

**NMED – SWQB PUBLIC DISCUSSION DRAFT
DRAFT CHANGES TO 20.6.4.8 NMAC - AUGUST 21, 2006**

**TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 6 WATER QUALITY
PART 4 STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE WATERS**

20.6.4.8 ANTIDegradation POLICY AND IMPLEMENTATION PLAN:

A. Antidegradation Policy: This antidegradation policy applies to all surface waters of the state.

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected in all surface waters of the state.

(2) Where the quality of a surface water of the state exceeds levels necessary to support the propagation of fish, shellfish, and wildlife, and recreation in and on the water, that quality shall be maintained and protected unless the commission finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the state’s continuing planning process, that allowing lower water quality is necessary to accommodate important economic and social development in the area in which the water is located. In allowing such degradation or lower water quality, the state shall assure water quality adequate to protect existing uses fully. Further, the state shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable BMPs for nonpoint source control. Additionally, the state shall encourage the use of watershed planning as a further means to protect surface waters of the state.

(3) No degradation shall be allowed in [high quality] waters designated by the commission as outstanding national resource waters (ONRWs) except as provided in subparagraphs (a) through (d) of this paragraph.

(a) Temporary and short-term degradation of water quality shall be allowed only when such degradation is necessary to restore or maintain the physical, chemical or biological integrity of the ONRW and is consistent with the objective in 20.6.4.6 NMAC.

(b) Temporary and short-term degradation of water quality may include the application of piscicides approved by the commission under 20.6.4.16 NMAC or the implementation of watershed restoration projects approved, on a case-by-case basis, by the Department.

(c) In approving projects that may result in temporary and short-term degradation of water quality, the frequency and cumulative effects of such degradation shall be considered and minimized. The degradation from such approved projects shall not permanently degrade water quality in the ONRW. The degradation from such approved projects shall not result in water quality lower than necessary to protect existing uses in the ONRW.

(d) In implementing projects that may result in temporary and short-term degradation of water quality, all practical means of minimizing such temporary and short-term degradation shall be utilized.

BASIS FOR CHANGE: The Department proposes to modify this provision to allow under certain circumstances the degradation of water quality of an ONRW. The degradation would be allowed only if:

- the degradation is temporary and short-term, and
- the project causing the degradation is approved by the Water Quality Control Commission (Commission) for piscicide application or by the Department for watershed restoration projects.

This change to allow temporary and short-term degradation in ONRWs is consistent with the federal antidegradation program as it has evolved overtime.

The foundation of EPA’s antidegradation requirements is Congress’ “Declaration of Goals and Policies” (the first sentence of the federal Clean Water Act (Sec. 101(a) – codified at 33 U.S.C. 1251)) that states:

The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.

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In the early days of the EPA WQS program, the EPA antidegradation policy regulation was “no degradation shall be allowed in high quality waters which constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance.” (See 40 CFR 130.17(e)(2) - 40 FR 55341, November 28, 1975) Since that time, EPA has addressed the issue of an exception to the “no degradation requirement” of ONRWs in two documents:

1. In November 1983, EPA issued final changes to the WQS regulation. The rulemaking revised and consolidated a number of the federal WQS regulations. With respect to ONRWs, EPA stated in the Federal Register [48 FR 51403, November 8, 1983]:

Fourth, §131.12(a)(3) dealing with the designation of outstanding National Resource Waters (ONRW) was changed to provide a limited exception to the absolute “no degradation” requirement. EPA was concerned that waters which properly could have been designated as ONRW were not being so designated because of the flat no degradation provision, and therefore were not being given special protection. The no degradation provision was sometimes interpreted as prohibiting any activity (including temporary or short-term) from being conducted. States may allow some limited activities which result in temporary and short-term changes in water quality. Such activities are considered to be consistent with the intent and purpose of an ONRW. Therefore, EPA has rewritten the provision to read “... that water quality shall be maintained and protected,” and removed the phrase “No degradation shall be allowed...”

2. The EPA Water Quality Standards Handbook Second Edition (1994) (WQS Handbook) states:

Section 131.12(a)(3), or “Tier 3,” applies to Outstanding National Resource Waters (ONRW) where the ordinary use classifications and supporting criteria may not be sufficient or appropriate. As described in the preamble to the Water Quality Standards Regulation, “States may allow some limited activities which result in temporary and short-term changes in water quality,” but such changes in water quality should not impact existing uses or alter the essential character or special use that makes the water an ONRW. (Section 4.2, page 4-1)

and

The regulation requires water quality to be maintained and protected in ONRWs. EPA interprets this provision to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs. The only exception to this prohibition, as discussed in the preamble to the Water Quality Standards Regulation (48 F.R. 51402), permits States to allow some limited activities that result in temporary and short-term changes in the water quality of ONRW. Such activities must not permanently degrade water quality or result in water quality lower than that necessary to protect the existing uses in the ONRW. It is difficult to give an exact definition of “temporary” and “short-term” because of the variety of activities that might be considered. However, in rather broad terms, EPA’s view of temporary is weeks and months, not years. The intent of EPA’s provision clearly is to limit water quality degradation to the shortest possible time. If a construction activity is involved, for example, temporary is defined as the length of time necessary to construct the facility and make it operational. During any period of time when, after opportunity for public participation in the decision, the State allows temporary degradation, all practical means of minimizing such degradation shall be implemented. Examples of situations in which flexibility is appropriate are listed in Exhibit 4-1. (Section 4.7, page 4-10)

The WQS Handbook Exhibit 4-1 lists “Examples of Allowable Temporary Lowering of Water Quality in Outstanding National Resource Waters.” The examples clearly show that temporary short-term allowances can be made.

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The current federal antidegradation language in 40 CFR 131.12(a)(3) regarding Tier 3 waters (ONRWs) reads:

Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

New Mexico did not amend the water quality standards language regarding “no degradation” in Tier 3 waters after the EPA’s 1983 regulation change. The Commission’s antidegradation policy remained virtually the same from June 4, 1981 to February 22, 2000. The format of the antidegradation policy was amended through the 1998 triennial review and codified in the February 23, 2000 WQS at 20 NMAC 6.1.1101 (now 20.6.4.8 NMAC). The 2000 amendments were intended to better clarify the three “tiers” of the policy and to conform to the format of 40 CFR 131.12. However, the Commission did not revise the “no degradation” requirement for Tier 3 waters.

In the 2005 NM WQS revisions, the Commission approved several criteria for designating waters as ONRWs. One ONRW criterion is based on the level of water quality (Paragraph 3 of Subsection B of 20.6.4.9 NMAC). Although the "ONRW" term implies high water quality, the ONRW concept also can include other waters with less than pristine water quality (or even impaired waters) depending on ecological or recreational significance. As NMED staff testified during the 2005 Hearing for the waters of the Valle Vidal (WQCC 05-04 (R), p. 35, line 19 through p. 37, line 5):

The USEPA describes ONRWs in Section 4.7 of the Water Quality Standards Handbook. And an excerpt of the handbook is attached as Exhibit 2.

Section 4.7 states, "Outstanding National Resource Waters (or ONRWs) are provided the highest level of protection under the antidegradation policy. The policy provides for the protection of water quality in high-quality waters that constitute an ONRW by prohibiting the lowering of water quality. ONRWs are often regarded as the highest quality waters of the United States: That is clearly the thrust of 40 CFR 131.12(a)(3).

"However, ONRW designation also offers special protection for waters of 'exceptional ecological significance.' These are water bodies that are important, unique or sensitive ecologically, but whose water quality, as measured by the traditional parameters such as dissolved oxygen or pH, may not be particularly high or whose characteristics cannot be adequately described by these parameters (such as wetlands)."

In New Mexico, for example, a lower mainstem wildlife refuge such as the Bitter Lake National Wildlife Refuge on the Pecos River near Roswell or the Bosque del Apache National Wildlife Refuge on the Rio Grande near Socorro might also be considered to be very important ecologically but might not be considered pristine water.

In the Valle Vidal, we have waters that are generally of good quality and, more importantly, make a major contribution to the ecological and recreational significance of the area. All of these waters are ecologically and recreationally important and valuable as a natural resource, and ONRW designation would be beneficial to the state.

And that's really the point. ONRW designation should be applied to waters needing special protection regardless of having pristine water.

For ONRWs that do not meet WQS (are impaired), the Department attempts to determine the causes of the impairment. When the causes are nonpoint sources (Section PP of 20.6.4.7 NMAC), activities to

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reduce the impacts from nonpoint sources may themselves contribute to the degradation on a temporary basis. Because the goal is to restore the water quality of the ONRW, it is necessary to allow some degradation for longer term improvements in water quality. If the "no degradation" in ONRWs language is not changed, then it will be difficult if not impossible to restore the water quality of ONRWs or the watersheds around them.

Commissioner Steve Glass recognized this issue and raised it during the December 2005 hearing and the Commission's deliberations on the ONRW petition. (WQCC Hearing Transcript (WQCC 05-04 (R)) (12/14/05, p. 209, line 4 to p. 215, line 12) and WQCC Deliberations for WQCC 05-04 (R) (p. 18, line 6 to p. 19, line 8)). In addition, a summary was included in the Commission's Statement of Reasons. (See paragraphs 74-76 of the WQCC Statement of Reasons (WQCC 05-04(R)).)

Therefore, for a very limited set of circumstances and as explained above, the Department believes it would be beneficial for NM to allow temporary and short-term degradation in ONRWs if the degradation would be associated with watershed restoration projects including piscicide application projects. To accomplish this, the Department proposes to make the following changes to Paragraph 3 of Subsection A of 20.6.4.8 NMAC:

- Delete the words "high quality" from Paragraph 3 of Subsection A because this provision should apply to all ONRWs not just those that have high water quality.
- Describe the conditions for when "temporary and short-term degradation" would be allowed (in the new subparagraphs).
- Emphasize that any "temporary or short-term degradation" would only be allowed in an ONRW if it was necessary to "restore or maintain the chemical, physical or biological integrity" of the ONRW as stated in 20.6.4.6 NMAC and Section 101(a) of the Clean Water Act.
- State that "temporary and short-term degradation" may include degradation from piscicide application projects approved by the Commission under 20.6.4.16 NMAC or the implementation of watershed restoration projects approved by the Department.

Typically the Department considers projects in those categories as meeting the objective of 20.6.4.6 NMAC because they are intended to restore the chemical, physical or biological integrity of the waters. The degradation must be of a "temporary and short-term" nature. Watershed restoration projects may include:

- projects funded under Section 319 of the Clean Water Act;
- projects funded by state, federal or other sources to improve water quality in an ONRW; or
- projects permitted under Section 404 of the Clean Water Act.

The merits of each project will be reviewed on a case-by-case basis. The Department will not approve watershed restoration projects in ONRWs that may cause degradation unless the proposed conditions of Paragraph (3) of Subsection A of 20.6.4.8 NMAC are met. The Department interprets the word "approved" to be consistent with current authority that the Department has to either fund projects through Section 319 of the CWA or certify "404 permits" under Section 401 of the CWA. The Department proposes to also include approval of watershed protection projects that may affect ONRWs but that are funded through other sources to ensure that the requirements in Paragraph 3 of Subsection A of 20.6.4.8 NMAC are met.

- Build in a requirement for the approval authority to consider the cumulative effects from multiple projects that could impact the same waterbody.

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The Commission or Department would evaluate the number of projects in an area and the frequency of the events to consider the cumulative effects. The applicant should provide information on how the applicant will minimize the effects of the degradation resulting from the project and schedule such projects so that there is enough time for the waterbody to recover from any previous “temporary and short-term degradation.”

- Require that the degradation from the approved projects does not permanently degrade water quality in the ONRW and that degradation does not result in water quality lower than that necessary to protect existing uses in the ONRW.

The Department notes that the EPA WQS Handbook suggests that the degradation “shall not permanently degrade water quality in the ONRW or result in the water quality lower than that necessary to protect the existing uses in the ONRW.” The Department proposes to address this suggestion in two separate requirements within the approval conditions.

For ONRWs for which existing uses are impaired, because the water quality is *already* impaired, the Department believes that the additional degradation from activities that equates to “temporary and short-term degradation” would not “result in” water quality lower than necessary to protect existing uses in the ONRW. The additional degradation (“temporary and short-term degradation”) will be allowed only if it is linked to a watershed restoration project with the goal of restoring the “chemical, physical or biological integrity” of the ONRW. (short-term degradation for long-term improvement.) The Department would like comment on this way of interpreting the guidance within the EPA Handbook.

- Require project applicants to implement all practical means of minimizing the “temporary and short-term” degradation.

In any submittal, whether the request is to apply piscicide or for approval of a watershed restoration project, the applicant should address the types of practices that will be used to “minimize” the degradation and the expected outcome (in addition to other information required for the project).

The Department does not define “temporary and short-term degradation” in the draft rule amendments. The WQS Handbook (guidance) suggests that “temporary and short-term” degradation would equate to weeks or months. However, the Department does not believe it is appropriate to restrict “temporary and short-term” to that short of a period because many watershed restoration activities, due to New Mexico’s arid climate, can take more than a few months to take affect. If the Commission defines “temporary and short-term” degradation as degradation lasting only for “weeks or months,” many watershed restoration projects would not qualify under this proposed provision. For example, a watershed restoration project may include removal of non-native plants to reduce water uptake and replacement with native plants. Although the non-native plants absorb a great amount of water in the stream, the non-native plants also provide canopy for the water. The canopy helps to reduce the temperature of the stream. One drawback to removing the non-native plants would be that removing the plants also removes the canopy. Depending on the time of year, without the canopy, the water temperature will increase. It may take more than a year for enough native plants to take root and then even longer for the plants to grow to the level where a canopy is effective.

The Department considered adding in a provision to require “notice” of the temporary and short-term degradation in ONRWs to communities and interested parties. The Department decided not to include such a provision in this public discussion draft because it is a procedural requirement. The section of the rule contains technical requirements. The Department believes it can address the goals of such a “notice” through the 319 grant letting process or the 20.6.4.16 NMAC. Specifically for watershed restoration projects, NMED would add a special notation for ONRWs within the Request for Proposal (RFP)

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document. For piscicide application projects, based on the notice provisions in Subsection C of 20.6.4.16 NMAC and the fact that a petitioner needs to work closely with NMED to develop the application proposal, when piscicide applications will affect or occur in ONRWs, NMED will request that the notice specifically mention the ONRW status of the water(s).

Once watershed restoration projects are approved, if the implementers do not minimize the degradation or their actions lead to permanently degrading the water, the Department will rely on its authority within 74-6-10 NMSA 1978 to take enforcement action.

The Department welcomes comments/suggestions/questions on the draft amendments and explanation of changes by September 8, 2006. Please forward comments to:

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