



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
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Jon Goldstein, Chair
State of New Mexico Water Quality Control Commission
P.O. Box 26110
Santa Fe, New Mexico 87502

Dear Mr. Goldstein:

Thank you for submitting New Mexico's 2006 §303(d) List of Water Quality Limited Segments. The Environmental Protection Agency (EPA) has conducted a complete review of the submittals dated May 12, 2007 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 §2006 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.

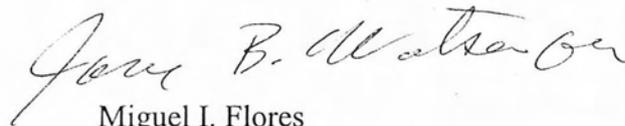
Based on this review, EPA has determined that New Mexico's 2006 §303(d) List of Water Quality Limited Segments (WQLSs) still requiring Total Maximum Daily Loads (TMDLs) meets the requirements of §303(d) of the Clean Water Act ("CWA" or "the Act") and EPA's implementing regulations. By this final action, EPA approves the States decisions to list all the water bodies and associated pollutants identified in the Final §2006 303(d) List of the States listing submission and associated priority rankings. Furthermore, EPA is taking no action regarding the de-listing of Assessment Unit NM-2701_00 (Segment §20.6.4.701 NMAC) until the State has an opportunity to evaluate data and/or information and will re-list during the 2008 §303(d) List cycle unless new data and/or information indicates it should not be listed. The statutory and regulatory requirements, and a summary of EPA's review of New Mexico's compliance with each requirement, are described in the enclosed Record of Decision document.

New Mexico's Final 2006 303(d) List now includes 296 water body-pollutant combinations as noted in the Record of Decision, Administrative Record No. 9. The State listings are based on an assessment methodology described in the State submittal. In addition to the List, EPA regulations at 40 CFR §130.7 require that the State provide a priority ranking for each listing and a TMDL development schedule for the next two years. The State provided priority rankings for all listed waters as required by §303(d) and its implementing regulations. Two Hundred and Ninety Six (296) water body-pollutant combinations are targeted for TMDL development in the next 10 years is consistent with the targeting requirement of 40 CFR §130.7 and meets the requirements under the 1997 Consent Decree (CD) in *Forest Guardians and Southwest Environmental Center v. EPA*, Civil Action Number: 96-0826 LH.

EPA acknowledges that the public participation process sponsored by the New Mexico Environment Department included solicitations of public comments through newspaper advertisements, public hearings, and preparation of a responsiveness summary explaining how the State considered public comment in the final listing decisions. These actions meet the public participation requirements as required in 40 CFR §130.7.

Thank you for your efforts to develop the Final 2006 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,

A handwritten signature in cursive script, appearing to read "Miguel I. Flores".

Miguel I. Flores
Director
Water Quality Protection Division

cc:
Marcy Levitt, Bureau Chief
Surface Water Quality Bureau
New Mexico Environment Department
1190 Saint Frances Drive
Santa Fe, NM 87505

Enclosure

Standards for Interstate and Intrastate Waters, 20.6.4 NMAC, 2005
Effective December 29, 2006

The following document includes all provisions that are in effect for Clean Water Act purposes with the following exceptions:

1. EPA has not taken action on new/revised provisions in **Sections 20.6.4.97, 98 and 99.**
2. EPA has not taken action on new and/or revised use designations for classified stream segments listed in **Sections 20.6.4.126, 128, 221, 310, 701 and 702.**
3. EPA has approved **Sections 20.6.4.108, 113, 115, 116, 118, 123, 206, 208, 209, 215, 217, 305, 309, 407 and 804** with the assumption that use designations for all non-perennial reaches and tributaries to classified stream segments that may be covered by these sections are capable of supporting the uses described in CWA Section 101(a)(2).

The corresponding provisions which *are* in effect for Clean Water Act purposes can be found in Standards for Interstate and Intrastate Surface Waters, 20.6.4 (Effective October 23, 2003)

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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.

Administrative Records Cited

1. EPA Approval of Revisions to New Mexico's Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC. December 29, 2006. Available at http://www.epa.gov/waterscience/standards/wqslibrary/nm/nm_6_wqs.pdf
2. Record of Decision for EPA Review of TITLE 2 Environmental Protection, Chapter 6, Water Quality, Part 4, New Mexico Standards for Interstate and Intrastate Surface Water, December 29, 2006.
3. Letter from State of New Mexico Water Quality Control Commission to Miguel Flores, Water Quality Protection Division, Region 6, EPA. May, 12 2007.
4. 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 January 24, 2006. Available at <http://www.nmenv.state.nm.us/swqb/protocols/index.html>
5. EPA Approval of Revisions to New Mexico's Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC as amended through October 11, 2002. October 23, 2003. Available at http://www.epa.gov/waterscience/standards/wqslibrary/nm/nm_6_wqs.pdf
6. Forest Guardians and Southwest Environmental Center v. EPA, Civil Action Number: 96-0826 LH. Available at <http://www.nmenv.state.nm.us/swqb/CDNM.html>
7. 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>.
8. EPA 2002 Integrated Water Quality Monitoring and Assessment Report Guidance. November 19, 2001. Available at <http://www.epa.gov/owow/tmdl/2002wqma.html>
9. Water Quality Limited Segments-Pollutant Combinations (Category 5 Waters)

Purpose

The purpose of this review document is to describe the rationale for EPA's approval and non action of New Mexico's 2006 §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 submittal 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 2006 §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.

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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 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. 7, Appendix C ("EPA's 1991 Guidance"). 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

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State described in its submittal titled "2006 – 2008 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 2006.

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 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. 7.

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 does not include all waters that meet §303(d) listing requirements. Therefore, regarding New Mexico's Final §303(d) List submission, EPA is both approving and taking a no 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, including a careful review of the waters addressed in the 1997 Consent Decree (CD) in *Forest Guardians and Southwest Environmental Center v. EPA*, Civil Action Number: 96-0826 LH.

As suggested by recent EPA guidance, New Mexico chose to combine the State's 2006 §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. 8. 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 2006 §303(d) List, was also included in the report. Category 5 is the portion of the Integrated Report on which EPA is taking action today. A single assessment methodology for the integrated report was used for both the §305(b) reporting and the §303(d) listing activities. Although EPA reviewed New Mexico's listing methodology as part of our review of the

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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 and take no action of 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

The listing methodology employed by New Mexico for the 2006 §303(d) listing cycle 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. However, EPA's review indicates that in some instances the State developed the 2006 §303(d) List using water quality standards that EPA has taken "no action." Under §303 of the CWA, EPA took an approval and "no action" regarding Revisions to New Mexico's Standards for Interstate and Intrastate Surface Waters, Chapter 20.6.4 New Mexico Administrative Code (NMAC). See 40 CFR §131.5 and Administrative Record No. 1. Specifically, EPA took "no action" regarding specific sections of the State's water quality standards under §303 of the CWA regarding:

1. Limited aquatic life, aquatic life and/or secondary contact recreation use designations, Sections 20.6.4.97, 20.6.4.98 and 20.6.4.99 of 20.6.4 NMAC respectively. See Administrative Record Nos. 1 and 2.
2. Modification of existing segment designated uses and criteria.¹

For the purpose of listing waters under 40 CFR §130.7(b), the term "water quality standard applicable to such waters" and "applicable water quality standard" refer to those water quality standards established under §303 of the CWA, including numeric criteria, narrative criteria, waterbody uses, and antidegradation. See 40 CFR §130.7(b)(3). Consequently, since New Mexico's 2006 §303(d) List submission premises a number of de-listing actions on water quality standards that EPA has taken "no action," EPA is taking both an approval and no action regarding these de-listings premised on water quality standards that have been approved under §303 of the CWA.

EPA presumes that at a minimum, CWA §101(a)(2) uses, i.e., fishable/swimmable, are attainable for all classified and unclassified ephemeral, intermittent and perennial surface waters in New Mexico unless supported by a Use Attainability Analyses (UAA)

¹ EPA took "no action" for the following NMAC Sections. See Administrative Record Nos. 1 and 2:
(a) §20.6.4.126 (Rio Grande Basin) - secondary contact use is not adequately supported;
(b) §20.6.4.128 (Rio Grande Basin) - limited aquatic life and secondary contact uses are not adequately supported;
(c) §20.6.4.221 (Pecos River Basin) - warmwater aquatic life use not adequately supported;
(d) §20.6.4.310 (Canadian River Basin) - warmwater aquatic life use not adequately supported;
(e) §20.6.4.701 (Dry Cimarron River) - marginal coldwater and warmwater aquatic life uses not adequately supported; and
(f) §20.6.4.702 (Dry Cimarron River) - warmwater aquatic life use not adequately supported.

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based on one of the factors listed in 40 CFR §131.10(g). Therefore, EPA interprets and applies the use of the term "aquatic life" in reference to the unclassified intermittent and perennial surface waters to mean that at a minimum "marginal warmwater aquatic life" (See §H.5 NMAC) use is attainable for intermittent surface waters in New Mexico, and that a "warmwater aquatic life" (See §H.4 NMAC) use is attainable for perennial surface waters in New Mexico. See Administrative Record Nos. 1 and 2.

As part of the State's ambient water quality assessment process, water quality standards segments, defined in §20.6.4 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. 4.

EPA has determined that New Mexico 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 2006 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 September 19, 2005 through October 18, 2005.
2. The entire 2006 Integrated Report was opened for a 37-day public comment period from March 5, 2007 to April 10, 2007, 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
4. New Mexico's Final 2006 Integrated Report was submitted to EPA Region 6 on May 12, 2007.

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 May 2007. EPA concludes that 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 to list the waters identified in its listing submittal are consistent with federal listing requirements. Furthermore, EPA concludes that the State's decision not to list a water and pollutant detailed below is inconsistent with federal listing requirements. As discussed in detail below, the available information leads to a conclusion that a particular water is Water Quality Limited under current New Mexico water quality standards and should be listed pursuant to §303(d) of the CWA. However, at this time, EPA is taking a no action regarding this water until the State has an opportunity to evaluate data and/or information and will re-list *ceteris paribus* during the 2008 §303(d) List cycle.

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Basis for 40 CFR §130.7(b)(1) decision not to include waters listed as impaired on its 2006 §303(d) list

Insufficient Data and Information - Category 3 Waters. See 40 CFR §130.7(b)(5)

Segments should be placed in Category 3 when there is insufficient available data and/or information to make a use support determination. The state should identify those segments that are higher and lower priority for follow-up monitoring, and may do so using predicative tools such as probability surveys or landscape models. Category 3 provides states with the flexibility to monitor these segments in a manner consistent with their overall monitoring strategy and schedule.

EPA has determined that New Mexico 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 2006 Integrated Report. See 40 CFR §130.7(b)(5). During the solicitation, neither did the State receive data and/or information nor does the State's routine ambient water quality monitoring program have data and/or information to evaluate whether the pollutant-combinations identified below are meeting water quality standards. For those pollutant-combinations identified, the State will at a later date, based on the State's rotating basin sampling program, collect sufficient data and/or information, to evaluate these pollutant-combinations. Furthermore, the pollutant combinations noted were listed as Water Quality Limited, (See 40 CFR §130.2(j)) premised on anecdotal information, i.e., no data but rather Best Professional Judgment (BPJ), as part of the 1997 Consent Decree (CD) in Forest Guardians and Southwest Environmental Center v. EPA, Civil Action Number: 96-0826 LH, Attachment A, Rio Puerco Bundle TMDLs, due December 31, 2006. See Administrative Record No. 6. In fulfilling its obligations under this Consent Decree, EPA is under no obligation to establish TMDLs for any Water Quality Limited Segments which are determined not to need TMDLs consistent with §303(d) of the CWA and its implementing regulations, including 40 CFR §130.7(b)(1), as amended, or are removed from New Mexico's 2006 §303(d) List consistent with the provisions of the CWA and its implementing regulations. See Administrative Record No. 6. Therefore, EPA is approving the following de-listings premised on "Insufficient Data and/or Information."

Assessment Unit	AU Name	Pollutant Combination ²	Associated Segment
NM-2107.A_44	Rio Puerco (northern bnd Cuba to headwaters)	Sedimentation/Siltation Nutrients	§20.6.4.1055 NMAC
NM-2107.A_41	San Pablo Canyon-Puerco to headwaters	Sedimentation/Siltation	§20.6.4.109 NMAC

² Section 20.6.4.12 NMAC, General Standards, establishes general standards applicable to "...all surface waters of the state at all times, unless a specified standard is provided elsewhere in this part." During the development of the State's 2006 §303(d) List, the State applied §20.6.4.12 NMAC, General Standards, limited to those classified segments as described in Sections 20.6.4.101 through 801 NMAC.

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Data support a conclusion that Temperature standards are exceeded for the waterbodies listed

During the evaluation of the Final New Mexico 2006 §303(d) List submission, EPA identified a water which exceeded current water quality standards resulting in a finding of non-support. This finding of non-support was based on EPA's review indicating that the State developed the 2006 §303(d) List using water quality standards that EPA has taken "no action." Under §303 of the CWA, EPA took an approval and "no action" on December 29, 2006 regarding Revisions to New Mexico's Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC. See 40 CFR §131.5 and Administrative Record No. 2. Specifically, EPA took "no action" regarding specific sections of the State's water quality standards under §303 of the CWA. Consequently, in lieu of those sections where EPA took "no action," EPA applied the applicable "approved" Chapter 6, NMAC.

Starting with this list, New Mexico applied a temperature criterion of 32.2 degrees Celsius (C) for the new segment as described in §20.6.4.702 NMAC. This new segment contains the perennial portions of the Dry Cimarron River below Oak Creek and the perennial portions of Long Canyon and Carrizozo Creeks, which were broken out of the original segment described in §20.6.4.701 NMAC with a temperature criterion of 25.0 degrees C. See Administrative Record No. 5.

For segment §20.6.4.702 NMAC, i.e., AU NM-2701_00, the maximum temperature from the New Mexico 2000 calendar year survey was 30.0 degrees C resulting in temperature being removed as a cause of non support. See Administrative Record No. 2, page 18. However, EPA took "no action" regarding §20.6.4.702 NMAC. See Administrative Record No. 1, pages 104-105. Therefore, as noted in the Administrative Record No. 2, the maximum temperature from the New Mexico 2000 calendar year survey was 30.0 degrees C which exceeds the temperature criterion of 25.0 degrees C as found in §20.6.4.701 NMAC.

At this time, EPA is taking no action regarding the de-listing of AU NM-2701_00, i.e., Segment §20.6.4.701 NMAC, until the State has an opportunity to evaluate data and/or information and will re-list the pollutant-combination *ceteris paribus* during the 2008 §303(d) List cycle.

Assessment Unit	Waterbody Name	WQS Reference
NM-2701_00	Dry Cimarron River (Perennial reaches OK bnd to Long Canyon)	§20.6.4.701 NMAC

Priority Ranking and Targeting

EPA also 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. The State's priority ranking falls into seven categories consistent with the Consent Decree, Attachment A, Schedule for TMDL development by the State of New Mexico. See Administrative Record No. 6.

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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. EPA concludes that the State's priority ranking and targeting commitments are consistent with federal requirements and Consent Decree commitments.

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 2006 §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 of the materials submitted by the State, copies of the New Mexico 2006 §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 submittal 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., raw 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.