

APPENDIX E
RESPONSE TO HEARING REQUEST

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June 1, 2006

Mr. Ron Curry, Chairman
New Mexico Water Quality Control Commission &
Secretary, New Mexico Environment Department
1190 S. St. Francis Dr.
Santa Fe, New Mexico 87502

attn: Joyce Medina
WQCC Administrator



RE: PETITION FOR HEARING / Rio Puerco Watershed TMDL

Dear Chairman & Secretary Curry:

Pursuant to **20.1.6 Rulemaking Procedures – Water Quality Control Commission (WQCC)**, we the undersigned do hereby petition the Water Quality Control Commission (WQCC) for a hearing in the matter of the Rio Puerco Watershed TMDL (total maximum daily load).

We request this hearing to allow all interested participants a reasonable opportunity to submit data, views, and arguments on the Rio Puerco Watershed TMDL (see *FINAL DRAFT Total Maximum Daily Load [TMDL] for the Rio Puerco Watershed – Part 1, Rio Grande to Headwaters, April 21, 2006 / Attachment A*).

Statement of Reasons:

- *There are no definitions.* The stakeholders who will be impacted by this document are largely unfamiliar with the processes and terminology utilized. Without definitions, it is difficult if not impossible for those stakeholders to grasp the implications of documents and decisions related to its' adoption and implementation. It is worth noting that it is highly likely that at least some of the impacted stake holders do not read or speak English.

A definitions section should be added defining numerous terms key to the document and the action.

1. There is a List of Abbreviations section on pages ii and iii. SWQB has expanded this list to included definitions where necessary.

- *The Surface Water Quality Bureau (SWQB) conducted an intensive surface water survey of the Rio Puerco Watershed in 2004. (page 1, Executive Summary).* The document fails to note that a public meeting was held in Cuba in 2004 at which time stakeholders were invited to participate in this survey process. However, although some signed up to participate, they were never again contacted by SWQB until the public meeting on the draft document in March 2006. Why weren't local stakeholders included in this survey?

Interested stakeholders must be included in surveying processes that will affect them if they indicate the desire to participate.

2. SWQB has added information to the Executive Summary regarding the pre-survey meeting. The purpose of these pre-survey meetings is to discuss the draft sampling plan and to solicit stakeholders input. Survey design is not a consensus process because we have limited resources and specific mandates to accomplish Clean Water Act goals for the state. We generally only have the resources for one station per assessment unit, and strive to establish this station at the bottom of the assessment unit because the data from that station are to represent the condition of that reach (assessment unit). SWQB does not imply at these meetings that we will be able to sample on all interested persons' property. We work with individual land owners if we propose sampling location on his/her

property. SWQB's policy is to add any interested stakeholders to our mailing lists at their request.

- *The 2004 ... Study also identified other potential water quality impairments... which are not addressed in this document. Subsequent TMDLs will be prepared in the near future in a separate TMDL document. (page 1, Executive Summary). How can stakeholders or the WQCC evaluate the impacts and whether or not there is undue economic burden on regulated entities of this TMDL designation without knowledge of what is planned for the future in regard to TMDLs?*

If additional information is available and additional TMDLs are to be presented, they should be all contained in a single document to effectively evaluate the impacts of the action.

3. Since 2002, SWQB has strived to include all TMDLs related to a particular watershed in one document. Prior to that time, separate documents were written for each impairment / waterbody pair. There is no obligation for SWQB to present all TMDLs for a particular area in one TMDL document. The Rio Puerco TMDLs were broken into two based on suggestion from EPA Region 6 to complete TMDLs on consent decree listings as soon as possible. Historic impairment listings on New Mexico's 1996 Clean Water Act Section 303(d) List of Impaired Waters in the Rio Puerco watershed are part of the consent decree. According to the consent decree,

“5. The parties agree...for the State of New Mexico to establish TMDLs for the Water Quality Limited Segments (“WQLSs”) identified on the Clean Water Act Section 303(d) list approved by EPA on May 1, 1996...

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 Section 303(d) of the Clean Water Act...or are removed from New Mexico's Section 303(d) list consistent with the provisions of the Clean Water Act and its implementing regulations.”

- *From the forest boundary downstream... to the Village of Cuba, overgrazing, road construction and maintenance activities ... have impacted... (page 4, 2.0 Background) This is a broad statement with unsupported assumptions. Where is the data to back up this statement?*

Data supporting these statements must be included in the document. When was their overgrazing? Have grazing practices changed? If so, have there been changes in impact? A massive road project was recently completed in the area. Was there any mitigation to water quality in that project? What maintenance activities? What is being maintained?

4. Qualitative assessment of land use impacts and past or present conditions, not quantitative data, characterizes the recognized or perceived ground conditions in the region. Residents, various agency staffs, and the landowners themselves - people living or working in the area, including Tribal interests - have been the source of information via a multitude of personal communications and accounts, initial assessments and descriptions have been shared during any variety of public meetings, listening sessions, Watershed Group meetings, and field visits. These parties' participation in conservation and restoration grant and award programs is customarily accompanied by written descriptions of the wide range of problems and conditions they themselves wish to see improved, including some of those presented in the draft TMDL text.

The Probable Sources list is intended to include any and all activities that could be contributing to the identified impairment. It is not intended to single out any particular land owner or single land management activity, and has therefore been labeled “Probable” and generally includes several items. USEPA through guidance documents strongly encourages states to include a list of Probable Sources for each listed impairment. According to the 1998 305(b) report guidance, “..., states must always provide aggregate source category totals...” in the biennial submittal that fulfills CWA section 305(b)(1)(C) through (E) (USEPA 1997). “Sources” are defined as activities that may contribute pollutants or stressors to a water body (USEPA 1997).

References: USEPA. 1997. Guidelines for preparation of the comprehensive state water quality assessments (305(b) reports) and electronic uptakes. EPA-841-B-97-002A. Washington, D.C.

- *At and below the Village of Cuba, flows... combine with effluent from the Cuba WWTP to provide perennial flow... (page 4, 2.0 Background) There is no data to support this statement. What are the flows? When were they measured? How much is attributable to the effluent? Does the Cuba WWTP keep track of its' releases? How does a stretch between two (2) intermittent segments become perennial?*

At the May 9, 2006 WQCC it was reported that there was monitoring data available. If it is available it should be made a part of this document. If it is not available, it should be obtained.

5. SWQB did not include flow data in the draft TMDL because flow is not a part of the Sedimentation/Siltation TMDL calculation. We have added available stream flow data, Cuba WWTP effluent discharge data, and observational field notes to Appendix D.

- *Erosional processes within this reach of the stream are extensive... Consequently, lands that had been historically very productive irrigated farms have dried up. (page 4, 2.0 background) Where is the data to support this statement?*

Data should be provided to support this statement or it should be removed from the document.

6. SWQB has added additional information regarding erosional processes on page 4 in this reach based on field observation and measurements taking during on-going watershed restoration efforts in the area.

- *Photo 2.1 and 2.2 (page 5) The historic photo is not dated. Was it taken after a heavy rain storm? What was the rainfall the year it was taken? Additionally the photos are not taken from the same photo point. What is the comparative value of the two photos?*

Misleading photos of this nature should be removed from the document.

7. SWQB has added text to the draft TMDL explaining the intent of including these photos on page 4. They were included to provide a general visual overview of the area and to show the extent to which portions of the watershed have experienced erosion and cut banks.

- *Water Quality Survey Summary... (page 12, 2.4 Intensive Water Quality Sampling)* The document states that this summary is available on a website. First, there is an assumption that most stakeholders have computer access. That is not necessarily true. Second, the summary is not on the website (see Attachment B - printout of screen on 5.31.06)

The summary should be made an appendix to the document so that it is available for stakeholders and the WQCC to review prior to decision-making.

8. The TMDL states,

“A more detailed description of the Rio Puerco intensive survey can be found in the *Water Quality Survey Summary for the Rio Puerco and Tributaries* this document will be available online...” [emphasis added].

SWQB added an estimate posting date and a sentence (page 12) to clarify that summary reports can also be requested through a phone call to the Bureau. The Rio Puerco survey summary is expected to be completed Fall 2006. It is not necessary to include survey summaries in TMDL documents as an appendix because all the pertinent information is integrated directly into the TMDL.

- *All sampling and assessment techniques used... are detailed in the Quality Assurance Project Plan... (page 13, Survey Design)* Again, this document is not readily available to the impacted public.

The Project Plan should be made an appendix to the document.

9. The Quality Assurance Project Plan (QAPP) that covers sampling activities for the entire bureau on a yearly basis is over 100 pages and not appropriate as an appendix in TMDL documents. It is readily available on the web, or through a phone call to the bureau. Clarification was added on page 13 regarding requesting the document by phone.

- *The 2004... survey was performed over varying flow conditions... (page 14, 2.4.2 Hydrologic Conditions)* Why were the follow conditions detailed in the document?

Flow data should be contained in the document.

10. *Secion 2.4.2 Hydrologic Conditions* is generally the section in a TMDL document where SWQB presents pertinent USGS gage data. There is no USGS gage in the Rio Puerco (Arroyo Chijuilla to Northern boundary Cuba) assessment unit. The nearest USGS gage is at Rio Puerco above Arroyo Chico at Guadalupe, NM (08334000) which is 43 stream miles south/southwest of Cuba. The watershed size at the gage is 420 square miles whereas the watershed area at the bottom of the Rio Puerco (Arroyo Chijuilla to Northern boundary Cuba) assessment unit is 138 square miles. It is not appropriate to include the flow data in the TMDL document given the difference in watershed areas. However, the discharge data available during the development of the TMDL is included in Appendix D for informational purposes.

- *Target values... will be determined... (page 15, 3.1 Target Load Capacity)* This determination is questionable due the use of the reference site of La Jara Creek (page 16) being of substantially greater diversity in elevation, geology and hydrology.

A more comparable site should be used as a reference point.

11. The target load capacity of 20% fines (Table 3.3) is independent of the reference site selection. The determination of this target value, based on New Mexico streams, is explained in the second full paragraph on page 16, beginning:

“The target levels involved in the examination of developed relationships between percent fines and biological score as compared to a reference site...”

Based on this comment, SWQB looked further into the choice of the La Jara Creek above Irrigation Diversion site and determined that there was a better reference site available. Further information regarding the Rio Hondo above Rio Grande reference site is available on pages 16-17.

- *La Jara Creek... was chosen as the... reference station... (page 16, 3.1 Target Loading Capacity)* How was La Jara Creek chosen? Are there not areas closer in elevation, geology and hydrology to the Rio Puerco than La Jara? What is an ecoregion?

Comparative data should be included in the document to justify this as the “best available” reference location.

12. Comparative characteristics between the reference site and study site are now included as Table 3.1 on page 17. SWQB has added the definition of “ecoregion” to the List of Abbreviations/Definitions section in the Table of Contents and included additional listings in the References section.

- *No streamflow data are necessary... (page 17, 3.2 Flow)* There is serious question as to whether or not this stream segment is really a perennial stream. There is no flow data to support the New Mexico Environment Department (NMED) conclusion that this stream segment is perennial.

Flow data should be supplied within the document to support the conclusion.

13. SWQB did not include flow data in the draft TMDL because flow is not a part of the Sedimentation/Siltation TMDL calculation. Available flow data has been included in Appendix D. However, as far as the perennial nature of the Rio Puerco (Arroyo Chijuilla to Northern boundary Cuba), the amount of water has been fully capable of continually supporting aquatic life (as in the various macroinvertebrate and fish samples collected by SWQB) and is supporting an existing, thriving, and expanding riparian plant community.

- *Data used in the calculation of this TMDL were collected in the fall... (page 21, 3.8 Consideration of Seasonal Variation).* This statement presents two (2) problems. First, on page 17, 3.3 Calculations, the document states: "No calculations were necessary..." Second on page 12, 2.4.1 Survey Design, the document states: "Surface water quality samples were collected monthly between March and November during the 2004 intensive SWQB study." Were calculations necessary? Were the samples taken early than the fall of 2004 not considered?

These statements need to be clarified in the document.

14. First, the statement regarding calculations in Section 3.3 is in reference to calculations involving flow. Calculations for the determination of WLA, LA, MOS, and the TMDL were performed as discussed in Tables 3.2, 3.3, 3.4, and 3.5. Second, there were no earlier pebble counts and benthic macroinvertebrate samples to consider. Benthic macroinvertebrate and pebble count data are collected once per intensive survey, typically in the fall during the benthic macroinvertebrate index period.

- *Estimations of future growth are not anticipated... that cannot be controlled with BMP implementation... and proper land management. (page 22, 3.9 Future Growth).* What is "proper land management?" Who makes that determination? Is that affected by the social and economic value of the sources of water contaminants?

This statement should be explained in the document or be removed.

15. ~~SWQB has extended the statement regarding "proper land management" on page 23.~~ TMDLs must include a section on Future Growth.

- *Based on information from these sampling stations... the reach... has been determined to be a perennial reach... (page 23, 4.1 Rio Puerco)* What was the information? How reliable is it?

The sampling information that led to the determination should be included in the document.

16. The issue of the perennial nature of this reach is discussed in response #5, 10, and 13.

The next scheduled monitoring date for the Rio Puerco watershed is 2010. (page 27, 5.0 Monitoring Plan) It is understandable that staffing and financial resources are at a premium, however, when impacting stakeholders and regulated entities, monitoring every six (6) to eight (8) years, with dramatic differing precipitation from year to year does not appear to be adequate.

More frequent monitoring should be prescribed.

17. SWQB agrees more frequent monitoring is desired. Unfortunately, SWQB currently has the financial and staff resources to perform intensive watershed surveys on a rotational basis every 8 years because we are charged with monitoring the entire state. We have several initiatives in progress, such as the development of improved bioassessment tools and biocriteria that will hopefully help us shorten this rotational time frame to 5 years in the future.

- *Staff from the SWQB have worked with stakeholders to develop a WRAS for the Rio Puerco... The WRAS is essentially the Implementation Plan... of the TMDL Process. (page 29, 6.1 Coordination)* While with some diligent searching the Rio Puerco WRAS is available on the web (Attachment C), if it is the implementation plan, why isn't it included as an appendix to the document so that all involved stakeholders and regulated entities can determine implementation impacts? Additionally who were the stakeholders and how many of them were included in the development of the WRAS? According to the cover page of the WRAS, not a single member of the WRAS Subcommittee of the Rio Puerco Management Committee is a resident of the Cuba area. Finally, if the "WRAS was finalized prior to the preparation of these TMDLs," what assurance is there that the WRAS addressed the necessary elements? Finally, according to *Table 6.1 Proposed Implementation Timeline*, "implementation management measures" have been being applied for six (6) years. How has that impacted water quality?

The WRAS should be added to the document as an appendix. Prior to any implementation of the WRAS as part of the TMDL program, it should be reviewed and possibly amended by additional stakeholders who reside in the area.

18. In general, a well constructed WRAS will identify, among many other elements, the specific proposals, recommendations, plans, and possible funding sources to address the impairment(s) identified by a TMDL. A Clean Water Act Section 319 Project Workplan further pinpoints the active cooperators, calculates associated costs, determines a schedule, generates a monitoring component, and activates an actual TMDL Implementation Plan. SWQB does not include WRAS' as part of the TMDL because EPA does not approve TMDL implementation plans. SWQB found it focusing to have one single document that is only half approved, so we removed TMDL implementation information from TMDL documents and started referring stakeholders to the WRAS for implementation information. The Rio Puerco watershed is a unique case. Generally, WRAS development follows TMDL development, but watershed restoration efforts in the Rio Puerco started many years ago due to the Rio Puerco's notoriety as one of the nation's most actively eroding watersheds. Stakeholder involvement in WRAS development is voluntary. The 2001 Rio Puerco WRAS is slated for updating in the future, as select pollutant loading elements of the WRAS will rely on calculations made available once the TMDLs are complete. This updating is being undertaken by the Rio Puerco Management Committee, with input being received from broad segments of the public

- *Appendix C: Responses to Comments / Comment Set B* The response indicates that there were fishes collected in March 2006, which is well after all the data for this document was collected according to

early references. Additionally, there was no reference in the document anywhere to specific fishes. What data is available regarding the collection of fishes? Why isn't that data included in the document? Was there any consideration given to the fact that these fishes might be coming from area stock ponds? Finally, the statement in the response that says that two age classes of fishes were present seems to be in conflict with the statement that there are "short-lived fish."

If fish data is available, it should be included in the document, along with potential scenarios of the generation of those fish.

19. As you stated, the March 2006 fish data were not available at the time the draft TMDL was prepared so it was not included and the data were referenced in the Response to Comments. Now that the data are available, SWQB has included the available fish data in Appendix D in the TMDL to provide additional information regarding the perennial nature of the reach where collections were performed.

A review of the Administrative Record as well as other documents pertaining to this issue may reveal additional areas of concern.

Pursuant to **20.1.6.305 Location of Hearing** which states "*The commission may hold hearings on proposed regulatory changes of local application within the area substantially affected by the proposal,*" we request that this hearing be held in Cuba, New Mexico so that all interested parties have that reasonable opportunity to participate. Traveling to Santa Fe for a hearing may be out of reach for the multi-cultural residents of the Cuba area who could be substantially affected by the adoption of the Rio Puerco Watershed TMDL.

Finally, while we are not requesting a verbatim transcript of the proceeds due to the cost, we are requesting that the hearing proceeding be tape recorded. Pursuant to **20.1.6.404 Transcript of Proceedings**, the commission may specify actions regarding a transcript.

Thank you in advance for your attention to this petition for hearing.

Sincerely,

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87027.

PETITION FOR HEARING / RIO PUERCO WATERSHED TMDL

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