQLSs for Inclusion on § 303(d) List

Section 303(d)(1) of the CWA directs states to identify those waters within its jurisdiction for which effluent limitations required by § 301(b)(1)(A) and (B) of the CWA are not stringent enough to assure attainment with any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and

RECORD OF DECISION DOCUMENT FOR THE APPROVAL OF NEW MEXICO'S CLEAN WATER ACT 2010 § 303(d) LIST

the uses to be made of such waters. The § 303(d) listing requirements apply to waters impaired by point and/or nonpoint sources, pursuant to EPA's long standing interpretation of § 303(d).

EPA regulations provide that states do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology based effluent limitations required by the CWA; (2) more stringent effluent limitations required by state or local authority; and (3) other pollution control requirements required by state, local, or federal authority. See 40 CFR § 130.7(b)(1).

Consideration of Existing and Readily Available Water Quality Related Data and Information

In developing § 303(d) lists, the states are required to assemble and evaluate all existing and readily available water quality related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the state's most recent § 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate non-attainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any § 319 non-point assessments submitted to EPA. See 40 CFR § 130.7(b)(5). In addition to these minimum categories, the states are required to consider any other data and information that are existing and readily available. EPA's 1991 "Guidance for Water Quality Based Decisions" describes categories of water quality related data and information that may be existing and readily available. See Administrative Record No. 3. While the states are required to evaluate all existing and readily available water quality related data and information, the states may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring the states to assemble and evaluate all existing and readily available water quality related data and information, EPA regulations at 40 CFR § 130.7(b)(6) require the states to include as part of their submissions to EPA documentation to support decisions to rely or not rely on particular data and information for decisions to list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the EPA Regional Administrator. The State described in its submission titled "2010 – 2012 State of New Mexico Integrated Clean Water Act § 303(d)/§ 305(b) Report" how it used existing and readily available data in the preparation of New Mexico's § 303(d) List for 2010.

Priority Ranking

EPA regulations also codify and interpret the requirement in § 303(d)(1)(A) of the CWA that the states establish a priority ranking for listed waters. The regulations at 40 CFR § 130.7(b)(4) require the states to prioritize waters on their § 303(d) lists for TMDL development, and also to identify those Water Quality Limited Segments (WQLSs) targeted for TMDL development in the next two years. In prioritizing and targeting waters, the states must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. See § 303(d)(1)(A) CWA. As long as these factors are taken into account, the CWA

RECORD OF DECISION DOCUMENT FOR THE APPROVAL OF NEW MEXICO'S CLEAN WATER ACT 2010 § 303(d) LIST

provides that the states establish priorities. The states may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats; recreational, economic, and aesthetic importance of particular waters; degree of public interest and support; and the state or national policies and priorities. See 57 FR 33040, 33045 (July 24, 1992), and Administrative Record No. 3.

EPA reviewed the State's priority ranking of listed waters for TMDL development, and concludes that the State properly took into account the severity of pollution and the uses to be made of such waters. In addition, EPA reviewed the State's identification of Water Quality Limited Segments targeted for TMDL development in the next two years, and concludes that the targeted waters are appropriate for TMDL development in this time frame.

Review of New Mexico's Submission

Consideration of Existing and Readily Available Water Quality-Related Data and Information.

EPA has reviewed the State's submission, and has concluded that the State developed its § 303(d) list in compliance with § 303(d) of the CWA and 40 CFR § 130.7. EPA has determined that New Mexico's submission includes all waters that meet § 303(d) listing requirements. Therefore, regarding New Mexico's 2010 Final § 303(d) List submission, EPA is taking an approval action. EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

As suggested by EPA guidance, New Mexico chose to combine the State's 2010 § 305(b) report and § 303(d) List into a single report following EPA's listing guidance titled "Guidance for the 2002 Integrated Assessment and Reporting on the Quality of States' Waters" ("Integrated Report"). See Administrative Record No. 4. A single assessment methodology for the Integrated Report was used for both the § 305(b) reporting and the § 303(d) listing activities. The Integrated Report included five categories as established in EPA guidance. Category 5, which is the New Mexico 2010 § 303(d) List was also included in the report. Category 5 is the portion of the Integrated Report on which EPA is taking action. See Administrative Record No. 6.

While EPA reviewed New Mexico's listing methodology as part of our review of the listing submission, EPA's approval of the State's listing decisions should not be construed as concurrence with or approval of the listing methodology. EPA is not required to take action on the listing methodology. See 40 CFR § 130.7. EPA's decision to approve New Mexico's listing decisions is based on EPA's review of the data and information submitted concerning individual waters and the State's evaluations of those waters. While EPA considered the State's listing methodology as part of its review, our evaluation was intended to determine whether the State had identified all waters that meet federal listing requirements specified in § 303(d) of the CWA and 40 CFR § 130.7. Furthermore, a State's applicable water quality standards are the basis for determining whether a waterbody is impaired by a pollutant and therefore included on the State's § 303(d) List (Category 5). See 40 CFR § 130.7(b)(3).

RECORD OF DECISION DOCUMENT FOR THE APPROVAL OF NEW MEXICO'S CLEAN WATER ACT 2010 § 303(d) LIST

The listing methodology employed by New Mexico for the 2010 § 303(d) List describes a set of decision criteria that were flexibly applied. In general, waters were listed in cases where samples exceeded the applicable water quality standards.

As part of the State's ambient water quality assessment process, water quality standards segments, defined in § 20.6.4.7.M NMAC, are further divided into assessment units (AUs) for use impairment determination and linked to the National Hydrographic Dataset (NHD) for national electronic reporting requirements. Assessment Units are stream reaches, lakes, or reservoirs defined by hydrologic boundaries, WQS, geology, topography, incoming tributaries, and surrounding land use/ land management. See Administrative Record No. 2.

Public Participation

The process for identifying water quality limited segments requires the involvement of the general public commonly referred to as the *public participation process*. The *public participation process* is intended to foster public awareness and open processes of government decision making. See 40 CFR § 25.1(a). At a minimum, the *public participation process* must provide, encourage and assist the participation of the public or segments of the public which may have a particular interest in a given program or decision. See 40 CFR § 25.3(a) and § 25.4(b)(5). The public notification must be provided far enough in advance of agency action to permit time for public response which in general should not be less than 30 days. See 40 CFR § 25.4(c). The State's *public participation process* is to be clearly described in the State Continuing Planning Process (CPP). See 40 CFR § 130.7(a).

EPA has determined that New Mexico in general took reasonable steps to solicit all existing and readily available water quality-related data and information from members of the public and government agencies via the public participation for New Mexico's 2010 Integrated Report by the State of New Mexico as outlined:

1. The New Mexico Environment Department (NMED) solicited existing and readily available data via public notice April 20, 2009 through May 20, 2009.
2. The entire 2010 Integrated Report was opened for a 60-day public comment period from December 17, 2009 through February 15, 2010, to fulfill public participation requirements and generate public comments.
3. Notices were placed in the following newspapers:
 - a. Albuquerque Journal
 - b. Santa Fe New Mexican
 - c. Farmington Daily Times
 - d. Las Cruces Sun News
 - e. Silver City Daily Press
4. New Mexico's Final 2010 Integrated Report was received by EPA Region 6 on April 22, 2010.

EPA has reviewed New Mexico's description of the data and information it considered, its methodology for identifying waters, and the State's responsiveness summary dated April 13,

RECORD OF DECISION DOCUMENT FOR THE APPROVAL OF NEW MEXICO'S CLEAN WATER ACT 2010 § 303(d) LIST

2010. See Administrative Record No. 5. EPA concludes that in general the State properly assembled all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR § 130.7(b)(5). EPA concludes that the State's decisions in general to list the waters identified in its listing submission are consistent with federal listing requirements.

Radioactive Listings

Section 502(6) of the CWA (See 33 U.S.C. § 1362 et seq.) defines *pollutant* to include radioactive materials except those regulated under the Atomic Energy Act. See *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976). EPA interprets § 303(d) of the CWA to require EPA establishment or approval of § 303(d) or TMDLs for *pollutants*. Waters listed on New Mexico's 2010 § 303(d) List as impaired by radioactive materials may have a range of probable sources, e.g., watershed runoff following wildfire, natural sources, erosion, or sedimentation, many of which have no relationship to activities regulated by the Atomic Energy Act of 1954, § 1 et seq. as amended, 33 U.S.C.A. § 1251 et seq. (AEA). Therefore, EPA approves New Mexico's listings as consistent with § 303(d) and the Agency's implementing regulations, insofar as these waters are listed for radioactive materials that are *pollutants* under the CWA. If it is subsequently demonstrated that the radioactive material for which a water is listed is not a *pollutant* under the CWA, there would be no obligation to establish or approve a TMDL for such material.

Administrative Record Supporting This Action

In support of this decision to approve the State's listing decisions, EPA carefully reviewed the materials submitted by the State with its § 303(d) listing decision. The administrative record supporting EPA's decision comprises materials submitted by the State, copies of the New Mexico 2010 § 303(d) List, associated federal regulations, and EPA guidance concerning preparation of § 303(d) Lists, and this Record of Decision and supporting reports. EPA determined that the materials provided by the State with its submission provided sufficient documentation to support our analysis and findings that the State listing decisions meet the requirements of the CWA and associated federal regulations. We are aware that the State compiled and considered additional materials (e.g., data and water quality analysis reports) as part of its list development process that were not included in the materials submitted to EPA. EPA did not consider these additional materials as part of its review of the listing submission. It was unnecessary for EPA to consider all of the materials considered by the State in order to determine that the State complied with the applicable federal listing requirements. Moreover, federal regulations do not require the State to submit all data and information considered as part of the listing submission.