


## **RECORD OF DECISION DOCUMENT FOR THE APPROVAL OF NEW MEXICO'S CLEAN WATER ACT 2008 §303(d) LIST**

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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, EPA is taking both an approval and disapproval action regarding the State's decisions to list all the water bodies and associated pollutants identified in the Final 2008 § 303(d) List of the State's listing submission and associated priority rankings. Specifically, EPA cannot approve the State's decision not to list one assessment unit (or assessment unit/*E. coli* pollutant combination) and the decision to list two assessment units (or assessment units/dissolved oxygen pollutant combinations) as identified and discussed in this decision document. Therefore, EPA in the instances cited is listing and delisting these assessment units and pollutants.

### **Administrative Records Cited**

1. EPA Approval of Revisions to New Mexico's Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC. December 29, 2006. Available at [http://www.epa.gov/waterscience/standards/wqslibrary/nm/nm\\_6\\_wqs.pdf](http://www.epa.gov/waterscience/standards/wqslibrary/nm/nm_6_wqs.pdf)
2. Record of Decision for EPA Review of TITLE 2 Environmental Protection, Chapter 6, Water Quality, Part 4, New Mexico Standards for Interstate and Intrastate Surface Water. December 29, 2006. 
3. Letter from State of New Mexico Water Quality Control Commission to Miguel Flores, Water Quality Protection Division, Region 6, EPA. August, 12 2008.
4. State Of New Mexico Procedures For Assessing Standards Attainment For The Integrated §303(d) /§305(b) Water Quality Monitoring And Assessment Report: Assessment Protocol, Revised January 23, 2008. Available at <http://www.nmenv.state.nm.us/swqb/protocols/index.html>
5. EPA Approval of Revisions to New Mexico's Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC as amended through October 11, 2002. October 23, 2003. Available at [http://www.epa.gov/waterscience/standards/wqslibrary/nm/nm\\_6\\_wqs.pdf](http://www.epa.gov/waterscience/standards/wqslibrary/nm/nm_6_wqs.pdf)
6. Forest Guardians and Southwest Environmental Center v. EPA, Civil Action Number: 96-0826 LH. Available at <http://www.nmenv.state.nm.us/swqb/CDNM.html>
7. 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>.
8. EPA 2002 Integrated Water Quality Monitoring and Assessment Report Guidance. November 19, 2001. Available at <http://www.epa.gov/owow/tmdl/2002wqma.html>
9. Water Quality Limited Segments-Pollutant Combinations (Category 5 Waters)
10. Memorandum, Tudor T, Davies, Director, Office of Science and Technology, EPA, Establishing Site Specific Criteria Equal to Natural Background. November 5, 1997.
11. New Mexico Environment Department. *E. coli* Sampling of the Rio Fernando de Taos and Apache Creek, Taos County, New Mexico. 2006.
12. NMED Email, Applicability of New Mexico Water Quality Standards to Unclassified Waters. September 3, 2008.

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13. EPA Draft Implementation Guidance for Ambient Water Quality Criteria for Bacteria. EPA-823-B-02-003. May 2002.
14. New Mexico Water Quality Control Commission Continuing Planning Process. Revised December 14, 2004. Available at <http://www.nmenv.state.nm.us/swqb/cpp/2004cpp.pdf>
15. New Mexico Water Quality Control Commission Water Quality Management Plan. Revised May 13, 2003. Available at [http://www.nmenv.state.nm.us/swqb/Planning/Water\\_Quality\\_Management\\_Plan/index.html](http://www.nmenv.state.nm.us/swqb/Planning/Water_Quality_Management_Plan/index.html)

### **Purpose**

The purpose of this review document is to describe the rationale for EPA's approval and disapproval of New Mexico's 2008 § 303(d) List of water quality limited waters 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. 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 considered. EPA's review of New Mexico's 2008 § 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.

### **Statutory and Regulatory Background**

#### **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 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).

#### **Consideration of Existing and Readily Available Water Quality Related Data and Information**

In developing § 303(d) lists, the 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

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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 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. 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 No. 7. 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 the 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 EPA documentation to support decisions to rely or not rely on particular data and information for decisions to 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. The State described in its submission titled "2008 – 2010 State of New Mexico Integrated Clean Water Act § 303(d)/§305(b) Report" how it used existing and readily available data in the preparation of New Mexico's § 303(d) List for 2008.

### 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 also to identify those Water Quality Limited Segments (WQLSs) targeted for TMDL development in the next two years. In prioritizing and targeting waters, the states must, at a minimum, take into account 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 No. 7.

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## Review of New Mexico's Submission

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

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. EPA has determined that New Mexico's submission does not include all waters that meet § 303(d) listing requirements. Therefore, regarding New Mexico's 2008 Final §303(d) List submission, EPA is taking both an approval and disapproval action. 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, including a careful review of the waters addressed in the 1997 Consent Decree (CD) in *Forest Guardians and Southwest Environmental Center v. EPA*, Civil Action Number: 96-0826 LH.

As suggested by recent EPA guidance, New Mexico chose to combine the State's 2008 § 305(b) report and § 303(d) List into a single report following EPA's listing guidance titled "Guidance for the 2002 Integrated Assessment and Reporting on the Quality of States' Waters" ("Integrated Report"). See Administrative Record No. 8. 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 2008 § 303(d) List was also included in the report. Category 5 is the portion of the Integrated Report on which EPA is taking action today.

While EPA reviewed New Mexico's listing methodology as part of our review of the listing submission, EPA's approval of the State's listing decisions should not be construed as concurrence with or approval of the listing methodology. EPA is not required to take action on the listing methodology. See 40 CFR § 130.7. EPA's decision to approve and disapprove New Mexico's listing decisions is based on EPA's review of the data and information submitted concerning individual waters and the State's evaluations of those waters. While EPA considered the State's listing methodology as part of its review, our evaluation 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. Although EPA has concerns about some aspects of the State's listing methodology, i.e., use of natural conditions for delisting, there were no instances noted where this particular delisting argument was used in the State's 2008 Integrated Report. Specifically, the New Mexico listing methodology provides that for those water bodies that are shown to be impaired solely due to natural conditions will be delisted and placed in Category 4N on the Integrated List. See Administrative Record No. 3. However, 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

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§ 303(d) List (Category 5). See 40 CFR § 130.7(b)(3). States may remove a designated use or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible because of *naturally occurring pollutant concentrations* prevent the attainment of the use. See 40 CFR § 131.10(g)(1). If the State wishes to remove a designated use that is specified in section 101(a)(2) of the Clean Water Act (CWA) or to adopt subcategories of uses specified in section 101(a)(2) of the CWA which requires less stringent criteria, a State must conduct a use attainability analysis as described in 40 CFR §131.3(g). See 40 CFR § 131.10(j)(2) and Administrative Record No. 10.

The listing methodology employed by New Mexico for the 2008 § 303(d) List describes a set of decision criteria that were flexibly applied. In general, waters were listed in cases where samples exceeded the applicable water quality standards. However, EPA's review indicates that in some instances the State developed the 2008 § 303(d) List using water quality standards upon which EPA took no action. Under § 303 of the CWA, EPA took an approval and no action regarding Revisions to New Mexico's Standards for Interstate and Intrastate Surface Waters, Chapter 20.6.4 New Mexico Administrative Code (NMAC). See 40 CFR § 131.5 and Administrative Record No. 1. Specifically, EPA took no action regarding specific sections of the State's water quality standards under § 303 of the CWA regarding:

1. Limited aquatic life, aquatic life and/or secondary contact recreation use designations, Sections 20.6.4.97, 20.6.4.98 and 20.6.4.99 of 20.6.4 NMAC respectively. See Administrative Record Nos. 1 and 2.
2. Modification of existing segment designated uses and criteria.<sup>1</sup>

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). EPA determined that the State's use of Section 20.6.4.98 NMAC is inconsistent with New Mexico's water quality standards based on EPA's no action regarding specific sections of the State's water quality standards under § 303 of the CWA, specifically § 20.6.4.98 NMAC. Consequently, since New Mexico's 2008 § 303(d) List submission premised a de-listing action, i.e., Fernando de Taos, Unclassified Intermittent Waters within the Classified Perennial Waters of the § 20.6.4.123 NMAC, Assessment Unit NM-98.A\_001, on water quality standards that EPA took no action, EPA is taking a disapproval action and re-listing this assessment unit/*E. coli* pollutant-combination.

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<sup>1</sup> EPA took no action for the following NMAC Sections. See Administrative Record Nos. 1 and 2:

- (a) §20.6.4.126 (Rio Grande Basin) - secondary contact use;
- (b) §20.6.4.128 (Rio Grande Basin) - limited aquatic life and secondary contact uses;
- (c) §20.6.4.221 (Pecos River Basin) - warmwater aquatic life use;
- (d) §20.6.4.310 (Canadian River Basin) - warmwater aquatic life use;
- (e) §20.6.4.701 (Dry Cimarron River) - marginal coldwater and warmwater aquatic life uses; and
- (f) §20.6.4.702 (Dry Cimarron River) - warmwater aquatic life use.

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During the calendar years 2006 and 2007, the State of New Mexico implemented a special study of Pajarito Plateau. Since data from this special study was not received in time to collate and assess for inclusion in the New Mexico 2008 Integrated Report, the State has indicated that an addendum [or § 303(d) mid-cycle] to the New Mexico 2008 Integrated Report will be submitted to EPA in early 2009 for approval or disapproval.

As part of the State's ambient water quality assessment process, water quality standards segments, defined in § 20.6.4.7.M NMAC, are further divided into assessment units (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, WQS, geology, topography, incoming tributaries, and surrounding land use/ land management. See Administrative Record No. 4.

### 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).

EPA has determined that New Mexico 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 New Mexico's 2008 Integrated Report by the State of New Mexico as outlined:

1. The New Mexico Environment Department (NMED) solicited existing and readily available data via public notice July 30, 2007 through August 31, 2007.
2. The entire 2008 Integrated Report was opened for a 30-day public comment period from June 9, 2008 through July 9, 2008, to fulfill public participation requirements and generate public comments.
3. Notices were placed in the following newspapers:
  - (a) Albuquerque Journal
  - (b) Santa Fe New Mexican
  - (c) Farmington Daily Times
  - (d) Las Cruces Sun News
  - (e) Silver City Daily Press

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4. New Mexico's Final 2008 Integrated Report was submitted to EPA Region 6 on August 18, 2008.

EPA has reviewed New Mexico's description of the data and information it considered, its methodology for identifying waters, and the State's responsiveness summary dated August 2008. 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). EPA concludes that the State's decisions in general to list the waters identified in its listing submission are consistent with federal listing requirements. Furthermore, EPA concludes that the *public participation process* regarding the listing of two assessment units/dissolved oxygen pollutant combinations, i.e., NM-2105\_50 and NM-2105.1\_00, is inconsistent with federal requirements and the New Mexico Water Quality Control Commission Continuing Planning Process (CPP) and Water Quality Management Plan (WQMP). See Administrative Record Nos.14 and 15. Consequently, EPA is taking a disapproval action and de-listing these assessment units/dissolved oxygen pollutant-combinations.

### **Decision to Delist Waters from New Mexico's 2008 section 303(d) List**

Reviewing the State's Public Notice for the New Mexico 2008 § 303(d) List, EPA noted that two Assessment Units, NM-2105\_50 and NM-2105.1\_00, for dissolved oxygen were added following the close of the 30-day public notice period. The addition of these assessment units/dissolved oxygen pollutant-combination were based not as a response to any public comment but rather due to an administrative oversight by the State during the development of the 2008 § 303(d) List. Following these actions, the State promptly issued a 20-day public notice seeking comment regarding the 2008 Integrated Report prior to being presented to the New Mexico Water Quality Control Commission for approval.

EPA has concluded that while that State's addition of the two Assessment Units, NM-2105\_50 and NM-2105.1\_00, for dissolved oxygen following the close of the 30-day public notice period, was due to an administrative oversight, the State did not provide the minimum 30-day public notice as required by the New Mexico Water Quality Control Commission CPP, WQMP, and 40 CFR § 25.4(c). Consequently, EPA is disapproving the addition of these Assessment Units to the New Mexico 2008 § 303(d) List (Category 5 of the Integrated Report).

EPA will promptly issue a Public Notice seeking comment regarding this disapproval/delisting action. Furthermore, EPA will request that the State promptly Public Notice the addition of these assessment units/dissolved oxygen pollutant-combination to the New Mexico § 303(d) List during either the Pajarito Plateau New Mexico 2008 § 303(d) List addendum scheduled for calendar year 2009 or during the New Mexico 2010 § 303(d) List submission scheduled for April 1, 2010.

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### **Decision to Add Waters to New Mexico's 2008 section 303(d) List**

During the evaluation of New Mexico's Final 2008 § 303(d) List submission, EPA identified a water which exceeded applicable water quality standards resulting in a finding of non-support. The concerns identified by EPA, the State's response, and EPA's decisions are discussed below.

Data are sufficient to support a conclusion that the Primary Body Contact Use standard is exceeded for the Fernando de Taos, Unclassified Intermittent Waters within the Classified Perennial Waters of the § 20.6.4.123 NMAC, Assessment Unit NM-98.A\_001

During the development of New Mexico's 2008 § 303(d) List, based on flow observations, the Fernando de Taos (Tienditas Creek) was determined by the State to be an intermittent water as defined in § 20.6.4.7.CC NMAC, i.e., *a water body that contains water only at certain times of the year, such as when it receives flow from springs, melting snow or precipitation, and as such the State applied § 20.6.4.98 NMAC.* See Administrative Record No. 11. Starting with the 2006 § 303(d) List and the current 2008 § 303(d) List, during the public comment period the State of New Mexico received a public response regarding the unclassified intermittent waters of Fernando de Taos, Assessment Unit NM-98.A\_001, located within the classified perennial waters of § 20.6.4.123 NMAC.

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). In December 2006, EPA took no action regarding specific sections of the State's water quality standards under § 303 of the CWA regarding Limited aquatic life, aquatic life and/or secondary contact recreation use designations, Sections 20.6.4.97 through 20.6.4.99 NMAC respectively. See 40 CFR § 131.5 and Administrative Record Nos. 1 and 2.

The State argued that criteria found in § 20.6.4.900 NMAC is to be applied unless otherwise indicated in Sections 20.6.4.97 through 20.6.4.899 NMAC. The 2005 *Revisions to New Mexico's Standards for Interstate and Intrastate Surface Waters*, 20.6.4 NMAC, identified other numeric criteria to be applied to Sections 20.6.4.97 through 20.6.4.99 NMAC, thus, the State concluded that (1) it is not a valid interpretation to nullify the identified section-specific numeric criteria and then apply Section 20.6.4.900 NMAC numeric criteria; and (2) it is also inappropriate to apply the primary and secondary body contact uses numeric criteria in Section 20.6.4.900 NMAC since these uses are based on EPA's draft *Implementation Guidance for Ambient Water Quality Criteria for Bacteria* for "lightly used full body contact," a different category than the "infrequent used full body contact" category in the same document upon which the Sections 20.6.4.97 through 20.6.4.99 NMAC numeric criteria were based. See Administrative Record Nos. 12 and 13.



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EPA determined that the State's use of Section 20.6.4.98 NMAC is inconsistent with New Mexico's water quality standards based on EPA's no action regarding specific sections of the State's water quality standards under § 303 of the CWA, specifically §20.6.4.98 NMAC. Consequently, EPA concluded that the State erred in applying § 20.6.4.98 NMAC and that criteria found in § 20.6.4.900 NMAC are the applicable water quality standards since the intermittent water in question is expressly exempted from § 20.6.4.123 NMAC.

During the 2006 and 2007 calendar years, *E. coli* samples were collected for the intermittent waters of the Fernando de Taos. The Primary and Secondary Body Contact applicable water quality criteria are found at § 20.6.4.900 NMAC as delineated:

Primary Contact: The monthly geometric mean of *E. coli* bacteria of 126 cfu/100 mL and single sample of 410 cfu/100 mL, apply to this use.

Secondary Contact: The monthly geometric mean of *E. coli* bacteria of 548 cfu/100 mL and single sample of 2507 cfu/100 mL apply to this use.

The listing methodology used by New Mexico for the 2008 § 303(d) List describes the decision criteria for assessing Primary and Secondary Contact Use Support, as delineated below. See Administrative Record No. 3.

Type of Data	Fully Supporting	Not Supporting	Notes
1 to 7 samples	No more than one exceedance of the single sample criterion.	More than one exceedance of the single sample criterion.	The monthly geometric mean shall be used in assessing attainment of criteria when a minimum of five samples is collected in a 30-day period (20.6.4.14.B NMAC). New Mexico replaced fecal coliform criteria with <i>E. coli</i> criteria during the 2005 triennial review process.
> 7 samples	Single sample criterion is exceeded in <15% of samples and/or geometric mean criterion is met	Single sample criterion exceeded in ≥ 15% of measurements and/or geometric mean criterion is not met.	

During the period June through September 2006, 36 *E. coli* samples were collected. An additional 15 *E. coli* samples were collected during the period May through September 2007. During calendar year 2006, a total of 9 of 36 samples exceeded the Primary Body Contact Single Sample Maximum of 410 cfu/100 mL or 25 percent exceedance and during calendar year 2007, a total of 6 of 15 samples exceeded the Primary Body Contact Single Sample Maximum of 410 cfu/100 mL or 40 percent exceedance. Consequently, the Primary Body Contact Designated Use has been determined to be Non-Supporting based on a sample size greater than 7 samples and a single sample criterion exceedance greater than or equal to 15 percent. See Administrative Record No. 11.

**Priority Ranking and Targeting**

EPA also reviewed the State's priority ranking of listed waters for TMDL development, and concludes that the State properly took into account the severity of

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pollution and the uses to be made of such waters. The State's priority ranking falls into seven categories consistent with the Consent Decree, Attachment A, Schedule for TMDL development by the State of New Mexico. See Administrative Record No. 6.

In addition, 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. EPA concludes that the State's priority ranking and targeting commitments are consistent with federal requirements and Consent Decree commitments.

### **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). 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 2008 § 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, 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 is listed is not a *pollutant* under the CWA, there would be no obligation to establish or approve a TMDL for such material.

### **Administrative Record Supporting This Action**

In support of this decision to both approve and disapprove the State's listing decisions, EPA carefully reviewed the materials submitted by the State with its § 303(d) listing decision. The administrative record supporting EPA's decision comprises of the materials submitted by the State, copies of the New Mexico 2008 §303(d) List, associated federal regulations, and EPA guidance concerning preparation of § 303(d) Lists, and this Record of Decision and supporting reports. 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., raw data and water quality analysis reports) as part of its list development process that were not included in the materials submitted to EPA. EPA did not consider these additional materials as part of its review of the listing submission. It was unnecessary for EPA to consider all of the materials considered by the State in order 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.