

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**



**IN THE MATTER OF PROPOSED
AMENDMENTS TO SURFACE
WATER QUALITY STANDARDS
FOR SAN ISIDRO ARROYO AND
TRIBUTARIES**

WQCC No. 19-03(R)

**THE WATER QUALITY CONTROL COMMISSION'S
STATEMENT OF REASONS AND FINAL ORDER**

This matter comes before the Water Quality Control Commission (“Commission”) upon a Petition filed by Peabody Natural Resources Company (“Peabody”) proposing amendments to the Commission’s regulations governing Standards for Interstate and Intrastate Surface Waters codified at Title 20, Chapter 6, Part 4 of the New Mexico Administrative Code (“NMAC”). Peabody’s petition for rulemaking sought to expand the designation of the ephemeral portions of San Isidro Arroyo, Mulatto Canyon and Arroyo Tinaja, including tributaries to these waters. Peabody’s petition also sought to include a new ephemeral designation for portions of Doctor Arroyo and its tributaries. In order to demonstrate the stream segments are unable to attain their currently designated uses due to natural, ephemeral, intermittent or low flow conditions that prevent the attainment of the use, and because state water conservation requirements prevent effluent discharges in sufficient volumes to compensate for those conditions, Peabody conducted a Use Attainability Analysis (“UAA”), as required and in accordance with 40 CFR 131.10(g) and 20.6.4.15 NMAC. The UAA implemented NMED’s approved Hydrology Protocol to support its findings. The UAA was completed by Peabody Natural Resources Company in October 2018 and demonstrates that, based on the ephemeral nature of these waters, the highest attainable aquatic life and recreational use for these waters is limited aquatic life and secondary contact, respectively. The

New Mexico Environment Department (“NMED”) participated in the development of the proposed regulation, and the Parties agree on the language for the regulatory change.

A public hearing on this matter was held before the Commission and a Hearing Officer (Felicia L. Orth) on Tuesday, October 8, 2018, at the State Capitol Building, Room 307, 490 Old Santa Fe Trail, Santa Fe, New Mexico. At the public hearing, Peabody and NMED presented technical testimony in support of the proposed rulemaking. No other party entered an appearance in this matter, and there was no public comment. The Commission deliberated on October 8, 2019, at which time it voted unanimously to adopt Peabody’s proposed amendments to 20.6.4.97(C)(1) NMAC for the following reasons:

1. Peabody submitted a workplan to NMED requesting to conduct a UAA in accordance with 20.6.4.15.D NMAC. The purpose of the UAA was to determine the attainability of the aquatic and recreational designated uses for the San Isidro watershed within the Lee Ranch Mine. NMED approved the workplan to conduct the UAA on January 12, 2018.
2. Upon completion of the UAA, Peabody filed a Petition to Amend the Ground and Surface Water Protection Regulations (“Petition”) on April 5, 2019 to amend certain portions of the New Mexico Administrative Code found at 20.6.4.97(C)(1) NMAC. The proposed rule would change the designated uses of portions of San Isidro Arroyo Mulatto Canyon, Arroyo Tinaja, Doctor Arroyo, and tributaries thereof. *See* Petition, Exhibit 2.
3. Following discussions with NMED, Peabody revised its proposed regulatory language. The revised regulatory language was admitted into evidence at the public hearing as Peabody Exhibit 9. The proposed regulatory language in Peabody Exhibit 9 is the proposed regulatory amendment before the Commission for decision. The proposed regulatory language is a logical outgrowth of the proposed language included in Peabody’s April 6, 2016 petition. *See* Peabody Exhibit 9.

4. At a meeting conducted in compliance with the Open Meetings Act and other applicable requirements, the Commission granted Peabody's request for a hearing and assigned a hearing officer to preside over this matter. *See* Notice of Appointment of a Hearing Officer, WQCC 19-03(R).
5. The Hearing Officer scheduled the hearing for October 8 and 9, 2019. *See* Scheduling Order, WQCC 19-03(R).
6. Public notice of the hearing was published in the Albuquerque Journal and the Gallup Independent on August 2, 2019, and in the New Mexico Register on July 30, 2019. The Commission also posted an agenda that stated the Commission might deliberate and reach a decision on the proposed rule at the conclusion of the hearing or might convene at a later date to consider action on the proposal.
7. NMED filed a Notice of Intent to Present Technical Testimony on September 18, 2019, in accordance with 20.1.6.202 NMAC and the Notice of Public Hearing.
8. Peabody filed a Notice of Intent to Present Technical Testimony on September 18, 2019, in accordance with 20.1.6.202 NMAC and the Notice of Public Hearing.
9. A hearing in this matter was held in Santa Fe, New Mexico on October 8, 2019, at which a reasonable opportunity for all persons to be heard was provided. The hearing was transcribed by Ms. Cheryl Arreguin.
10. Mr. John Cochran, an expert in environmental compliance and hydrology on behalf of Peabody, provided written and oral testimony at the hearing in support of the regulatory amendment. *See* Peabody Exhibit 1. Mr. Cochran's testimony, among other things, described Peabody's purposes for conducting a UAA in and around Peabody's Lee Ranch Mine.
11. Mr. Pleasant Chad Gaines, an environmental management expert on behalf of Peabody, provided written and oral testimony at the hearing in support of the regulatory amendment. *See*

Peabody Exhibit 5. Mr. Gaines oriented the Commission to the watersheds analyzed in the UAA and the revised regulatory change being proposed.

12. Mr. Jeffrey Olyphant, a hydrology expert on behalf of Peabody, provided written and oral testimony at the hearing in support of the regulatory amendment. *See* Peabody Exhibit 11. Mr. Olyphant provided a hydrological and climatological overview of the watershed analyzed in the UAA.

13. Mr. James Boswell, an expert in environmental compliance, hydrology and NMED's Hydrology Protocol, on behalf of Peabody, provided written and oral testimony at the hearing in support of the regulatory amendment. *See* Peabody Exhibit 21. Mr. Boswell provided a detailed discussion of the approved workplan, the Hydrology Protocol, including how it was implemented in the field, and the UAA and its conclusion.

14. Ms. Shelly Lemon, Bureau Chief of the New Mexico Environment Department Surface Water Quality Bureau, provided written and oral testimony at the hearing in support of the regulatory amendment. *See* NMED Exhibit A. Ms. Lemon provided background related to New Mexico's water quality standards, use attainability analyses, and Hydrology Protocol, as well as a description of the coordination between NMED and Peabody on the proposed regulatory amendment before the Commission.

15. Ms. Jennifer Fullam, New Mexico Environment Department Surface Water Quality Bureau water quality standards coordinator, provided written and oral testimony at the hearing in support of the regulatory amendment. *See* NMED Exhibit C. Ms. Fullam described the process for changing a designated use in accordance with 20.6.4 NMAC and Peabody's compliance with that regulatory process.

16. Pursuant to the Water Quality Act, the Commission is responsible for adopting water quality standards for surface waters of the state, which include narrative standards and, as appropriate, the designated uses of the waters and water quality criteria necessary to protect such uses. NMSA 1978, §74-6-4(D). Pursuant to the Water Quality Act, any person may petition the Commission to adopt, amend or repeal a water quality standard. NMSA 1978, §74-6-6(B). The Commission can remove a designated use or adopt subcategories of a use requiring less stringent criteria only if a UAA demonstrates that attaining the use is not feasible. 20.6.4.15.A NMAC.

17. Any entity other than NMED can conduct a UAA and, upon completion, may petition the Commission to modify the designated use of a waterway if the conclusions of the UAA support such a petition. In this case, the evidence showed there had been close collaboration between Peabody and NMED on the workplan and the UAA.

18. A UAA is a structured scientific study conducted to assess the factors affecting the attainment of a use. A UAA evaluates the physical, chemical, biological, economic or other factors affecting the attainment of a use and relies on scientifically defensible methods, such as NMED's Hydrology Protocol, for identifying ephemeral and intermittent streams.

19. NMED's Hydrology Protocol provides a methodology for distinguishing between ephemeral, intermittent, and perennial waters in New Mexico. It relies on hydrological, geomorphic and biological indicators of the persistence of water. The protocol uses a scoring mechanism to classify waterways. The Hydrology Protocol includes two levels of evaluation. Level 1 includes an evaluation of fourteen indicators to assess the persistence of water at a location.

20. A Hydrology Protocol Level 1 score less than 9 results in a hydrologic determination that the stream is ephemeral, a score between 9 and 12 indicates that the stream will be recognized as intermittent until further analysis indicates that the stream is ephemeral, a score between 12 and

19 indicates that the stream is intermittent, a score between 19 and 22 indicates that the stream will be recognized as perennial until further analysis indicates that the stream is intermittent, and a score greater than 22 indicates that a stream is perennial.

21. Following completion of the first six Level 1 indicators, the Hydrology Protocol allows for the assessment team to sum an intermediate score. If the total score is less than or equal to 2, the reach can be determined to be ephemeral. Although it could have, Peabody's assessment team did not stop at this intermediate step and instead completed evaluation of all fourteen Level 1 indicators at all Hydrology Protocol sites, regardless of the score following completion of the first six Level 1 indicators.

22. Individuals intending to conduct a UAA must develop and submit a workplan to NMED for review and approval, and to the United States Environmental Protection Agency ("EPA") Region 6 for review and comment. 20.6.4.15.D NMAC.

23. As a result of a UAA completed by NMED in 2012, portions of the San Isidro Arroyo, Mulatto Canyon and Arroyo Tinaja are identified as ephemeral under 20.6.4.97 NMAC. *See* Peabody Exhibit 8.

24. Peabody completed a UAA to evaluate the natural conditions of the San Isidro Arroyo, Arroyo Tinaja, Mulatto Canyon and Doctor Arroyo within the Lee Ranch Mine site that were not previously evaluated in NMED's 2012 UAA. Peabody's UAA demonstrates what is believed to be the highest attainable aquatic life and human contact uses based on naturally occurring conditions.

25. Over the course of a year, beginning September 2015, Peabody worked with NMED and EPA Region 6 to develop an approvable workplan. *See* NMED Exhibits E, F, G, H, and I. NMED

approved the workplan, as required by 20.6.4.15.D NMAC, on January 12, 2018. NMED Exhibit J.

26. Peabody implemented the workplan by conducting Hydrology Protocol surveys at ten locations at or near the Lee Ranch Mine on June 19, 20 and 21, 2017. *See* Peabody Exhibit 21. The ten locations were sufficiently representative of the conditions throughout the 51,006-acre watershed area to support the conclusions of the UAA. NMED participated in the surveys on June 20, 2017. *See* NMED Exhibit A. The ten survey locations were representative of the stream segments identified in Peabody Exhibit 9. Peabody satisfactorily evaluated the entirety of the San Isidro Arroyo watershed identified in Peabody Exhibit 9.

27. Using a conservative approach, evaluating all fourteen Level 1 Hydrology Protocol indicators, Peabody performed the Hydrology Protocol at ten locations at the Lee Ranch Mine site. All scores at the ten locations resulted in a Hydrology Protocol score that was less than 9, indicating that the waterways are ephemeral.

28. Peabody followed NMED's Hydrology Protocol in evaluating Mulatto Canyon, Arroyo Tinaja, San Isidro Arroyo, Doctor Arroyo, and the tributaries thereof.

29. Peabody accepted all of NMED's suggested revisions to its purposed regulatory amendment.

30. NMED supports Peabody's proposed regulatory amendment.

31. Peabody collaborated with NMED and EPA Region 6 in developing the workplan, implementing the workplan, conducting field visits, and drafting the UAA.

32. Peabody's UAA demonstrates that the marginal warm water aquatic life and primary human contact uses are not attainable for the stream segments identified in Peabody Exhibit 9 due

to naturally ephemeral conditions. The highest attainable uses for the waterways identified in Peabody Exhibit 9 are limited aquatic life and secondary contact.

33. The stream segments identified in Peabody’s proposed rulemaking, as reflected in Peabody Exhibit 9, should be reclassified to 20.6.4.97 NMAC as ephemeral waters, with the attainable uses designated as limited aquatic life use and secondary contact.

34. Peabody provided extensive public notice of the UAA. *See* Peabody Exhibit 23. Although comments were received from NMED and EPA, no public comments were received as a result of those notices or at the public hearing.

ORDER

By a unanimous 13-0 vote of the Commissioners participating when the vote was taken following deliberations, the proposed changes to 20.6.4.97(C)(1) NMAC were approved by the Commission. Subject to approval from the USEPA, Title 20, Chapter 6, Part 4, Section 97(C)(1) of the New Mexico Administrative Code is hereby amended to reflect the language indicated in Peabody Exhibit 9, with any appropriate corrections of formatting or other changes necessary to file the rule with the New Mexico State Records Center. Following approval from the USPEA, the regulatory change as described in this Order is hereby adopted, to be effective 30 days after its filing in accordance with the State Rules Act. *See* NMSA 1978, §§14-4-5(D), 74-6-6(E).


Jennifer Pruett, Commission Chair
Water Quality Control Commission

Dated: 11/4/19

Appeal Path

Any aggrieved party may seek appellate review in the New Mexico Court of Appeals, pursuant to NMSA 1978, §74-6-7, 20.1.6.400(A) NMAC and Rules of Appellate Procedure, 12-601 NMRA. Direct appeals from orders shall be taken by filing a notice of appeal with the appellate court clerk within thirty (30) days from the date of the Order.

CERTIFICATE OF SERVICE

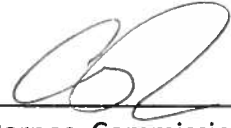
I hereby certify that a copy of the **Water Quality Control Commission's Statement of Reasons and Final Order** was sent via email to the persons below on November 4, 2019. Hard-copies can be mailed via first-class US mail upon request.

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