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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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SURFACE WATER QUALITY BUREAU

Marcy Leavitt
Bureau Chief
Surface Water Quality Bureau
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87502

Dear ~~Ms. Leavitt~~: Marcy

Thank you for submitting New Mexico's 2004 section 303(d) list of water quality limited water bodies. EPA has conducted a complete review of this submittal dated June 17, 2004, and supporting documentation and information. Based on its review, EPA has determined that New Mexico's 2004 list of water quality limited segments (WQLSs) still requiring TMDLs meets the requirements of section 303(d) of the Clean Water Act ("CWA" or "the Act") and EPA's implementing regulations. Therefore, by this action, EPA hereby approves New Mexico's 2004 section 303(d) list. The statutory and regulatory requirements, and a summary of EPA's review of New Mexico's compliance with each requirement, are described in the enclosure to this letter.

Please note that EPA issued guidance for integrating the development and submission of 2004 section 305(b) water quality reports and section 303(d) lists of impaired waters. See EPA's Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act, July 21, 2003. This guidance recommends that states develop an integrated report of the quality of their waters by placing all waters into one of five assessment categories. If a State follows this guidance, category 5 of the integrated report constitutes the State's section 303(d) list. In 2004, the State of New Mexico developed an integrated report consistent with this guidance. Therefore, today's action is limited to only those waters found in category 5 of the integrated report.

Although no such waters have been identified, EPA's approval of New Mexico's section 303(d) list extends to all water bodies on the list with the exception of those waters that are within Indian Country. EPA is taking no action to approve or disapprove the State's list with respect to those waters at this time. EPA, or eligible Indian Tribes, as appropriate, will retain responsibilities under section 303(d) for those waters.

Some of the waters listed on New Mexico's 2004 section 303(d) list are impaired by radioactive materials. The radioactive materials in question may have a range of probable sources (watershed runoff following wildfire, natural sources, erosion, or sedimentation), many of which have no relationship to activities regulated by the Atomic Energy Act of 1954, §1 et seq. as amended, 33 U.S.C.A. § 1251 et seq. (AEA). This is important because EPA's regulations define "pollutant" to include radioactive materials except those regulated under the

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Atomic Energy Act. See Train v. Colorado Public Interest Research Group, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976). EPA interprets section 303(d) of the CWA to require EPA establishment or approval of section 303(d) or TMDLs for "pollutants." Therefore, EPA approves New Mexico's listings as consistent with section 303(d) and the Agency's implementing regulations, insofar as these waters are listed for radioactive materials that are "pollutants" under the CWA. If it is subsequently demonstrated that the radioactive material for which a water is listed is not a "pollutant" under the CWA, there would be no obligation to establish or approve a TMDL for such material.

New Mexico's 303(d) submission includes 174 water body assessment units. The State listings are based on assessment methodologies and data and information described in the State submittal. EPA acknowledges and supports the State's approach of retaining on the list all previously listed waters until new data and information are available to support a change in their assessment. Priority rankings for all listed waters are established as required by section 303(d) and its implementing regulations. Priorities are established based on the severity of pollution and the uses assigned to those waters. Sixty-one waterbodies are targeted for TMDL development in the next two years, consistent with the targeting requirement of 40 CFR 130.7(b)(4).

The public participation process sponsored by the New Mexico Environment Department (NMED) included solicitations of public comment through newspaper advertisements, several public meetings, mailing lists, and web site postings. A responsiveness summary, prepared by the State, explained how the State considered public comment in the final listing decisions.

We commend you for your efforts to develop the 2004 section 303(d) water body list and for being so responsive to our clarification requests. Documentation supporting the EPA's determinations in this matter are contained in the administrative record for this action. If you have questions on any of the above information, feel free to give me a call at 214-665-7101 or call Mike Schaub at 214-665-7314.

Sincerely yours,

Miguel I. Flores

Miguel I. Flores
Director
Water Quality Protection Division

Enclosure