

ATTACHMENT 2

STATEMENT OF REASONS

I. SUMMARY OF PROPOSAL:

The New Mexico Environment Department (“Department”) proposes to change two sections of the Standards for Interstate and Intrastate Surface Waters (“Standards”), specifically 20.6.4.7 and 20.6.4.8 NMAC. The proposal to change 20.6.4.7 NMAC would add a new definition for the term “designated management agency”, which is used in the proposed change to 20.6.4.8 NMAC. The proposal to change 20.6.4.8 NMAC would allow under limited circumstances the temporary and short-term degradation of water quality in waters designated as Outstanding National Resource Waters (“ONRW”).

II. REASONS FOR CHANGE - 20.6.4.7 NMAC

A. Proposed change

S. “Designated management agency” means an agency as defined by 40 C.F.R. Section 130.9(d).

B. Statement of Reasons Supporting Proposed Change

The Department proposes to insert the term “designated management agency” into the definitions of the Standards. The new definition simply references the existing federal definition for designated management agency, which occurs at 40 C.F.R. § 130.9(d). The Department proposes to use the term “designated management agency” within the proposed amendment to Paragraph 3 of Subsection A of 20.6.4.8 NMAC. The Department proposes to incorporate the federal definition by reference. The Water Quality Control Commission (“Commission”) has previously used the term “designated management agency” in the Statewide Water Quality Management Plan, specifically Work Element 5. The Department’s proposed definition would be consistent with the Commission’s previous use of the term.

III. REASONS FOR CHANGE - 20.6.4.8 NMAC

A. Proposed change to Subsection (A)

(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.

B. Statement of Reasons Supporting Proposed Change

(1) Removal of “high quality”

The Department proposes to change Paragraph 3 of Subsection A by deleting the words “high quality”. The Department proposes this change because the prohibition of degradation contained in this subsection should apply to all waters designated as ONRW and not just ONRWs that have high quality waters. Although the “ONRW” term is typically associated with

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. *See* Subsection (B)(2) of 20.6.4.9 NMAC.

Section 4.7 of the U.S. Environmental Protection Agency's ("EPA") Water Quality Standards Handbook ("Handbook") provides that ONRWs are provided the highest level of protection under the antidegradation policy. Water Quality Standards Handbook, 2nd Ed., p. 4-10. The policy provides for the protection of water quality in high quality waters that constitute an ONRW by prohibiting the lowering of water quality. *See* Handbook, p. 4-10. ONRWs are often regarded as the highest quality waters of the United States. *Id.* However, ONRW designation also offers special protection for waters of "exceptional ecological significance". *Id.* 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). *Id.*

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, there are waters that are generally of good quality and, more importantly, make a major contribution to the ecological and recreational significance of the area. ONRW designation can apply to waters needing special protection regardless of having pristine water. Thus, the protection provided by antidegradation provision should also extend to all ONRW designated waters and not just high quality waters designated by the Commission as ONRWs.

(2) Allowing temporary and short-term degradation

The Department proposes language to allow temporary and short-term degradation to occur under limited circumstances in waters that have been designated as ONRWs. This proposed change is consistent with the federal antidegradation program as it has evolved over time. EPA's antidegradation requirements are based upon Congress' Declaration of Goals and Policies in Section 101(a) of the Clean Water Act, which states that the objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters". 33 U.S.C. § 1251(a). When EPA first promulgated its water quality standards regulations, the antidegradation policy regulation provided that "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." 40 Fed. Reg. 55341 (November 28, 1975) (codified at 40 C.F.R. § 130.17(e)(2)). EPA has subsequently reconsidered this no degradation provision.

In November 1983, EPA amended the "no degradation" regulation and changed it to provide a limited exception to the absolute "no degradation" requirement. 48 Fed. Reg. 51400 (November 8, 1983). EPA was concerned that waters which properly could have been designated as ONRW were not being so designated because of the strict no degradation provision, and therefore, were not being given special protection. 48 Fed. Reg. at 51403

(November 8, 1983). The “no degradation” provision was sometimes interpreted as prohibiting any activity (including temporary and short-term) from being conducted. *Id.* EPA stated that States may allow some limited activities which result in temporary and short-term changes in water quality. *Id.* Such activities were considered to be consistent with the intent and purpose of an ONRW. *Id.* Therefore, EPA rewrote the provision to read that water quality shall be maintained and protected, and removed the phrase “[n]o degradation shall be allowed”. *Id.* As such, the current federal antidegradation language regarding Tier 3 waters (ONRWs) provides that “[w]here 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. 40 C.F.R. § 131.12(a)(3) (2005).

The Handbook interprets the amended regulation “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.” *See* Handbook, p. 4-10. The Handbook provides that States may allow some limited activities that result in temporary and short-term changes in the water quality of ONRW. *Id.* 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. *Id.* The Handbook also provides that “[s]tates 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.” *Id.*

New Mexico has never amended its water quality standards language regarding “no degradation” in Tier 3 waters to be consistent with EPA’s regulation change. The Commission’s antidegradation policy remained virtually the same from June 4, 1981 to February 22, 2000. The 2000 amendments were intended to better clarify the three “tiers” of the policy and to conform to the format of 40 C.F.R. § 131.12. However, the Commission did not revise the “no degradation” requirement for Tier 3 waters. If the “no degradation” language is not changed, then it will be difficult, if not impossible, to perform activities that restore and maintain the chemical, physical, and biological integrity of the waters designated as ONRWs.

C. Proposed change to Subsection (A)(3)

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

D. Statement of Reasons Supporting Proposed Change

(1) Necessary to restore and maintain

The Department proposes to allow temporary and short-term degradation only when it is necessary to “restore or maintain the chemical, physical or biological integrity” of the ONRW or when it is consistent with the objectives of the Standards. When the goal is to restore the

chemical, physical, and biological integrity of the waters designated as ONRWs, it is necessary to allow some degradation that will ultimately result in longer term improvements. In addition to restoration activities, some activities may have a short-term impact on water quality but could be necessary to maintain the chemical, physical, and biological integrity of the ONRW. These types of activities may include the application of piscicides, the maintenance of culverts or bridges, or the replacement of septic tank and leachfield systems. Therefore, the Department believes it would be beneficial to allow temporary and short-term degradation in ONRWs.

The objective of the Standards is provided in 20.6.4.6 NMAC. The objective includes the establishment of water quality standards that consist of the designated use or uses of surface waters of the state, the water quality criteria necessary to protect the use or uses and an antidegradation policy. Subsection (A) of 20.6.4.6 NMAC. The objective provides that the Standards are consistent with Section 101(a)(2) of the Clean Water Act, which declares that it is the national goal that wherever attainable, an interim goal of water quality that provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water. Subsection (B) of 20.6.4.6 NMAC. The objective of the Clean Water Act also includes the restoration and maintenance of the chemical, physical and biological integrity of the nation's waters, including those in New Mexico. In order to accomplish these objectives and goals, the Department believes it would be beneficial to allow temporary and short-term degradation in ONRWs.

E. Proposed change to Subsection (A)(3)

(b) Temporary and short-term degradation of water quality shall last no longer than 12 months, unless a demonstration is made to the commission, the department or a designated management agency, as appropriate, that longer term degradation is necessary to restore or maintain the chemical, physical or biological integrity of the ONRW.

F. Statement of Reasons Supporting Proposed Change

(1) “Temporary and short-term”

The Department proposes to specify a time limit for “temporary and short-term degradation” by proposing language that limits temporary and short-term to no longer than twelve months. The time limitation is proposed in order to provide regulatory certainty regarding the length of time that degradation may occur. The Department also proposes to add a provision that any anticipated degradation lasting more than twelve months shall require a demonstration that such degradation is necessary to restore or maintain the chemical, physical, and biological integrity of the ONRW.

The intent of EPA's current federal antidegradation language in 40 C.F.R. § 131.12(a)(3) is to limit water quality degradation to the shortest possible time. *See Handbook*, p. 4-10. 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. *Id.* EPA states that “temporary and short-term” degradation would equate to weeks or months. *Id.*

The Department does not believe it is appropriate to restrict “temporary and short-term” to a period of weeks and months in New Mexico because many activities, due to New Mexico’s arid climate, can take more than a few months to take affect. A limitation that restricts “temporary and short-term” degradation to only weeks or months would necessarily prevent many appropriate activities from proceeding if they lasted longer than weeks or months. For example, a watershed restoration project may include removal of non-native plants and revegetation with native plants. In the interim period when native plants are being re-established, water quality could be temporarily degraded by increased temperatures due to loss of canopy or increased sediment due to loss of vegetative cover. The proposed language provides regulatory certainty by providing a twelve-month limitation and also provides the flexibility to allow sufficient time for appropriate projects that may take more than one year to complete. These demonstrations to exceed the twelve-month limitation would necessarily be made to the appropriate approval authority.

G. Proposed change to Subsection (A)(3)

(c) Temporary and short-term degradation shall only be approved on a case-by-case basis by the commission, the department or a designated management agency as appropriate. Temporary and short-term degradation resulting from applications under 20.6.4.16 NMAC shall be considered and may be approved by the commission. All other temporary and short-term degradation shall be considered and may be approved by the department or by a designated management agency pursuant to a memorandum of agreement between the department and the designated management agency. In approving temporary and short-term degradation, the commission, the department or the designated management agency shall consider and minimize the frequency and cumulative effects of such degradation. The approval of temporary and short-term degradation shall not result in permanent degradation of water quality in the ONRW or water quality lower than necessary to protect existing uses in the ONRW.

H. Statement of Reasons Supporting Proposed Change

(1) Case-by-case

The Department proposes to require that every time temporary and short-term degradation is approved in waters with the ONRW designation the approval must be done on a case-by-case basis. The purpose for this case-by-case approval requirement is to ensure that the merits of each case are considered and that the special circumstances and factors for each case shall be considered by the approval authority. The location of the activity and type of impact would also be evaluated. The requirement that approvals must be done on a case-by-case basis is intended to prevent the use of categorical or multiple approvals by the approval authority. This case-by case requirement will apply to all approvals by the Commission, the Department, or a designated management agency as appropriate.

(2) Approval by Commission

The Department proposes to include language that makes clear that the Commission may approve temporary and short-term degradation in ONRWs through the process provided under 20.6.4.16 NMAC. This language is an acknowledgement of the authority of Commission to approve the application of piscicides under 20.6.4.16 NMAC. This acknowledgement is simply a recognition of the Commission's existing authority and is not an attempt to increase, limit, or modify that existing authority.

(3) Approval by Department

The Department proposes to include language that allows it to approve temporary and short-term degradation. The Department would use this authority to approve the following types of projects: (1) watershed protection projects that may affect ONRWs; and (2) activities necessary to restore or maintain chemical, physical, and biological integrity of the waters designated as ONRWs. The Department interprets the word "approved" to include the approval of non-point source projects through Section 319 of the CWA, certifications of 402 or 404 permits under Section 401 of the CWA, and other approvals requested on a case-by-case basis.

(4) Approval by designated management agency

The Department proposes to add language to allow the case-by-case approval of temporary and short-term degradation by "designated management agencies". The Department proposes to include language that allows the Department to enter into memorandums of agreement with designated management agencies, which would provide the designated management agency the authority to approve temporary and short-term degradation on lands subject to the designated management agency's authority or jurisdiction. The Water Quality Act ("WQA") provides authority to the Commission to authorize constituent agencies, like the Department, to enter into agreements with federal and state agencies for purposes consistent with the WQA. NMSA 1978, § 74-6-4(F) (2003). The designations of such agencies are addressed in Work Element 5 of the Commission's Statewide Water Quality Management Plan.

The Department anticipates that these memorandums of agreement will include the following provisions: (1) notification to the Department of any project that will result in temporary and short-term degradation of water quality in an ONRW; (2) an opportunity for the Department to participate in the initial planning phases of projects that have potential to temporarily degrade water quality in ONRWs; (3) a case-by-case process for the designated management agency's evaluation of water quality impacts in ONRWs to ensure that all requirements of 20.6.4.8 NMAC are met; (4) site-specific best management practices (BMPs) that minimize impacts to water quality in ONRWs; (5) monitoring to ensure that BMPs are effective; (6) an assurance that authorizations for use of the designated management agency's lands will comply with all provisions of 20.6.4.8 NMAC; (7) an employee training and education program to increase awareness regarding the higher standards of water quality protection required for ONRWs and methods to achieve those higher standards; and (8) recognition that the Department retains full enforcement authority to ensure compliance with the Standards and provisions regarding water quality protection in ONRWs.

(5) Consider and minimize frequency and cumulative effects

The Department proposes language that would require that the Commission, the Department, or a designated management agency to consider and minimize the frequency and cumulative effects of such degradation. This language is proposed to ensure that any approval of temporary and short-term degradation is limited to only that degradation that is considered necessary to restore or maintain the chemical, physical or biological integrity of the ONRW, or to achieve the objectives in 20.6.4.6 NMAC. This language also will ensure that the Commission, the Department, or a designated management agency evaluate the proposed degradation in the context of the current conditions of the ONRW and on-going activities in the ONRW and, to the extent possible, minimize the frequency and cumulative effects of the degradation. This proposed requirement is consistent with the requirements of the Handbook. *See Handbook, p. 4-10.*

(6) Prohibition against permanent degradation or lowering water quality necessary to protect existing uses

The Department proposes to require that the degradation from approved projects does not permanently degrade water quality in the ONRW or result in water quality lower than that necessary to protect existing uses in the ONRW. This provision is added to ensure that temporary and short-term degradation shall not be used as mechanism to subvert the prohibition against degradation contained in Subsection (A)(3) of 20.6.4.8 NMAC. This provision is based on language in the Handbook. *See Handbook, p. 4-10.*

The Department emphasizes that 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 may be allowed if it is for the purpose of restoring or maintaining the “chemical, physical or biological integrity” of the ONRW. Therefore, temporary and short-term degradation may be allowed for long-term improvement or maintenance purposes.

I. Proposed change to Subsection (A)(3)

(d) In implementing activities 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.

J. Statement of Reasons Supporting Proposed Change

(1) Implementation / Minimization

The Department proposes language to require implementation of all practical means of minimizing the temporary and short-term degradation. After temporary and short-term degradation is approved, the implementers of the project or activity will be required to minimize

the degradation. This proposed requirement is consistent with the requirements of the Handbook. *See Handbook, p. 4-10.* During any period of time when the State allows temporary degradation, all practical means of minimizing such degradation shall be implemented. *See Handbook, p. 4-10.*

If the implementers of the project or activity fail to minimize the degradation, including ensuring that cumulative effects are minimized, or their actions lead to permanent degradation of the water quality, the Department would have full authority to pursue an appropriate enforcement action under the Water Quality Act, NMSA 1978, § 74-6-10. Furthermore, even if the temporary and short-term degradation was approved by a designated management agency, the Department would have full authority to pursue enforcement of these proposed antidegradation provisions.