


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **NEW MEXICO ENVIRONMENT**  
3 **DEPARTMENT, SURFACE WATER**  
4 **QUALITY BUREAU,**

Court of Appeals of New Mexico  
Filed 5/22/2024 10:30 AM

  
Ramon J. Maestas  
Chief Clerk

5 Petitioner-Appellant,

6 v.

**No. A-1-CA-40799**

7 **WATER QUALITY CONTROL**  
8 **COMMISSION,**

9 Respondent-Appellee,

10 **IN THE MATTER OF THE FINAL TOTAL**  
11 **MAXIMUM DAILY LOAD FOR THE UPPER**  
12 **RIO GRANDE WATERSHED.**

13 **APPEAL FROM THE WATER QUALITY CONTROL COMMISSION**  
14 **David Sypher, Vice-Chair**

15 Christal Weatherly, Assistant General Counsel  
16 Albuquerque, NM

17 for Appellant

18 Raúl Torrez, Attorney General  
19 Robert F. Sánchez, Assistant Attorney General  
20 Santa Fe, NM

21 for Appellee

22 **MEMORANDUM OPINION**

23 **BOGARDUS, Judge.**

24 {1} The New Mexico Environment Department (NMED) appeals the Water  
25 Quality Control Commission's (the Commission) order denying its petition to

1 approve the total maximum daily load (TMDL) for the Upper Rio Grande Watershed  
2 for final submission to the Environmental Protection Agency (EPA)—which has the  
3 ultimate authority to accept or reject proposed TMDLs. *See* 33 U.S.C. § 1313(d)(2)  
4 (stating the EPA must approve state’s TMDLs). The Commission denied the  
5 petition, concluding that it “d[id] not constitute a petition for regulatory change, nor  
6 d[id] it otherwise comply with the requirements for the commencement of proposed  
7 rulemaking before the Commission.” On appeal, NMED points this Court to our  
8 Legislature’s recent clarification that a TMDL is a planning document rather than a  
9 rule or regulation under New Mexico’s Water Quality Act (WQA), NMSA 1978,  
10 §§ 74-6-1 to -17 (1967, as amended through 2019). Because we agree that a TMDL  
11 is not a regulation under the WQA, we dismiss for lack of jurisdiction.

12 **BACKGROUND**

13 {2} In June 2022, NMED published a Public Notice, fact sheet, and draft of the  
14 TMDLs for public comment. The issuance of the draft TMDLs initiated a thirty-day  
15 comment period, pursuant to 40 C.F.R. § 130.7(c) (2019) and Section IV of New  
16 Mexico’s Statewide Water Quality Management Plan and Continuing Planning  
17 Process (WQMP-CPP).<sup>1</sup> The Public Notice and draft TMDLs were published on the  
18 NMED website, the NMED online calendar, and the NMED public comment portal.

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<sup>1</sup>The WQMP-CPP outlines New Mexico’s procedural process for TMDL development and implementation.

1 Shortly thereafter, NMED’s Surface Water Quality Bureau (SWQB) also published  
2 an announcement soliciting comment, along with the Public Notice, fact sheet, and  
3 draft TMDLs, to its interested-parties list via the GovDelivery email system—which  
4 included over 1,900 recipients. The SWQB held two separate community meetings  
5 regarding the draft TMDLs—the public comment period closed the following  
6 month.

7 {3} Following this process and its consideration of the public input, NMED filed  
8 the petition at issue in this case with the Commission, and requested a hearing to  
9 present the final draft of the TMDLs to the Commission for its approval, pursuant to  
10 Section 74-6-3(E) and Section IV of the WQMP-CPP. NMED submits TMDLs to  
11 the Commission prior to sending to EPA for final approval. Only after approval by  
12 EPA, does a TMDL become part of a state’s water quality management plan. *See* 33  
13 U.S.C. § 1313(d)(2) (stating EPA must approve state’s TMDLs); *see also* 40 C.F.R.  
14 § 130.6(c)(1) (2019) (listing TMDLs as an “element” of water quality management  
15 plans).

16 {4} In August 2022, NMED presented the petition to the Commission during a  
17 regularly scheduled public meeting. The Commission unanimously voted to grant  
18 NMED’s request for hearing and scheduled it to take place during the public meeting  
19 set for October of that year. Before the end of the meeting, the Commission inquired  
20 whether the draft TMDLs should be publicly noticed as a regulatory proposal in light

1 of this Court’s decision, in a nonprecedential opinion, holding that that TMDLs are  
2 regulations under the WQA. *See Rio Hondo Land & Cattle Co. v. N.M. Water*  
3 *Quality Control Comm’n (Rio Hondo)*, A-1-CA-36039, mem. op. ¶¶ 1, 7 (N.M. Ct.  
4 App. Nov. 6, 2019) (nonprecedential). The Commission further suggested NMED  
5 review that case.

6 {5} During a public meeting held in September, the Commission discussed  
7 whether the hearing set for October should proceed if NMED failed to provide the  
8 public notice required for a rulemaking procedure. Ultimately, the Commission  
9 agreed to revisit the issue and make a final decision regarding whether a rulemaking  
10 would be required for the draft TDMLs during the October hearing.

11 {6} In advance of the hearing, NMED submitted the final version of the draft  
12 TMDLs, along with a PowerPoint presentation, to the Commission for review in  
13 accordance with the required submission timelines set by the Commission. However,  
14 during the October meeting, the Commission did not place the hearing on its  
15 agenda—nor did it hear NMED’s presentation of the draft TMDLs. The Commission  
16 discussed our decision in *Rio Hondo*, other options in lieu of rulemaking for TMDLs,  
17 the purpose of a rulemaking, the Commission’s historical procedures for addressing  
18 TMDLs, the impact of a rulemaking requirement on other state agencies, and the  
19 possibility of changing the WQA to clarify that TMDLs are planning documents  
20 rather than regulations. Ultimately, the Commission delayed the decision on how to

1 move forward with TMDLs until its November public meeting and planned to decide  
2 then whether the petition should be denied for failing to follow rulemaking  
3 procedures.

4 {7} Finally, during the public meeting held in November, the Commission denied  
5 NMED's petition. NMED appeals.

## 6 **DISCUSSION**

7 {8} This Court is a court of limited jurisdiction. *State ex rel. Dep't of Human*  
8 *Servs. v. Manfre*, 1984-NMCA-135, ¶ 9, 102 N.M. 241, 693 P.2d 1273. As such, we  
9 review administrative decisions only “when express legislative authorization  
10 specifies a right of direct appeal.” *Id.* While neither party raises the issue of subject  
11 matter jurisdiction, NMED points out that the Legislature has recently stated that  
12 TMDLs are not regulations under the WQA. Based on this legislation, we conclude  
13 that this Court lacks jurisdiction to decide the merits of this direct appeal. *See Smith*  
14 *v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300 (noting that  
15 “it is incumbent upon the appellate court to raise jurisdiction questions sua sponte  
16 when the Court notices them”); *see also In re Doe*, 1975-NMCA-002, ¶ 8, 87 N.M.  
17 170, 531 P.2d 218 (“[L]ack of jurisdiction at any stage of the proceedings is a  
18 controlling consideration which must be resolved before going further and an  
19 appellate court may raise the question of jurisdiction on its own motion.”). For the  
20 following reasons, we dismiss.

1 **I. Standard of Review**

2 {9} To the extent that our review involves statutory interpretation, we review  
3 those issues de novo. *See N.M. Indus. Energy Consumers v. N.M. Pub. Regul.*  
4 *Comm’n*, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105.

5 **II. This Court Lacks Jurisdiction to Hear This Direct Appeal**

6 {10} The Commission’s denial of the petition was based exclusively on this Court’s  
7 unpublished memorandum opinion in *Rio Hondo*, which it asserts is central to this  
8 appeal and supports denial of the petition. In *Rio Hondo*, this Court held that the  
9 Commission’s order adopting a 2016 TMDL for a segment of the Rio Ruidoso  
10 constituted a regulation and thus was appealable under Section 74-6-7 of the WQA.  
11 *See Rio Hondo*, A-1-CA-36039, mem. op. ¶¶ 1, 7. We caution parties not to rely  
12 heavily on nonprecedential opinions. *See State v. Gonzalez*, 1990-NMCA-040, ¶ 48,  
13 110 N.M. 218, 794 P.2d 361 (stating unpublished memorandum opinions “are not  
14 meant to be cited as controlling authority because such opinions are written solely  
15 for the benefit of the parties”); *see also* Rule 12-405(B) NMRA (stating the rule  
16 governing nonprecedential opinions).

17 {11} As an initial matter, we note that the WQA itself does not define “TMDL,”  
18 nor does it address whether a TMDL is a type of regulation. Since our decision in  
19 *Rio Hondo*, the Legislature has provided clarity concerning the nature of TMDLs in  
20 an adjacent statutory section to the WQA, also under the Environmental

1 Improvement Act. *See State ex rel. Child., Youth & Fams. Dep't v. Djamila B.*, 2014-  
2 NMCA-045, ¶ 10, 322 P.3d 444 (stating “the statute or statutes, whose construction  
3 is in question, are to be read in connection with other statutes concerning the same  
4 subject matter” (alteration, internal quotation marks, and citation omitted)); *see also*  
5 *Sims v. Sims*, 1996-NMSC-078, ¶ 21, 122 N.M. 618, 930 P.2d 153 (stating that a  
6 statutory scheme is comprehensive). According to the San Juan Generating Station  
7 Facility and Mine Remediation and Restoration Study Act, NMSA 1978, § 74-4H-3  
8 (2023), a TMDL is a type of “planning document” under the WQA—the purpose of  
9 which is to “guide future actions and strategies to meet water quality rules or  
10 standards.”<sup>2</sup> *See* § 74-4H-3(G); *see also* § 74-4H-3(F) (stating that “[p]lanning  
11 documents are not rules or standards under the [WQA]”). Therefore, under the plain

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<sup>2</sup>Federal case law discussing the role of TMDLs within the federal Clean Water Act affirms the characterization of TMDLs in the manner most recently stated by our Legislature. *See City of Arcadia v. EPA*, 411 F.3d 1103, 1105 (9th Cir. 2005) (stating “[a] TMDL is not self-enforcing, but serves as an informational tool or goal for the establishment of further pollution controls”); *Pronsolino v. Nastro*, 291 F.3d 1123, 1129 (9th Cir. 2002) (explaining “TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans”); *see also Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 755 (4th Cir. 2019) (acknowledging the Ninth Circuit’s characterization of a TMDL as an information tool rather than “a regulatory mandate”). It is well-settled that in the context of the CWA, “TMDLs do not give rise to an independent legal obligation.” *Appalachian Voices*, 912 F.3d at 755; *see also Anacostia Riverkeeper, Inc. v. Wheeler*, 404 F. Supp. 3d 160, 165 (D.D.C. 2019) (stating “TMDLs themselves has no self-executing regulatory force[, r]ather they are informational tools used by [s]tate and federal authorities to plan coordinated effort to attain water quality standards”).

1 language of Section 74-4H-3(F),(G), a TMDL is a type of planning document rather  
2 than a rule or regulation under the WQA. *See Quynh Truong v. Allstate Ins. Co.*,  
3 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P.3d 73 (stating “when a statute contains  
4 language which is clear and unambiguous, we must give effect to that language and  
5 refrain from further statutory interpretation” (text only) (citation omitted)).

6 {12} Given the recent clarity provided by the Legislature concerning TMDLs, we  
7 conclude that this Court lacks jurisdiction to hear the merits of this appeal. The  
8 Commission’s denial of proposed planning documents, like the petition in this case,  
9 does not fall under one of the circumstances authorizing a direct appeal under the  
10 applicable statute. *See* § 74-6-7(A) (authorizing a right of direct appeal to this Court  
11 only to “a person who is [(1)] adversely affected by a regulation adopted by the  
12 [C]ommission or by a compliance order approved by the [C]ommission or [(2)] who  
13 participated in a permitting action or appeal of a certification before the  
14 [C]ommission and who is adversely affected by such action”). Accordingly, the  
15 Legislature has not authorized a direct appeal under the circumstances of this case  
16 and we therefore lack jurisdiction to review the Commission’s denial of the petition.

17 **CONCLUSION**

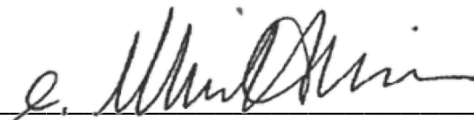
18 {13} For the reasons stated above, we dismiss NMED’s appeal for lack of subject  
19 matter jurisdiction.

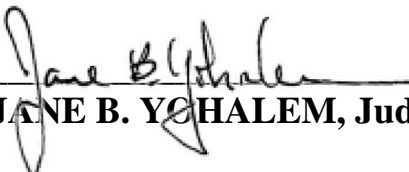


1 {14} IT IS SO ORDERED.

2   
3 KRISTINA BOGARDUS, Judge

4 WE CONCUR:

5   
6 J. MILES HANISEE, Judge

7   
8 JANE B. YCHALEM, Judge