



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Kristine Pintado
Standards Planning and Reporting
Surface Water Quality Bureau
New Mexico Environment Department
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Dear Ms. Pintado:

As the New Mexico Environment Department continues to develop its proposed triennial revisions for the *New Mexico Standards for Interstate and Intrastate Surface Waters*, the Environmental Protection Agency (EPA) Region 6 would like to share some comments and recommendations on the latest public discussion draft. The comments and recommendations provided in the enclosure are part of the water quality standards development process and do not represent a finding under §303(c) of the Clean Water Act or Standards Regulation (40 CFR 131). Any decisions on new and revised water quality standards will be made by EPA following their adoption and submission to Region 6 by the New Mexico Water Quality Control Commission.

The Region would also like to take this opportunity to recognize the Surface Water Quality Bureau's efforts in the development of these draft revisions. It is clear that a significant amount of work has gone into the development of these draft proposals. If you have any questions, please contact me at nelson.russell@epa.gov or (214) 665-6646.

Sincerely,

Russell Nelson
Regional Standards Coordinator
Watershed Management Section (6WQ-EW)

Enclosure

cc: James Hogan, Bureau Chief
SWQB (N2107)

Jeff Scarano, Program Manager Monitoring Assessment and Standards Section
SWQB (N2106)

EPA Comments and Recommendations on the 2014 Discussion Draft of the New Mexico's Surface Water Quality Standards

Part 4. Standards for Interstate and Intrastate Surface Waters

General Comments

The following comments are specific to those sections of the New Mexico standards where the New Mexico Environment Department (NMED or Department) has proposed modifications. General recommendations have been provided previously.

20.6.4.7 - Definitions

Region 6 does not have specific comments on the proposed new and revised definitions. It should be noted however, that definitions may or may not be considered to be a water quality standard depending on how a particular definition supports or is integral to the understanding or application of a provision or criterion.

20.6.4.10 - Review of Standards: Need for Additional Studies

20.6.4.10 F. – Temporary Criteria

EPA guidance explains that variance procedures involve the same substantive and procedural requirements as removing a designated use, but unlike use removal, variances are both discharger and pollutant specific, are time-limited, and should be used instead of removal of a use where the State believes the standard can ultimately be attained. In its public discussion draft, the NMED explains that this proposed provision allows for the adoption of temporary criteria that are implementable by the State to advance pollution controls where the water quality standards are not immediately achievable. Although generally consistent with EPA guidance on variances, as detailed in discussions and prior comments related the state's antidegradation provisions and implementation, particularly 20.6.4.8 A (4)(b) NMAC, the Region explained that it believes that the currently proposal limits the state's flexibility and how extensively such a provision could be applied .

The Region recommends that the provision refer to temporary standards rather than limiting it to the term "criteria." In actions elsewhere, EPA has approved temporary standard provisions. While the state's originally proposed language allows the state to address discharger and pollutant specific issues where a 3-year time-limitation may be appropriate, the recommended language that follows is intended to allow for instances where the duration of temporary

standards can be tailored to site-specific circumstances. Region 6 believes that these recommendations expand the state's flexibility to provide a process to address shorter term situations, as well as restore and remediate damaged water resources that are not meeting their designated uses that may require more time to implement and the waterbody to recover. Such an approach is consistent with the Clean Water Act (CWA) 'restore and maintain' objectives.

F. Temporary Criteria Standards.

(1) Any person may petition the commission to adopt a temporary ~~standard criterion~~ applicable to all or part of a surface water of the state as provided for in this section. The commission may adopt a proposed temporary ~~standard criterion~~ if the applicable criterion is not being attained as reported in the CWA Section 305(b)/303(d) Integrated Report and the petitioner demonstrates that:

By stating that any person may petition the Commission to adopt a temporary standard without a qualifier may lead some entities to petition the Commission even though the Commission's approval will be limited to uses/criteria identified in the state's 305(b)/303(d) Integrated Report as not attained. Similarly, there are no qualifiers as to what NMED would be obligated to review in such an instance, leading to possible confusion over what the Department is and is not obligated to review.

The intent of the Commission limiting its approval of such petitions to all or part of a surface water that has been identified in the state's 305(b)/303(d) Integrated Report is likely to ensure that well documented problems are addressed. However, this approach may limit the incentive by "good Samaritan" groups to consider restoration and remediation that may not be clearly tied to a specific discharger or parameter. It may also limit the state itself where problems that may not as yet be identified in the state's Integrated Report that could be addressed through these provisions.

(a) attainment of the associated designated use may not be ~~is not~~ feasible in the short term due to one or more of the factors listed in 40 CFR 131.10(g) as demonstrated through a petition and supporting work plan as detailed in paragraphs (4) and (6) below. ~~by means of a use attainability analysis completed pursuant to 20.6.4.15 NMAC;~~

*State procedures contained in its water quality standards must be consistent with the substantive requirements of 40 CFR 131. EPA has approved State-adopted provisions like the one proposed here when, among other requirements, the state (or 3rd-party proponent) demonstrates that meeting the standard is unattainable based on one or more of the factors outlined in 40 CFR 131.10(g) for removing a designated use (see Water Quality Standards Handbook, 2nd Ed.). This should not be interpreted to mean that a use attainability analysis (UAA) is required to support a variance or temporary standard. A UAA has a specific regulatory purpose of supporting the removal of a designated use. **The intent of a variance or temporary standards is to preserve the use and temporarily modify applicable criteria to detail how incremental progress will be made in ultimately meeting that use. This provision should make it clear that proposals and work plans developed in support of a temporary standard as detailed in subsequent paragraphs***

clearly describe the basis for a temporary standards supported by documentation that shows meeting the current standard is unattainable based on one or more of the factors outlined in 40 CFR 131.10(g). See paragraphs (4) and (6) below.

(b) the proposed temporary standard ~~criteria~~ represents the highest degree of protection feasible in the short term and adoption will not cause loss or impairment of an existing use; ~~and~~

(c) for point sources, existing or proposed discharge control technologies will comply with applicable technology-based limitations and feasible technological controls and other management alternatives, such as a pollution prevention program; ~~and-~~

(d) for restoration activities, nonpoint source or other control technologies to limit downstream impacts and existing or control technologies consistent with subparagraph (c) if applicable.

The suggested language in subparagraphs (c) and (d) is intended to differentiate between those instances where a temporary standard is appropriate for a discharger and parameter specific situations and those where a project may be broader in scope, such as a restoration or remediation project that may or may not include a defined point source.

(2) A temporary standard ~~criteria~~ shall apply to a specific pollutant(s), or to a specific water body segment(s). The adoption of a temporary criterion does not exempt dischargers from complying with all other applicable criteria or control technologies.

(3) Designated uses shall not be modified on a temporary basis. Designated use attainment as reported in the CWA Section 305(b)/303(d) Integrated Report shall be based on the original criteria, not on temporary standard ~~criteria~~.

(4) A petition for a temporary criterion shall:

(a) identify the current applicable criterion, the proposed temporary standard ~~criteria~~ and the surface water(s) of the state to which the temporary standard ~~criteria~~ would apply;

(b) demonstrate that the proposed temporary standard ~~criteria~~ meets the requirements in this Subsection;

(c) present a plan and timetable for achieving compliance with the original standard or criterion, including any investigations, projects, facility modifications, monitoring, or other measures; ~~and~~

(d) implement 122.44(d)(1)(i), by identifying the level currently achievable and the schedule of specific actions approved by EPA in the variance including review during triennial reviews will be included in the permit as enforceable limits and permit conditions; and

~~(e)~~ include any other information necessary to support the petition.

By including the recommended subparagraph (d), this provision would ensure that the requirements of a temporary standard are enforceable. Failure to comply would result in termination of the temporary standard(s) during a triennial review as outlined in paragraph (8). See other related comments on paragraph (6) below.

(5) The commission may condition the approval of a temporary ~~standard~~ critereion by requiring monitoring, relevant analyses, the completion of specified projects, submittal of information, or other actions.

(6) Any person may submit notice to the department stating the intent to propose a temporary ~~standard~~ critereion. The proponent shall develop a work plan to conduct the analyses required in this Subsection, and shall submit the work plan to the department ~~and region 6 EPA~~ for review and comment. The work plan shall identify the factors affecting attainment of the criterion that will be analyzed and timetable for specific actions to be taken to achieve the uses that are attainable over the term of the temporary standard, including baseline water quality, identification of threatened and endangered species, investigations, projects, facility modifications, monitoring, or other measures necessary to achieve compliance with the original standard/criterion. The work plan shall include ~~and the~~ provisions for public notice and consultation with appropriate state and federal agencies. Upon approval of the work plan by the department, the proponent shall conduct the analyses in accordance with the approved work plan. The cost of such analyses shall be the responsibility of the proponent. Upon completion of the analyses, the proponent shall submit the conclusions to the department. The department or the proponent may petition the commission to adopt a temporary criterion if the department determines the conclusions of the analyses support such action.

This provision states that a proponent may submit notice of the intent to propose a temporary standard, and then requires the proponent to submit a work plan to both NMED and EPA in support of that proposal. By allowing the proponent the option of submitting notice of the intent but not requiring a work plan to accompany that proposal could result in proposals with no advanced notice by only following the requirements in paragraph (4).

In those instances where a proponent develops a work plan to conduct supporting analyses, this provision requires that the work plan be submitted to NMED and EPA Region 6. While the provision requires the proponent to submit pre-decisional work plan, it cannot bind EPA Region 6 to review such documents. The state has primacy in developing and adopting its water quality standards and would be the primary reviewer for such 3rd-party proposals. NMED has consistently provided high quality comments and recommendations on pre-decisional regulatory documents. NMED's comments and recommendations play an essential role in informing Region 6 as to the appropriateness of pre-decisional proposals and their consistency with state law. Region 6 may be able review proposed workplans and provide NMED with comments and recommendations, but cannot assure that resources will be available prior to adoption. However, as part of its oversight authority, EPA is required to review and act on state water quality standards actions once submitted for approval pursuant to section 303(c) of the Act.

The reference to a plan and required actions are vague. To be effective, the provision should include the recommended language or something similar, specifying the basis for a temporary standard, the applicable uses that can be attained during the variance and the timeline for specific actions that will be taken to ultimately achieve the original standard. This paragraph could potentially be merged into paragraph (4) under subparagraph (b) and (c).

(7) Temporary standard~~criteria~~ may be implemented only after appropriate public participation, commission approval and adoption pursuant to this Subsection, and EPA Clean Water Act Section 303 (c) approval.

(8) ~~Unless renewed, a~~ A temporary standard ~~criteria~~ shall expire no later than the effective date specified in the EPA approval. A temporary standard is subject to review to determine progress consistent with the original conditions during succeeding~~of the~~ next triennial reviews for the duration of the temporary standard as required by Subsection A of 20.6.4.10 NMAC. The commission may consider a petition to extend ~~for renewal~~ an existing temporary standard. The effective period of a temporary criterion shall be extended only if the factors precluding attainment of the underlying criterion still apply, if the petitioner is meeting the conditions for approval of the interim criterion, and if reasonable progress towards meeting the underlying criterion is being achieved.

The recommended language in paragraph (8) is intended to be consistent with and support paragraphs (4) and (6). The recommended language is intended to make it clear that a temporary standard expires consistent with the duration described in the original petition as established in the supporting work plan. In addition, the recommended language is also intended to make it clear that a temporary standard is subject to triennial review no matter what its original duration or whether it is associated with a permitted discharge or not. This keeps the provision consistent with the 3-year limit derived from the requirements of section 303(c) of the Act.

(9) Upon expiration of a temporary standard~~criteria~~, the original criterion becomes applicable.

(10) Temporary standard~~criteria~~ shall be identified in 20.6.4.97 – 899 NMAC as appropriate for the surface water affected.

20.6.4.15 - Use Attainability Analysis

Although no amendments are proposed for this section, as noted in our December 2013 recommendations, Region 6 believes NMED should address the inconsistencies with how “classified” and “unclassified” waters are treated in the state’s standards. Given that there are no functional differences between existing classified segments, reassessed classified segments and assessed unclassified waters, Region 6 recommended that the state amend §20.6.4.15.C to explain that assessed unclassified waters only will be retained in §§20.6.4.97-99 NMAC or identified under these sections on the NMED website as an interim step until NMED petitions and the Commission incorporates these waters into classified segments in §§20.6.4.101- 899 NMAC consistent with the river/closed basin structure that currently exists in the standards.

20.6.4.16 - Planned Use of a Piscicide

The U.S. Sixth Circuit held in *National Cotton Council, et al. v. EPA* (2009) that the application of a pesticide to a water of the U.S. was a pollutant and is subject to NPDES permit requirements. Following that decision, EPA issued a nationwide Pesticide General Permit (PGP)

to cover pesticide applications in states, including those without NPDES permit authorization. Since that decision, NMDGF has relied upon the nationwide general permit and approval from the Water Quality Control Commission (Commission) when conducting piscicide applications to remove unwanted species from various waters within the state.

Given the Sixth Circuit's decision, NMDGF is eligible for and covered under EPA's NPDES PGP, making some of the requirements in 20.6.4.16 NMAC redundant. As a result, Region 6 previously recommended that the SWQB consider revisions to include an exemption for those portions now covered under EPA's NPDES PGP and address those requirements in the state's rules that don't appear to be covered under the PGP. The proposed revisions appear to address these recommendations. It may be useful to consider if the amended language should refer specifically to the NPDES PGP where appropriate rather than only NPDES permit(s).

20.6.4.97 - Ephemeral Waters

The amendments found in §20.6.4.97 NMAC indentifies waters where NMED has sought Region 6 technical approval for beneficial use modifications consistent with federal regulations at 40 CFR 131.10, state regulations at §20.6.4.15 NMAC and implementation contained in the state's Quality Management Plan/CPP (WQMP/CPP) document.

Region 6 has granted technical approval for the majority of the waters that are proposed to be listed under §20.6.4.97 C. NMAC with the exception of those waters associated with the Freeport MacMoRan/Chino Mines proposal at §20.6.4.97 C (6)(b). Following an initial review, Region 6 does not believe it can grant technical approval at this time given the limited detail in the body of the ARCADIS report. Based on the lack of detail in the body of the report, it is difficult to follow and determine if ongoing or past activities affect the assessed waters and at points, and what specific waters are being discussed in what is clearly a complex site. NMED's UAA for the Animas River is currently under review and should be completed soon.

For those waters that Region 6 has granted technical approval, those actions are not a final actions under §303(c) of the CWA, but are interim actions relying the previously approved performance-based approach (*See* 65 FR 24647, 24648 ((April 27, 2000)) outlined in §20.6.4.15 NMAC and the state's WQMP/CPP document. This approach is intended to allow the state to make water quality management decisions for the assessed water(s) during what may be a significant time frame between the assessment by NMED and final action and submission to Region 6 by the Commission.

20.6.4.97, 98 and 99 – Ephemeral, Intermittent and Perennial Waters

Based on the draft proposals, related to Region 6's recommendations on §20.6.4.15 NMAC, NMED is considering removal of the term "unclassified" for those waters which have been characterized as ephemeral, and adding the term "surface" to be consistent with the term "surface water(s) of the state" defined in Subsection S of 20.6.4.7 NMAC. This proposal would be a welcome addition to the Region 6's earlier recommendations and reiterated in §20.4.6.15 NMAC above.

Proposed Revisions to Sections 20.6.4.100 - 807

20.6.4.100, 102, 103, 110, 116 and 124 – Rio Grande Basin

Region 6 supports the proposed amendments to these segments in the Rio Grande Basin. These include proposed amendments consistent with EPA recommendations for recreational contact and CWA 101(a) goals (77 FR71191, November 29, 2012). In some instances, revising the designation from secondary to primary contact for compatibility with downstream waters is consistent with 40 CFR 131.10(b). Region 6 supports the proposed amendments replacing the word ‘below’ with the hydrologic term ‘downstream of’ in these segment descriptions appropriate and a useful clarification.

20.6.4.204, 206, 207, 213 and 219 – Pecos River Basin

Region 6 supports the proposed amendments to these segments in the Pecos River Basin. As noted for segments in the Rio Grande Basin, Region 6 supports NMED’s recommendation to designate these segments based on field survey results and consistent with the latest EPA recommendations for recreational contact and CWA 101(a) goals. Region 6 also considers the proposed amendments replacing the word ‘below’ with the hydrologic term ‘downstream of’ in these segment descriptions to be appropriate and a useful clarification.

20.6.4.305, 308 and 317 – Canadian River Basin

No comments are necessary concerning the amendments to 20.6.4.305. As noted above, Region 6 supports NMED’s recommendation to designate these segments for primary contact consistent with the latest EPA recommendations.

20.6.4.403 and 404 – San Juan River Basin

The editorial changes to the segment descriptions, adding the word ‘river’ and referring to the correct jurisdiction boundary for Southern Ute Indian Tribe are appropriate. NMED has developed a draft use attainability analysis (UAA), *Aquatic Life Uses for the Animas River in New Mexico*, to support the proposed designated amendments outlined for these segments. NMED has submitted an early draft UAA and is expected to submit a final draft to Region 6 for technical approval. The preliminary review suggests that the use and related temperature criteria may be appropriate. When the review the final document is complete, Region 6 will notify NMED of its decision on technical approvability.

20.6.4.502 and 503 – Gila River Basin

As noted for segments discussed previously, Region 6 supports replacing the word ‘below’ with the hydrologic term ‘downstream of’ in these segment descriptions. The proposed correction to

the segment description for 20.6.4.503 NMAC to accurately reflect where site-specific conductivity criteria should apply is reasonable. The analysis of the conductivity in this segment should be submitted in support of this amendment if adopted by the Commission.

20.6.4.803, 804 and 807 – Closed Basins

NMED is developing a draft UAA supporting the proposed amendments to the aquatic life designated uses and criteria for segments 20.6.4.803, 804 NMAC and the addition of a new segment 20.6.4.807 NMAC. Once a draft UAA is developed, Region 6 anticipates that NMED will present it for public comment. Based on its findings and those comments, Region 6 anticipates NMED preparing and submitting a UAA and supporting documentation for technical review prior to proposing these amendments or as supporting documentation as part of their triennial submission.

20.6.4.900 - Criteria

20.6.4.900 D. Primary and E. Secondary Contact

Region 6 appreciates NMED's proposal to update its standards and previously approved testing methodology for sampling, analyzing and reporting bacteria levels in ambient water consistent with current EPA recommendations.

20.6.4.900 H. Aquatic Life

The proposed amendments in subparagraphs (3), (5) and (6) have been revised to show decimal places, consistent with dissolved oxygen criteria for the other aquatic life designated uses. No comment is necessary.

20.6.4.900 I. (1) Acute and (2) Chronic aquatic life criteria for metals

EPA approved the revised acute and chronic hardness-based formulae and criteria for chromium III, copper, lead, manganese, nickel and silver, cadmium, and zinc but limited the approval of aluminum in its action on New Mexico's 2010 triennial revision. In that action, EPA recognized the significant variability in both pH and hardness in waters in New Mexico, but noted that it does not believe that the hardness-based equations the state had adopted for aluminum were appropriate as a basis for statewide criteria and may not be protective of beneficial uses in all Waters of the State. EPA believes that the hardness-based equations for aluminum would be protective for waters within the pH range of 6.5 to 9.0, particularly at low hardness levels, but would not be protective for waters below that pH range. As a result, EPA approved the hardness-based equation for aluminum for only those waters of the State where pH is equal to or greater than 6.5, but disapproved the use of these equations in waters where the pH is less than 6.5.

To resolve this disapproval, EPA recommended that the State adopt a footnote for these equations specifying that where pH is equal to or greater than 6.5 in the receiving water after mixing, the chronic hardness-dependent aluminum equation will apply, and where pH is 6.5 or less in the receiving water after mixing, the more stringent of either the 87 µg/L chronic total recoverable aluminum criterion or the criterion resulting from the chronic hardness-dependent equation will apply.

The currently proposed language for both 20.6.4.900 I. (1) and (2) states that the hardness-based equation for total recoverable aluminum as applicable only where pH is equal to or greater than 6.5 in the receiving stream after mixing, but also appears to say that when pH is less than 6.5 in the receiving stream after mixing, that the 750 µg/L acute and 87 µg/L chronic criteria for aluminum found in subsection J are applicable. This approach would not resolve EPA's disapproval in situations where the 87 µg/L chronic standard applies. In those instances, the more stringent of either the 87 µg/L chronic total recoverable aluminum criterion or the criterion resulting from the chronic hardness-dependent equation should be applied. Without this minor additional change, EPA will continue to apply the more stringent of the 87 µg/L chronic total recoverable aluminum criterion or the criterion resulting from the chronic hardness-dependent equation.

20.6.4.900 I. (3), J. (1) and L. – Criteria Tables

The modifications to the tables in 20.6.4.900 I. (3), J. (1) and L. do not require comment.

20.6.4.901 H. – Publication References

No comment is necessary on the update to the Colorado River Basin Salinity Control Forum reference.