

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



IN THE MATTER OF
PROPOSED AMENDMENTS
TO 20.6.4.7 and 20.6.4.8 NMAC
NEW MEXICO ENVIRONMENT DEPARTMENT

Petitioner.

**ORDER AND STATEMENT OF REASONS
FOR AMENDMENT OF STANDARDS**

THIS MATTER comes before the New Mexico Water Quality Control Commission (“Commission”) upon a petition filed by the New Mexico Environment Department (“NMED” or “Petitioner”) proposing amendments to 20.6.4.7 and 20.6.4.8 NMAC to change standards for interstate and intrastate surface waters. A public hearing was held in Santa Fe, New Mexico on April 10, 2007, before a hearing officer, with a quorum of the Commission present during the hearing. The Commission heard technical testimony from Petitioner and admitted exhibits into the record. United States Forest Service and San Juan Water Commission also provided technical testimony. The Commission also heard non-technical testimony. On June 12, 2007, the Commission deliberated and voted to adopt the amendments set forth below in relevant part, for the reasons that follow.

II. STATEMENT OF REASONS

1. Petitioner filed its Petition for a public hearing on December 22, 2006.
2. A pre-hearing scheduling order was entered on January 26, 2007.
3. Notice of Hearing for the proposed amendments was duly published in the Albuquerque Journal on February 14, 2007. See NMED’s Exhibit 6.
4. NMED filed a Notice of Intent to Present Technical Testimony on March 21, 2007.

5. The United States Forest Service filed a Notice of Intent to Present Technical Testimony on March 21, 2007.
6. San Juan Water Commission filed a Notice of Intent to Present Technical Testimony on March 21, 2007.
7. Amigos Bravos, represented by Western Environment Law Center, filed an entry of appearance on March 21, 2007.
8. Pursuant to NMSA 1978, Section 74-6-4(C), when the Commission enacts standards it “shall give weight it deems appropriate to all facts and circumstances” including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes.
9. Pursuant to NMSA 1978, Section 74-6-4(C), “[t]he standards shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act.”
10. Ms. Pamela Homer, Team Leader of the Standards, Planning and Reporting team of the Surface Water Quality Bureau, provided oral and written testimony at the hearing in support of the amendments.
11. Her testimony established that NMED proposed to add a definition for “designated management agency” in 20.6.4.7.S NMAC. The definition is consistent with the Commission’s designation process outlined in the Water Quality Management Plan. See NMED’s Exhibit #2.
12. Her testimony established that NMED proposed to delete the phrase “high quality” in 20.6.4.8.A(3). NMED proposed this change because the prohibition against degradation contained in this subparagraph should apply to all waters designed as ONRWs and not

just ONRWs that have high quality water. Although the ONRW term is typically associated with high quality waters, an ONRW may include waters with less than pristine water quality or even impaired waters if the water have special ecological or recreational significance. See NMED's Exhibit #2.

13. Her testimony established that NMED has proposed language to allow for exceptions to allow temporary and short-term degradation under 20.6.4.8.A(3) (a) – (d) NMAC. This proposed language would allow temporary and short-term degradation to occur under limited circumstances in waters that have been designated as ONRWs. The proposed language is consistent with the federal antidegradation program as it has evolved over time. In November 1983, United States Environment Protection Agency (“EPA”) amended its no degradation requirement to provide a limited exception. EPA was concerned that waters which properly could have been designated as ONRW were not being so designated because of the strict no degradation provision and therefore were not being given special protection. The EPA Handbook provides that States may allow some limited activities that result in temporary and short-term changes in the water quality of ONRW. Such activities must not permanently degrade water quality or result in water quality lower than that necessary to protect the existing uses in the ONRW. See NMED's Exhibit #2.

14. Her testimony established that NMED has proposed an exception under A(3)(a) for temporary and short-term degradation when such degradation is necessary to restore or maintain the chemical, physical or biological integrity of the ONRW and is consistent with the objectives in 20.6.4.6 NMAC. The principal activity that NMED anticipates approving under this provision is watershed restoration, which may have a short-term

impact on water quality but could be necessary to maintain the chemical, physical, and biological integrity of the ONRW. Other types of activities that could maintain the integrity of the ONRW, but could result in short term degradation of water quality include the application of piscicides, the maintenance of culverts or bridges, or the replacement of septic tank and leachfield systems. See NMED's Exhibit #2.

15. Her testimony established that NMED has proposed language that under A(3)(b) temporary and short-term degradation is permitted when such action shall last no longer than twelve months, unless a demonstration is made to the approval body, such as Commission or NMED, that longer term degradation is necessary to restore or maintain the chemical, physical or biological integrity of the ONRW. The time limitation is proposed in order to provide regulatory certainty regarding the length of time that degradation may occur under most circumstances. The EPA Handbook states that temporary and short-term degradation equates to weeks or months, not years. NMED believes that twelve months is appropriate because certain activities, due to New Mexico's arid climate, can take more than a few months to take effect. See NMED's Exhibit #2.
16. Her testimony established that NMED has proposed an exception under A(3)(c) for temporary and short-term degradation on a case-by-case basis when reviewed by an approval body. The purpose for this requirement is to ensure that the merits of each case are considered and that the special circumstances and factors for each case are considered by the approval authority. The requirement that approvals must be done on a case-by-case basis is intended to prevent the use of categorical or multiple approvals by the approval authority. See NMED's Exhibit #2.

17. Her testimony established that the principle activity that the Commission would approve would be piscicide application. The principle activity that NMED would approve would be watershed protection and restoration projects. NMED will implement the antidegradation provision as part of its approval process of non-point source projects through Section 319 of the federal Clean Water Act (“CWA”) and as part of its certification process of 402 and 404 permits under Section 401 of the CWA. NMED, pursuant to the Water Quality Management Plan, will enter into interagency Memorandum of Understandings with designated management agencies to ensure several items, including but not limited to a case-by-case process for the designated management agency’s evaluation of water quality impacts in ONRWs to ensure that all requirements of 20.6.4.8 NMAC are met and site-specific best management practices that minimize impacts to water quality in ONRWs. See NMED’s Exhibit #2.
18. Ms. Marcy Leavitt, Surface Water Quality Bureau Chief, provided oral testimony at the hearing in support of the amendments. She testified that as a general rule the baseline for degradation is set at the time of the ONRW designation and no further degradation is allowed.
19. Ms. Leavitt testified that NMED would view a project or activity that is part of the existing use, such as fixing an acequia headgate even though it may temporarily cause more sediment to go into the water for a short time, as permissible.
20. Ms. Homer’s testimony established that NMED has proposed language so that the Commission or NMED shall evaluate the proposed degradation in the context of the current conditions of the ONRW and on-going activities in the ONRW and, to the extent possible, minimize the frequency and cumulative effects of the degradation. This

proposed requirement is consistent with the requirements of the EPA Handbook. See NMED's Exhibit #2.

21. Her testimony established that NMED has proposed language to require that the degradation from approved projects will not permanently degrade water quality in the ONRW or result in water quality lower than that necessary to protect existing uses in the ONRW. This provision is based almost verbatim on language in the EPA Handbook. This provision is added to ensure that temporary and short-term degradation will not be used as mechanism to subvert the prohibition against degradation contained in 20.6.4.8.A(3) NMAC, and result in permanent degradation. See NMED's Exhibit #2.
22. Her testimony established that NMED has proposed language to A(3)(c) since filings its Petition for Regulation Change. The new proposal is based on comments received from EPA on March 6, 2007 after NMED filed its Petition. EPA comments that an ONRW may be designated because of its recreational or ecological significance, and recommended that NMED add language from the EPA Handbook stating that the temporary and short term degradation of water quality may not alter the essential character or special use that makes the water on ONRW. See NMED's Exhibit #2.
23. Her testimony established that NMED has proposed language under A(3)(d) for temporary and short-term degradation as long as all practical means of minimizing such degradation is utilized. This proposed requirement is consistent with the requirements of EPA. If the implementers of the project or activity fail to minimize the degradation (regardless if the project or activity had been approved) including ensuring that cumulative effects are minimized, or their actions lead to permanent degradation of the water quality, NMED will have full authority to pursue an appropriate enforcement

actions under the Water Quality Act, NMSA 1978, Section 74-6-10. See NMED's Exhibit #2.

24. Mr. Tom Pitts, P.E., on behalf of San Juan Water Commission, provided oral and written testimony on the Petition. Mr. Pitts expressed concern that placing a restriction in the standards that may limit activities solely on the basis of the purpose of the activity (even if the activity causes only short-term degradation, protects uses and meets all other NMED and EPA criteria) would be problematic.
25. Mr. Pitts expressed concern that the language did not have a "public health or welfare" exception.
26. Ms. Homer and Ms. Leavitt testified that creating a "public welfare" exception was not part of the Commission's charge to NMED in preparing this Petition. The stakeholder groups did not vet the concepts of "public welfare" or "emergency" exceptions.
27. Ms. Homer and Ms. Leavitt expressed concern that "public welfare" is a broad term and could be subject to citizens or governmental agencies asserting that oil and gas exploration, home subdivision, and timber sales constituted public welfare.
28. Mr. Pitts acknowledged that the Petition was permissible under EPA because a State may have a more stringent standard on antidegradation matters.
29. EPA did not state a concern to the NMED in its comments that the Petition was contrary to letter or spirit of EPA policy.
30. Dr. Roy Jemison, United States Forest Service, Water Resources Program Manager, provided oral and written testimony on the Petition. Dr. Jemison did express concern that A(3)(a) contains the word "only" and thus could be interpreted as an absolute prohibition of any activity in an ONRW. The Forest Service has many pre-existing uses on Forest

Service lands that may be prohibited by this language, such as prescribed fire, forest thinning, invasive plant treatment, grazing and recreation management and development. See United States Forest Service's Exhibit #1. NMED, in response, submitted revised language to address these concerns. See NMED's Exhibit #10.

31. The New Mexico Wildlife Federation, New Mexico Council of Trout Unlimited, and New Mexico Department of Game & Fish provided written comments in support of the Petition.
32. Ms. Rachel Conn, Amigos Bravos, provided oral comments in support of the Petition.
33. The Commission assigned weight: (a) to the importance of protecting water quality for water supplies and recreational purposes; (b) helping fish and wildlife thrive through stream maintenance, and (c) agricultural use that will improve through projects such as fixing an acequia headgate.
34. The Commission found that the proposed standards shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act.
35. The Commission adopts NMED's proposed amendment to 20.6.4.7 and 20.6.4.8 NMAC.
36. The Commission has authority to modify a petition because "even substantive changes in the original plan may be made so long as they are in character with the original scheme and a logical outgrowth of the notice and comment already given." BASF Wyandotte Corp., et al. v. Costle, 598 F. 2d 637, 642 (1st Cir. 1979), cert. denied, 444 U.S. 1086 (1980).
37. Therefore, the Commission modifies NMED's amendment to 20.6.4.8.A(3) to improve the clarity of the language, to include reference to a new subpart A(3)(e), and to avoid


using the word “necessary” because replacing a headgate is not always “necessary” but can result in improved maintenance.

38. The Commission modifies NMED’s amendment to 20.6.4.8.A(3)(b) NMAC to improve the clarity of the language and for the Commission to approve temporary and short-term degradation of water quality that will last longer than twelve months. Commissioner Peggy Johnson raised this option at the public hearing. The Commission is best equipped to provide for coordinated review in a public meeting setting.
39. The Commission modifies NMED’s amendment to 20.6.4.8.A(3)(c) NMAC in order for the Commission and NMED, and not a designated management agency, to approve the temporary and short-term degradation items. This modification will ensure state agency oversight of these items. NMED and a designated management agency may still enter into a memorandum of agreement, but the Commission must approve it. This modification will ensure document uniformity and allow the Commission to exercise oversight in order that the agreement contains sufficient provisions to protect the purpose of the ONRW.
40. The Commission adopts NMED’s new language, provided at hearing, as a new 20.6.4.8.A(3)(e) NMAC to address the Forest Service and Mr. Pitts’ concerns. See NMED’s Exhibit #10; Transcript p. 192, line 21- p. 197, line 7.
41. The Commission hereby CONCLUDES:
 - (a) NMED has the authority to bring this petition.
 - (b) The Commission has the authority to approve this petition.
 - (c) The petition satisfies all applicable procedural requirements.
 - (d) The proposed amendments satisfy NMSA 1978, Section 74-6-4(C).

42. The proposal is adopted for any or all of the reasons stated above.

III. ORDER

By a unanimous vote, the amended petition was approved on June 12, 2007. The proposed amended petition with any appropriate corrections of typographical errors, formatting or other changes necessary to file this rule with the New Mexico State Records Center, are hereby adopted, to be effective 30 days after filing with the State Records Center.


Cindy Padilla, Acting Chair
Water Quality Control Commission