



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

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JAN 23 2001

Copy

Mr. Peter Maggiore, Secretary
State of New Mexico Environment Department
Harold Runnels Building
1190 Saint Frances Drive
Santa Fe, NM 87502

Dear Mr. Maggiore:

The Environmental Protection Agency (EPA) has completed its review of the New Mexico Standards for Interstate and Intrastate Surface Waters (NMAC Title 20, Chapter 6.1). I would like to acknowledge the efforts of the New Mexico Water Quality Control Commission and particularly the New Mexico Environment Department in the development of these revised standards. The State's efforts to inform and involve the citizens of New Mexico in the water quality standards process should be commended.

EPA's review was of the triennial revisions which were adopted by the New Mexico Water Quality Control Commission on December 8-9, 1999. These water quality standards were submitted to EPA on January 31, 2000, as required under federal regulations at 40 CFR 131.5. The revised standards were certified by the New Mexico Attorney General on January 25, 2000, and became effective as State law on February 23, 2000.

Section 303(c) of the Clean Water Act (CWA) requires EPA to review and approve or disapprove new or revised water quality standards. In today's action, except as specified below, EPA is approving the majority of the new and revised elements of these standards, subject to the results of consultation under section 7(a)(2) of the Endangered Species Act. However, EPA is disapproving several new and revised provisions that are inconsistent with the requirements of the CWA and its regulations (40 CFR 131). These provisions include the State's definition of "waters of the state," its antidegradation implementation plan, general exclusions for irrigation and flood control and unsupported use designation changes. The State has 90 days from this notification to adopt specified changes or EPA will take corrective action. A detailed explanation of the basis for EPA's decision is enclosed.

In addition, EPA Region 6 has identified two previously approved provisions that may not meet the requirements of the CWA. If the state is not able to resolve these matters, EPA Region 6 will consider recommending that the Administrator make a finding under Section 303(c)(4)(B) that new or revised water quality standards are needed in New Mexico to comply with statutory and regulatory requirements.

RECORDED

JAN 29 2001

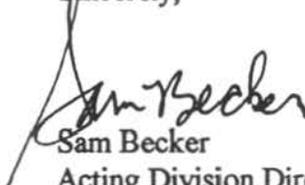
Today's action does not apply to those waters or portions of waters located in Indian country in the State of New Mexico. As you know, States generally do not have authority to develop or apply water quality standards in Indian country. The State's water quality standards are only approved for those portions that are outside Indian country.

Although the State has not sought to demonstrate such authority in its standards, during its review of the 1999 New Mexico standards, EPA noted that some of the waters for which use designations were made in the State's 1995 revisions included portions of stream segments located within Indian country. Because EPA has not analyzed the State's authority to make use designations for waters in Indian country, and has not expressly found that the State has such authority, EPA does not view its 1995 action as having approved any use designations by the State for portions of waters that lie within Indian country. To clarify this matter further, the State should amend its standards to specify that the State's water quality standards do not apply to any portions of waters located in Indian country.

EPA initiated consultation with the U.S. Fish and Wildlife Service under section 7(a)(2) of the Endangered Species Act on these standards on March 25, 1998. Section 7(a)(2) requires that federal agencies, in consultation with the Services, insure that their actions are not likely to jeopardize the existence of federally listed species or result in the adverse modification of designated critical habitat of such species. As of today, this consultation has not been completed. By approving the standards "subject to the results of consultation under section 7(a)(2) of the Endangered Species Act," EPA retains the full range of options available under section 303(c) for ensuring water quality standards are environmentally protective. EPA retains the discretion to revise its approval decision if the consultation identifies deficiencies in the water quality standards that require remedial action.

Again, we appreciate both the Commission and Environment Department's efforts in the development of this triennial revision package. If you have any questions or concerns, please contact me at (214) 665-7101.

Sincerely,



Sam Becker
Acting Division Director
Water Quality Protection Division

Enclosure

cc: Fred Leutner, Office of Science and Technology
Susan Lepow, Office of General Counsel
Joy Nicholopoulos, U.S. Fish and Wildlife Service

**RECORD OF DECISION
FOR
EPA REVIEW OF**

**TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 6 WATER QUALITY
PART 1 STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE
WATERS**

New or Revised Provisions EPA is Approving

EPA has determined that the new or revised provisions discussed in this section are approvable. EPA has identified additional approvable new or revised provisions for which follow-up is recommended and which are discussed under **Issues of Concern**.

SUBPART I - GENERAL

1007F. Definitions

“Attainable use”

This definition has been deleted from the previous standards.

“Bioaccumulation factor”

The definition was modified to more closely track the federal definition.

“Biomonitoring”

This definition was added to increase clarity in the standards document.

“Classified water of the State”

This modification provides some clarification as to meaning throughout the remainder of the document.

“Coldwater fishery”

This definition was modified, removing the reference to specific representative cold water species. Although removing this reference reduces the level of precision that may be used to describe this subcategory of fishery, the definition is not inconsistent with the Clean Water Act (CWA) and Part 131 because it does not provide a particular level of specificity. In addition, the “*cold water fishery*” subcategory is still reasonably specific.

“Criteria”

This is a new definition, and appears intended to help specify that when the term is used in the standards, it means numeric criteria.

“Ephemeral stream”

This definition has been modified to indicate that the term “*ephemeral stream*” does not include streams that support self-sustaining fish populations.

“*High quality cold water fishery*”

This definition was modified, to remove a reference to reproducing salmonids. As with the “*coldwater fishery*” definition, although this modification reduces the level of precision that can be used to *describe* this subcategory, it is not inconsistent with the requirements of the CWA and Part 131 because it does not provide a particular level of specificity. In addition, the “high quality cold water fishery” subcategory is still reasonably specific.

“*Interstate waters*”

The actual modification is a minor clarification made to demonstrate applicability of the State’s standards.

“*Natural causes*”

The definition was simplified.

“*State*”

This is a new definition intended to avoid confusion with the federal definition.

“*Warmwater fishery*”

This definition was modified, removing the reference to specific representative warm water species. As with both the “*coldwater fishery*” and “*High quality cold water fishery*” definitions, this modification reduces the level of precision of the previous definition, but is not inconsistent with the requirements of the CWA and Part 131 because it does not provide a particular level of specificity. In addition, the “*warmwater fishery*” subcategory is still reasonably specific.

“*Water contaminant*”

The modified definition excludes source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, but may include all other radioactive materials.

“*Water course*”

The definition was actually a description, and has been deleted.

“*Water(s)*”

The previously approved private waters exclusion in this definition appropriately covers some “*waters*” which are not considered waters of the US, e.g., wholly isolated stock ponds created on dry land (not within a water of the US), man-made swimming pools, etc. However, this definition could in theory also exclude some waters from protection under the water quality standards which are “*waters of the United States*” as defined in 40 CFR 122. The waters of the United States which most likely could be covered by the private waters exclusion would be playalakes which have an interstate commerce link (e.g., are used as habitat by migratory birds and/or are used by a business in interstate commerce), are wholly on privately owned land, and which

do not connect with other surface or groundwater.

Although not specifically aware of any actual waters which are both “waters of the US” and excluded from the definition of “waters,” EPA requested and received clarification from the State verifying the lack of overlap.

“Wildlife habitat”

The modification expanded the previous definition to exclude habitat for pathogen vectors or intermediate hosts from the definition.

Action: EPA approves these new/revised definitions.

1101. Antidegradation Policy and Implementation Plan

A. Antidegradation Policy

The antidegradation policy statement was restructured to more closely resemble the federal requirements found at 40 CFR 131.12, clarifying the levels (Tiers) of protection provided.

In making these modifications, the State also deleted descriptive language that prohibited degradation in high quality waters of national and state monuments, parks, wildlife refuges and waters designated by Congress under the Wild and Scenic Rivers Act. Nonetheless, the State policy contains Tier III provisions consistent with the requirements of 40 CFR 131.12. Section 131.12(a)(4) does not mandate that all waters in national and state monuments, etc., be designated as ONRWs. While Region 6 historically considered it the State’s intent to provide Tier III protection to the waters listed in the previous State policy, subsequent inquiry indicates that no clear outstanding national resource waters (ONRWs) designation has been made by the State. Thus, EPA has no basis to conclude that these modifications effectively lowered the level of protection offered any ONRWs. [*See 2. New or Revised Provisions EPA is Disapproving and 4. Issues of Concern for a discussion of the process for designating waters as ONRWs.*]

Action: EPA approves the revised provisions.

1102. Review of Standards, Need for Additional Studies

The language in this provision has been modified slightly to clarify that as water quality improves, standards will be revised to protect attainable designated uses. This language generally follows the requirements found at 40 CFR 131.10(j) which require the State to evaluate and revise uses to reflect new uses as they are attained.

Action: EPA approves the revised provision.

1103. Applicability of Water Quality Standards
A. Livestock Watering and Wildlife Habitat Uses

These modifications restructure previously held provisions for the application of standards to ‘created flows’ in otherwise ephemeral streams (essentially Tier I waters). The limitation in the protections for ‘created water’ apply when it joins a classified (Tier II) water of the State. Standards applicable to the downstream (Tier II) water must be met at the point of confluence, but do not specifically apply to the upstream unclassified segment. However, as a practical matter, the unclassified segment itself is indirectly protected as long as the ‘created flow’ exists.

Action: EPA approves the revised provision.

1105. General Standards
F. Toxic Pollutants

The State made extensive modifications to this section to provide a mechanism for the use of piscicides. This modification is seen as part of the State’s efforts to remove non-native species that may be adversely affecting native and threatened and endangered species. The overall intent is to improve the biological integrity of the State’s waters.

Action: EPA approves the modification.

1107. Use Attainability Analysis

This provision lays out the requirements for a use attainability analyses (UAA) or equivalent study. Specific guidance for development of a UAA found here is intended for entities other than the New Mexico Environment Department (NMED). These requirements require that such analyses be approved by NMED and the “Regional Administrator” in order to remove a designated use. We understand and agree with the intent, and assume that the State’s reference to “Regional Administrator” includes Division Directors to whom the Regional Administrator has delegated the authority to approve use modifications.

Action: EPA approves the modification.

Subpart III, Numeric Standards Applicable to Attainable or Designated Uses
3100. G. Primary Contact

The State revised this provision eliminating a specific numeric criterion for turbidity from its primary contact use. The primary contact classification describes activities where ingestion of, or immersion in, water is likely. Bacteriological criteria supporting this use are intended to protect people from illness resulting from ingestion or immersion. The secondary contact use assumes that ingestion or immersion is unlikely, but bacterial criteria sufficient to protect the primary use may be applied. Designation for secondary contact is typically made

because immersion/ingestion is unlikely because of physical factors such as flow, velocity or depth.

EPA believes that the State recognized that physical factors may not be used as a basis for not designating primary contact recreation uses where it is able to occur, as discussed in the preamble to the Water Quality Standards Regulation, but adopted the turbidity criterion to discourage swimming in certain waters as a safety issue. The State recognizes, and EPA agrees, that such an inflexible numeric turbidity standard doesn't recognize the natural regime of many rivers to transport sediment that are supporting primary contact recreation, and retaining this criterion would only lead to standards non-attainment. [See further discussion concerning *bacteriological criteria in Issues of Concern*]

Action: EPA approves the modification.

3100. J. Numeric Criteria

The State revised the schedule of numeric criteria and equations for several priority pollutants that apply to the fishery use subcategories. The new/revised criteria and equations that have been adopted are EPA's current recommended values for the following pollutants:

Arsenic _(dissolved)	Nickel _(dissolved)
Cadmium _(dissolved)	Selenium _(total recoverable)
Chromium _(dissolved)	Zinc _(dissolved)
Copper _(dissolved)	

Action: EPA approves the modification.

3100. L. Wildlife Habitat

The State made extensive changes to this provision. A significant portion of the narrative language was deleted. Much of the language that was developed in the previous revision, although acceptable to EPA, appears to have proved unworkable in its implementation by the State. Although some of the language that provided narrative "free from" toxics protection was eliminated, specific numeric toxic criteria were adopted in its place.

The new/revised criteria that have been adopted are EPA's current recommended values for the following pollutants:

Mercury _(dissolved)	Chlorine residual _(total)
Selenium _(total recoverable)	DDT and metabolites _(total)
Cyanide _(weak acid dissociable)	PCB _(total)

Action: EPA approves the modification.

New or Revised Provisions EPA is Disapproving

SUBPART I - GENERAL
1007F. Definitions

“Surface water(s) of the State”

The modification of this definition expands and clarifies the previous definition of “waters of the State,” demonstrating applicability of the standards to waters of the State. While we understand that this definition is intended to include all waters of the United States, the definition paraphrases the federal definition in way which could be interpreted to change its meaning. For example, tributaries to water bodies which are waters of the United States are also defined as waters of the United States, without the need to demonstrate that their use, degradation, or destruction would affect interstate or foreign commerce. Also, wetlands adjacent to waters of the United States are automatically also waters of the United States. The paraphrase does not clearly cover these waters. The state definition must be at least as inclusive as the federal definition.

EPA Action: EPA disapproves the revised definition.

The state must revise the definition of “surface water(s) of the State” to be as inclusive as “waters of the US,” e.g., to include all tributaries to waters which are themselves waters of the US and all wetlands which are adjacent to waters of the US. In addition, the state should revise the waste treatment system exclusion in the final sentence to refer to meeting “the requirements of the Clean Water Act” or else provide documentation showing that referring to the “Water Quality Act” instead of the Clean Water Act does not broaden the waste treatment exclusion.

1101. Antidegradation Policy and Implementation Plan
E. Implementation Plan

This provision has been expanded to indicate that the implementation of the water quality standards and antidegradation policy will be carried out by the State through specific methods and procedures listed in the State’s Continuing Planning Process document and those steps laid out in this section (i.e., 1101). Although on its face this revision is consistent with the requirements in 40 CFR 131.12 to identify implementation methods, in fact the 1998 New Mexico Continuing Planning Process document does not contain specific methods or procedures guiding antidegradation reviews and the steps laid out in section 1101 are inadequate.

In discussions with the State, EPA has learned that NMED does not carry out specific antidegradation reviews of activities that may significantly affect water quality, although it does look at individual actions on a “case-by-case basis” as part of its CWA §401 certification review of federal NPDES permits. EPA is aware that the Department is planning to develop specific antidegradation implementation procedures, and encourages the State to continue with that effort.

Action: EPA disapproves the revised provision.

The State must adopt specific procedures that ensure that activities that pose significant degradation are reviewed and preliminary determinations are documented and subjected to public review. These procedures at a minimum, should include the following:

- 1) A description of activities to be regulated under Tier II,
- 2) Determination of applicability of the Tier II process,
- 3) Alternatives analysis,
- 4) Weighting of socio-economic vs. water quality issues,
- 5) Public review/input,
- 6) Documentation of final decision.

SUBPART I - GENERAL

1105. General Standards

This provision codifies a long-standing statutory amendment to the New Mexico State Act (NMSA, section 74-6-12(H)) exempting irrigation and flood control activities from compliance with standards. The fourth sentence of this provision was modified to reflect an amendment made by the New Mexico Legislature in 1999, limiting the exemption to specific numeric criteria.

The NMSA, in referring to the “reasonable operation and maintenance” of irrigation and flood control structures, requires that this activity be defined by regulation of the WQCC. Without a clear definition of what this exemption means and where it does and/or does not apply, this provision is not acceptable because it could be interpreted as either consistent or inconsistent with the requirements of the CWA. An interpretation of the underlying statutory provisions as precluding enforcement against listed activities (essentially nonpoint sources associated with the “reasonable operation and maintenance” of irrigation and flood control structures) may be acceptable as long as assurance is provided that the numeric criteria in question continue to apply to affected surface waters and will be considered in assessing water quality in surface waters of the state affected by such activities. It would be unacceptable if this provision means that exceedance of criteria due to such activities are simply ignored in assessing water quality.

Action: EPA disapproves the revised provision.

The New Mexico Water Quality Control Commission could provide an interpretation of the underlying statutory provision as precluding enforcement against listed activities (essentially nonpoint sources associated with the “reasonable operation and maintenance” of irrigation and flood control structures), and provide EPA assurance that the numeric criteria in question will be considered in assessing water quality in surface waters of the state affected by such activities. EPA would reserve the right to use 303(c)(4)(B) if the state does not adhere to this interpretation.

Alternatively, the New Mexico Attorney General, or equivalent legal officer, could

provide an opinion that this provision is not effective or operable in the absence of a an interpretation of the underlying statutory provision. EPA could approve the modifications, reserving the right to act under section 303(c)(4)(B) if the State fails to address the Agency’s concerns once the provisions is defined, or if additional information becomes available that indicates the provision(s) are not being implemented in a manner consistent with the CWA or its implementing regulations.

Subpart II, Use Designation and Standards
2305, 2305.1 and 2306. Cimarron River and Tributaries

States/Tribes are required to conduct a use attainability analysis (as described in 131.3(g)) whenever they wish to remove a designated use as specified in section 101(a)(2) of the Act, or adopt subcategories of those uses that require less stringent criteria. Tributaries to the upper reaches of segment 2306 of the Cimarron River, previously classified as “high quality cold water fishery,” were reclassified as “warm water fishery” without a supporting use attainability analysis.

Action: EPA disapproves the revised provision.

In EPA’s discussions with the State, it became clear that reclassifying the tributaries of the Cimarron from “high quality cold water fishery” to “warm water fishery” was not part of the intended modifications of these segments. New Mexico could satisfy CWA requirements by reinstating the “high quality cold water fishery” classification or, alternatively, by providing a use attainability analysis to support the use downgrade.

**Existing Provisions for which EPA Region 6 Will Consider Requesting
the Administrator Make a Finding of Inconsistency Under the Clean Water Act**

SUBPART II, Use Designations and Standards
2101. Rio Grande Basin

The standards regulation requires States/Tribes to consider the water quality standards for downstream waters and ensure that its standards provide for attainment and maintenance of the water quality standards of downstream States/Tribes 40 CFR 131.10(b).

New Mexico’s segment 2101 of the mainstem of the Rio Grande (to the Texas state line) is designated for secondary contact. The criteria associated with this designation provide for a monthly geometric mean of coliform bacteria not to exceed 1,000/100 mL, with no single sample exceeding 2,000/100mL. These criteria are not protective of the Texas standards in the

downstream segment of the mainstem, which is designated for (primary) contact recreation and requires a geometric mean of fecal coliform bacteria not to exceed 200/100 mL, with no single sample exceeding 400/100mL.

In the Water Quality Control Commission's (WQCC) formal hearing on the then proposed standards, substantial evidence was presented supporting primary contact as an existing use in the upper reaches of segment 2101 of the Rio Grande. The NMED presented information during the WQCC hearing indicating that the 400 / 100 mL fecal coliform criterion for primary contact was only exceeded occasionally in this segment, which indicates that a primary contact designation may be an attainable use in the lower reaches as well. Uses are deemed attainable if they can be achieved by imposition of effluent limits and cost effective and reasonable best management practices 40 CFR 131.10(d). Since the primary contact use is existing in the upper reaches of this segment, the primary contact use and/or more protective criteria must be adopted.

Action: Region 6 will recommend that the Administrator make a finding under section 303(c)(4)(B) of the CWA that this previously approved provision does not meet federal requirements.

The State may avoid EPA action by adopting primary contact as a beneficial use in this segment and adopting bacteria criteria that are protective of primary contact use in this segment and the downstream State. This can be accomplished by retaining numeric criteria for fecal coliform bacteria and by adopting EPA's *Ambient Water Quality Criteria for Bacteria -1986*, and make the transition to monitoring for the recommended E. coli and enterococci indicators. Including both indicators in its water quality standards for a limited period of time will enable the State to establish an adequate database to support certain regulatory actions, including establishing National Pollutant Discharge Elimination System (NDPES) permit limits based on the new criteria, and, if necessary, revising monitoring protocols related to 305(b) assessments and 303(d) listing. For waters previously included in the State's 303(d) list for pathogens, EPA recommends that the water body continue to be listed until enough data has been gathered to allow development of a Total Maximum Daily Load (TMDL), or support a de-listing decision. The State should adopt both a single sample maximum (based on expected frequency of use) and a geometric mean into the water quality standards.

If the state does not act to adopt primary contact as a beneficial use and recommended protective bacteria criteria, EPA will promulgate such use and appropriate bacteria criteria. States, Territories, and authorized Tribes must adopt the *Ambient Water Quality Criteria for Bacteria -1986* and make the transition to monitoring for recommended E. coli and enterococci indicators, rather than total or fecal coliforms, by FY 2003.

Subpart III, Numeric Standards Applicable to Attainable or Designated Uses
3100. Standards Applicable to Attainable or Designated Uses Unless Otherwise Specified in Subpart II of this Part (Sections 2000 - 2999)

Section 303(c)(2)(B) of the CWA requires States to adopt numeric criteria for priority toxic pollutants that could reasonably be expected to interfere with designated uses. As part of its national guidance on section 303(c)(2)(B), the Office of Water interprets priority toxic pollutants that may “reasonably be expected” to interfere with designated uses to imply a rebuttable presumption that any information indicating that such pollutants are discharged or present in surface waters (now and in the future) is sufficient justification to require adoption or derivation of numeric criteria. The presence of facilities that manufacture or use section 307(a) toxic pollutants or other information indicating that such pollutants are discharged strongly suggests that such pollutants could be interfering with attainment of designated uses. The goal is not just to identify pollutants that are already impacting surface waters, but rather to identify pollutants that may be impacting surface waters now, or have the potential to do so in the future.

The inclusion of water quality criteria for toxics in New Mexico’s water quality standards is critical to States’ as well as EPA’s efforts to address water quality problems. Clearly established water quality goals will enhance the effectiveness of many of the State’s and EPA’s water quality programs including permitting, fish tissue quality protection, nonpoint source controls, drinking water quality protection, and ecological protection. Numeric criteria for toxics allow the State and EPA to better evaluate the adequacy of existing and potential control measures to protect aquatic ecosystems and human health. Numeric criteria also provide a more precise basis for deriving water quality-based NPDES permits and wasteload allocations for TMDLs to control toxic pollutant discharges.

In EPA’s review of the New Mexico standards to determine compliance with CWA §303(c)(2)(B), the State was found to be in compliance based on the information that was reviewed at that time. In the review of these revised standards, a cursory review of priority pollutant scans for NPDES permits currently being developed indicate detectable levels of at least some priority toxic pollutants. This discovery suggests that priority toxic pollutants may “reasonably be expected” to interfere with designated uses in New Mexico, and is sufficient justification to require adoption (or derivation) of numeric criteria.

Although New Mexico has made progress in adopting numeric criteria for some priority toxic pollutants, our review indicates that the State has not fully satisfied CWA §303(c)(2)(B). The lack of detailed or widespread monitoring data is not an acceptable basis to omit numerical (or derived numerical) criteria from water quality standards. Even a limited amount of data indicating the discharge or presence of priority toxic pollutants in surface waters is sufficient basis to conclude that numerical criteria are necessary. Without data to demonstrate that a pollutant is not present in a discharge or surface water, EPA assumes criteria are necessary.

Action: Region 6 will consider recommending that the Administrator make a finding that this previously approved provision does not meet federal requirements under §303(c)(4)(B) of the CWA.

The State could provide data/analyses demonstrating that aquatic life and human health criteria are not needed for the remaining priority pollutants. For example, the State could provide a

representative sample of permit application data (priority pollutant scans) showing pollutants that are identified through screening are not present in concentrations that threaten aquatic life and human health. Alternatively, the State could adopt aquatic life and human health criteria for the remaining priority pollutants. [See **Attachments I and II** for representative list of priority pollutants]

Issues of Concern

EPA has identified the following provisions as Issues of Concern. Although EPA has determined that these provisions may be approved, EPA reserves the right to act under section 303(c)(4)(B) if the State fails to address the Agency's concerns or additional information becomes available that indicates the provision(s) are not being implemented in a manner consistent with the CWA or its implementing regulations.

SUBPART I - GENERAL

1007F. Definitions

“Limited warmwater fishery”

This definition describes a surface water where intermittent flow may severely limit the segment's ability to sustain a natural fish population.

Although use of a *“limited warmwater fishery”* use subcategory is consistent with the CWA, this definition is problematic because it fails to insure that assignment of this use is based on *natural* ephemeral, intermittent or low flow conditions or a finding that attaining a higher use is not feasible based on the conditions described in 40 CFR 131.10(g). However, EPA is not presently aware of any specific water bodies to which this use has been inappropriately applied.

Action: EPA approves the revised definition.

EPA reserves the right to act under section 303(c)(4)(B) to limit the definition and modify use designations for any waters improperly designated as *“limited warmwater fishery”* if discovered at a later time. EPA recommends that this definition be clarified during the next triennial review.

“Wetlands”

This definition was modified to exclude “constructed wetlands” used for wastewater treatment purposes.

It is unclear how this relates to the provisions in “surface water(s) of the State” which exert jurisdiction over manmade bodies of water originally created in, or from the impoundment of, surface waters of the state but otherwise exclude waste treatment systems designed to meet the requirements of the CWA. That is, if a treatment wetland is “constructed” in or by impounding an existing waters of the US, it should still be jurisdictional, unless a 404 permit was issued for the construction.

Action: EPA approves the revised definition.

EPA will work with the state to clarify the limited scope of the “constructed wetland” sentence. EPA reserves the right to use 303(c)(4)(B) to promulgate a revised definition if the discrepancies in language interfere with the proper implementation of New Mexico’s water quality standards.

1101. Antidegradation Policy and Implementation Plan

B. Procedures for Nominating an ONRW

The State adopted provisions to allow any entity the opportunity to nominate a surface water as an ONRW. Support for such a petition requires baseline water quality data and an economic impact analysis. Although we agree that developing baseline data can be important in establishing a benchmark to maintain water quality, we are concerned that the process laid out here may effectively bar the general public from nominating any waters from being designated an ONRW. Although high quality water is the thrust of 131.12(a)(3), ONRW designation is also intended to offer protection to those waters of exceptional ecological or recreational significance that may have little to do with water quality.

Action: EPA approves the new provision based on the State’s representation that limiting application was not the intent of the process.

EPA will monitor the implementation of this provision over the next triennial review. If in fact no waters are nominated, EPA will review the circumstances and consider whether to exercise its 303(c)(4)(B) authority to amend the nominating process.

1104. Compliance with Water Quality Standards.

The *implementation language* contained in this provision will likely prove unworkable in ambient waters without adequate detailed guidance from the State to allow scientifically valid and representative data to be gathered and used when it is available, as required by 40 CFR 130.4. The assessment approach is also inconsistent with EPA’s 305(b) guidance.

A. This provision states that compliance with acute standards will be determined by a single grab sample. Such a restrictive approach to determine compliance may result in an unacceptably high rate of false positive samples and inappropriate (303(d)) listings and

resulting total maximum daily load development requirements.

B. This provision defines compliance with chronic standards through an arithmetic mean of an undefined number of samples. Since the chronic criteria are only applicable to the arithmetic mean of a small population of samples, individual samples that exceed the chronic criteria may not constitute a standards violation. Further, the approach ignores the magnitude and duration of any exceedance and the period between exceedances, which may lead to 303(d) and/or 305(b) listing of water bodies because of an insignificant event.

Action: EPA approves the revised provision.

EPA will work with the State to develop more appropriate and meaningful language during the next triennial review.

SUBPART I - GENERAL

1105. General Standards and

SUBPART II - USE DESIGNATIONS AND STANDARDS

EPA's approval of the 1999 triennial revisions does not apply to those waters or portions of waters located in Indian country in the State of New Mexico. States generally do not have authority to develop or apply water quality standards in Indian country. The State's water quality standards are only approved for those portions that are outside Indian country.

Although EPA does not believe New Mexico has sought to demonstrate such authority in its standards, during its review of the 1999 New Mexico standards, EPA noted that some of the waters for which use designations were made in the State's 1995 revisions included portions of stream segments (in Subpart II) located within Indian country. Because EPA has not analyzed the State's authority to make use designations for waters in Indian country, and has not expressly found that the State has such authority, EPA does not view its 1995 action as having approved any use designations by the State for portions of waters that lie within Indian country.

To clarify this matter further, the State should amend its standards to specify that the State's water quality standards do not apply to waters located in Indian country.

Attachment 1

To comply with Section 303(c)(2)(B) of the Clean Water Act, the State should adopt numeric human health criteria for the following priority toxic pollutants:

1. Antimony
2. Arsenic
3. Copper
4. Mercury
5. Nickel
6. Selenium
7. Thallium
8. Zinc
9. Cyanide
10. Asbestos
- 11 2,3,7,8-TCDD (Dioxin)
12. Acrolein
13. Acrylonitrile
14. Benzene
15. Bromoform
16. Carbon Tetrachloride
17. Chlorobenzene
18. Chlorodibromomethane
19. Chloroform
20. Dichlorobromomethane
21. 1,2-Dichloroethane
22. 1,1-Dichloroethylene
23. 1,2-Dichloropropane
24. 1,3-Dichloropropylene
25. Ethylbenzene
26. Methyl Bromide
27. Methylene Chloride
28. 1,1,2,2-Tetrachloroethane
29. Tetrachloroethylene
30. Toluene
31. 1,2-Trans-Dichloroethylene
32. 1,1,2-Trichloroethane
33. Trichloroethylene
34. Vinyl Chloride
35. 2-Chlorophenol
36. 2,4-Dichlorophenol
37. 2,4-Dimethylphenol
38. 2-Methyl-4,6-Dinitrophenol
39. 2,4-Dinitrophenol
40. Pentachlorophenol
41. Phenol
42. 2,4,6-Trichlorophenol
43. Acenaphthene
44. Anthracene
45. Benzidine
46. Benzo(a)Anthracene
47. Benzo(a)Pyrene
48. Benzo(b)Fluoranthene

Attachment 1

49. Benzo(k)Fluoranthene
50. Bis(2-Chloroethyl)Ether
51. Bis(2-Chloroisopropyl)Ether
52. Bis(2-Ethylhexyl)Phthalate
53. Butylbenzyl Phthalate
54. 2-Chloronaphthalene
55. Chrysene
56. Dibenzo(a,h)Anthracene
57. 1,2 Dichlorobenzene
58. 1,3 Dichlorobenzene
59. 1,4 Dichlorobenzene
60. 3,3'-Dichlorobenzidine
61. Diethyl Phthalate
62. Dimethyl Phthalate
63. Di-n-Butyl Phthalate
64. 2,4-Dinitrotoluene
65. 1,2-Diphenylhydrazine
66. Fluoranthene
67. Fluorene
68. Hexachlorobenzene
69. Hexachlorobutadiene
70. Hexachlorocyclopentadiene
71. Hexachloroethane
72. Indeno(1,2,3-cd) Pyrene
73. Isophorone
74. Nitrobenzene
75. N-Nitrosodimethylamine
76. N-Nitrosodi-n-Propylamine
77. N-Nitrosodiphenylamine
78. Pyrene
79. 1,2,4-Trichlorobenzene
80. Aldrin
81. alpha-BHC
82. beta-BHC
83. gamma-BHC
84. Chlordane
85. 4,4'-DDT
86. 4,4'-DDE
87. 4,4'-DDD
88. Dieldrin
89. alpha-Endosulfan
90. beta-Endosulfan
91. Endosulfan Sulfate
92. Endrin
93. Endrin Aldehyde
94. Heptachlor
95. Heptachlor Epoxide
96. Polychlorinated biphenyls (PCBs)
97. Toxaphene

Attachment 2

To comply with Section 303(c)(2)(B) of the Clean Water Act, the State should adopt numeric aquatic life criteria for the following priority toxic pollutants:

1. Cyanide
2. Pentachlorophenol
3. Aldrin
4. Gamma-BHC (Lindane)
5. 4,4'-DDT
6. Dieldrin
7. alpha-Endosulfan
8. beta-Endosulfan
9. Endrin
10. Heptachlor
13. Heptachlor Epoxide
14. Polychlorinated biphenyls (PCBs)
15. Toxaphene