

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

**IN THE MATTER OF PROPOSED
AMENDMENTS TO STANDARDS FOR
INTERSTATE AND INTRASTATE
SURFACE WATERS, 20.6.4 NMAC,**

WQCC No. 20-51(R)

**Surface Water Quality Bureau, Water
Protection Division, New Mexico
Environment Department,**

Petitioner.

CORRECTED STATEMENT OF REASONS AND DECISION

A duly constituted quorum of the Water Quality Control Commission (“Commission”) having met on March 1 and 2, 2022, in public meeting to deliberate and issue its decision on the proposed amendments to certain parts of the Commission’s surface water quality standards at 20.6.4 NMAC, titled “Standards for Interstate and Intrastate Surface Waters,” the Commission, in accordance with the relevant provisions of 20.1.6.306 NMAC, issues this Statement of Reasons and Decision, as corrected.

STATEMENT OF REASONS

I. Statutory Requirements and Jurisdictional Authority

1. The amendments to New Mexico’s surface water quality standards are required by the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, Pub. L. 95-217, December 27, 1977, 91 Stat. 1566 (commonly referred to as the “Clean Water Act”), 33 U.S.C. § 1251, *et seq.* (2006), and the related Federal regulation, 40 C.F.R. § 131.20 (2015).

2. 33 U.S.C. § 1313(c)(1) (2000) of the Clean Water Act requires the water pollution control agency of each State to, “from time to time (but at least once each three-year period

beginning with October 18, 1972), hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.”

3. Consistent with § 303(c)(1) of the Clean Water Act, the Commission’s regulations at 20.6.4.10(A) NMAC “requires that the [S]tate hold public hearings at least once every three years for the purpose of reviewing water quality standards and proposing, as appropriate, necessary revisions to water quality standards.”

4. The U.S. Environmental Protection Agency (“EPA”) last approved revisions to New Mexico’s surface water quality standards promulgated by a Triennial Review process in August 2017, and therefore, the current Triennial Review is timely.

5. Under NMSA 1978, § 74-6-3(E) (2007), “[t]he Commission is the state water pollution control agency for [New Mexico] for all purposes of the federal [Clean Water Act],” and under the pertinent part of NMSA 1978, § 74-6-4(D) (2019), the Commission is charged with the duty to “adopt water quality standards for surface and ground waters of the [S]tate based on credible scientific data and other evidence appropriate under the Water Quality Act.”

6. Adoption of amendments to New Mexico’s surface water quality standards must comply with the procedural and substantive requirements of NMSA 1978, § 74-6-6 (1993), and with the procedural requirements of 20.1.6 NMAC for rulemaking hearings before the Commission.

7. Under 20.6.4.6(A) NMAC, “[t]he purpose of [Standards for Interstate and Intrastate Surface Waters] is to establish water quality standards that consist of the designated use or uses of surface waters of the [S]tate, the water quality criteria necessary to protect the use or uses and an antidegradation policy.”

8. The State is required under the Clean Water Act and the Water Quality Act “to adopt water quality standards that protect the public health or welfare, enhance the quality of water and

are consistent with and serve the purposes of the Water Quality Act and the Clean Water Act.”
20.6.4.6(B) NMAC.

9. It is the objective of the Clean Water Act to restore and maintain the chemical, physical and biological integrity of the [N]ation’s waters, including those of New Mexico.” 20.6.4.6(B) NMAC.

10. The Standards for Interstate and Intrastate Surface Waters are consistent with § 101(a)(2) [33 U.S.C. § 1251(a)(2)] of the Clean Water Act, which declares that “it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.” 20.6.4.6(B) NMAC. “Agricultural, municipal, domestic and industrial water supply are other essential uses of New Mexico’s surface water; however, water contaminants resulting from these activities will not be permitted to lower the quality of surface waters of the [S]tate below that required for protection and propagation of fish, shellfish and wildlife and recreation in and on the water, where practicable.” *Id.*

II. Federal Clean Water Act

11. Under 33 U.S.C. § 1251(a) of the Clean Water Act, “[t]he objective of the [Water Pollution Prevention and Control statutes] is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

12. 33 U.S.C. § 1313(c)(2)(A) (2000) provides: “Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the [EPA] Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the

purposes of [33 U.S.C. Ch. 26, “Water Pollution Prevention and Control”]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.”

13. 33 U.S.C. § 1313(c)(2)(B) (2000) requires: “Whenever a State reviews water quality standards pursuant to [33 U.S.C. § 1313(c)(1)], or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1) or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.”

14. The *Water Quality Standards Handbook* issued by the EPA provides further guidance: “Under Section 303(c)(2)(A) of the [Clean Water Act], [S]tates and authorized tribes are responsible for adopting water quality standards that ‘... consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.’ These standards shall ‘...protect the public health or welfare, enhance the quality of water and serve the purposes of this Act.’ 40 CFR 131.3(b) further defines criteria as ‘...elements of State

water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.’ Water quality criteria represent the conditions (e.g., concentrations of particular chemicals, levels of certain parameters) sufficient to restore and maintain the chemical, physical, and biological integrity of water bodies and protect applicable designated uses. Generally, criteria provide for the protection and propagation of fish, shellfish, and wildlife as well as recreation in and on the water. If a criterion is exceeded, the water quality may pose a human health or ecological risk, and protective or remedial action may be needed.” *Water Quality Standards Handbook, Chapter 3: Water Quality Criteria*, EPA-823-B-17-001 (2017). (Accessed Feb. 23, 2022) <https://www.epa.gov/sites/default/files/2014-10/documents/handbook-chapter3.pdf>.

III. New Mexico Water Quality Act

15. NMSA 1978, § 74-6-4(D) (2019) of the Water Quality Act provides that the Commission: “shall adopt water quality standards for surface and ground water of the state based on credible scientific data and other evidence appropriate under the Water Quality Act. The standards shall include narrative standards and as appropriate, the designated uses of the waters and the water quality criteria necessary to protect such uses. The 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. In making standards, the commission 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.”

16. NMSA 1978, § 74-6-4(E) (2019) requires the Commission to adopt, promulgate and publish regulations to prevent or abate water pollution in the [S]tate or in any specific geographic area, aquifer or watershed of the State or in any part thereof. In making those regulations, the Commission must give weight it deems appropriate to all relevant facts and circumstances, including:

- (1) the character and degree of injury to or interference with health, welfare, environment and property;
- (2) the public interest, including the social and economic value of the sources of water contaminants;
- (3) the technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;
- (4) the successive uses, including domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;
- (5) feasibility of a user or a subsequent user treating the water before a subsequent use;
- (6) property rights and accustomed uses; and
- (7) federal water quality requirements;

17. NMSA 1978, § 74-6-4(F) (2019) states that the New Mexico Environment Department (“Department” or “NMED”) is to provide technical services to the Commission.

18. In that capacity, and as specifically provided by the State of New Mexico Continuing Planning Process, the Department takes the lead technical role in the Triennial Review process.

IV. Triennial Review

19. The Department’s Petition to Amend the Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC) and Request for Hearing (“Petition”) was filed on August 19, 2020, which filing commenced the current Triennial Review process.

20. The Order for Hearing and Appointment of Hearing Officer was filed on October 19, 2020, setting the rulemaking proceeding for public hearing commencing on July 13, 2021, and

continuing thereafter until completion of the hearing, or as might then be further ordered by the Commission.

21. The Order for Hearing and Appointment of Hearing Officer designated Gregory Chakalian as the Hearing Officer for the public hearing, with all the powers and duties prescribed or delegated under 20.1.6 NMAC, or as otherwise might be provided by law.

22. The Hearing Officer, after conducting a teleconference on October 27, 2020, with then counsel of record, entered his Procedural Order on November 9, 2020 (“Procedural Order”), establishing the procedures for conducting the public hearing and setting forth a table of relevant deadlines.

23. The Department filed its Notice of Amended Petition on March 12, 2021, to include revisions to the Department’s proposed amendments to the surface water quality standards at 20.6.4 NMAC. The Amended Petition was filed thirty (30) days prior to the date the respective Notices of Intent to Present Technical Testimony were due under the Procedural Order (April 12, 2021), so as to provide other parties and stakeholders with sufficient notice to address those revisions. As required by the Procedural Order, the revisions the Department proposed in the Amended Petition were all logical outgrowths of the Department’s original Petition.

24. On January 7, 2021, Triad National Security, LLC and the U.S. Department of Energy (“Triad/DOE” or “LANL”) filed its comments on the Public Comment Draft of the Department’s Proposed Amendments to Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC, for the administrative record.

25. On March 25, 2021, the San Juan Water Commission (“SJWC”) submitted for the administrative record its comments on the Public Comment Draft of the Department’s Proposed Amendments to Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC.

26. On March 29, 2021, the New Mexico Mining Association (“NMMA”) submitted its comments on the Public Comment Draft of the New Mexico Environment Department’s Proposed Amendments to Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC.

27. All of the above parties’ comments were filed pursuant to the Department’s *Notice of Public Comment Period and Informational Meetings Regarding the New Mexico Environment Department’s Proposed Amendments to Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC) - Triennial Review* (November 2, 2020) and *the Extension of Public Comment Period Regarding the New Mexico Environment Department’s Proposed Amendments to Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC) - Triennial Review* (November 25, 2020).

28. On May 3, 2021, SJWC filed its Notice of Intent to Present Technical Testimony at the public hearing scheduled to begin on July 13, 2021.

29. On May 3, 2021, the Department submitted its Notice of Intent to Present Technical Testimony at the public hearing scheduled to begin on July 13, 2021.

30. On May 3, 2021, NMMA submitted its Notice of Intent to Present Technical Testimony at the public hearing scheduled to begin on July 13, 2021.

31. On May 3, 2021, Triad/DOE submitted its Notice of Intent to Present Technical Testimony at the public hearing scheduled to begin on July 13, 2021.

32. On May 3, 2021, Amigos Bravos filed its Notice of Intent to Present Direct Testimony at the public hearing scheduled to begin on July 13, 2021.

33. On June 22, 2021, the Department filed its Notice of Intent to Present Rebuttal Testimony at the public hearing scheduled to begin on July 13, 2021.

34. On June 22, 2021, SJWC files its Notice of Filing Rebuttal Technical Testimony for the public hearing scheduled to begin July 13, 2021.

35. On June 22, 2021, LANL submitted its Notice of Intent to Present Rebuttal Technical Testimony at the public hearing scheduled to begin on July 13, 2021.

36. On June 22, 2021, the Buckman Direct Diversion Board (“Buckman”) filed its Notice of Intent to Present Rebuttal Testimony at the public hearing scheduled to begin on July 13, 2021.

37. On June 22, 2021, Communities for Clean Water and the Gila Resources Information Project (“CCW-GRIP”) jointly submitted their Notice of Intent to Present Technical Rebuttal Testimony and Nontechnical Rebuttal Testimony at the public hearing scheduled to begin on July 13, 2021.

38. In July 2020, the Department held three stakeholder outreach sessions for Department-identified and self-identified stakeholders, using the PowerPoint slides filed at the public hearing as NMED Exhibit 82. NMED Exhibit 4, p. 50.

39. In November 2020, the Department also provided a public comment period for the proposed amendments to New Mexico’s surface water quality standards. Notification was distributed through several outlets, including posting on the Surface Water Quality Bureau’s main webpage, the Water Quality Standards webpage, and the 2020 Triennial Review webpage (NMED Exhibit 83). The Department provided notification in both English and Spanish (NMED Exhibit 84) through a GovDelivery email distribution to 1,805 individuals subscribed to the Bureau’s distribution list (NMED Exhibit 85); notification to 37 individuals representing 24 tribes (NMED Exhibit 78); and 101 NMED-identified stakeholders (NMED Exhibit 86). NMED Exhibit 4, p. 52.

40. The public comment period was initially open from November 2, 2020 through December 2, 2020; however, due to public response, the Department extended the comment period

to January 6, 2021, an additional thirty-five days. The Department conducted two virtual public meetings as a part of the public outreach efforts; the first was held on November 12, 2020, at 5:30 PM (NMED Exhibit 87), which 36 individuals attended, and the second was held on November 16, 2020, at 2:30 PM, which approximately 17 individuals attended. NMED Exhibit 4, p. 52.

41. Through the public comment period and outreach discussions, the Department received approximately 200 comments regarding the proposed amendments to New Mexico's surface water quality standards. The Department posted the submitted comments on the Department's Triennial Review webpage. NMED Exhibit 4, p. 53.

42. On March 12, 2021, more than four months prior to the public hearing and more than six weeks prior to the final due date for the Notices of Intent to Present Technical Testimony, the Department filed an amended version of the proposed amendments to New Mexico's surface water quality standards.

V. Public Notice and Triennial Review Hearing

43. Notice of the public hearing was timely given in accordance with all relevant Federal and State laws and regulations. NMED Exhibit 4, pp. 53-56.

44. The following non-petitioning parties entered appearances in the rulemaking proceeding: Amigos Bravos, CCW-GRIP, NMMA, LANL, SJWC, and Buckman.

45. A virtual public hearing using a WebEx platform was held commencing on July 13, 2021 and continuing through July 16, 2021, and then concluding on July 21, 2021.

46. The Commission duly heard and considered testimony on behalf of all parties who entered an appearance in the rulemaking proceeding, and allowed members of the general public to testify at the public hearing, and to also offer non-technical exhibits in connection with their testimony. The Commission further allowed any member of the general public who wished to

submit a written statement for the record, in lieu of providing oral testimony at the hearing, to file the written statement prior to the public hearing or submit it at the hearing.

47. The Hearing Officer conducted the public hearing in a fair and equitable manner, providing a reasonable opportunity for all persons to be heard, and allowing all interested persons a reasonable opportunity to submit data, views or arguments orally and in writing, and to examine the parties' individual witnesses.

48. The record proper, as that term is defined in 20.1.6.7(Q) NMAC, was submitted to the Commission for review in compiling this Statement of Reasons, as corrected. The Department's final proposed changes to 20.6.4 NMAC are included as NMED Exhibit 141, which exhibit is incorporated by reference as if fully set forth herein.

49. The Commission administrator, following receipt of the transcript of proceedings, promptly furnished copies of the transcript to the Commission members, Commission counsel and the Hearing Officer.

50. The Department made several post-hearing changes and edits to its proposed amendments to 20.6.4 NMAC, which are summarized as follows:

20.6.4.7(A)(8) NMAC: Removed the word "be" and added "have criteria" and "criteria for the" to clarify that stringency applies to the criteria not the use.

20.6.4.7(C) NMAC: Removed the definition for "contaminants of emerging concern" based on the renaming of the definition of "contaminants of emerging concern" to "emerging contaminants."

20.6.4.7(C) NMAC: Amended subsection references following moving "contaminants of emerging concern" to "emerging contaminants."

20.6.4.7(E) NMAC: Added the definition for "emerging contaminants" based on the renaming of "contaminants of emerging concern" to "emerging contaminants."

20.6.4.7(E) NMAC: Amended subsection references following moving "contaminants of emerging concern" to "emerging contaminants."

20.6.4.11(I) NMAC: Changed the subsection reference to correct a typographic error when re-establishing language in 20.6.4.11(H) NMAC.

20.6.4.13(F) NMAC: Changed language from “contaminants of emerging concern” to “emerging contaminants” based on the amendment to the term in the definitional section.

20.6.4.103 NMAC: Added “Las Animas creek” based on Commissioner Patten’s cross-examination of Ms. Aranda on July 16, 2021. Tr. Vol. 4, 1056:10-1058:25.

20.6.4.105 NMAC: Changed language from “effluent conditions” to “effluent requirements.”

20.6.4.106 NMAC: Changed language from “effluent conditions” to “effluent requirements.”

20.6.4.112 NMAC: Added “Las Animas creek” based on Commissioner Patten’s cross-examination of Ms. Aranda on July 16, 2021. Tr. Vol. 4, 1056:10-1058:25.

20.6.4.140 NMAC: Changed the word “Two-Mile” to “Twomile” to accurately reflect the waterbody being referred to.

The Department’s post-hearing changes and edits to its proposed amendments to 20.6.4 NMAC are hereby adopted by the Commission to the extent that they may not have been otherwise formally adopted during the Commission’s deliberations, and insofar as these post-hearing changes and edits are not contrary to or inconsistent with any formal action taken by the Commission.

VI. Changes Adopted by Commission

20.6.4.6 NMAC Objective - Climate Change Objective

51. The Department proposed to add an objective in 20.6.4.6(D) NMAC indicating that “[t]hese surface water quality standards serve to respond to the inherent threats of climate change and provide resiliency for the continued protection and enhancement of water quality.” NMED Exhibit 1, pp. 11-12; NMED Exhibit 106, pp. 3-14; Tr. Vol. 1, 116:20-128:12.

52. Amigos Bravos supported the Department's proposal to add an objective addressing climate change, but proposed alternative language to provide additional context on how climate change impacts New Mexico's surface waters. AB Exhibit 1, p. 1; AB Exhibit 3, pp. 2-6; Tr. Vol. 1, 184:8-194:11. The Commission does not accept Amigos Bravos' proposed alternative language set forth in AB Ex. 24 at 1.

53. SJWC was concerned about climate change and its potential adverse impacts on water supplies and quality; however, it opposed the Department's proposed amendment because it arguably elevates climate change above all other sources of water quality impairment. SJWC's SOR at 11-12, 13 (P. 4), 15-16 (P. 13), 18 (P. 20); [Exhibit] 2, pp. 3-8; Tr. Vol. 1, 223:3-230:13. SJWC further contended that a new objective was not needed because current standards address climate change.

54. The Department considered the reasoning and arguments offered by SJWC and Amigos Bravos' written direct testimony and modified the proposed climate change objective to better reflect how the surface water quality standards will address climate change, while noting that the objective will not change implementation of those standards. NMED Exhibit 106, p. 10-11; NMED Exhibit 110; Tr. Vol. 1, 127:2-128:8.

55. LANL opposed the Department's proposed amendment because in its view the objective does not contain enough detail about what actions are required to meet the objective. LANL Exhibit 59, pp. 34-36; Tr. Vol. 1, 244:12-246:10. LANL Ex. 59 at 35-36 (Gallegos Rebuttal); SJWC Ex. 2 (DeRose-Bamman Direct).

56. NMMA contended that the Commission should reject the proposed amendments to 20.6.4.6 NMAC and 20.6.4.7(C)(4) NMAC offered by Amigos Bravos because they are superfluous and create regulatory uncertainty, and further, unlike the Department's proposed

changes, Amigos Bravos' proposed amendments to 20.6.4.6(C) and 20.6.4.7(C)(4) NMAC, as set forth in AB Ex. 10, do not state cogent objectives for the surface water regulations, and therefore create confusion and are unnecessary.

57. CCW-GRIP supported the Department's proposal to include an objective related to climate change, but suggested alternative language. CCW-GRIP Exhibit 5; Tr. Vol. 1, 123:8-124:4. CCW-GRIP proposed the following alternate new subsection (D) to Section 20.6.4.6: "A further purpose of these surface water quality standards is to address the inherent threats to water quality due to climate change." CCW-GRIP's suggested alternative language is declined by the Commission.

58. Amigos Bravos proposed additional language regarding the climate change objective shortly before the start of the public hearing, but the Department did not find reason for altering its proposed definition. AB Exhibit 24; NMED Exhibit 141; Tr. Vol. 1, 127:23-128:12.

59. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to explicitly include a response to the inherent threats of climate change and resiliency for the continued protection and enhancement of water quality as an objective of the surface water quality standards is well taken. Therefore, the Commission adopts the Department's proposal to amend the objective section in 20.6.4.6 NMAC as proposed.

20.6.4.7(A) NMAC Definitions - 4Q3

60. The Department proposed adding the definition of the term "4Q3" to the definitions section in 20.6.4.7 NMAC and deleting the definition of the term in 20.6.4.11(B)(2) NMAC. As provided in the Department's proposed amendments, this definition would become paragraph 20.6.4.7(A)(1) NMAC. NMED Exhibit 1, p. 13; NMED Exhibit 110; Tr. Vol. 1, 273:24-275:4.

61. The definition of “4Q3” is in the middle of a paragraph in 20.6.4.11 NMAC. Moving the definition from 20.6.4.11(B)(2) to 20.6.4.7(A)(1) NMAC would make it easier to locate the definition by placing it with the others. NMED Exhibit 1, p. 13; Tr. Vol. 1, 273:24-275-4.

62. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department’s proposal to move the definition of “4Q3” is well taken and adopts the Department’s amendments to 20.6.4.7(A)(1) and 20.6.4.11(B)(2) NMAC as proposed.

20.6.4.7(A) NMAC Definitions - Attainable Use

63. The Department proposed to amend the definition of “Attainable” to that of “Attainable use,” to aid in the implementation of the surface water quality standards. NMED Exhibit 4, p. 3; NMED Exhibit 9; Tr. Vol. 2, 321:22-323:23.

64. As currently written, the definition of “attainable” does not make clear that it refers to a specific type of use for a surface water of the State. Other uses for surface waters of the State are “designated use” and “existing use,” both of which include the word “use” in their definitions to distinguish them from the common usage of the word. NMED Exhibit 4, pp. 3-4; Tr. Vol. 2, 321:22-323:23.

65. LANL initially objected to the inclusion of the word “use” as it would limit the term to uses that are achievable by the imposition of effluent limits. LANL further argued that this excludes many of the factors that prevent attainment of a use in 40 C.F.R. 131.10(g). LANL Exhibit 63, pp. 8-10; Tr. Vol. 2 385:1-386:23.

66. At the public hearing, in response to NMED witness Fullam’s testimony, LANL withdrew its objection to the word “use” in its post-hearing submission but maintained its objections to the definition proposed by the Department because it excludes many of the factors

that prevent attainment of a use in 40 C.F.R. 131.10(g). LANL Exhibit 63, pp. 8-10; Tr. Vol. 2 385:1-386:23. The Commission does not accept LANL's objection.

67. LANL pointed out that the application of stringency is not applicable to a use, but to a criteria. The Department agreed with this point and revised the last sentence of the proposed definition to read: "An attainable use may or may not have criteria as stringent as the criteria for the designated use." LANL Exhibit 62; NMED Exhibit 110; Tr. Vol. 2, 326:1-20.

68. No other party provided testimony regarding these changes. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend the definition of "Attainable" to "Attainable Use" is well taken and adopts the Department's amendments to 20.6.4.7(A) NMAC as proposed.

20.6.4.7(B) NMAC Definitions - Baseflow

69. The Department proposed to add a definition of the term "baseflow" in 20.6.4.7(B) NMAC to assist with implementation of the water quality standards. According to the Department, the term "baseflow" would also provide clarity for the Department's proposed definition of "effluent dominated" in 20.6.4.7(E) NMAC. NMED Exhibit 1; NMED Exhibit 106; NMED Exhibit 110; Tr. Vol. 1, 276:7-276:17.

70. The Department did not propose to add the term "baseflow" to any other section of 20.6.4 NMAC. However, the concept of baseflow, as proposed in 20.6.4.7(B)(1), is often evaluated when analyzing water quality and pollutant loading into surface waters. NMED Exhibit 1, p. 13; NMED Exhibit 110; Tr. Vol. 1, 276:11-278:6.

71. SJWC opposed the Department's proposed inclusion of a definition for "baseflow." SJWC [Exhibit] 2, p. 7 (2020 TR SJWC-0010); Tr. Vol. 2, 412:24-413:24. SJWC did not support adoption of the proposed definition because the term is not used anywhere else in the surface water

quality standards found in 20.6.4 NMAC, and therefore the definition was not needed and could create confusion concerning the applicability to those standards. Further, SJWC contended that it was not possible to determine whether the proposed definition was appropriate without knowing the context in which it may be used, if ever in future surface water quality standards. *See*, SJWC Exception, p. 15.

72. LANL opposed the Department's proposed inclusion of a definition for "baseflow" because it is not used in the surface water quality standards, serves no regulatory purpose, and is not needed. LANL Exhibit 58, pp. 24-27 (2020 TR LANL-01102 - 01105); LANL Exhibit 59, p. 32 (2020 TR LANL-01147); Tr. Vol. 2, 408:10-410:5; Tr. Vol. 2, 396:21-398:5.

73. Amigos Bravos originally opposed the Department's proposed inclusion of a definition for "baseflow," but later revised its position to oppose reference to the term "effluent dominated" in the "baseflow" definition. Amigos Bravos then proposed alternate wording for a definition of "baseflow," in the form of removing the term "effluent dominated" and replacing it with the word "some." AB Exhibit 1, p. 3; AB Exhibit 10, p. 4; Tr. Vol 2, 422:23-426:13.

74. Based on the weight of the evidence in the record, the Commission agrees that the particular term "baseflow" is not used elsewhere in the surface water quality standards, does not clarify those standards, and serves no regulatory purpose. Further, the Department did not provide sufficient evidence concerning the context in which it is used in other documents. Accordingly, the Commission finds the Department's proposal to add a definition of "baseflow" at 20.6.4.7(B)(1) NMAC is not well taken and declines to adopt the Department's amendments to 20.6.4.7(B) NMAC as proposed.

20.6.4.7(C) NMAC Definitions - Climate Change

75. The Department proposed to add a definition of “climate change” in 20.6.4.7(C) NMAC to support and clarify the proposed inclusion of the climate change objective. The Department based its proposed definition on EPA’s publicly available climate change definition, which is similar to other leading climate science organizations’ definitions. NMED Exhibit 1, p. 12; NMED Exhibit 33; Tr. Vol. 1, 128:19-134:7.

76. Amigos Bravos contended that the Commission should include in the definition of climate change that human activity is the primary cause of climate change, and that the Department’s proposed definition implied that the causes of climate change - natural processes and human activities - are equivalent. Amigos Bravos proposed the following addition to the Department’s proposed definition:

(4) “Climate change” refers to any significant change in the measures of climate lasting for an extended period of time, typically decades or longer, and includes major changes in temperature, precipitation, wind patterns or other weather-related effects. Climate change may be due to natural processes or human-caused changes of the atmosphere, or a combination of the two. Humans are largely responsible for recent climate change.

AB Ex. 24 at 2.

77. SJWC objected to the Department’s proposal to add a definition of “climate change” because it objected to the inclusion of an objective in 20.6.4.6 NMAC that relates to addressing climate change. As the term “climate change” does not appear elsewhere in the regulations, SJWC argued that the definition was unnecessary if the Commission did not adopt the Department’s proposed climate change objective. SJWC [Exhibit] 2, pp. 3-7 (2020 TR SJWC-0006 - 0010); SJWC [Exhibit] 3, pp. 1-4 (2020 TR SJWC-0192 - 0195); Tr. Vol. 1, 223:10-230:13. Moreover, SJWC argued the Amigos Bravos proposed definition was vague and ambiguous, and that the Commission should not adopt a definition based on disputed evidence in the scientific community.

78. LANL also objected to the Department's proposal to add a definition of "climate change" on the basis that the definition would be unnecessary if the Commission did not adopt an objective relating to climate change. LANL Exhibit 59, pp. 33-36; Tr. Vol. 1, 244:12-246:10. Neither the "climate change" objective nor the definition would have a direct effect or create additional implementation actions or responsibilities. Hrg. Tr., Vol. I, 160:6-17 (Lemon). LANL contended that the record reflected the lack of a consensus on the definition of "climate change" and, in the absence of specific implementation provisions, the Commission should find that the concerns about unintended consequences are reasonable and legitimate. *See* Hrg. Tr., Vol. I, 227:2-18 (DeRose-Bamman); Hrg. Tr., Vol. I, 244:15-25, 251:19-252:14 (Gallegos).

79. NMMA originally objected to the Department's proposal to include a definition of "climate change," but later withdrew its objection. NMMA NOI, pp. 3-4, Tr. Vol. 1, 133:23-134:1.

80. Although Amigos Bravos and CCW-GRIP supported adding a "climate change" definition, neither of those parties agreed with the definition proposed by the Department, with both proposing a statement that climate change is primarily human caused, which statement was refused by the Department. *See* Hrg. Tr., Vol. I, 130:4-13, 125:3-126:14 (Lemon); Amigos Bravos Ex. 3 at 5-6 (Conn Direct) and Amigos Bravos Ex. 24 at 2 (Second Revised Proposed Amendments); CCW-GRIP Ex. 1 (Proposed Revisions to 20.6.4 NMAC). There is no definition of "climate change" in the Clean Water Act (Hrg. Tr., Vol. I, 147:8-12 (Lemon); SJWC Ex. 3 at 4), or in EPA's regulations. Hrg. Tr., Vol. I, 173:25-174:11 (Lemon).

81. Based on the weight of the evidence in the record, the Commission finds that it presently has authority to consider climate change in surface water quality standards

development.¹ Further, the proposed definition is subjective and does not serve to clarify New Mexico’s surface water quality standards, and there is no support in the record for an expanded definition of “climate change.” Consequently, the Commission adopts the Department’s proposed addition of a definition of “climate change” in 20.6.4.7(C) NMAC, with the deletion of the second sentence: “Climate change may be due to natural processes or human-caused changes of the atmosphere, or a combination of the two.”

20.6.4.7(E) NMAC Definitions - Effluent Dominated

82. The Department proposed to add a definition of the term “effluent dominated” in 20.6.4.7(E) NMAC to assist with implementation of the surface water quality standards.

83. The Department did not propose to add the term “effluent dominated” to any other Section of 20.6.4 NMAC. Instead, the Department contended that the concept of effluent dominated, as proposed in 20.6.4.7(E)(2), is often evaluated when implementing the water quality standards, specifically in TMDL development, NPDES permitting, and State certifications of Federally-issued permits, and therefore, a definition of “effluent dominated” would have applicability beyond 20.6.4 NMAC and provide for consistent application the surface water quality standards. NMED Exhibit 1; NMED Exhibit 106; NMED Exhibit 110; Tr. Vol. 1, 282: 281:1-271:16, 1-287:12.

84. SJWC opposed the Department’s proposed inclusion of a definition for “effluent dominated.” SJWC [Exhibit] 2, p. 7 (2020 TR SJWC-0010); Tr. Vol. 2, 412:24-416:9. 82. SJWC did not support adoption of the proposed definition because the term is not used anywhere else in

¹ See NMSA 1978, § 74-6-3(E) (2019); *Also see*, Hrg. Tr., Vol. I, 145:13-22 (Lemon); Hrg. Tr., Vol. I, 200:7-12, 203:24-204:3 (Conn); Hrg. Tr., Vol. I, 225:20-226:1 (DeRose-Bamman); Hrg. Tr., Vol. I, 249:17-250:1, 253:21-24, 254:21-255:1 (Gallegos).

the surface water quality standards and could create confusion concerning the applicability to other surface water quality standards.

85. LANL opposed the Department's proposed inclusion of a definition for "effluent dominated" because it is not used elsewhere in the surface water quality standards and therefore serves no regulatory purpose. Tr. Vol. 2, 408:10-410:5; Tr. Vol. 2, 396:21-398:5.

86. Amigos Bravos opposed the Department's proposed inclusion of a definition for "effluent dominated." AB Exhibit 1, p. 3; AB Exhibit 3, p.11; AB Exhibit 10, p. 4; Tr. Vol 2, 422:23-426:13. Amigos Bravos opposed the Department's proposed inclusion of a definition for "effluent dominated" because it could lead to lesser protections for effluent dominated waters. AB Exhibit 1, p. 3; AB Exhibit 3, p.11; AB Exhibit 10, p. 4; Tr. Vol 2, 422:23-426:13; Hrg. Tr., Vol. II, 424:2-10, 425:10-17 (Conn).

87. Based on the weight of the evidence in the record, the Commission finds that the particular term "effluent dominated" is not used elsewhere in the surface water quality standards, does not clarify those standards, and serves no regulatory purpose. Because the term "effluent dominated" is not currently used in New Mexico's surface water quality standards, and because the Department has not provided sufficient evidence concerning the context in which it is used in other documents, the Commission declines the Department's proposal to add the definition of the term "effluent dominated" in 20.6.4.7(E) NMAC.

20.6.4.7(C) NMAC Definitions - Contaminants of Emerging Concern

88. The Department proposed adding a definition of the term "contaminants of emerging concern" as a reference because it proposed to use the term elsewhere in the surface water quality standards in the general criterion for toxic pollutants. NMED Exhibit 2, p. 4; NMED Exhibit 107, pp. 2-5; NMED Exhibit 110; Tr. Vol. 2, 436:7-441:24.

89. The Department agreed with CCW-GRIP that the term “emerging contaminants” is clearer than “contaminants of emerging concern,” and incorporated the former term as proposed 20.6.4.7(E)(3). NMED Exhibit 141.

90. SJWC opposed the Department’s proposed inclusion of a definition for “contaminants of emerging concern.” SJWC [Exhibit] 2, pp. 7-8 and 16-17 (2020 TR SJWC-0010 - 0011 and 0019 - 0020); Tr. Vol. 2, 582:2-587:13. SJWC urged the Department to not adopt the reference in the toxic pollutants regulation because it would allow the Department to regulate contaminants which are not routinely monitored, may not have existing regulatory standards, and may not have been fully studied to determine their negative impacts on water quality. Further, the Department’s final proposed definition of contaminants of emerging concern admitted that they “may cause” ecological or human health effects and their “negative impacts have not been fully quantified.” NMED Ex. 110 at 3. This definition directly conflicted with the definition of a “toxic pollutant,” which is a pollutant that “will cause” death or other significant adverse effects. 20.6.4.7(T)(2) NMAC.

91. LANL opposed the Department’s proposed inclusion of a definition for “contaminants of emerging concern.” LANL Exhibit 5; LANL Exhibit 63; LANL Exhibit 65; Tr. Vol. 2, 499:7-501:2, 555:12-556:15; 537:6-537:21. Moreover, LANL, SJWC, and NMMA opposed the Department’s amendment to reference contaminants of emerging concern in the toxic pollutant general criterion.²

² LANL Ex. 5 at 10 (Dail Direct) (“LANL opposes inclusion of pollutants and contaminants not tied to the adoption of existing 304(a) criteria, or other scientifically defensible guidance . . . NMED’s proposal “seeks to broaden even further without regulatory oversight, this group of unnamed chemicals . . . and further muddies the waters and creates additional regulatory uncertainty”); LANL Ex. 5 at 6-7 (Dail Direct) (explaining that given “the possibly hundreds of pharmaceuticals, detergents, and other possible endocrine disruptors (and breakdown products thereof) that fall under the CEC definition, there is no indication what entity (state or regulated community, or both) will need to perform monitoring, and for which among these contaminants”); Hrg. Tr., Vol. II, 536 (Judd) (stating there are so many CECs including thousands of PFAS that “lack toxicological data for criteria development or assessment as to whether they

92. LANL also opposed the Department’s language referencing those toxic pollutants listed in the Commission’s groundwater regulations, 20.6.2 NMAC because some pollutants included in the list “lack EPA-promulgated guidance documents which determine numeric limits that are going to be use-specific to [the uses] covered in 20.6.4 NMAC” making it “unclear what numeric limits would apply to both state surveillance and NPDES discharges absent some consideration and promotion before this Commission.” Hrg. Tr., Vol. II, 501-502 (Dail); see also LANL Ex. 5 at 7 (Dail Direct) (noting that the criteria that is available for Toxic Pollutants listed in 20.6.2 is not listed in 20.6.2).

93. NMMA opposed the Department’s proposed inclusion of a definition for “contaminants of emerging concern” in a summary of potential non-technical testimony. NMMA contended that the Department’s proposed definition of “contaminants of emerging concern” as set out in 20.6.4.7(C)(7) NMAC, and its proposed use of that definition in 20.6.4.13(F)(1) NMAC, was vague and rife with uncertainty for the regulators and regulated community and should be rejected by the Commission. As set forth in NMED Exhibit 110, the Department proposed to define, “contaminants of emerging concern,” to essentially mean “generally chemical compounds that, although suspected to potentially have impacts, do not have regulatory standards, are not routinely monitored for, and the concentrations to which negative impacts are observed have not been fully studied.” This unscientific definition by its own terms is without standard, largely turns on mere speculation, fails to provide meaningful guideposts for compliance, and is highly problematic

are toxic pollutants”); SJWC Ex. 2 at 8 (DeRose-Bamman Direct), 16-17 (objecting to reference to [CECs] because it “would allow NMED to regulate contaminants that are not routinely monitored, may not yet have regulatory standards, and may not yet have been fully studied to determine their negative impacts”); NMMA NOI at 4 (stating the “open-ended definition [of CEC], with its vaguely stated and unscientific operative phrase ‘suspected to have impacts’ is troublesome enough by itself. It is highly objectionable when one considers how the phrase is substantively used . . . This provision effectively could be construed as adding a broad range of ill-defined and not fully studied contaminants to the scope of “toxic pollutants” under the regulations, and worse, could create a surface water regulatory prohibition for them.”).

given how it is used in the Department's proposed amendments to 20.6.4.13(F)(1) NMAC. That provision, as proposed, would require in relevant part that "surface waters shall be free of toxic pollutants, including but not limited to contaminants of emerging concern . . ."

94. Although NMMA did not offer (technical) testimony regarding the Department's proposed definition of "contaminants of emerging concern," the Department adjusted the definition reflected in NMED Exhibit 110. NMMA NOI, p. 4.

95. Amigos Bravos supported adding a definition of "contaminants of emerging concern" and proposed an edit which the Department adopted in NMED Exhibit 110. AB Exhibit 10, pp. 3; AB Exhibit 11, pp. 2-3 and pp. 6-8; Tr. Vol. 4, 1167:3-1168:4.

96. CCW-GRIP supported the Department's proposed addition of a definition of "contamination of emerging concern" and opposed LANL's argument against including the definition. CCW-GRIP proposed calling the term "emerging contaminants," rather than "contaminants of emerging concern," which proposal the Department adopted in NMED Exhibit 141. CCW-GRIP Ex. 1; Tr. Vol. 2, 619:4-622:25.

97. Buckman supported the Department's definition of "contaminants of emerging concern" in the amended petition at 20.6.4.7(C)(7) but opposes the Department's proposed amendment to 20.6.4.13(F) NMAC that would include "contaminants of emerging concern" within the general criteria for toxic pollutants.

98. Based on the weight of the evidence in the record, the Commission finds that the Department's proposal to add a definition of "emerging contaminants" at 20.6.4.7(E)(3) NMAC as submitted is overly broad in its use of the phrase "including, but not limited to per- and polyfluoralkyl substances, pharmaceuticals and personal care products," defining the term by use of examples is ill-considered, and that by listing those examples creates the potential for requiring

monitoring of those listed “emerging contaminants.” Accordingly, the Commission adopts the Department’s proposed definition of “emerging contaminants” at 20.6.4.7(E)(3) NMAC with the deletion of the phrase “including, but not limited to per- and polyfluoralkyl substances, pharmaceuticals and personal care products.”

20.6.4.7(H) NMAC Definitions - Hardness

99. The Department proposed adding a definition of the term “hardness” to clarify the meaning of the term. As provided in the Department’s proposed amendments, this definition would become subparagraph 20.6.4.7(H)(1) NMAC, while the existing subparagraphs 20.6.4.7(H)(1) and (2) NMAC would be renumbered as subparagraphs 20.6.4.7(H)(3) and (4) NMAC, respectively. NMED Exhibit 3; NMED Exhibit 110; Tr. Vol. 2, 358:25-359:18.

100. The word “hardness” is used several times throughout 20.6.4 NMAC. Adding a definition would clarify the term, providing consistency when implementing the State’s hardness-based aquatic life use metals criteria at 20.6.4.900(I) NMAC. NMED Exhibit 3; Tr. Vol. 2, 358:25-359:18.

101. SJWC recommended removing the word “dissolved” before “hardness” in 20.6.4.12(F) NMAC and 20.6.4.900(I) NMAC, so that it aligned with the new definition, and to eliminate redundancy and clarify the term. SJWC [Exhibit] 2, p. 8 (2020 TR SJWC-0011).

102. The Department concurred with SJCW’s recommendation and removed the word “dissolved” before “hardness” in 20.6.4.12(F) and 20.6.4.900(I) NMAC in its proposed amendments to 20.6.4 NMAC. NMED Exhibit 108; NMED Exhibit 110.

103. No party objected to these changes. The Commission finds that the Department’s proposal to add a definition of “hardness” at 20.6.4.7(H)(1) NMAC as submitted is well taken but lacks clarity in how units will be expressed. Accordingly, based on the weight of the evidence in

the record, the Commission finds the Department's proposal to add a definition of "hardness" is well taken and adopts the Department's amendments to 20.6.4.7(H) NMAC, as revised to read "...expressed in units of calcium carbonate concentration unless otherwise noted."

20.6.4.7(H) NMAC Definitions - Harmonic Mean Flow

104. The Department proposed adding the definition of the term "harmonic mean flow" to the definitions section in 20.6.4.7 NMAC and deleting the definition of the term from 20.6.4.11(B)(1) NMAC. As provided in the Department's proposed amendments, this definition would become subparagraph 20.6.4.7(H)(2) NMAC, while the existing subparagraph 20.6.4.7(H)(2) NMAC would be renumbered as subparagraph 20.6.4.7(H)(4) NMAC. NMED Exhibit 1; NMED Exhibit 110; Tr. Vol. 1, 275:10-275:20.

105. The definition of "harmonic mean flow" is in the middle of a subparagraph that sets forth the relationship of critical low flow to human health-organism-only criteria as applied to water quality standards in 20.6.4.11 NMAC. Moving the definition from 20.6.4.11(B)(1) to 20.6.4.7(H)(2) would make it easier to locate by placing it with other definitions. NMED Exhibit 1; Tr. Vol. 1, 275:25-275-20.

106. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to move the definition of "harmonic mean flow" is well taken and adopts the Department's amendments to 20.6.4.7(H) and 20.6.4.11(B)(1) NMAC as proposed.

20.6.4.7(L) NMAC Definitions - Limited Aquatic Life

107. The Department proposed to amend language in the definition for "limited aquatic life" at 20.6.4.7(L)(2) NMAC to clarify that this designated aquatic life use is not limited in

application only to ephemeral or intermittent waters. NMED Exhibit 4, pp. 4-5. NMED Exhibit 9; Tr. Vol. 2, 327:15-332:11.

108. LANL initially objected to this proposed amendment. LANL Exhibit 6, pp. 7-9 (2020 TR LANL-00172 - 00174); LANL Exhibit 62, pp. 8-10 (TR LANL-01194 - 01196). However, after considering the Department's testimony at the public hearing, LANL withdrew its objection. Tr. Vol. 2, 367:15-370:17.

109. Amigos Bravos initially objected to this proposed amendment. AB Exhibit 10, p. 5; AB Exhibit 11, p. 20. However, after considering the Department's testimony at the public hearing, Amigos Bravos withdrew its objection. Tr. Vol. 2, 422:17-423:7.

110. All parties who initially objected to this proposed amendment, later withdrew their objections. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend the definition of "limited aquatic life" at 20.6.4.7(L)(2) NMAC is well taken and adopts the amendments as proposed.

20.6.4.7(M) NMAC Definitions - Marginal Coldwater

111. The Department proposed to amend the definition of "marginal coldwater" at 20.6.4.7(M)(1) NMAC to clarify that this designated use is not limited to ephemeral or intermittent waters, and to include those conditions that distinguish it from a coldwater aquatic life use designation. NMED Exhibit 4, pp. 5-7; NMED Exhibit 9; NMED Exhibit 109, pp. 2-6; NMED Exhibit 110; Tr. Vol. 2, 332:15-338:12.

112. LANL initially objected to this proposed amendment. LANL Exhibit 6, pp. 4-7 (2020 TR LANL-00169 - 0173); LANL Exhibit 62, pp. 3-8 (TR LANL-01189 - 01194); Tr. Vol. 2,

368:12-372:17. After considering the Department's testimony at the public hearing, LANL partially withdrew its objection. Tr. Vol. 2, 370:18-372:17.³

113. SJWC also objected to the Department's proposal, arguing that a similar amendment was not proposed for the definition of "marginal warmwater." SJWC [Exhibit] 2, pp. 8-9 (2020 TR SJWC-0011 - 0012). Tr. Vol. 2, 416:10-418:10. SJWC contended that the information provided by the Department in support of its proposal did not sufficiently explain the rationale behind deleting the temperature criterion from the definition of "marginal coldwater." The Department had not proposed to remove the temperature criterion from the definition of "marginal warmwater" in 20.6.4.7(M)(2), but on the contrary had proposed to modify the temperature criterion in 20.6.4.900(H)(6) NMAC to match the criterion in the definition. In SJWC's view, the Department's position was inconsistent with respect to the temperature criteria in the definitions of "marginal coldwater" and "marginal warmwater," and therefore, the Department's proposal to remove the temperature criterion from the definition of "marginal coldwater" should be rejected by the Commission. SJWC's SOR at 31-32.

114. The Department provided substantial evidence in response to the objections of the other parties. NMED Exhibit 109, pp. 2-6; NMED Exhibit 110; Tr. Vol. 2, 332:15-338:12.

³ LANL objected to removing numeric temperature criteria and hydrologic regimes on the basis that NMED has not provided a sufficient explanation for the changes or justified why NMED seeks to retain "intermittent low flow" in the definition of "marginal warmwater" but exclude the language from the nearly identical definition of "marginal coldwater." Hrg. Tr., Vol. II, 371:4-11 (Fulton); SJWC Ex. 2 at 8-9 (DeRose-Bamann Direct); Hrg. Tr., Vol. II, 417:20-418:5 (DeRose-Bamann); see also Hrg. Tr., Vol. II, 343:22-344:9 (Fullam) (acknowledging that the real difference between marginal warmwater and marginal coldwater is the temperature criteria). LANL cautioned that excluding hydrologic regime from marginal coldwater and retaining hydrologic regime in marginal warmwater will create confusion as to how the terms will be applied and regulatory uncertainty. Hrg. Tr., Vol. II, 371-372 (Fulton); LANL Ex. 6 at 5-6 (Fulton Direct). LANL's proposed amendment: "Marginal coldwater" in reference to an aquatic life use means that natural intermittent or low flows, or other natural habitat conditions severely limit maintenance of a coldwater aquatic life population during at least some portion of the year or historical data indicate that the temperature in of the surface water of the state may exceed 25°C (77°F).

115. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend the definition of "marginal coldwater" at 20.6.4.7(M)(1) NMAC is well taken and adopts the Department's amendments as proposed.

20.6.4.7(P) NMAC Definitions - Persistent Toxic Pollutants

116. The Department proposed to add a definition of "persistent toxic pollutants" at 20.6.4.7(P)(3) NMAC to clarify its meaning, as the term describes certain pollutants with numeric criteria in 20.6.4.900(J)(1). NMED Exhibit 2, pp. 4-5; NMED Exhibit 110; Tr. Vol. 2, 432:8-433:11.

117. No party objected to the proposed addition of this definition. Based on the weight of the evidence in the record, the Commission finds the Department's addition of the definition of "persistent toxic pollutants" is well taken and adopts the amendments to 20.6.4.7(P) NMAC as proposed.

20.6.4.7(S) NMAC Definitions - Sufficiently Sensitive

118. LANL proposed to define "sufficiently sensitive" under 20.6.4.7(S) NMAC using the EPA definition under 40 C.F.R. § 122.44(i)(1)(iv). LANL Ex. 57 (Proposed Changes to 20.6.4 NMAC); Hrg. Tr., Vol. III, 770:9-14 (Toll); LANL Ex. 7 at 11 (Toll Direct):

(5) "Sufficiently sensitive" means any method approved under 40 CFR part 136 for the analysis of pollutants or pollutant parameters for which (1) the method minimum level (ML) is at or below the level of the effluent limit established in the permit; or (2) the method has the lowest ML of the analytical methods approved under 40 CFR part 136 for the measured pollutant or pollutant parameter.

119. LANL witness Toll explained that these amendments seek to conform New Mexico water quality standards requirements for analytical methods and use of analytical methods for compliance purposes to Federal law. The anticipated effect of these changes would be (1) elimination of ambiguity about compliance monitoring obligations, and (2) clarification as to how

the Commission’s numeric criteria should be applied in situations where the criterion is less than the ML of the required method. LANL Ex. 7 at 5, 9 (Toll Direct).

120. The Department objected to the proposed amendment to 20.6.4.7(S) NMAC. NMED Exhibit 106, pp. 5-9.

121. Based on the weight of the evidence in the record, the Commission finds that the term “sufficiently sensitive” is not used elsewhere in the surface water quality standards, does not serve to clarify those standards, and therefore declines adoption of LANL’s proposed amendment to 20.6.4.7(S) NMAC.

20.6.4.7(S) NMAC Definitions - Surface Waters of the State

122. The Department proposed to amend the definition of “surface waters of the state” in 20.6.4.7(P) NMAC to make formatting changes in order to provide clarity. NMED Exhibit 3, pp. 3-4; Tr. Vol. 5, 1477:25-1478:18.

123. No party objected to the proposed addition of this definition. Based on the weight of the evidence in the record, the Commission finds the Department’s proposed amendments to the definition of “surface waters of the state” is well taken and adopts the amendments to 20.6.4.7(S)(5) NMAC as proposed.

20.6.4.7(U) NMAC Definitions - Unclassified Waters of the State

124. The Department proposed to move the definition of “unclassified waters of the state” from 20.6.4.11 NMAC to the definitions section in 20.6.4.7(U) NMAC and edit the definition for clarity. NMED Exhibit 2, pp. 2-3; Tr. Vol. 2, 352:19-353:20

125. SJWC objected to the Department’s proposed amendments to “unclassified waters of the state,” as it did not see a reason to move the definition and viewed the Department’s proposed changes as unnecessary and confusing. SJWC [Exhibit] 2, pp. 9-10 (2020 TR SJWC-0012 - 0013).

126. In response to written testimony from SJWC, the Department modified the proposed definition of “unclassified waters of the state.” SJWC then withdrew its objection. NMED Exhibit 110; Tr. Vol. 2, 353:10-17.

127. Based on the weight of the evidence in the record, the Commission finds the Department’s proposed amendments to “unclassified waters of the state” is well taken and adopts the amendments to 20.6.4.7(U) NMAC as proposed.

20.6.4.7(T) NMAC Definitions - Toxic Pollutant

128. CCW-GRIP argued that the Department’s proposed reference to the list of toxic pollutants from 20.6.2.7 NMAC in 20.6.4.13(F) NMAC would be more appropriately placed in the definition of “toxic pollutant” in 20.6.4.7(T) NMAC. CCW-GRIP Exhibit 5; Tr. Vol. 2, 620:4-620:14. CCW-GRIP were opposed to LANL’s revised definition of “toxic pollutant” because the proposal would eliminate the current narrative definition of “toxic pollutant.” The narrative portion of the definition served to allow flexibility to address a contaminant not currently on the list without waiting to go through a years-long regulatory revision. CCW-GRIP Ex. 5 at 6; Tr. Including a list of pollutants in the definition of “toxic pollutants” would be helpful. It would enhance certainty for all parties, and it would avoid unnecessary future arguments about whether those pollutants are or are not toxic. CCW-GRIP Ex. 5 at 5-6; 2 Tr. p. 619, lines 15-21.

129. CCW-GRIP propose the following amendment:

(2) “Toxic pollutant” means those pollutants, or combination of pollutants, including disease-causing agents, that after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will cause death, shortened life spans, disease, adverse behavioral changes, reproductive or physiological impairment or physical deformations in such organisms or their offspring. The term includes, but is not limited to, the toxic pollutants listed in the federal regulations at 40 CFR 401.15, and the groundwater quality regulations at 20.6.2.7.T(2) NMAC as those lists may be amended.

130. The Department concluded that CCW-GRIP's proposal to refer to the list of toxic pollutants in 20.6.2.7 NMAC in 20.6.4.7(T) NMAC would make no regulatory difference to the Department's proposal. Tr. Vol. 2, 457:14-457:25.

131. SJWC opposes the CCW-GRIP proposal to amend the definition of "toxic pollutant" in the surface water quality standards to incorporate, in its entirety, the Groundwater Rule's list of toxic pollutants and the toxic pollutants referenced in 40 C.F.R. § 401.15. SJWC's SOR at 49-51. SJWC opposed this proposal on the same grounds that it opposed incorporating the Groundwater Rule's list of toxic pollutants in 20.6.2 NMAC into the surface water quality standards narrative standard for toxic pollutants in 20.6.4.13(F)(1) NMAC. SJWC noted that the Department also opposed the CCW-GRIP proposal.

132. CCW-GRIP did not present any technical testimony to support its proposal. Therefore, it failed to meet the standard for Commission adoption requiring "credible scientific data and other evidence appropriate under the Water Quality Act."

133. LANL did not oppose individually identifying each toxin from the list of toxic pollutants in the ground water regulations, 20.6.2.7 NMAC, provided it was made clear that applicability is limited to human health-related designated uses. Hrg. Tr., Vol. II, 505:19-506:1 (Dail).

134. LANL also proposed to add the list of toxic pollutants in 20.6.2.7 NMAC to the list of toxic pollutants, subject to this limitation: "For purposes of 20.6.4 NMAC, toxic pollutants listed in 20.6.2.7 NMAC only apply to waters with a domestic water supply designated use, with the exception of the PFAS compounds listed above." LANL therefore proposed a revised definition

of “Toxic Pollutant” to limit toxic pollutants to those listed by EPA under the Clean Water Act at § 307(a).

135. Amigos Bravos contended that the nine PFAS identified by Dr. DeWitt are toxic pollutants under the Commission’s definition at 20.6.4.7(t)(2) NMAC. The nine are: PFOA, PFOS, perfluorohexane sulfonic acid (PFHxS), perfluorononanoic acid (PFNA), perfluorobutane sulfonate (PFBS), fluorotelomer sulphonic acid 8:2 (8:2 FTS), N-ethyl perfluorooctanesulfonamidoacetic acid (NEtFOSAA), N-methylperfluorooctane sulfonamidoacetic acid (NMeFOSAA), and perfluorooctanesulfonamide (PFOSA or FOSA). No party rebutted Dr. DeWitt’s testimony.

136. NMMA contended the Commission should adopt LANL’s proposed amendments to the definition of “toxic pollutant,” as set forth in LANL Exhibit 1, as they addressed contaminants of emerging concern and provided clarity about the pollutants that are subject to the regulatory requirements of the rule. LANL’s proposed definition of “toxic pollutant” included reference to a specific and clear list of pollutants that are provided by the EPA Administrator under §307(a) of the Clean Water Act as toxic and provided the Commission with the ability to list additional pollutants it considers toxic on an as needed basis.

137. Buckman opposed LANL’s proposed definition as it would limit what are considered to be toxic pollutants from the current narrative definition to those listed by EPA under § 307(a) of the Clean Water Act, or under a list adopted, through rulemaking, by the Commission. BDD Exhibit 1 at pg. 134.

138. The Department’s response to LANL’s proposed amendment is found in NMED Exhibit 107, pp. 5-9.

139. Based on the weight of the evidence in the record, the Commission finds that the proposal of CCW-GRIP to amend the definition of “toxic pollutant” at 20.6.4.7(T)(2) NMAC provides no regulatory clarity, is unnecessary, and it is therefore rejected.

140. Based on the weight of the evidence in the record, the Commission declines to adopt the proposed regulation submitted by LANL.

20.6.4.7(U) NMAC Definitions - Use Attainability Analysis

141. LANL proposed to move the definition of “use attainability analysis” to the definitions section, 20.6.4.7(U)(2) NMAC. LANL Exhibit 5, pp. 18-19 (2020 TR LANL-00157 - 00158).

142. The Department found LANL’s proposal to be consistent with other amendments associated with definitions and updated its proposed amendments accordingly. NMED Exhibit 109, p. 35; NMED Exhibit 110.

143. Based on the weight of the evidence in the record, the Commission finds that the Department’s proposal to move the definition of “use attainability analysis” to 20.6.4.7(U)(2) NMAC is well taken and adopts the amendment as proposed.

20.6.4.8 NMAC Antidegradation Policy and Implementation Plan

144. The Department proposed three amendments to the Antidegradation Policy and Implementation Plan at 20.6.4.8 NMAC. These amendments were for the purpose of adding clarity to that Section. NMED Exhibit 3, pp. 4-5; NMED Exhibit 9.

145. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department’s proposal to amend the Antidegradation Policy and Implementation Plan at 20.6.4.8 NMAC is well taken and adopts the amendments as proposed.

20.6.4.9 NMAC Outstanding National Resource Waters

146. The Department proposed amendments to the procedures for nominating an Outstanding National Resource Water at 20.6.4.9(A) NMAC to reflect the correct citation to the rulemaking procedures for the Commission. NMED Exhibit 3, p. 5; NMED Exhibit 9.

147. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend the procedures for nominating an Outstanding National Resource Water at 20.6.4.9(A) NMAC is well taken and adopts the amendment as proposed.

20.6.4.10(B)-(F) and (H) NMAC Review of Standards

148. The Department proposed to amend the language pertaining to reviewing and amending standards at 20.6.4.10 NMAC to clarify when and how a designated use or criterion may be amended for a surface water of the State. Related amendments to 20.6.4.12(H) NMAC and 20.6.4.318(C)(10) NMAC were also proposed, amending the references in those subsections to align with the proposed amendments to 20.6.4.10 NMAC. No new provisions were proposed which would impact the review of standards; the amendments were solely to provide additional clarity. NMED Exhibit 4, pp. 9-12; NMED Exhibit 9; Tr. Vol. 3, 936:22-941:9.

149. SJWC opposed certain of the Department's proposed amendments. SJWC [Exhibit] 2, pp. 12-15 (2020 TR SJWC-0015 - 0018); SJWC [Exhibit] 3, pp. 7-10 (2020 TR SJWC-0198 - 0201) Tr. Vol. 4, 1201:19-1203:23. SJWC contended that the Department proposed to add a new subsection (B) to 20.6.4.10 NMAC to address when a designated use must be upgraded to protect an existing use.

150. The Department made three attempts to rewrite the new subsection. SJWC and LANL opposed the proposal. Specifically, the Department's proposal referred to an existing use with "higher quality water," but it did not define that term. Therefore, it is unclear whether a designated

use must be upgraded because the quality of one single constituent is better than the numeric criteria assigned to that constituent for the designated use. Additionally, the Department's proposal referred to "supporting evidence demonstrating the presence of an existing use," but it did not define the "supporting evidence" required to determine a use is an existing use, nor did it define a process to make such a determination.

151. LANL opposed certain of the Department's proposed amendments. LANL Exhibit 3, pp. 32-40 (2020 TR LANL-00091 - 00099); LANL Exhibit 6, pp. 10-12 (2020 TR LANL-00175 - 00177); Tr. Vol. 3, 1016:3-1018:9; Tr. Vol. 4, 1100:4-1113:5.

152. Based on the testimony of LANL, the Department made certain changes to its proposed amendments, and provided rebuttal testimony in response to the testimony of SJWC and LANL. NMED Exhibit 109, pp. 8-25; NMED Exhibit 110; Tr. Vol. 3, 936:22-941:9.

153. Based on the weight of the evidence in the record, the Commission finds that LANL's proposed revisions to 20.6.4.10(B) and (C) NMAC are not well taken and are not supported by the weight of the evidence in the record. Further, the proposed post-hearing revision is not a logical outgrowth of the Department's proposed amendments to the surface water quality standards, or alternatively, are significantly different so as to deny interested parties and the general public a meaningful opportunity for comment.

154. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend the language pertaining to reviewing and amending standards at 20.6.4.10 NMAC is well taken and adopts the Department's amendments to 20.6.4.10 NMAC and the related amendments to 20.6.4.12(H) NMAC and 20.6.4.318(C)(10) NMAC as proposed.

20.6.4.10(F)(1)(d) NMAC Site-Specific Criteria

155. LANL proposed amendments to 20.6.4.10(F) NMAC regarding site-specific criteria. LANL Exhibit 6, pp. 13-14 (2020 TR LANL-00178 - 00179); LANL Exhibit 62, pp. 11-13 (2020 TR LANL-01197 - 01199); Tr. Vol. 3, 1019:19-1024:11.

156. The Department did not propose any amendments to 20.6.4.10(F) NMAC beyond changing subsection and paragraph numbers and letters based on proposed amendments to other Sections of 20.6.4.10 NMAC, a fact acknowledged by LANL's witness. NMED Exhibit 109, pp. 15-16; Tr. Vol. 3, 941:15-942:12. LANL Exhibit 62, p. 12 (2020 TR LANL-01198).

157. LANL did not conducted any outreach activities relative to its proposed amendments to 20.6.4.10(F) NMAC, nor did it publish any additional notice for this rulemaking proceeding to supplement that issued by the Department. Therefore, interested parties and the general public could not have reasonably anticipated the adoption of the amendments proposed by LANL to 20.6.4.10(F) NMAC. Tr. Vol. 3, 942:4-12.

158. Even if interested parties and the general public could have reasonably anticipated adoption of the amendments proposed by LANL to 20.6.4.10(F) NMAC, those amendments are not sufficiently protective of human health. NMED Exhibit 109, pp. 15-16; Tr. Vol. 3, 942:13-946:5.

159. Based on the weight of the evidence in the record, the Commission declines to adopt the amendments to 20.6.4.10(F) NMAC as proposed by LANL.

20.6.4.11(B)(1) NMAC Harmonic Mean Flow

160. The Department proposed to move the definition of "harmonic mean flow" from 20.6.4.11(B)(1) NMAC (Applicability of Water Standards) to the definitions section in 20.6.4.7(H). NMED Exhibit 2, p. 14; NMED Exhibit 110; Tr. Vol. 1, 275:10.

161. No parties objected to the Department's proposal to move the definition of "harmonic mean flow" from 20.6.4.11 NMAC to 20.6.4.7 NMAC. Based on the weight of the evidence in the record, the Commission finds the Department's proposal is well taken and adopts the amendments to 20.6.4.11(B)(1) NMAC as proposed.

20.6.4.11(G) NMAC Human Health-Organism Only Criteria

162. LANL proposed changes to 20.6.4.11(G) NMAC to remove the applicability of human health-organism only criteria from all water bodies except those with a designated, existing or attainable fish consumption use. LANL Exhibit 6, p. 16 (2020 TR LANL-00181); LANL Exhibit 57, p. 10 (2020 TR LANL-01068); LANL Exhibit 62, pp. 15-16); Tr. Vol. 3, 809:23-815:4

163. The Department did not propose any amendments to 20.6.4.11(G) NMAC.

164. The Department opposed LANL's proposed amendments to 20.6.4.11(G) NMAC, as the proposed amendments would leave every water in the State without the protection of human health criteria, and would conflict with 20.6.4.900(H) NMAC. NMED Exhibit 107, pp. 9-10; Tr. Vol. 3, 704:22-709:10.

165. CCW-GRIP also opposed LANL's proposed amendments to 20.6.4.11(G) NMAC on the grounds that New Mexico does not have a fish consumption use and human health-organism only criteria should apply to all waters with an aquatic life use. The Department agreed with CCW-GRIP's reasoning. CCW-GRIP Exhibit 5; NMED Exhibit 107, pp. 9-10; Tr. Vol. 3, 709:13.

166. After considering the Department and CCW-GRIP's reasoning, LANL substantially withdrew its proposal to amend 20.6.4.11(G) NMAC. Tr. Vol. 3, 814:8-815:4.

167. Based on the weight of the evidence in the record, the Commission declines to adopt the amendments to 20.6.4.11(G) NMAC as proposed by LANL, to the extent they were not substantially withdrawn.

20.6.4.11(H) NMAC Unclassified Waters of the State

168. The Department proposed to move the definition of “unclassified waters of the state” from 20.6.4.11(H) NMAC (Applicability of Water Standards) to the definitions section in 20.6.4.7(U) NMAC. NMED Exhibit 2, p. 14; NMED Exhibit 110; Tr. Vol. 1, 275:10.

169. SJWC objected to the Department’s proposed amendments to move the definition of “unclassified waters of the state,” as SJWC did not see a reason for doing so. SJWC Ex. 2, pp. 9-10 (2020 TR SJWC-0012 - 0013).

170. In response to written testimony from SJWC, the Department modified the proposed definition of “unclassified waters of the state” in 20.6.4.7(U) NMAC. In turn, SJWC withdrew its objection to moving the definition from 20.6.4.11(H) NMAC. NMED Exhibit 110; Tr. Vol. 2, 353:10-17.

171. Based on the weight of the evidence in the record, the Commission finds the Department’s proposal is well taken and adopts the Department’s proposed deletion of the definition of “unclassified waters of the state” in 20.6.4.11(H) NMAC as proposed.

20.6.4.12(E) NMAC Establishing Numeric Water Quality Criterion

172. LANL proposed amending 20.6.4.12(E) NMAC to limit sampling and analysis to only the EPA-approved methods listed in 40 C.F.R. Part 136. LANL Exhibit 7, pp. 5-9 (2020 TR LANL-00189 - 00193); Tr. Vol. 3, 767:17-777:20.

173. The Department did not propose any amendments to 20.6.4.12(E) NMAC.

174. The Department opposed LANL’s proposed amendments to 20.6.4.12(E) NMAC, as the proposed amendments would eliminate the flexibility to use alternative methods to evaluate compliance with the water quality standards and protect human health. NMED Exhibit 106, pp. 2-3; Tr. Vol. 3, 711:4-715:1.

175. CCW-GRIP opposed LANL's proposed amendments to 20.6.4.12(E) NMAC on similar grounds as the Department. CCW-GRIP Exhibit 5, pp. 7-9; Tr. Vol. 4, 1399:20-1401:25.

176. Buckman also opposed LANL's proposed amendments to 20.6.4.12(E) NMAC on similar grounds as the Department. BDD Exhibit 1; BDD Exhibit 7; Tr. Vol. 3, 821:2-825:24.

177. There is no evidence in the record that LANL conducted any outreach activities or published any additional notice for this rulemaking proceeding to supplement that issued by the Department. Therefore, interested parties and the general public could not have reasonably anticipated the adoption of the amendments to 20.6.4.12(E) NMAC proposed by LANL.

178. Even if interested parties and the general public could have reasonably anticipated adoption of the amendments to 20.6.4.10(F) NMAC proposed by LANL, those amendments are not sufficiently protective of human health. NMED Exhibit 106, pp. 3-9; Tr. Vol. 3, 711:4-715:1; Tr. Vol. 3, 821:2-825:24; Tr. Vol. 4, 1399:20-1401:25.

179. Based on the weight of the evidence in the record, the Commission declines to adopt the amendments to 20.6.4.12(E) NMAC as proposed by LANL.

20.6.4.12(G) NMAC - Compliance Schedules

180. The Department proposed to reorganize the first sentence of 20.6.4.12(G) NMAC in order to clarify the meaning of the sentence and to reflect current practice. The existing wording implies that the Commission has a policy to allow compliance schedules in NPDES permits, which is incorrect. NMED Exhibit 1, p. 14; NMED Exhibit 106, p. 19; Tr. Vol. 3, 715:11-716:7.

181. No party objected to this proposed amendment. LANL specifically noted its lack of opposition in filed written testimony. LANL Exhibit 7, p. 4 (2020 TR-LANL-00188); Tr. Vol. 3, 716:7.

182. Based on the weight of the evidence in the record, the Commission finds that the Department's amendments to 20.6.4.12(G) NMAC are well taken and adopts those amendments as proposed.

20.6.4.13(F) NMAC Toxic Pollutants

183. The Department proposed the addition of "including but not limited to emerging contaminants" and the toxic pollutants listed in 20.6.2.7 NMAC to the general criteria for toxic pollutants in 20.6.4.13(F) NMAC, in order to clarify the scope of the general criteria to better uphold the goals and objectives of the federal Clean Water Act. NMED Exhibit 2, pp. 3-4; NMED Exhibit 107, pp. 11-16; NMED Exhibit 110; NMED Exhibit 117; Tr. Vol. 2, 450:5-460:7.

184. LANL opposed the Department's proposed addition of "contaminants of emerging concern" and the toxic pollutants listed in 20.6.2.7 NMAC to the general criteria for toxic pollutants in 20.6.4.13(F) NMAC, and proposed additional amendments to 20.6.4.13(F) NMAC. LANL Exhibit 5, pp. 6-10 (2020 TR LANL-00145 - 00149): Tr. Vol. 2, 500:20-503:4. LANL opposed inclusion of pollutants and contaminants not tied to the adoption of existing 304(a) criteria, or other scientifically defensible guidance. (The Department's proposal "seeks to broaden even further without regulatory oversight, this group of unnamed chemicals . . . and further muddies the waters and creates additional regulatory uncertainty"); LANL Ex. 5 at 6-7 (Dail Direct) (explaining that given "the possibly hundreds of pharmaceuticals, detergents, and other possible endocrine disruptors (and breakdown products thereof) that fall under the CEC definition, there is no indication what entity (state or regulated community, or both) will need to perform monitoring, and for which among these contaminants"); Hrg. Tr., Vol. II, 536 (Judd); SJWC Ex. 2 at 8 (DeRose-Bamman Direct), 16-17 (objecting to reference to [contaminants of emerging concern] because it "would allow NMED to regulate contaminants that are not routinely

monitored, may not yet have regulatory standards, and may not yet have been fully studied to determine their negative impacts.”).

185. The Department concurred with LANL’s addition of the word “duration” to 20.6.4.13(F)(1) NMAC, but opposed all the other proposed amendments by LANL. NMED Exhibit 107, pp. 13-14; NMED Exhibit 110.

186. SJWC opposed the Department’s proposed amendments to 20.6.4.13(F) NMAC on the grounds that the language might expand the scope of the Department’s regulatory authority. SJWC [Exhibit] 2, pp. 16-18 (2020 TR SJWC-0019 - 0021); Tr. Vol. 2, 581:19-584:8.

187. The Department denied that its proposed amendments to 20.6.4.13(F) NMAC would expand the scope of the Department’s regulatory authority in any way. Tr. Vol. 2, 454:18-455:5.

188. Buckman opposed the Department’s proposed amendments to 20.6.4.13(F) NMAC because the toxic pollutants listed in 20.6.2.7 NMAC were conflated with contaminants of emerging concern. BDD Exhibit 1; Tr. Vol. 2, 647:12-649:16. Buckman supported the Department’s definition of “contaminants of emerging concern” in the amended Petition at 20.6.4.7.C(7) but opposed the Department’s proposed amendment to 20.6.4.13.F that would include contaminants of emerging concern within the general criteria for toxic pollutants.

189. The Department denied that its proposed amendments to 20.6.4.13(F) NMAC conflated the toxic pollutants listed in 20.6.2.7 NMAC with contaminants of emerging concern, as the Department did not propose to add contaminants of emerging concern to the definition of toxic pollutants. Tr. Vol. 2, 456:9-457:10.

190. CCW-GRIP argued that the Department’s proposed reference to the list of toxic pollutants from 20.6.2.7 NMAC would be more appropriately placed in the definition of “toxic pollutant” in 20.6.4.7(T) NMAC. CCW-GRIP Exhibit 5; Tr. Vol. 2, 620:4-620:14.

191. The Department concluded that CCW-GRIP's proposal to refer to the list of toxic pollutants in 20.6.2.7 NMAC in 20.6.4.7(T) NMAC would have no regulatory difference to the Department's proposal. Tr. Vol. 2, 457:14-457:25.

192. Based on the weight of the evidence in the record, the Commission declines adoption of the Department's proposed amendments to 20.6.4.13(F) NMAC to include "including but not limited to emerging contaminants and those toxic pollutants listed in 20.6.2 NMAC"; however, the Commission finds the proposal to include the word "duration" to 20.6.4.13(F)(1) NMAC to be well taken and adopts the proposed change to 20.6.4.13(F)(1) NMAC to read "...in amounts, duration, concentrations, ..."

20.6.4.14(A) NMAC Methods for Compliance

193. LANL proposed an amendment to 20.6.4.14(A) NMAC to limit sampling and analytical methods to only those methods specifically approved by EPA in 40 C.F.R. Part 136, which relates to compliance determinations for federal permits and Clean Water Act § 401 State certifications. LANL Exhibit 7, pp. 5-10; Tr. Vol.

194. The Department did not propose any amendments to 20.6.4.14 NMAC and opposes LANL's proposal to amend 20.6.4.14(A) NMAC, as EPA has other approved analytical methods that are not contained in 40 C.F.R. Part 136. NMED Exhibit 106, pp. 7-8; Tr. Vol 3, 716:20-720:7.

195. LANL did not provide any testimony or documentary evidence as to the reason 20.6.4.14(A) NMAC as currently written is either problematic or overly burdensome. NMED Exhibit 106, p. 8; Tr. Vol. 3, 717:16-717:25.

196. In written rebuttal testimony, the Department, Amigos Bravos, Buckman, and CCW-GRIP all opposed LANL's proposed amendment. Those comments and the corresponding

references to exhibits and testimony in the record are summarized in the Hearing Officer's Report at pages 76 through 77, incorporated herein by reference.

197. There is no evidence in the record that LANL conducted any outreach activities or published any additional notice for this rulemaking proceeding to supplement that issued by the Department. Therefore, interested parties and the general public could not have reasonably anticipated the adoption of the amendments to 20.6.4.14(A) NMAC for analytical methods proposed by LANL.

198. Even if interested parties and the general public could have reasonably anticipated adoption of the amendments proposed to 20.6.4.14(A) NMAC by LANL, the proposed amendments are not sufficiently protective of human health as they limit the methods the Department may use to evaluate criteria. NMED Exhibit 106, pp. 7-8; Tr. Vol. 3, 717:16-717:25.

199. Amigos Bravos contended that LANL's proposal to limit sampling methods at 20.6.4.14.A NMAC for purposes of compliance with federal permits to Part 136 Methods, LANL Ex. 67 at 13, would leave New Mexico surface waters vulnerable to discharges of known water contaminants, was inconsistent with the primary purpose of the Water Quality Act, and should be rejected. Amigos Bravos further contended that LANL did not put on any evidence that the other methods authorized in the Commission's regulations are somehow inadequate, inaccurate, or not based on good science. Instead, LANL made a legal argument, through a non-lawyer, LANL witness Toll, that EPA regulations require states to use Part 136 Methods for compliance with federal permits. *See*, LANL Ex. 7 at 9-10. If the Commission adopts LANL's proposal to limit testing to Part 136 Methods, NMED will not be able to ensure that all the Commission's standards for polychlorinated biphenyls ("PCBs") are met or require monitoring for per- and polyfluoroalkyl substances ("PFAS").

200. CCW-GRIP contended that LANL’s proposal to limit monitoring requirements would severely limit the authority of the Department to require monitoring of certain toxic pollutants. In particular, the proposal would limit regulatory authority over PCBs and PFAS.

201. Based on the weight of the evidence in the record, the Commission declines to adopt the amendments to 20.6.4.14(A) NMAC as proposed by LANL.

20.6.4.14(F) NMAC Monitoring

202. Amigos Bravos proposed a new Subsection (F) to 20.6.4.14 NMAC: “The department may include sampling and monitoring of contaminants of emerging concern as a condition in a federal permit under Section 401 of the Clean Water Act.” AB Exhibit 1, p. 2; AB Exhibit 17, p. 2; Tr. Vol. 3, 843:10, 844:25.

203. The Department did not propose any amendments to 20.6.4.14 NMAC and noted that NMED already has authority to require sampling and monitoring of contaminants in permits. However, the Department had no real objection to inclusion of Amigos Bravos’ proposed language. NMED Exhibit 106, pp. 19-21; Tr. Vol. 3, 720:14-722:24.

204. LANL opposed Amigos Bravos’ proposal to add 20.6.4.14(F) NMAC. LANL Exhibit 63, pp. 15-18.

205. Based on the weight of the evidence in the record, the Commission finds that the amendment to 20.6.4.14(F) NMAC proposed by Amigos Bravos is well taken and adopts the amendment as proposed, with the minor adjustment to the use of the term “emerging contaminants” to be consistent with terminology used in the relevant definitions.

20.6.4.15 NMAC Use Attainability Analysis (“UAA”)

206. The Department proposed to amend language in 20.6.4.15 NMAC to ensure that the state regulations, at a minimum, meet the Federal regulations for amending a designated use to a

use with less stringent criteria. The Department proposed several amendments with the goal of ensuring effective implementation of the UAA process. The Department also proposed related amendment to 20.6.4.97 NMAC, amending the reference in that subsection to align with the proposed amendments to 20.6.4.15 NMAC. NMED Exhibit 4, pp. 12-17; NMED Exhibit 9; NMED Exhibit 109, pp. 25-27; NMED Exhibit 110; Tr. Vol. 3, 946:6-953:1.

207. SJWC initially objected to those proposed amendments, but later withdrew its objections in response to the Department's rebuttal testimony. Tr. Vol. 3, 947:16-948:15.

208. NMMA submitted non-technical comment on the Department's proposed amendments, which comments were addressed by the Department. NMMA NOI, pp. 6-7; NMED Exhibit 109, pp. 25-27; Tr. Vol. 3, 949:18-951:12.

209. LANL objected to the Department's proposed amendments based on the use of the term "stringency" and the claim that these amendments would provide the Department greater discretion. LANL Exhibit 3, p. 32 (2020 TR LANL-00092); LANL Exhibit 6, pp. 10-12 (2020 TR LANL-00175 - 00177); LANL Exhibit 59, pp. 20-21 (2020 TR LANL-01135 - 01136); LANL Exhibit 62, pp. 10-13 (TR LANL-01196-01199); Tr. Vol. 3, 1016:3-25; Tr. Vol 4, 1100:3-1113:6.

210. The Department provided substantial evidence in response to LANL's objections. NMED Exhibit 109, pp. 25-27; NMED Exhibit 110; Tr. Vol. 3, 946:6-953:1.

211. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend the language pertaining to reviewing and amending standards at 20.6.4.15 NMAC is well taken and adopts the amendments as proposed.

20.6.4.97 NMAC Unclassified Ephemeral Waters

212. The Department proposed an amendment to 20.6.4.97(C)(1)(g) NMAC to correct the spelling of “Canon” to “Cañon,” in order to be consistent with other spellings in this Section that utilize the Spanish *eñe*. NMED Exhibit 110; Tr. Vol. 5, 1473:14-1474:3.

213. Although the Department did not present technical testimony regarding the correction of this spelling error, no party opposed the proposed amendment. The Commission finds the Department’s proposal to correct the spelling of “Cañon” is well taken and adopts the amendments to 20.6.4.97(C)(1)(g) NMAC as proposed.

20.6.4.101-899 NMAC Amendments to Selected Sections that Contain Secondary Contact Uses

214. The Department proposed to amend language in 20.6.4.103, 20.6.4.112, 20.6.4.116, 20.6.4.204, and 20.6.4.207 NMAC, and add a new section, 20.6.4.231 NMAC, to remove nonperennial reaches of tributaries from the list of classified perennial sections. NMED Exhibit 3, pp. 5-14. NMED Exhibit 9; NMED Exhibit 56; Tr. Vol. 3, 918:14-936:7.

215. LANL objected to certain of the Department’s proposed amendments. LANL Exhibit 58, pp. 5-12 (2020 TR LANL-01083 - 01090). Tr. Vol. 4, 1080:9-1099:14.

216. SJWC objected to certain of the Department’s proposed amendments. SJWC [Exhibit] 3, pp. 10-32 (2020 TR SJWC-0201 - 0223); Tr. Vol. 4, 1201:12-1216:17; SJWC’s Exc. at pp. 30-33.

217. Amigos Bravos objected to certain of the Department’s proposed amendments. AB Exhibit 11, pp. 12-20. Tr. Vol. 4, 1177:17-11:93:6.

218. The Department provided substantial evidence in response to the objections of the above parties. NMED Exhibit 108, pp. 6-8; NMED Exhibit 110; Tr. Vol. 3, 918:14-936:7.

219. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend language in 20.6.4.103, 20.6.4.112, 20.6.4.116, 20.6.4.204, and 20.6.4.207 NMAC, and to add a new Section, 20.6.4.231 NMAC, to establish the highest attainable use as intermittent waters pursuant to 20.6.4.98 NMAC is well taken and adopts the amendments to these sections as proposed.

20.6.4.101-899 NMAC Amendments to Selected Sections of Non-perennial Reaches

220. The Department proposed to amend language in 20.6.4.103, 20.6.4.108, 20.6.4.112, 20.6.4.115, 20.6.4.206, 20.6.4.208, 20.6.4.209, 20.6.4.215, 20.6.4.220, 20.6.4.307 and 20.6.4.309 NMAC to remove nonperennial reaches of tributaries from the list of classified perennial sections. NMED Exhibit 3, pp. 14-23. NMED Exhibit 9; NMED Exhibit 59; Tr. Vol. 3, 904:23-916:6.

221. LANL objected to certain of the Department's proposed amendments. LANL Exhibit 58, pp. 5-12 (2020 TR LANL-01083 - 01090). Tr. Vol. 4, 1080:9-1099:14.

222. SJWC objected to certain of the Department's proposed amendments, although some of those objections were later withdrawn. SJWC [Exhibit] 3, pp. 10-32 (2020 TR SJWC-0201 - 0223); Tr. Vol. 4, 1201:12-1216:17.

223. Amigos Bravos objected to certain of the Department's proposed amendments, citing among other reasons the age of the data used by the Department in its UAA (NMED Exhibit 59). AB Exhibit 11, pp. 12-20. Tr. Vol. 4, 1177:17-11:93:6.

224. On cross-examination, the Amigos Bravos' witness expressed a lack of familiarity with the National Hydrography Dataset, the source of the data used by the Department in its UAA NMED Exhibit 59; Tr. Vol. 4, 1188:5-17.

225. The Department provided substantial evidence in response to the objections of the above parties. NMED Exhibit 108, pp. 6-8; NMED Exhibit 110; Tr. Vol. 3, 904:23-916:6.

226. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend language in 20.6.4.103, 20.6.4.108, 20.6.4.112, 20.6.4.115, 20.6.4.204, 20.6.4.206, 20.6.4.207, 20.6.4.208, 20.6.4.209, 20.6.4.215, 20.6.4.220, 20.6.4.307 and 20.6.4.309 NMAC to remove nonperennial reaches of tributaries from the list of classified perennial sections and establish the highest attainable use as intermittent waters pursuant to 20.6.4.98 NMAC is well taken and adopts the amendments to these sections as proposed.

20.6.4.105 NMAC and 20.6.4.106 NMAC Classified Waters Rio Grande Basin

227. The Department proposes to add language to 20.6.4.105 NMAC and 20.6.4.106 NMAC to clarify that effluent requirements referenced in 20.6.2.2102 NMAC apply if the conditions in 20.6.2.2100 NMAC are met. The purpose of this proposed amendment was to provide clarification that the criteria in 20.6.2.2102 NMAC may apply to certain discharges in the Rio Grande Basin, but it did not change the meaning of these sections. NMED Exhibit 1, p. 15; NMED Exhibit 106, p. 21; NMED Exhibit 110; Tr. Vol. 3, 726:11.

228. SJWC opposed the Department's proposed amendment on the grounds that the scope of applicability is very limited and that there is no definition of "community sewerage system" in 20.6.2 NMAC or 20.6.4 NMAC. SJWC [Exhibit] 2, p. 20; Tr. Vol. 3, 883:8-890:5.

229. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend 20.6.4.105 NMAC and 20.6.4.106 NMAC to be unclear in its intent to adopt as a criterion or a remark, and therefore rejects the Department's proposal.

20.6.4.126, 128, and 140 NMAC Perennial, Ephemeral and Intermittent, and Specified Intermittent Waters within LANL

230. The Department proposed to create a new Section, 20.6.4.140 NMAC, breaking out certain intermittent waters within LANL from 20.6.4.128 NMAC, and amending 20.6.4.128

NMAC accordingly. NMED Exhibit 4, pp. 25-48; NMED Exhibit 64; NMED Exhibit 109, pp. 37-78; NMED Exhibit 110; Tr. Vol. 4, 1283:12-1320:15.

231. Amigos Bravos expressed support for the reclassification of certain intermittent waters within LANL from 20.6.4.128 NMAC to 20.6.4.140 NMAC. AB Exhibit 3, p. 15; Tr. Vol. 5, 1437:22-1443:20.

232. LANL opposed certain of the Department's proposed amendments. Central to the disagreement between the parties, LANL characterized NMED's position as "the segments within Section 128 discovered to have perennial characteristics (*i.e.*, Pajarito Upper and Lower Sections, and Arroyo de la Delfe from Pajarito Canyon to Kieling Spring) [could] not be moved to Section 126 because they [had] allegedly been automatically unclassified to Section 99, without a Commission decision and without any notice or locational information to LANL or other stakeholders." LANL's position was that "the segments in question are not classified under Section 99 because Section 99 only includes perennial waters of the State that have not been previously classified, and the segments were classified by the Commission under Section 128 during the 2003 Triennial Review, and the Commission has not made a decision to declassify those waters since that time." LANL Exhibit 2, pp. 6-37 (2020 TR LANL-00028 - 00057); LANL Exhibit 3, pp. 7-31 (2020 TR LANL-00066 - 00090); LANL Exhibit 4, pp. 6-36 (2020 TR LANL-00109 - 00137); LANL Exhibit 57, pp. 17-18 (2020 TR LANL-01075 - 01076); LANL Exhibit 58, pp. 12-23 (2020 TR LANL-01090 - 01101); LANL Exhibit 59 (2020 TR LANL-01116 - 01151); LANL Exhibit 60 (2020 TR LANL-01152 - 01171); Tr. Vol. 4, 1321:8-1394:20, 1404:15-1414:21. 171. LANL contended that the Commission classified all waters within the lands managed by DOE within LANL during the 2003 Triennial Review. Specifically, the Commission classified specific waters within LANL with perennial flow characteristics under Section 126 and classified all remaining

water waters within LANL with ephemeral and intermittent flow characteristics under Section 128. In 2007 the EPA approved the Commission's classification of all surface waters within LANL under Sections 126 and 128. The Commission has not amended its prior classification of LANL waters under Section 126 and 128 since the completion of the 2003 Triennial Review, including during the 2009 and 2013 Triennial Reviews. 174. In this Triennial Review, LANL proposed to add language to Section 126 to clarify that all "[p]erennial waters within lands managed by the U.S. Department of Energy (DOE) within Los Alamos National Laboratory (LANL)," are classified under Section 126, "including but not limited to," the stream segments that are specifically identified within the section. *See*, LANL Ex. 57 (Proposed Changes to 20.6.4 NMAC). During the 2013 Triennial Review, Amigos Bravos, DOE, Los Alamos National Security LLC and NMED entered into the October 9, 2015 Joint Stipulation Regarding Proposed Changes to 20.6.4.128 NMAC ("2015 Joint Stipulation"). *See*, LANL Ex. 29 (2015 Joint Stipulation). The 2015 Joint Stipulation required that the parties meet, share available data, and confer regarding the appropriate level of water quality protections for ephemeral and intermittent waters classified under 20.6.4.128 NMAC. LANL Ex. 2 at 19-20 (Meyerhoff Direct); LANL Ex. 30 at 8 (Affidavit of M. Saladen). Based on the data collected pursuant to the 2015 Joint Stipulation, LANL has proposed to classify the following two segments under Section 126: (1) Pajarito canyon from 0.5 miles below Arroyo de la Delfe upstream to Homestead Spring; and (2) Arroyo de la Delfe from Pajarito canyon to Kieling Spring. *See* LANL Ex. 57 (Proposed Changes to 20.6.4 NMAC); *see* also LANL Ex. 3 at 19 (Gallegos Direct). As described in LANL's proposal, the first segment - Pajarito canyon from 0.5 miles below Arroyo de la Delfe upstream to Homestead Spring - includes the existing Section 126 perennial water in Pajarito canyon from the confluence with Arroyo de la Delfe to Starmers gulch and the following two contiguous reaches: (i) Pajarito canyon from 0.5

miles below Arroyo de la Delfe to the confluence with Arroyo de la Delfe (“Pajarito Upper Section”); and (ii) Pajarito canyon from Starmers Gulch to Homestead Spring (“Pajarito Lower Section”). See, LANL Ex. 3 at 19-20 (Gallegos Direct).

LANL’s proposed amendment was as follows:

~~20.6.4.126 RIO GRANDE BASIN – 20.6.4.126 RIO GRANDE BASIN - Perennial waters within lands managed by the U.S. Department of Energy (DOE) within Los Alamos National Laboratory (LANL), including but not limited to: portions of Canon de Valle from Los Alamos national laboratory (LANL) stream gage E256 upstream to Burning Ground spring, Sandia canyon from Sigma canyon upstream to LANL NPDES outfall 001, Pajarito canyon from 0.5 miles below Arroyo de La Delfe upstream to Homestead Spring, Arroyo de La Delfe from Pajarito canyon to Kieling Spring, into Starmers gulch and Starmers spring and Water canyon from Area-A canyon upstream to State Route 501.~~

A. Designated Uses: coldwater aquatic life, livestock watering, wildlife habitat and secondary contact.

B. Criteria: the use-specific numeric criteria set forth in 20.6.4.900 NMAC are applicable to the designated uses.

233. The Department provided substantial evidence in response to LANL’s objections. NMED Exhibit 109, pp. 37-78; NMED Exhibit 110; Tr. Vol. 4, 1283:12-1320:15.

234. Based on the weight of the evidence in the record, the Commission finds the Department’s proposal to create new Section 20.6.4.140 NMAC and amend 20.6.4.128 NMAC accordingly is well taken and adopts the Department’s amendments to these sections as proposed. The Commission also adopts LANL’s proposed amendments to 20.6.4.126 NMAC and the additional typographical and grammatical proposed revisions to 20.6.4.128 NMAC to capitalize “Department of Energy” and remove the word “specifically” from the segment description for 20.6.4.128 NMAC.

20.6.4.311 NMAC and 20.6.4.312 NMAC Classified Waters Canadian River Basin

235. The Department proposed to add the words “Canadian River Basin” to the headers in 20.6.4.311 NMAC and 20.6.4.312 NMAC, as these words are missing in the current regulation

and the additions will provide consistency with others in 20.6.4.301 NMAC through 20.6.4.318 NMAC. Tr. Vol. 5, 1471:11-1472:2.

236. Although the Department did not present technical testimony on this proposal amendment, no party opposed it. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to add the words "Canadian River Basin" to the headers in 20.6.4.311 and 20.6.4.312 NMAC is well taken and adopts the amendments as proposed.

20.6.4.405 NMAC and 20.6.4.408 NMAC Classified Waters San Juan Basin

237. The Department proposed amendments to 20.6.4.405 NMAC and 20.6.4.408 NMAC in order to correct the spelling of "Canyon" to "Cañon," in order to be consistent with other referenceable sources, including topographic maps. NMED Exhibit 110; Tr. Vol. 5, 1473:6-1474:3.

238. Although the Department did not present technical testimony on correcting this spelling error, no party opposed the proposed amendments. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend the spelling to "Cañon" in 20.6.4.405 NMAC and 20.6.4.408 NMAC is well taken and adopts the amendments as proposed.

20.6.4.808 NMAC Closed Basins

239. The Department proposed an amendment to 20.6.4.808 NMAC to remove a period that inexplicably appeared in the middle of a sentence. NMED Exhibit 2, p. 17; NMED Exhibit 110; Tr. Vol. 5, 1472:11-1472:24.

240. No party opposed this proposed amendment. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to remove the period in the middle of the sentence is well taken and adopts the proposed amendment to 20.6.4.808 NMAC.

20.6.4.900(D) NMAC Criteria Applicable to Existing, Designated or Attainable Uses Unless Otherwise Specified in 20.6.4.97 through 20.6.4.899 NMAC - Primary Contact

241. The Department proposed to amend 20.6.4.900(D) NMAC in order to add criteria for waters with a primary contact designated use, specifically to adopt EPA's 2019 numeric criteria for toxins associated with harmful algal blooms. NMED Exhibit 2, p. 6; NMED Exhibit 110; Tr. Vol. 4, 1232:18-1233:7.

242. SJWC initially contended that the Commission should not adopt the Department's proposal unless the proposed amendment contained additional clarification. SJWC later withdrew its objection. SJWC [Exhibit] 2, p. 25 (2020 TR SJWC-0028); Tr. Vol. 4, 1233:16.

243. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend 20.6.4.900(D) NMAC is well taken and adopts the proposed amendments.

20.6.4.900(I) NMAC Criteria - Hardness-Based Metals

244. In response to testimony offered by SJWC, the Department proposed to remove the word "dissolved" before the word "hardness" in 20.6.4.900(I) NMAC. NMED Exhibit 109, pp. 78-81; NMED Exhibit 110; Tr. Vol. 5, 1482:2-18.

245. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to remove the word "dissolved" before the word "hardness" in 20.6.4.900(I) NMAC is well taken and adopts the amendments as proposed.

20.6.4.900(I)(1)-(2) NMAC Criteria - Aluminum

246. The Department proposed to amend the criteria for aluminum in the tables at 20.6.4.900(I)(1) and (2) NMAC. NMED Exhibit 4, pp. 19-22; NMED Exhibit 109, pp. 78-81; NMED Exhibit 110; Tr. Vol. 4, 1220:12-1224:7.

247. LANL objected to these proposed amendments. LANL Exhibit 8 (2020 TR LANL-00205); LANL Exhibit 64, pp. 1-8 (2020 TR LANL-01226 - 01234); Tr. Vol. 3, 688:18-698:9.

248. The Department provided substantial evidence in response to the objections of LANL. NMED Exhibit 109, pp. 78-81; NMED Exhibit 110; Tr. Vol. 4, 1220:12-1224:7.

249. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend the criteria for aluminum in the tables at 20.6.4.900(I)(1) and (2) NMAC is well taken and adopts the amendments to 20.6.4.900(I) (1) and (2) NMAC as proposed.

20.6.4.900(I)(1)-(2) NMAC Criteria - Cadmium

250. The Department proposed the adoption of acute and chronic hardness-based cadmium criteria in the tables in 20.6.4.900(I)(1) and (2) NMAC based on EPA's current recommended criteria. NMED Exhibit 4, pp. 22-24; NMED Exhibit 110; Tr. Vol. 4, 1219:11-1220:6.

251. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend acute and chronic hardness-based cadmium criteria in the tables in 20.6.4.900(I)(1) and (2) NMAC based on EPA's current recommended criteria is well taken and adopts the amendments as proposed.

20.6.4.900(I)(1)-(2) NMAC Criteria - Copper

252. The Department did not propose adopting EPA's recommended aquatic life criteria for copper as a replacement for the current hardness-based water quality standard in 20.6.4.900(I)(1)-(2) NMAC. NMED Exhibit 2, p.14.

253. No party opposed the Department's proposed delay in adopting EPA's recommended copper criteria. LANL specifically noted its lack of opposition. LANL Exhibit 63, pp. 3-5 (2020 TR LANL-01207 - 01209).

254. No party proposed any amendments to 20.6.4.900(I) NMAC relating to replacing the current hardness-based water quality standard with EPA's criteria for copper, and therefore, the Commission does not adopt any amendments to 20.6.4.900(I)(1)- (2) NMAC on copper criteria.

20.6.4.900(I)(3) NMAC Criteria - Hardness-Based Metals Table

255. The Department proposed to amend the values in the acute and chronic hardness-based metals criteria table located at 20.6.4.900(I)(3) NMAC consistent with the hardness-dependent equations for acute and chronic aquatic life criteria. NMED Exhibit 3, pp. 23-24; NMED Exhibit 110.

256. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to amend the values in the acute and chronic hardness-based metals criteria table located at 20.6.4.900(I)(3) NMAC consistent with the hardness-dependent equations for acute and chronic aquatic life criteria is well taken and adopts the amendments to 20.6.4.900(I)(3) NMAC as proposed.

20.6.4.900(J)(1) NMAC Criteria - Acute and Chronic Aluminum

257. The Department proposed to add language regarding the pH range for hardness-based criteria for total recoverable aluminum and to remove language regarding EPA's disapproval of hardness-based aluminum criteria in 20.6.4.900(J)(1) and 20.6.4.900(J)(2) NMAC. NMED Exhibit 4, pp. 19-22; NMED Exhibit 109, pp. 78-81; NMED Exhibit 110; Tr. Vol. 4, 1220:12-1224:7.

258. LANL objected to these proposed amendments. LANL Exhibit 8 (2020 TR LANL-00205); LANL Exhibit 64, pp. 1-8 (2020 TR LANL-01226 - 01234); Tr. Vol. 3, 688:18-698:9.

259. The Department provided substantial evidence in response to the objections of LANL. NMED Exhibit 109, pp. 78-81; NMED Exhibit 110; Tr. Vol. 4, 1220:12-1224:7.

260. Based on the weight of the evidence in the record, the Commission finds the Department's proposal to add language regarding the pH range for hardness-based criteria for total recoverable aluminum and to remove language regarding EPA's disapproval of hardness-based aluminum criteria in 20.6.4.900(J)(1) and (2) NMAC is well taken and adopts the amendments to 20.6.4.900(J) (1) and (2) NMAC as proposed.

20.6.4.900(J)(1) NMAC Criteria - 304(a)

261. The Department did not propose amendments to 20.6.4.900(J)(1) NMAC regarding criteria for copper, selenium, arsenic, and manganese, although EPA recommended updates to these criteria. The Department may propose these amendments in the future and is working with testing laboratories to develop the capacity to analyze samples. The Department proposed to adopt the other criteria recommended by EPA into 20.6.4.900(J)(1) NMAC. NMED Exhibit 2, pp. 13-16; Tr. Vol. 4, 1239:8-1242:8.

262. No party objected to the Department's proposed delay in adopting the EPA's criteria for copper, selenium, arsenic, and manganese.

263. SJWC objected to the Department's proposal to add numeric criteria for the pollutant Tributyltin (TBT) to the table in 20.6.4.900(J)(1) NMAC on the basis that a specific Chemical Abstract System ("CAS") number had not been provided in the Department's proposal. SJWC [Exhibit] 2, p. 25 (2020 TR SJWC-0028); Tr. Vol. 4, 1266:22-1267:11.

264. In response to SJWC's objection, the Department explained why Tributyltin (TBT) does not have a single CAS number associated with it. Tr. Vol. 4, 1243:18-1246:16; Tr. Vol. 4, 1267:21-1268:13.

265. Based on the weight of the evidence in the record, the Commission finds that the Department's amendments to 20.6.4.900(J)(1) NMAC are well taken and adopts those

amendments as proposed, with the understanding that amendments to 20.6.4.900(J)(1) NMAC relating to copper, selenium, arsenic, or manganese are delayed.

20.6.4.900(J)(2) NMAC Criteria - Applicable Notes

266. The Department proposed to add a note at 20.6.4.900(J)(2)(i) NMAC pertaining to the numeric criteria table at 20.6.4.900(J)(1) NMAC to provide guidance as to when acute and chronic hardness-based aquatic life total recoverable aluminum criteria is applicable and when the acute and chronic numeric aquatic life dissolved aluminum criteria is applicable. NMED Exhibit 4, pp. 21-22; NMED Exhibit 110; Tr. Vol. 4, 1224:11-1225:21.

267. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department’s proposal to add a note under the numeric criteria table at 20.6.4.900(J)(2) NMAC to provide guidance as to when acute and chronic hardness-based aquatic life total recoverable aluminum criteria is applicable and when the acute and chronic numeric aquatic life dissolved aluminum criteria is applicable is well taken and adopts the amendments to 20.6.4.900(J)(2)(i) NMAC as proposed.

20.6.4.900(K)-(M) NMAC Criteria - Ammonia

268. The Department proposed to update the aquatic life ammonia criteria in 20.6.4.900(K), (L) and (M) NMAC to be consistent with the federal aquatic life ambient water quality criteria for total ammonia, including acute and chronic aquatic life criteria for Total Ammonia Nitrogen (“TAN”). NMED Exhibit 3, pp. 24-25; NMED Exhibit 110.

269. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department’s proposal to update the aquatic life ammonia criteria in 20.6.4.900(K), (L) and (M) NMAC to be consistent with the federal aquatic life ambient water quality criteria for total ammonia, including acute and chronic aquatic life criteria for Total

Ammonia Nitrogen (“TAN”) is well taken and adopts the amendments to 20.6.4.900(K), (L) and (M) NMAC as proposed.

20.6.4.901 NMAC - Publication References

270. The Department proposed to amend the publication references section at 20.6.4.901 NMAC to be consistent with the most current versions of these documents. Overall, some references needed updates, some were removed because they were no longer the correct reference and replaced with the correct references, and some were reworded for consistency within the reference section. These changes will facilitate appropriate implementation of the State’s water quality standards. NMED Exhibit 3, p. 5.

271. No party objected to these changes. Based on the weight of the evidence in the record, the Commission finds the Department’s proposal to update the publication references section at 20.6.4.901 NMAC to be consistent with the most current versions of these documents is well taken and adopts those amendments as proposed.

VII. Other Matters

272. The Commission authorizes the Department to address any necessary numbering changes, grammatical errors, or non-substantive typographical mistakes that may be necessary in connection with the final compilation of the surface water quality standards adopted herein by the Commission.

273. In addition to this Statement of Reasons, as corrected, the Commission references the Hearing Officer’s Report for identification of the issues addressed at the public hearing, identification of the parties’ final proposals, and the evidence supporting or opposing those proposals.

DECISION

IT IS THEREFORE DECIDED AND ORDERED:

A. This Statement of Reasons, as corrected, constitutes the written decision of the Commission’s actions on the proposed regulatory changes in this rulemaking proceeding, and the reasons for those actions. Other written or oral statements by Commission members are not recognized as part of the Commission’s official decision or reasons.

B. The Commission directs the Department to prepare the amendments to the Commission’s surface water quality standards at 20.6.4 NMAC, titled “Standards for Interstate and Intrastate Surface Waters,” in a format acceptable to State Records Administrator for filing as part of the New Mexico Administrative Code. This preparation may include re-numbering and re-lettering of existing sections of the surface water quality standards and correcting any errata consistent with this Statement of Reasons, as corrected.

Issued this 9th day of March, 2022.

New Mexico Water Quality Control Commission

Stephanie Stringer Digitally signed by Stephanie Stringer
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By: Stephanie Stringer, Chair

Certificate of Service

I hereby certify that on March 28, 2022 a copy of the foregoing was emailed to the persons listed below. A copy will be mailed first class upon request.

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