



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 ELM STREET, SUITE 500
DALLAS, TEXAS 75270

April 26, 2022

James C. Kenney, Secretary
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502

RE: EPA Action on New Mexico 2022 Clean Water Act § 303(d) List

Dear Mr. Kenney:

Thank you for your March 29, 2022, submission of New Mexico's 2022 Integrated Report and Clean Water Act § 303(d) list of water quality limited segments.

The Environmental Protection Agency (EPA) reviewed the submission and supporting documentation and determined that the 2022 § 303(d) list meets the requirements of the Clean Water Act and the EPA's implementing regulations. By this action, the EPA approves the state's decisions regarding segments and associated pollutants identified in the 2022 § 303(d) list and the associated priority rankings for development of total maximum daily loads (TMDLs). A detailed discussion of the EPA's action is included in the record of decision enclosed with this letter.

The New Mexico Environment Department (NMED) § 303(d) program personnel expended considerable effort to monitor and assess environmental data against the state water quality standards. They produced a § 303(d) list that was of the highest quality. They responded quickly to requests for additional information and were very helpful in their interactions with the EPA regional staff. The state personnel's knowledge of the program and dedication to protection of the water of New Mexico is to be commended.

The EPA staff looks forward to working closely with the NMED to make continuing improvements to the § 303(d) program. Thank you again for your efforts in developing New Mexico's 2022 § 303(d) list and for your cooperation in addressing EPA's questions. If you have any questions, please contact me at (214) 665-8138 or Robert Cook of my staff at (214) 665-7141.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles W. Maguire", written in a cursive style.

Charles W. Maguire
Director
Water Division

Enclosure (1): Record of Decision for the Approval of New Mexico's Clean Water Act 2022 § 303(d)
List

cc: Rebecca Roose, NMED, Water Protection Division Director
Shelly Lemon, NMED, Surface Water Quality Bureau Chief
Heidi Henderson, NMED, Assessment and TMDL Team

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Summary of Actions

The statutory and regulatory requirements, and the Environmental Protection Agency's (EPA's) review of the State of New Mexico's compliance with each requirement, are described in detail below. Today, by this final action, the EPA is taking an approval action regarding the State's decisions to list all the water bodies and associated pollutants identified in the final 2022 § 303(d) list of the State's listing submission and associated priority rankings.

Administrative Records Cited

1. Electronic data submittal of New Mexico's 2022-2024 Clean Water Act (CWA) § 303(d)/§ 305(b) Integrated List of Assessed Surface Waters from New Mexico Environment Department to the EPA's Assessment, Total Maximum Daily Load (TMDL) Tracking and Implementation System (ATTAINS) database. March 29, 2022.
2. Comprehensive Assessment and Listing Methodology (CALM): Procedures for Assessing Water Quality Standards Attainment for The State of New Mexico CWA § 303(d) /§ 305(b) Integrated Report, Revised August 18, 2021. Available at https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/18/2021/09/CALM_2021-FINAL_with_appendices.pdf
3. Guidance for Water Quality Based Decisions: The TMDL Process. EPA 440/4-91-001. April 1991. Available at <http://www.epa.gov/waterscience/library/modeling/SASD0109.pdf>.
4. EPA 2002 Integrated Water Quality Monitoring and Assessment Report Guidance. November 19, 2001. Available at <http://www.epa.gov/owow/tmdl/2002wqma.html>
5. 2022 – 2024 State of New Mexico CWA § 303(d)/§ 305(b) Integrated Report, Appendix C, Response to Comments. February 4, 2022. Available at https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/18/2022/03/2022-02-01-WPD-SWQB-DRAFT_2022-IR-Appendix-C_Response-to-Comments-FINAL-20220307.pdf
6. State of New Mexico Statewide Water Quality Management Plan and Continuing Planning Process. October 23, 2020. Available at https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/25/2018/08/WQMP-CPP-20201023b-EPA-APPROVED-with-Appendices_Dec2020update.pdf
7. Final Draft 2022-2024 State of New Mexico CWA § 303(d)/§ 305(b) Integrated Report, February 25, 2022. Available at <https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/18/2022/02/2022-02-24-FINAL-DRAFT-2022-IR.pdf>
8. State of New Mexico Water Quality Control Commission Order Approving Final Draft of 2022 – 2024 State of New Mexico CWA § 303(d)/§ 305(b) Integrated List, March 18, 2022. Available at <https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/18/2022/03/2022-03-18-WQCC-21-63-Order-Approving-Final-Draft-2022-2024-State-of-New-Mexico-%C2%A7-303d-%C2%A7-305b-Integrated-List-pj.pdf>

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9. New Mexico Environment Department Surface Water Quality Bureau Draft 2022-2024 State of New Mexico CWA Sections 303(d)/305(b) Integrated List of Assessed Surface Waters. Notice of 45-Day Public Comment Period, November 30, 2021. Available at <https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/18/2021/11/2022-2024-Draft-Integrated-List-PN.pdf>
10. New Mexico Environment Department, Surface Water Quality Bureau Seeks Water Quality Data and Comment on the Comprehensive Assessment and Listing Methodology (CALM) Used to Determine Impairment Status on the 2022-2024 State of New Mexico CWA §303(d) / §305(b) Integrated Report. Extension of Public Comment Period, June 18, 2021. Available at https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/18/2021/09/CALM-and-Data-Call-PN-063021_extension_ENGLISH_SPANISH.pdf
11. Water Quality Limited Segments-Pollutant Combinations (Category 5 Waters)/State of New Mexico 2022-2024 § 303(d) List. Available at <https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/18/2022/03/2022-2024-IR-Appendix-A-303d-305b-Integrated-List.pdf>
12. New Mexico Environment Department, Surface Water Quality Bureau Public Involvement Plan (PIP) for the State of New Mexico CWA § 303(d)/§ 305(b) Integrated Report and List. November 2021. Available at <https://www.env.nm.gov/surface-water-quality/wp-content/uploads/sites/18/2021/11/2021-11-17-NMED-SWQB-2022-Integrated-List-PIP-FINAL.pdf>

List of Abbreviations

AU – Assessment Unit
CFR – Code of Federal Regulation
CPP – Continuing Planning Process
CWA – Clean Water Act
EPA – Environmental Protection Agency
NHD – National Hydrographic Dataset
NMAC – New Mexico Administrative Code
NMED – New Mexico Environment Department
TMDL – Total Maximum Daily Load
WQCC – Water Quality Control Commission
WQLS – Water Quality Limited Segments
WQMP/CPP – Water Quality Management Plan/Continuous Planning Process

A. Purpose

The purpose of this review document is to describe the rationale for the EPA's approval of New Mexico's 2022 § 303(d) list of Water Quality Limited Segments (WQLS) requiring Total Maximum Daily Loads (TMDLs). The following sections identify those key elements to be included in the list submission based on the Clean Water Act (CWA) and EPA regulations (See 40 CFR § 130.7). The EPA reviewed the methodology used by the State in developing the § 303(d) list and the State's description of the data and information it

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considered. The EPA's review of New Mexico's 2022 § 303(d) list is based on whether the State reasonably considered all existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

B. Statutory and Regulatory Background

1. Identification of WQLSs for Inclusion on § 303(d) List

Section 303(d)(1) of the CWA directs states to identify those waters within its jurisdiction for which effluent limitations required by § 301(b)(1)(A) and (B) of the CWA are not stringent enough to assure attainment with any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The § 303(d) listing requirements apply to waters impaired by point and/or nonpoint sources, pursuant to the EPA's long-standing interpretation of § 303(d).

EPA regulations provide that states do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology based effluent limitations required by the CWA; (2) more stringent effluent limitations required by state or local authority; and (3) other pollution control requirements required by state, local, or federal authority (See 40 CFR § 130.7(b)(1)).

2. Consideration of Existing and Readily Available Water Quality Related Data and Information

In developing § 303(d) lists, states are required to assemble and evaluate all existing and readily available water quality related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the state's most recent § 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate non-attainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any § 319 non-point assessments submitted to the EPA (See 40 CFR § 130.7(b)(5)). In addition to these minimum categories, the states are required to consider any other data and information that are existing and readily available. The EPA's 1991 "Guidance for Water Quality Based Decisions" describes categories of water quality related data and information that may be existing and readily available (See Administrative Record 3). While the states are required to evaluate all existing and readily available water quality related data and information, the states may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring states to assemble and evaluate all existing and readily available water quality related data and information, EPA regulations at 40 CFR § 130.7(b)(6) require the states to include as part of their submissions to the EPA documentation to support decisions to rely or not rely on particular data and information for decisions to

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list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the EPA Regional Administrator.

3. Public Participation

The process for identifying water quality limited segments requires the involvement of the general public commonly referred to as the *public participation process*. The *public participation process* is intended to foster public awareness and open processes of government decision making (See 40 CFR § 25.1(a)). At a minimum, the *public participation process* must provide, encourage, and assist the participation of the public or segments of the public which may have a particular interest in a given program or decision (See 40 CFR § 25.3(a) and § 25.4(b)(5)). The public notification must be provided far enough in advance of agency action to permit time for public response which in general should not be less than 30 days (See 40 CFR § 25.4(c)). The State's *public participation process* is to be clearly described in the State Continuing Planning Process (CPP) (See 40 CFR § 130.7(a)).

4. Priority Ranking

EPA regulations also codify and interpret the requirement in § 303(d)(1)(A) of the CWA that the states establish a priority ranking for listed waters. The regulations at 40 CFR § 130.7(b)(4) require the states to prioritize waters on their § 303(d) lists for TMDL development, and to identify those WQLSs targeted for TMDL development in the next two years. In prioritizing and targeting waters, the states must, at a minimum, consider the severity of the pollution and the uses to be made of such waters (See § 303(d)(1)(A) CWA). As long as these factors are taken into account, the CWA provides that the states establish priorities. The states may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats; recreational, economic, and aesthetic importance of particular waters; degree of public interest and support; and the state or national policies and priorities (See 57 FR 33040, 33045 (July 24, 1992) and Administrative Record 3).

C. Review of New Mexico's Submission

The EPA reviewed New Mexico's description of the data and information it considered, its methodology for identifying waters, and the State's responsiveness summary dated February 4, 2022 (See Administrative Record 5). The EPA concludes that in general the State properly assembled all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR § 130.7(b)(5). The EPA concludes that the State's decisions in general to list the waters identified in its listing submission are consistent with federal listing requirements.

As part of the State's ambient water quality assessment process, water quality standards segments, defined in NMAC § 20.6.4.7.M, are further divided into assessment units

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(AUs) for use impairment determination and linked to the National Hydrographic Dataset (NHD) for national electronic reporting requirements. Assessment units are stream reaches, lakes, or reservoirs defined by hydrologic boundaries, water quality standards, geology, topography, incoming tributaries, and surrounding land use/ land management (See Administrative Record 2).

1. Identification of WQLSs for Inclusion on § 303(d) List

For the purpose of listing waters under 40 CFR § 130.7(b), the term water quality standard applicable to such waters and applicable water quality standard refer to those water quality standards established under § 303 of the CWA, including numeric criteria, narrative criteria, waterbody uses, and antidegradation (See 40 CFR §130.7(b)(3)).

The listing methodology employed by New Mexico for the 2022 § 303(d) list describes a set of decision criteria that were flexibly applied (See Administrative Record 2). New Mexico identified the pollutants that were causing or expected to cause a violation of the applicable water quality standards for every listed segment where the identity of the pollutant was known (See Administrative Record 11).

2. Consideration of Existing and Readily Available Water Quality-Related Data and Information.

The EPA has reviewed the State's submission and has concluded that the State developed its § 303(d) list in compliance with § 303(d) of the CWA and 40 CFR § 130.7. The EPA has determined that New Mexico's submission includes all waters that meet § 303(d) listing requirements and therefore, is taking an approval action. The EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

As suggested by EPA guidance, New Mexico chose to combine the State's 2022 § 305(b) report and § 303(d) list into a single report following the EPA's listing guidance titled "Guidance for the 2002 Integrated Assessment and Reporting on the Quality of States' Waters" ("Integrated Report") (See Administrative Record 4). A single assessment methodology for the Integrated Report was used for both the § 305(b) reporting and the § 303(d) listing activities. The Integrated Report included five categories as established in EPA guidance. Category 5, which is the New Mexico 2022 § 303(d) list was also included in the report. Category 5 is the portion of the Integrated Report on which the EPA is taking action.

While the EPA reviewed New Mexico's listing methodology as part of its review of its submission, the EPA's approval of the State's listing decisions should not be construed as concurrence with or approval of the listing methodology. The EPA is not required to act on the listing methodology (See 40 CFR § 130.7). The EPA's decision to approve New Mexico's listing decisions is based on the EPA's review of the data and information submitted concerning individual waters and the State's evaluations of those waters. While the EPA considered the State's listing methodology as part of its review, its evaluation

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was intended to determine whether the State had identified all waters that meet federal listing requirements specified in § 303(d) of the CWA and 40 CFR § 130.7. Furthermore, a State's applicable water quality standards are the basis for determining whether a waterbody is impaired by a pollutant and therefore included on the State's § 303(d) list (category 5) (See 40 CFR § 130.7(b)(3)).

3. Public Participation

The State of New Mexico public participation requirements are found at State of New Mexico Statewide Water Quality Management Plan and Continuing Planning Process (WQMP/CPP), Section XIV, and in the Public Involvement Plan (See Administrative Record 6,12). Specific to the New Mexico § 303(d)/305(b) Integrated Report public participation requirements, Table XIV-1, WQMP/CPP, the EPA has determined the State in general took reasonable steps to solicit all existing and readily available water quality-related data and information from members of the public and government agencies via the public participation for the New Mexico's 2022 Integrated Report as outlined:

- a. New Mexico Environment Department (NMED) solicited existing and readily available data via public notice June 18, 2021, through July 26, 2021 (See Administrative Record 10).
- b. New Mexico's 2022 Integrated Report was opened for a 45-day public comment period from November 30, 2021, through January 14, 2022, to fulfill public participation requirements and generate public comments (See Administrative Record 9).
- c. New Mexico's 2022 Integrated Report approval by the State of New Mexico Water Quality Control Commission (WQCC), March 18, 2022 (See Administrative Record 8).
- d. New Mexico's 2022 Integrated Report received by the EPA Region 6, March 29, 2022 (See Administrative Record 1).

4. Priority Ranking

The EPA reviewed the State's priority ranking of listed waters for TMDL development and concludes that the State properly considered the severity of pollution and the uses to be made of such waters. In addition, the EPA reviewed the State's identification of Water Quality Limited Segments targeted for TMDL development in the next two years and concludes that the targeted waters are appropriate for TMDL development in this time frame.

D. Radioactive Listings

Section 502(6) of the CWA (See 33 U.S.C. § 1362 et seq.) defines *pollutant* to include radioactive materials except those regulated under the 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).

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The EPA interprets § 303(d) of the CWA to require EPA establishment or approval of § 303(d) or TMDLs for *pollutants*. Waters listed on New Mexico's 2022 § 303(d) list as impaired by radioactive materials may have a range of probable sources, e.g., 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). Therefore, the EPA approves New Mexico's listings as consistent with § 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 quality limited segment is listed is not a *pollutant* under the CWA, there would be no obligation to establish or approve a TMDL for such material.

E. Administrative Record Supporting this Action

In support of this decision to approve the State's listing decisions, the EPA carefully reviewed the materials submitted by the State with its § 303(d) listing decision. The administrative record supporting the EPA's decision comprises materials submitted by the State, copies of the New Mexico 2022 § 303(d) list, associated federal regulations, and EPA guidance concerning preparation of § 303(d) lists, and this Record of Decision and supporting reports. The EPA determined that the materials provided by the State with its submission provided sufficient documentation to support our analysis and findings that the State listing decisions meet the requirements of the CWA and associated federal regulations. We are aware that the State compiled and considered additional materials (e.g., data and water quality analysis reports) as part of its list development process that were not included in the materials submitted to the EPA. The EPA did not consider these additional materials as part of its review of the listing submission. It was unnecessary for the EPA to consider all the materials considered by the State to determine that the State complied with the applicable federal listing requirements. Moreover, federal regulations do not require the State to submit all data and information considered as part of the listing submission.