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**To:** Kristine Pintado, Water Quality Standards Team Leader  
NMED, Surface Water Quality Bureau

**From:** Michael B. Sloane, Chief, Fisheries Management Division, New Mexico  
Department of Game and Fish

**Subject:** Piscicide Provision in 20.6.4.10 NMAC

**Date:** March 22, 2014

**Cc:**

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**Justification for Amending 20.6.4.16 NMAC.**

The New Mexico Department of Game and Fish (NMDGF) frequently uses piscicides (fish toxicants) to remove unwanted species from various waters within the State of New Mexico. Various formulations of rotenone are currently registered by the U.S. Environmental protection agency. Historic rotenone use focused on enhancement of sport fisheries primarily in reservoirs with contemporary use limited to native fish restoration efforts. Prior to the late 1990s, the use of a piscicide in waters of New Mexico was unregulated though concerns existed regarding violations of 20.6.4.13 NMAC. The U.S. Environmental Protection Agency consistently held the position that application of a pesticide in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act, including piscicides, was not a point source pollutant (71 Fed. Reg. 68,483) and thus did not require a National Pollutant Discharge Elimination System (NPDES) permit. As a result, 20.6.4.16 NMAC was adopted to provide a process for a piscicide use proponent to obtain approval from the NM Water Quality Control Commission (WQCC) with a mandatory hearing by the WQCC for all planned uses. The WQCC has held approximately seven hearings and repeatedly hears the same testimony with little new information regarding human or environmental health concerns. Consistent expert testimony indicates the products and their use are safe and effective for achieving fishery management and conservation goals in New Mexico.

Planned use of a piscicide in New Mexico requires compliance with a variety of Federal and State laws including the National Environmental Policy Act of 1969 (NEPA), Endangered Species Act of 1974 (ESA), and 20.6.4.16 NMAC Planned Use of a Piscicide. All known piscicide applications to waters of New Mexico have been conducted by either federal and/or state natural resource agencies (e.g. U.S. Forest Service, U.S. Fish and Wildlife Service, or

NMDGF). The NMDGF relies upon federal Sportfish Restoration Act funds to support agency operations. Many waters are located within U.S. Forest Service boundaries or involve threatened or endangered species. As a result, a federal nexus is created which triggers review under NEPA and ESA. Reviews conducted under ESA focus on the effects of the proposed action on threatened and endangered species with review limited to the agency proponent and the U.S. Fish and Wildlife Service. Review under NEPA, however, includes public comment periods, public review of environmental documents, and public involvement in the decision making process. The public involvement process required by NEPA consistently ensures public awareness and participation in project development and implementation similar to the procedures set out in 20.6.4.16 NMAC. In fact, the two are repetitive processes.

The requirement to obtain NPDES permits for point source discharges from pesticide applications to waters of the United States stems from a 2009 decision by the Sixth Circuit Court of Appeals. In its ruling on *National Cotton Council, et al. v. EPA*, the Court vacated the EPA's 2006 rule which said NPDES permits were not required for discharges of pesticides to waters of the United States for applications of pesticides to, or over, including near such waters when in compliance with the existing label (per the Federal Insecticide, Fungicide, and Rodenticide Act, or "FIFRA"). In its ruling, the Sixth Circuit determined that (1) biological pesticides and (2) chemical pesticides that leave a residue are pollutants as defined under the CWA and as such are subject to regulations applicable to pollutants. Courts have previously determined that applications of pesticides, such as from nozzles of planes and trucks, irrigation equipment, etc. are point sources. As a result of the Sixth Circuit's decision, point source discharges to waters of the United States from the application of pesticides require NPDES permits as of October 31, 2011. [http://cfpub.epa.gov/npdes/faqs.cfm?program\\_id=410#476](http://cfpub.epa.gov/npdes/faqs.cfm?program_id=410#476). The U.S. Environmental Protection Agency issued a nationwide Pesticide General Permit to cover pesticide applications in states, including those without NPDES permit programs, which includes activities by NMDGF. Since 2012, NMDGF has obtained coverage under the nationwide general permit and obtained approval from the WQCC to conduct piscicide applications in the Rio Costilla basin. The new NPDES permit process creates a new redundancy by requiring a federal review of piscicide use in addition to the requirements of 20.6.4.16 NMAC.

Considering federal law already requires public disclosure under NEPA, review of effects on threatened and endangered species under ESA, and regulation of piscicides under the Clean Water Act and the Federal Insecticide, Fungicide, and Rodenticide Act, NMDGF proposes to amend 20.6.4.16 NMAC to streamline the piscicide use process for more efficient use of government resources and enhance fishery management and conservation activities in New Mexico. If the planned use of a piscicide is covered under a NPDES permit, the proposed piscicide use would require no additional WQCC review but will require post-treatment assessment monitoring and additional public notice to local entities. If a NPDES permit is not available (e.g., Congress acts on proposed legislation to remove the NPDES requirement for pesticides), then the WQCC would still have the opportunity to review the project in the absence of other federal review. Whether a hearing is held to review the project would be discretionary, however, rather than a mandate.

**20.6.4.16 PLANNED USE OF A PISCICIDE:** The use of a piscicide registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 *et seq.*, and under the New Mexico Pesticide Control Act (NMPCA), Section 76-4-1 *et seq.* NMSA 1978 (1973) in a surface water of the state, shall not be a violation of Subsection F of 20.6.4.13 NMAC when such use is covered by a National Pollutant Discharge Elimination System (NPDES) permit or has been approved by the commission under procedures provided in this section. The use of a piscicide which is covered by a NPDES permit shall require no further review by the commission and the person whose application is covered by the NPDES permit shall meet the additional notification and monitoring requirements outlined in Subsection F of 20.6.4.16 NMAC. The commission may approve the reasonable use of a piscicide under this section if the proposed use is not covered by a NPDES permit to further a Clean Water Act objective to restore and maintain the physical or biological integrity of surface waters of the state, including restoration of native species.

**A.** Any person seeking commission approval of the use of a piscicide not covered by an NPDES permit shall file a written petition concurrently with the commission and the surface water bureau of the department. The petition shall contain, at a minimum, the following information:

- (1) petitioner's name and address;
- (2) identity of the piscicide and the period of time (not to exceed five years) or number of applications for which approval is requested;
- (3) documentation of registration under FIFRA and NMPCA and certification that the petitioner intends to use the piscicide according to the label directions, for its intended function;
- (4) target and potential non-target species in the treated waters and adjacent riparian area, including threatened or endangered species;
- (5) potential environmental consequences to the treated waters and the adjacent riparian area, and protocols for limiting such impacts;
- (6) surface water of the state proposed for treatment;
- (7) results of pre-treatment survey;
- (8) evaluation of available alternatives and justification for selecting piscicide use;
- (9) post-treatment assessment monitoring protocol; and
- (10) any other information required by the commission.

**B.** Within thirty days of receipt of the petition, the department shall review the petition and file a recommendation with the commission to grant, grant with conditions or deny the petition. The recommendation shall include reasons, and a copy shall be sent to the petitioner by certified mail.

**C.** The commission shall review the petition and the department's recommendation and ~~shall~~ within 90 days of receipt of the department's recommendation may hold a public hearing in the locality affected by the proposed use in accordance with Adjudicatory Procedures, 20.1.3 NMAC. In addition to the public notice requirements in Adjudicatory Procedures, 20.1.3 NMAC, the petitioner shall provide written notice to:

- (1) local political subdivisions;
- (2) local water planning entities;
- (3) local conservancy and irrigation districts; and

(4) local media outlets, except that the petitioner shall only be required to publish notice in a newspaper of circulation in the locality affected by the proposed use.

**D.** In a hearing provided for in this Section or, if no hearing is held, in a commission meeting, the registration of a piscicide under FIFRA and NMPCA shall provide a rebuttable presumption that the determinations of the EPA Administrator in registering the piscicide, as outlined in 7 U.S.C. Section 136a(c)(5), are valid. For purposes of this Section the rebuttable presumptions regarding the piscicide include:

- (1) Its composition is such as to warrant the proposed claims for it;
- (2) Its labeling and other material submitted for registration comply with the requirements of FIFRA and NMPCA;
- (3) It will perform its intended function without unreasonable adverse effects on the environment; and
- (4) When used in accordance with all FIFRA label requirements it will not generally cause unreasonable adverse effects on the environment.
- (5) "Unreasonable adverse effects on the environment" has the meaning provided in FIFRA, 7 U.S.C. Section 136(bb): "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."

**E.** After a public hearing or commission meeting, if no hearing is held, the commission may grant the petition in whole or in part, may grant the petition subject to conditions, or may deny the petition. In granting any petition in whole or part or subject to conditions, the commission shall require the petitioner to implement post-treatment assessment monitoring and provide notice to the public in the immediate and near downstream vicinity of the application prior to and during the application.

**F.** Any person whose application is covered by a NPDES permit shall provide written notice to local entities as described in 20.6.4.16 subsection C (1) to (4) and subsection (E) and implement post-treatment assessment monitoring within the application area.

[20.6.4.16 NMAC - Rn, Paragraph (6) of Subsection F of 20.6.4.12 NMAC, 05-23-05; A, 05-23-05; A, XX-XX-XX]