



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
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APR 11 2013

Butch Tongate, Chairman
New Mexico Water Quality Control Commission
Harold Runnels Building (N2153)
P.O. Box 5469
Santa Fe, NM 87502-5469

Dear Mr. Tongate:

I am pleased to inform you that the Environmental Protection Agency (EPA or the Agency) has completed its review of the ***Standards for Interstate and Intrastate Surface Waters 20.6.4. NMAC***. Revisions to New Mexico's water quality standards were adopted by the New Mexico Water Quality Control Commission after holding hearings on September 14-17 and October 12-14, 2010. EPA initiated its review of these revisions when they became effective as State law on January, 14, 2011.

EPA has completed its review and is approving the new or revised water quality standards contained in New Mexico's Water Quality Standards sections 20.6.4.7, 20.6.4.8, 20.6.4.9 NMAC and New Mexico's Continuing Planning Process - Appendix A, as consistent with the requirements of the CWA and EPA's implementing regulations at 40 CFR 131. In approving, we have described how EPA interprets these new and revised standards in the enclosed Technical Support Document (TSD). In acting on these revised water quality standards, EPA is fulfilling its CWA Section 303(c) responsibilities. Consultation pursuant to Section 7(a)(2) of the Endangered Species Act (ESA) on these provisions are not required, consistent with the ESA and the U.S. Fish and Wildlife Service's implementing regulations at 50 CFR 402.3.

I appreciate both the Commission's and the New Mexico Environment Department's efforts in the development of these revisions of the New Mexico's water quality standards and the Continuing Planning Process document. I also appreciate the cooperative and constructive way in which the Environment Department staff has worked with my staff during the revision process and look forward to working with you to refine these provisions. If you need additional detail concerning this letter and TSD, please call me at (214) 665-7101, or have staff contact Russell Nelson at (214) 665-6646.

Sincerely,

A handwritten signature in black ink, appearing to read "W.K. Honker".

William K. Honker, P.E.
Director
Water Quality Protection Division

TECHNICAL SUPPORT DOCUMENT

**New Mexico's Standards For
Interstate and Intrastate Surface Waters
20.6.4.7, 20.6.4.8 and 20.6.4.9 NMAC
And
New Mexico's Continuing Planning Process, Appendix A
Antidegradation Policy Implementation Procedure**

**U.S. EPA REGION 6
WATER QUALITY PROTECTION DIVISION**

April 2013

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I. Introduction

Background

As described in §303(c) of the Clean Water Act (CWA) and in the Standards Regulation at 40 CFR 131.20, states and authorized tribes have primary responsibility to develop and adopt water quality standards (WQS) to protect their waters. State and tribal WQS consist of three primary components: designated uses, criteria to support those uses, and an antidegradation policy. In addition, CWA §303(c)(1) and 40 CFR 131.20 require states to hold public hearings at least once every three years to review and, as appropriate, modify and adopt standards. Under 40 CFR 131.21, the Environmental Protection Agency (the EPA or the Agency) reviews new and revised surface WQS that have been adopted by States and authorized Tribes. Authority to approve or disapprove new and/or revised WQS submitted to the EPA for review has been delegated to the Water Quality Protection Division Director in Region 6. Tribal and state WQS are not considered effective under the CWA until approved by the EPA. 40 CFR 131.21(c).

The purpose of this Technical Support Document (TSD) is to provide the basis for the EPA's approval action on new or revised WQS specific to New Mexico's antidegradation policy and implementation plan provisions in the New Mexico Standards for Interstate and Intrastate Waters (20.6.4 NMAC) and New Mexico's Continuing Planning Process, Appendix A: Antidegradation Policy Implementation Procedure document.

Chronology of Events

The New Mexico Environment Department (NMED) filed a petition with the New Mexico Water Quality Control Commission (Commission) proposing amendments to 20.4.6.7 and 20.4.6.8 NMAC in December 22, 2006. EPA provided informal comments on a discussion draft on March 6, 2007, and formal comments on April 9, 2007. The public hearing was held on April 10 and 11, 2007. On June 12, 2007, the Commission concluded its deliberation and adopted these amendments.

EPA received the revised standards for review and approval on August 9, 2007. The EPA found that this submission did not meet the minimum requirements described in 40 CFR 131.6(f) for 20.6.4.8 NMAC because the State had not identified implementation procedures required by 40 CFR 131.12(a). Without the required implementation, the EPA could not determine how or if the intent and purpose of the State's antidegradation policy would be met. On October 23, 2008, the EPA notified the State that it was unable to act on the State's submission.

As a result, the revised provisions at 20.4.6.7 and 20.4.6.8 NMAC did not become effective and could not be used for regulatory purposes under the CWA. In response, the State began working with the EPA to address the EPA's concerns. In 2008, then Governor Bill Richardson announced an initiative to seek Outstanding Natural Resource Waters (ONRW) designation for surface waters in national forests and inventoried wilderness areas in New Mexico. Following the announcement of the Governor's initiative, NMED initiated a series of public meetings

around the State to inform and gain feedback from the public on the proposals it had developed during 2008 and 2009 time frame.

In 2008, NMED, the New Mexico Department of Game and Fish and New Mexico Energy, Minerals and Natural Resources Department filed a joint petition with the Commission proposing to nominate all surface waters in United States Forest Service Wilderness and Inventoried Roadless Areas as ONRWs. However, as a result of concerns over the breadth of the Petitioners' proposal and, in response to the adoption of House Joint Memorial 49 by the 2009 New Mexico Legislature, the Petitioners scaled back the proposal to exclude Inventoried Roadless Areas and non-perennial streams. In 2009, NMED filed an amended petition to reflect these exclusions.

In June 2009, and again in November 2009, NMED provided public notice of its latest draft proposal to nominate ONRWs and held twenty-one public meetings, providing the public an opportunity to comment. The draft proposal was posted on NMED's website in February 2010, and included ONRW designations, and draft amendments to the State's antidegradation policy implementation procedures. However, in response to additional concerns about the breadth of the proposal, the Petitioners filed an amendment in May 2010, further limiting the scope of the proposal to exclude intermittent waters and tributaries to the nominated waters. Following that notice, a public hearing was held in Santa Fe, New Mexico before the Commission on September 14-17 and October 12-14, 2010. On November 30, 2010, the Commission deliberated and voted to adopt the amended petition and Antidegradation Policy with its implementing documents. The amendments became effective as State law on January 14, 2011. The EPA initiated its review of the new/revised standards on that date.

Summary of the Revised Water Quality Standards for EPA Review

New Mexico's initial 2007 antidegradation amendments were intended to make the State's provisions consistent with the EPA's regulations regarding ONRWs, which as EPA explained, were intended to allow limited activities that result in temporary and short-term changes in water quality in ONRWs. (*See* 48 FR 51400, 51403 (Nov. 8, 1983)). Those amendments were generally intended to provide a means for authorizing "temporary and short-term degradation" of an ONRW in connection with projects for the purpose of maintaining or restoring the essential character or special use on which the ONRW's designation was based.

It should be noted that the amendments discussed in this TSD include some antidegradation policy language that was originally adopted by the Commission in 2007 but not acted on by the EPA because the state did not identify implementation procedures for these provisions as required by 40 CFR 131.12(a). Many of the original 2007 amendments were significantly revised and expanded as part of former Governor Richardson's initiative. Although not identified as part of the amendments adopted by the Commission in 2010, EPA is now reviewing new or revised WQS adopted by the Commission in 2007 that were not acted on by the EPA at that time as part of this submission. Those 2007 amendments that have since been struck by the Commission are no longer before the Agency.

The Commission has adopted modifications to the following sections of the *New Mexico Standards for Interstate and Intrastate Waters* at 20.6.4 NMAC, which include definitions and new or revised WQS over which EPA has authority to approve or disapprove under section 303(c) of the CWA:

20.6.4.7 Definitions

20.6.4.8 Antidegradation Policy and Implementation Plan

20.6.4.9 Outstanding National Resource Waters

The Commission has also adopted into State regulation implementation measures specific to these revisions in its Continuing Planning Process (CPP), Appendix A: Antidegradation Policy Implementation Procedure document, which are also subject to the EPA's review and action consistent with §303(c) of the CWA. This action is consistent with 40 CFR 131.12(a), which requires states to identify methods for implementing their statewide antidegradation policy, and 40 CFR 130.5(b)(6), which requires that the state describe the process for establishing and assuring adequate implementation of new or revised WQS in its CPP.

The substantive revisions to New Mexico's WQS apply to both point and non-point source discharges. Some procedural portions of the revised WQS appear to apply only to nonpoint sources, with corresponding procedural provisions applicable to point source discharges in the State's implementation plan revisions. EPA lacks authority to require state regulation of nonpoint sources and states may thus adopt antidegradation policies exempting nonpoint sources altogether. *See American Wildlands v. Browner*, 415 F.3d 1121 (10th Cir. 2001).

II. Definitions

Although New Mexico included amendments to its Definitions section at 20.6.4.7 NMAC, the EPA is not taking action on New Mexico's new definition of an "oversight agency" because this new definition is not considered to be a new WQS and therefore, is not subject to the EPA's review and approval/disapproval action under CWA 303(c) authorities. However, the EPA nevertheless notes that issues may arise under State and/or federal law in light of this new definition.

The new definition for "oversight agency" refers to state or federal agencies having responsibility for land use or water quality management decisions affecting nonpoint source discharges where ONRWs are located. Given the locations of the newly designated ONRWs, the amended regulation contemplates that the United States Forest Service (USFS) would likely be the responsible agency to make recommendations to the Commission on "short term and temporary" exceptions under 20.6.4.8.A(3)(a) and exercise State decisional authority for approving and regulating restoration and maintenance activities under 20.6.4.8.A(4)(a). However there is no assurance that such decisional authority would be accepted by USFS. In its comments on the State's then-proposed antidegradation provisions, USFS stated that it had not accepted the burden of delegation of State authority over such projects. The USFS further cautioned that it may not have adequate resources to accept state delegation and, without a

memorandum of understanding (MOU), the State would be solely responsible for providing review and approval of water quality impacts for all public and private projects.

Although EPA understands that a MOU has been developed, potential resource limitations mean that there is no assurance that these provisions will be met. As EPA interprets the amended provisions, NMED is solely responsible to ensure protection in ONRWs. If an oversight agency, such as the USFS, is delegated oversight authority under State law, and does not accept or withdraws from any MOU or other agreement, NMED remains responsible to ensure all State laws are met by that oversight agency.

III. New or Revised Water Quality Standards EPA is Approving

EPA has completed its review and is approving the new or revised water quality standards contained in New Mexico's Water Quality Standards 20.6.4 NMAC and New Mexico's Continuing Planning Process - Appendix A, as consistent with the requirements of the CWA and the EPA's implementing regulations at 40 CFR 131.

A. 20.6.4.8 NMAC - Antidegradation Policy and Implementation Plan

The amended language at 20.6.4.8.A(3) and 20.6.4.8.A(4) NMAC provides a general prohibition from degradation of ONRWs, ensuring that these exceptional waters be maintained and protected consistent with the objectives of the CWA §101(a) and intent of 40 CFR 131.12(a)(3). This provision also incorporates references to subsequent parts of the provision that provide exceptions to the general prohibition on degradation. Based on its review, the EPA approves the new and revised water quality standards contained in New Mexico's amendments to 20.6.4.8 NMAC as consistent with the requirements of the CWA and EPA's implementing regulations. A discussion of the amendments follows.

Temporary and Short-term Degradation

Section 20.6.4.8.A(3)(a) deletes language adopted by the State in 2007 and incorporates new language that no degradation be allowed in waters designated by the Commission as ONRWs, except as outlined in procedures specifying that after a 30-day notice. The provision provides that the Commission may authorize temporary and short-term activities to accommodate public health or safety that may result in the temporary and short-term degradation of water quality in ONRWs. The provision states that in making these decisions, the Commission will consider whether the activity will interfere with efforts to restore or maintain waters.

The provisions at 20.6.4.8.A(3)(a) and (3)(c) outline specific requirements allowing limited activities that result in temporary and short-term changes in the water quality of ONRWs that are consistent with 40 CFR §131.12(a)(3), as interpreted in the preamble to the Standards Regulation (48 FR 51402). Subsection 20.6.4.8.A(3)(a)(i) specifically limits the duration of such activities to the "shortest possible time and shall not exceed six months." The EPA explained in the Water Quality Standards Handbook (Handbook) that temporary and short-term changes in the water quality may be permissible in ONRWs, and while it is difficult to give an exact definition of what "temporary" and "short-term" mean given the various activities that might be considered,

the EPA's view of "temporary" is weeks and months, not years. The limitation to the "shortest possible time and not to exceed six months" is consistent with the EPA's interpretation of 40 CFR §131.12(a)(3).

Subsection 20.6.4.8.A(3)(a)(ii) requires that short term and temporary degradation be minimized and controlled by best management practices or in accordance with permit requirements "as appropriate." The record before the Commission indicates the State regards BMPs "appropriate" for controlling nonpoint sources. "Appropriate" controls for point source discharges must include technology-based effluent limitations, any more stringent limitations to meet water quality standards, and, possibly, BMPs, depending on the nature of the discharge and pollutants it may contain. *See* 40 CFR § 122.44.

Subsection 20.6.4.8.A(3)(a)(iii), which prohibits even short term degradation from lowering water quality to the extent it is insufficient to protect and maintain existing uses, is consistent with 40 CFR §131.12(a)(1), which establishes an absolute floor of water quality in all waters of the United States.

Subsection 20.6.4.8.A(3)(a)(iv) provides a limitation intended to ensure that an approved action does not alter the essential character of an ONRW. This limitation provides protection for waters designated as ONRWs that have either ecological or recreational significance and are not designated based solely on water quality. This provision is consistent with the objectives of the CWA outlined in Section 101(a) and EPA's regulations.

The provision at 20.6.4.8.A(3)(b) deletes language that was included in the State's 2007 submission but was not acted on by EPA. The amended provision now requires NMED or an appropriate oversight agency to provide a written recommendation to the Commission for an activity that may affect water quality in an ONRW. As explained below, the role of oversight agencies is limited to nonpoint source discharges.

20. 6.4.8.A(3)(c) no longer includes language from the State's 2007 submission that was not acted on by the EPA and is unrelated to the current provision. The amended provision now authorizes and provides specific requirements for undefined emergency response actions that may result in temporary and short-term degradation to an ONRW; 20.6.4.8.A(3)(c)(i) – (iv) requires that NMED be notified of the emergency discharge within seven days and provide a further report including information on compliance efforts within 30 days. This reporting requirement enables the State to determine whether the emergency discharge is authorized by this provision and, if not, consider appropriate enforcement action under State law authorizing direct enforcement of water quality standards. *See generally Defenders of Wildlife v. U.S. EPA*, 415 F.3d 1121 (10th Cir. 2005).

The provision at 20.6.4.8.A(3)(d) deletes some, but retains other language originally adopted in 2007, but not acted upon by EPA. The amended provision allows pre-existing land use activities authorized under federal and State law prior to ONRW designation and controlled by BMPs to continue so long as they do not result in new or increased discharges after designation as an ONRW. The phrase "pre-existing activities" appears intended to encompass any type of land use activity that the U.S. Forest Service (USFS) or other land management agency may carry out or

authorize. This includes, but is not limited to mining/resource extraction, timber harvest and associated road building, grazing and other activities that may cause point source and/or non-point discharges. This provision allows discharges from land use activities existing prior to ONRW designation to continue *if controlled* by BMPs, but prohibits *new or increased* discharges after designation.

Exemptions for acequia operation, maintenance, and repairs found in subparagraph 20.6.4.8.A(3)(e) are somewhat consistent with exemptions in subparagraph 20.6.4.11.I (2). EPA approved the latter amendments in 2001, having taken into consideration the Commission's interpretation of specific provisions in the New Mexico Water Quality Act. *See Defenders of Wildlife v. U.S. EPA, supra*. The 20.6.4.8.A(3)(e) exemption from new requirements due to ONRW designation is broader than that held in subparagraph 20.6.4.11.I (2) because it is neither limited to specific pollutants nor to non-point source discharges. However, degradation in downstream ONRWs is not allowable as the result of necessary operational or maintenance activities carried out in acequias.

EPA approves the new or revised water quality standards contained in New Mexico's amendments to 20.6.4.8 NMAC as consistent with the requirements of the CWA and EPA's implementing regulations at 40 CFR 131.12.

Restoration and Maintenance

An objective of the State's 2007 antidegradation amendments was to provide for "temporary" and "short-term" activities consistent with those described in the preamble to the Standards Regulation. During development of the current amendments in response to then-Governor Richardson's initiative, NMED drafted language that would allow for "restoration and maintenance" activities in existing and newly designated ONRWs. EPA supported that effort, but strongly recommended that the State establish a separate enabling regulation for restoration and maintenance activities applicable to all waters of the State. EPA sees as a clear distinction between temporary and short-term activities described in the preamble to the Standards Regulation and restoration and maintenance as stated in the CWA §101(a). Neither 40 CFR 131.12 nor the Handbook specifically contemplates longer-term restoration and/or maintenance activities - as a result, there is no published EPA guidance on how that objective should relate to the framework of a state's antidegradation policy. Because maintenance and restoration is a fundamental goal of the CWA, state provisions for authorizing such actions in ONRWs and other waters are generally approvable. Properly crafted, such provisions further the objectives specified in section 101(a) of the CWA "to restore and maintain the chemical, physical, and biological integrity" of the nation's waters, and can further protection and maintenance of water quality in ONRWs as contemplated by 40 CFR §131.12(a)(3).

20.6.4.8.A(4) generally exempts restoration and maintenance activities in ONRWs from the no degradation standard of its antidegradation policy. The distinction between temporary and short-term activities and the longer-term restoration and maintenance projects should be noted. For instance, 20.6.4.8.A(4)(a) and (b)(i) requires that the degradation from restoration and maintenance activities be limited to the shortest possible time, but does not limit that time to six months, as is the case with short term and temporary degradation allowable under

20.6.4.8.A(3)(a). These longer-term restoration or maintenance activities in semi-arid to arid environments may take years to complete. 20.6.4.8.A(4)(a) provides that NMED or the appropriate oversight agency will review and may approve discharges that may result in degradation from restoration and maintenance activities on a case-by-case basis.

EPA approves the new or revised water quality standards contained in New Mexico's amendments to 20.6.4.8 NMAC as consistent with the requirements of the CWA and EPA's implementing regulations at 40 CFR 131.12.

B. 20.6.4.9 NMAC - Outstanding National Resource Waters

The amendments made to 20.6.4.9 NMAC designate a significant number of named perennial surface waters of the State within Congressionally designated wilderness areas in United States Forest Service managed lands as ONRWs. The new provisions specifically identify individual river basins, the wilderness area within those basins, and individual waters as ONRWs. The waters designated as ONRWs include a significant number of wetlands that are identified on Forest Service wilderness areas maps and a list of wetlands published at the New Mexico State Library and available on the Environment Department's website.

The Water Quality Control Commission may designate any waters in the State of New Mexico as ONRWs. States have discretion in making such designations. 63 FR 36742, 36786 (1998). The Commission may designate waters as ONRW, but the protections afforded these waters depends on the implementation outlined in the State's antidegradation policy and CPP. EPA approves the new or revised water quality standards contained in New Mexico's amendments to 20.6.4.9 NMAC as consistent with the requirements of the CWA and EPA's implementing regulations at 40 CFR 131.12(a)(3).

C. State of New Mexico Continuing Planning Process – Appendix A

The EPA's implementing regulations at 40 CFR 131.12(a) specifically require that states identify the methods to implement their antidegradation policies as New Mexico has done and included in its state-adopted CPP - Appendix A: Antidegradation Policy Implementation Procedure. New or revised water quality standards contained in state antidegradation policies and implementation procedures that are adopted into or referenced in regulation are subject to review and approval by the EPA pursuant to section 303 of the CWA. EPA's review is intended to ensure that procedures describe how the state will implement the required elements of antidegradation protection described in 40 CFR 131.12(a)(1)-(4).

The adequacy of state antidegradation policy provisions is dependent on sound and detailed implementation procedures. The implementation procedures described in this section relate to the amended Antidegradation Policy and Implementation Plan at 20.6.4.8 NMAC. Because EPA and the Corps of Engineers are responsible for permitting point source discharges in New Mexico, those procedures are primarily relevant to how the State will develop certifications under CWA §401(a). The EPA approves all new or revised water quality standards contained in amendments to New Mexico's CPP - Appendix A as consistent with the requirements of the

CWA and the EPA's implementing regulations at 40 CFR 131.12(a). Highlights include the following:

II. Scope

The new procedures outlined here define permitted discharges as those regulated under the authority of the CWA and discharges regulated pursuant to 20.6.2 NMAC that have potential to impact surface water quality. Appendix A does not apply to nonpoint source discharges and other water quality-related actions as described there. The scope is consistent with CWA and EPA's regulations. We recommend that for future revisions, that the state consider the applicability of antidegradation as discussed in EPA's Advanced Notice of Public Rule Making. (*See* 63 FR 36742, 36779 (1998))

III. C Tier Definitions - Tier 3

This new provision clarifies that Tier 3 applies to waters designated by the Commission as ONRWs consistent with State's public notice and comment processes pursuant to New Mexico Water Quality Standards. As described above, because states have discretion in identifying ONRWs, this provision is consistent with the CWA and EPA's regulations.

IV. A-B Implementation

Permitted Activities that Result in the Restoration or Maintenance of the Chemical, Physical or Biological Integrity of Tier 1 and Tier 2 Waters

Consistent with revisions to the State's antidegradation policy at 20.6.4.8(4)(b) that apply to surface waters of the state other than ONRWs (i.e. Tier 1 and Tier 2 waters), the implementation procedures allow degradation of Tier 1 and Tier 2 waters by discharges from restoration and maintenance activities. 20.6.8.A(4)(b)(iii), however, prohibits restoration and maintenance project discharges that would lower the water quality below that necessary to protect existing uses. Thus, this provision of the State's Tier 1 and Tier 2 implementation plan recognizes that restoration and maintenance projects may occur in Tier 1 and Tier 2 waters, provided that existing uses, and the level of water quality necessary to protect those uses, are maintained and protected. This is consistent with the requirements of the CWA and EPA's regulations.

For Tier 2 waters, nothing in the revisions indicates that proponents of restoration and maintenance activities may forego submission of previously required documentation on the social and economic impacts of their proposals to obtain NMED approval and certification. For both Tier 1 and Tier 2 waters, the revised implementation procedures include a new provision enabling NMED to impose instream monitoring requirements and benchmarks to assure existing uses are not impaired and that restoration and maintenance projects are concluded expeditiously. EPA views such monitoring requirements and benchmarks as beneficial tools for managing such projects. EPA encourages, but cannot require, that NMED and/or oversight agencies impose similar requirements in authorizing nonpoint source discharges from restoration and maintenance activities.

IV. C Implementation - Tier 3

Language included under this section restates the general policy prohibition on degrading waters designated as ONRWs found at 20.6.4.8.A NMAC and states that this provision will be implemented “in accordance with” guidance outlined in section 4.7 of EPA’s Handbook.

General Requirements

General Requirements outlined here indicate that the State’s antidegradation policy in 20.6.4.8.A(3) is interpreted as prohibiting new or increased discharges to ONRWs and tributaries to ONRWs that would result in lower water quality in the ONRW except as provided in 20.6.4.8.A(3) and 20.6.4.8.A(4). These requirements note that the State interprets its antidegradation policy as prohibiting new or increased discharges to ONRWs and tributaries to ONRWs that would result in lower water quality in the ONRW and indicate that this is approach is “in accordance with EPA guidance.”

EPA’s guidance in the Handbook speaks to limitations that can be applied to tributaries of waters designated as ONRWs. There are a number of situations where water quality standards differ within watersheds, especially where states have used a segment-specific approach to determine applicability of appropriate water quality standards. As an example, in upstream tributaries with limited uses that flow into downstream waters designated with more protective uses or designated as an ONRW, the more protective or antidegradation requirements in the downstream waters would apply to activities upstream. The State’s prohibition on new or increased discharges to ONRWs or tributaries to ONRWs as written is consistent with the CWA, EPA’s regulations and the guidance described in the Handbook.

Temporary and Short-term Degradation

This section outlines the minimum information and actions required when requesting Commission approval to carry out an activity causing temporary and short-term degradation in an ONRW pursuant to the State’s provision at 20.6.4.8.A(3) NMAC. EPA considers these implementation provisions to be generally consistent with the CWA and EPA’s regulation and are approved. However, we believe that some aspects of some of these provisions should be expanded to provide more specifics on how the controlling provisions in the standards will be implemented. Several recommendations for immediate or future consideration are provided below.

a) Commission Approval of Temporary and Short Term Degradation

This subsection requires those seeking Commission approval of actions that cause temporary and short-term degradation of water quality in an ONRW to file concurrent written requests with the Commission and the Surface Water Quality Bureau (NMED). This subsection outlines specific content to be included in such requests.

b) Emergency Procedures - Temporary and Short Term Degradation

The need to address emergency situations is understandable, and addressing these in a way that may cause only temporary or short term degradation is consistent with EPA's guidance regarding temporary and short term degradation. Given that these procedures do not specify who will oversee or implement response actions, however, EPA recommends that New Mexico provide additional specificity on how the state will manage and direct any emergency situations although they may not be the primary entity implementing the actual control or remedial actions.

Permitted Activities That Result in Restoration or Maintenance of the Chemical, Physical or Biological Integrity of ONRWs

As previously mentioned, because maintenance and restoration is a fundamental goal of the CWA, state provisions for authorizing restoration and maintenance activities in ONRWs and other waters are approvable, provided they are consistent with other requirements of the CWA. Properly crafted, such provisions allow restoration and maintenance of the Nation's waters, consistent with the objectives of the CWA §101(a) "to restore and maintain the chemical, physical, and biological integrity" of the nation's waters and further protection of ONRWs as contemplated by 40 CFR §131.12(a)(3). The new implementation procedures included under this subsection are intended to implement the provisions at 20.6.4.8.A(4) NMAC.

20.6.4.8.A(4)(a) states that NMED or the appropriate oversight agency will review and may approve discharges that may result in degradation from restoration and maintenance activities on a case-by-case basis. The provision at 20.6.4.8.A(4)(a) indicates that NMED *or* the "appropriate oversight agency" will make such a determination, making it potentially unclear as to what agency will ultimately authorize degradation. Ultimately, however, these implementation procedures state that only NMED may allow degradation from such activities. The EPA considers this approach appropriate.

As previously mentioned for Tier 1 and Tier 2 waters, the new implementation procedures for Tier 3 waters enable NMED to impose instream monitoring requirements and benchmarks to assure existing uses are not impaired and that restoration and maintenance projects are concluded expeditiously. EPA views such monitoring requirements and benchmarks as beneficial tools for managing such projects. EPA encourages, but cannot require, that NMED and/or oversight agencies impose similar requirements in authorizing nonpoint source discharges from restoration and maintenance activities.

Other Provisions for Tier 3 Waters

These implementation provisions are specific to CWA §402 and 404 permits. Although EPA considers these provisions to be consistent with the CWA and EPA's regulations and are approved, we believe that it is important that the state consider the following recommendations to clarify these provisions.

Given that paragraph (a) within this subsection indicates that a permittee *may* be required as conditions of its permit to monitor to ensure that *no* pollutant load is added to the ONRW to ensure degradation does not occur and that the essential character or special use in an ONRW is

not altered, EPA believes it would be prudent to require monitoring for such discharges to prevent degradation in an ONRW. It is unclear how optional monitoring would ensure protection or who would make the decision as to what discharger(s) would be required to monitor.

As described earlier, these procedures include a requirement that NMED review and file recommendations for action with the Commission within 30 days of receipt of a proposal. Paragraph (f) requires NMED to provide notice of activities approved by the Commission and post a brief description, location, and timeframe for such activities on a dedicated website. However, the provision does not specify any requirement for NMED to make the content of its review available to the public or for the Commission or NMED to respond to public comments – addressing both of these actions would increase transparency for the protection of Tier 3 waters.

Implementing Agencies

These procedures indicate that permitting and certification of CWA permits is the responsibility of NMED pursuant to the New Mexico Water Quality Act Section 74-6-5.E. To clarify, while NMED can certify federal permits, the State is not authorized to issue CWA permits under §402.

V. REFERENCES

Federal Clean Water Act. 33 U.S.C. 1251 et seq.

40 CFR 130 (2001)

40 CFR 131 (2000)

48 FR: 51400-51413 (Nov. 8, 1983) Water Quality Standards Regulation, 40 CFR part 131: Final Rule.

63 FR: 36741-36806 (July 7, 1998) Water Quality Standards Regulation, 40 CFR part 131: Advance Notice of Proposed Rulemaking.

EPA-823- B-12-002: Water Quality Standards Handbook: *2nd Edition*, March 2012

New Mexico's Standards for Interstate and Intrastate Streams, 20.6.4 NMAC, 2011

New Mexico Water Quality Act, §§ 74-6-1 et seq., NMSA 1978

New Mexico Continuing Planning Process, Appendix A: Antidegradation Policy Implementation Procedures, May 10, 2011

New Mexico Legislature's House Joint Memorial 49 (2009).

American Wildlands v. Browner, 415 F.3d 1121 (10th Cir. 2001)

Defenders of Wildlife v. U.S. EPA, 415 F.3d 1121 (10th Cir. 2005)