Sent Via Electronic Mail

September 21, 2021

William V. Wechsler
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P.O. Box 5400
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Via email to william.wechsler@nnsa.doe.gov

RE: NMED Comments on Sandia National Laboratories' Tijeras Arroyo Use Attainability Analysis

Dear William V. Wechsler,

On June 8, 2020, the New Mexico Environment Department ("NMED" or "Department") Surface Water Quality Bureau ("SWQB") received a Use Attainability Analysis ("UAA") dated December 18, 2019, for Tijeras Arroyo-Rio Grande to Four Hills Bridge Reach prepared by Sandia National Laboratories, U.S. Department of Energy, National Nuclear Security Administration ("SNL"). SNL conducted the UAA in accordance with a work plan approved by NMED on February 9, 2018.

The UAA evaluates the attainability of the aquatic life and recreational designated uses for Tijeras Arroyo from the Rio Grande to the Four Hills bridge in Albuquerque, New Mexico. As described in the approved work plan, SNL planned to evaluate the appropriate designated uses using the SWQB's Hydrology Protocol survey methodology, in accordance with 20.6.4.15(C) NMAC.

Since NMED's approval of the work plan, the Environmental Protection Agency ("EPA") expressed concerns over granting EPA technical approval, pursuant to 20.6.4.15(C) NMAC, prior to a rulemaking before the Commission. Therefore, the UAA process as described in 20.6.4.15(C) NMAC cannot be used for proposed amendments related to this UAA. Following a discussion between SNL and SWQB on February 11, 2021, both parties decided that SNL would take the lead and proceed with petitioning for the aquatic life and recreational designated use amendments for Tijeras Arroyo through the standard rulemaking process for entities other than the Department, in accordance with 20.6.4.15(D) NMAC.

The Department provides the following comments on the draft UAA as submitted by SNL on June 8, 2020, with the expectation that the UAA and proposed amendments will be brought before the Water Quality Control Commission in a standard rulemaking proceeding consistent with the State Rules Act (NMSA 1978, 14-4) and Regulations for the Water Quality Control Commission (20.1.6 NMAC) prior to submittal to EPA in accordance with 40 CFR § 131.20 and 40 CFR § 131.6. The Department's comments may not be inclusive, and the Department reserves the right to bring forth additional findings as appropriate.

General Comments

- Since the process for the UAA must change based on EPA' concerns over granting technical approval, SNL must amend the work plan to reflect the applicable rulemaking process. Given it is only the administrative process of the work plan that must be amended, SNL may proceed with the development of a revised UAA before providing a revised work plan to the Department.

- All references to an expedited UAA process should be amended in the UAA to reflect the applicable rulemaking process in 20.6.4.15(D) NMAC.
- SNL uses Factor 2 as justification for the UAA, which states that "natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use…" (40 CFR § 131.10(g)). The UAA should better connect how low-flow conditions prevent the attainment of the marginal warmwater aquatic life and primary contact recreation designated uses (i.e., the Clean Water Act Section 101(a)(2) uses).
- The Department recommends including a section outlining the UAA framework, such as the reasoning behind the analysis, the designated uses for Tijeras Arroyo and background on how the proposed amendment would protect the water quality standards of downstream tributaries.
- In accordance with 40 CFR § 131.10(i), a designated use may not have criteria less stringent than the existing use. The Department recommends including a section demonstrating the proposed amendment maintains protections for Tijeras Arroyo under the State's antidegradation policy.
- Section 7(a)(2) of the Endangered Species Act ("ESA") requires EPA to consult with the U.S. Fish and Wildlife Service to ensure that any action authorized by the EPA is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species. To assist the EPA, the UAA should include a preliminary screening of listed terrestrial and aquatic threatened and endangered species within the geographical areas analyzed for potential designated use changes. The Department recommends including a section discussing the associated Threatened and Endangered species utilizing Tijeras Arroyo that the proposed designated use amendments may impact. In particular the UAA must evaluate potential impacts of amending the designated aquatic life uses in Tijeras Arroyo on populations of the Rio Grande silvery minnow (*Hybognathus amarus*) in the downstream reaches of the Rio Grande. The Department recommends using the U.S. Fish and Wildlife Service's Information for Planning and Consultation (IPaC) project planning tool (https://ecos.fws.gov/ipac/) to determine if the listed waterbodies in this UAA overlap with listed species or critical habitat (when applicable).
- Regarding downstream protections, EPA recommends the UAA include a characterization of the permitted discharges to Tijeras Arroyo.
- The Department recommends Section 2 of the UAA be titled "General Site Conditions" to be more reflective of the content. If there are any hydrologic modifications such as dams which could be removed; human caused conditions that can be remedied; and low flow conditions that permitted discharges can supplement, they should be noted and addressed.
- In Section 1.4, last sentence, SNL should specifically state that this UAA focuses on Factor 2 because natural, ephemeral, intermittent or low flow conditions or water levels in this reach of Tijeras Arroyo prevent the attainment of the "marginal warmwater aquatic life" and "primary contact" designated uses.
- The Department appreciates SNL's inclusion of surveys and supporting data as appendices to the UAA. The Department requests SNL include a new section to discuss quality assurance and quality control measures taken to ensure data used to support this UAA are appropriate and defensible.

Introduction

- The UAA states that the Hydrology Protocol was conducted to help NMED and the EPA determine whether the reach is most appropriately classified as intermittent or ephemeral. The Department requests this statement be amended. The UAA should state that SNL used the Hydrology Protocol surveys to determine the hydrology as supporting evidence that the current aquatic life and recreational designated uses are not attainable based on Factor 2.

Scope of Work

- The UAA states that the Hydrology Protocol survey method was designed to evaluate whether a stream is ephemeral or intermittent under the New Mexico *Standards for Interstate and*

Intrastate Surface Waters (20.6.4 NMAC). This statement is not entirely accurate. Under the State's WQMP/CPP, the Hydrology Protocol is a survey methodology approved for determining the hydrology of a tributary but does not amend the designated uses under NMAC without a UAA. A UAA is required under 20.6.4 NMAC to change a designated use to a less stringent use. SNL should reword the language in the UAA to correct the statement.

Background

- The UAA has a statement that the 303(d) List has a footnote that explains that NMED must complete the process detailed in 20.6.4.15(C) NMAC. Although the listing states, in part "… [t]he process detailed in 20.6.4.15 NMAC Subsection C must be completed in order to include a waterbody under 20.6.4.97 NMAC. Until such time, this waterbody will remain under 20.6.4.98 NMAC," it does not limit this task to the Department. A UAA process following 20.6.4.15(D) NMAC is also sufficient to amend the designated use through a UAA. SNL should amend language to the UAA to address the UAA process.
- The UAA references the process for an expedited UAA under Appendix B; however, Appendix B appears to have the Hydrology Protocol field forms and a "UAA Actions and Regulatory Crosswalk" that the Department provided as an informative tool for SNL. This crosswalk is not the process for an expedited UAA pursuant to 20.6.4.15(C) NMAC; therefore, reference should not be made to this document.
- In addition, NMED provided the "Regulatory Crosswalk" to SNL with a disclaimer that it was for informational purposes only and may not contain all the regulatory requirements associated with the UAA process. The Department requests SNL remove this reference and instead refer to the specific regulatory citations in the UAA itself, as applicable. **Sub-reach Observations**
- On page 20 of the UAA, there is a reference to the old sanitary sewer line. Please explain how the sewer line impacts streamflow, if at all, in regard to the Factor 2 demonstration.

If you have any questions regarding these comments or the process, please contact Jennifer Fullam by email at jennifer.fullam@state.nm.us or by phone at 505-946-8954.

Sincerely,

Shelly Lemon Digitally signed by Shelly Lemon
Date: 2021.09.21 17:22:00 -06'00'

Shelly Lemon, Chief
Surface Water Quality Bureau

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