New Mexico Environment Department

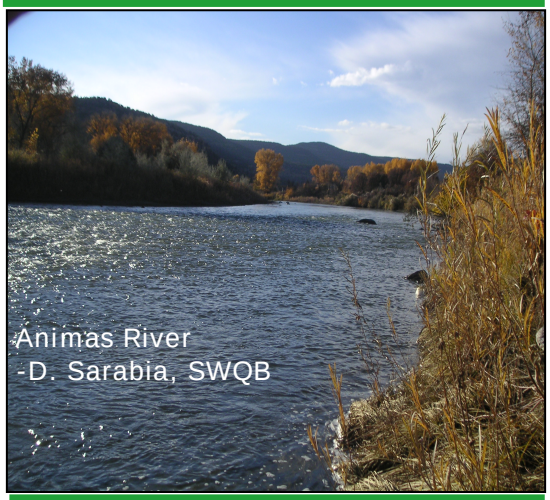
PROTECTING OUR ENVIRONMENT, PRESERVING THE ENCHANTMENT

2013 Triennial Review of the Water Quality Standards Public Comments

The Clean Water Act
33 U.S.C. § 1251

"...restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

"...provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water."



Animas River
-D. Sarabia, SWQB

Public Comment Periods

Scoping Period

April 3 – May 15, 2013

Public Discussion Draft

April 1- May 30, 2014

Comment Contributors

Citizens

Municipalities/Water Districts

Industrial/Trade Groups

Conservation Groups

New Mexico Department of Game and Fish

EPA

Background

On April 3, 2013, the Surface Water Quality Bureau invited public input to identify issues of concern and to propose revisions for consideration in the water quality standards during a Scoping Phase which ended on May 15, 2013. Bureau staff was also available to meet with stakeholder groups, as requested, for informal discussions regarding their issues of concern.

On April 1, 2014, the Bureau published a Public Discussion Draft with proposals for changes to the water quality standards and a comment period for public input. The comment period for the Public Discussion Draft was conducted April 1 – May 30, 2014, and included a 30-day extension which was granted on April 28, 2014.

During comment periods for both the Scoping Phase and Public Discussion Draft, the Bureau received comments from a variety of contributors including the U.S. Environmental Protection Agency (EPA), watershed/river conservation groups, municipalities, water districts, industrial/trade groups, private entities and citizens. Comments are presented in alphabetical order.

There will be additional opportunities for public participation after the SWQB files the petition for a hearing on the revisions to the Surface Water Quality Standards with the Water Quality Control Commission.

We're on the Web!

Information about the Triennial Review is available at: http://www.nmenv.state.nm.us/swqb/Standards/TR2013/index.html

Additional information about New Mexico's water quality standards and related information is also available on NMED's website at: www.nmenv.state.nm.us

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2013 Triennial Review of the Water Quality Standards

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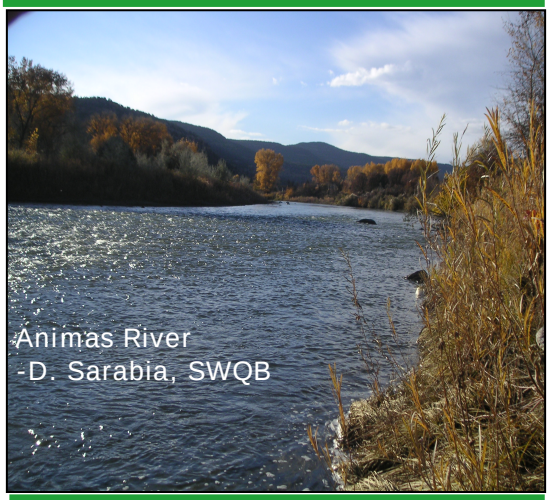

Animas River
-D. Sarabia, SWQB

Public Comment Periods

Scoping Period

April 3 – May 15, 2013

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Citizens

Municipalities/Water Districts

Industrial/Trade Groups

Conservation Groups

New Mexico Department of Game and Fish

EPA

Scoping Comments

Scoping Period: April 3 – May 15, 2013 (43 days)

The request for public input was announced via Bureau website, emails to interested parties list (>800 recipients) and a public service announcement.

- Priority issues were identified in the request for public input.
- Comments received from:
  - 1 Municipality
  - 3 Industrial/Trade Groups or Facilities
  - 1 Conservation/Environmental Group
- All timely comments received are attached in alphabetical order.

We're on the Web!

Additional information about New Mexico's water quality standards and the Triennial Review is available on NMED's website: http://www.nmenv.state.nm.us/swqb/Standards/

From:	Megan Anderson
To:	Pintado, Kristine, NMENV
Cc:	Brian Shields; Rachel Conn
Subject:	Triennial Review scoping comments
Date:	Wednesday, May 15, 2013 6:40:17 AM
Attachments:	comments.Amigos Bravos.scoping.triennial.5.15.13.pdf

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Dear Ms. Pintado,

Attached please find scoping comments for the Triennial Review submitted on behalf of Amigos Bravos. Please let me know if you have any questions about our comments.

Best,
Megan

_____

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please note: I am out of the office on Fridays, but I will respond to you as soon as possible.

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Western Environmental Law Center

Via Electronic Mail

May 15, 2013

Kristine L. Pintado
Water Quality Standards Coordinator
Surface Water Quality Bureau
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Santa Fe, NM 87502
Kristine.Pintado@state.nm.us

Re: Triennial Review Scoping Comments

Dear Ms. Pintado:

On behalf of Amigos Bravos, Friend of the Wild Rivers, I am writing to submit comments in response to the New Mexico Environment Department Surface Water Quality Bureau's ("NMED") request for scoping comments for the upcoming Triennial Review of Water Quality Standards. Amigos Bravos is a statewide river conservation organization guided by social justice principles. Amigos Bravos' mission is to protect and restore the rivers of New Mexico, and ensure that those rivers provide a reliable source of clean water to the communities and farmers that depend on them, as well as a safe place to swim, fish, and go boating. Amigos Bravos works locally, statewide, and nationally to ensure that the waters of New Mexico are protected by the best policy and regulations possible. In this capacity, Amigos Bravos works to make sure that New Mexico's water quality standards are protective enough to support the diverse human and non-human uses of our state's water resources.

Generally, we note that the State's obligations pursuant to the Clean Water Act ("CWA") are to "protect the public health or welfare, enhance the quality of water," and wherever possible, to ensure that water quality allows for the "protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1313(c)(2)(A); 33 U.S.C. § 1251(a)(2). Similarly, the New Mexico Water Quality Act ("WQA") directs the Commission to adopt standards that "shall *at a minimum* protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act." NM Stat. 74-6-4(D)

(emphasis added). These goals, in particular the emphasis on standards that *enhance* the quality of water, represent what is a fundamental truth in New Mexico—that water is the lifeblood of our communities, ecosystems, economy, and way of life. We call upon NMED to keep these goals in mind as it proceeds with the Triennial Review process.

Below, we provide both comments on NMED's suggested changes as well as suggestions of issues that we believe need to be addressed in the upcoming review.

COMMENTS ON NMED'S SUGGESTED REVISIONS:

• Revisions to segment-specific standards to apply appropriate protections for existing and designated aquatic life uses, particularly in the southern part of New Mexico.

Amigos Bravos looks forward to reviewing NMED's revisions of segment-specific standards and generally supports applying the appropriate protections for existing and designated aquatic life uses. We note, however, that *appropriate* protections are ones that serve to maintain *and restore* the quality of water. 33 U.S.C. § 1251(a). Therefore, as NMED considers what protections to provide for specific segments, it must consider what standards will serve to meet the goals of the Clean Water Act ("CWA"), including the goal that all waters are fishable and swimmable.

• Procedures to allow temporary site-specific standards to be proposed, adopted, and implemented.

Again, Amigos Bravos looks forward to reviewing the specifics of NMED's proposal that would allow for temporary standards to be proposed. However, the idea of temporary, site-specific standards raises some red flags. The power to change water quality is reserved for the Water Quality Control Commission ("Commission"), NMSA § 74-6-4(C), with approval needed from U.S. Environmental Protection Agency ("EPA"). As such, NMED must be careful to ensure that such site-specific, temporary standards do not allow NMED to change the status of a water body and thereby downgrade water quality protections *before* the Commission has had an opportunity to review NMED's actions and provide its approval or disapproval, and the public has had an opportunity to weigh in on the proposed changes; "[n]o regulation or water quality standard or amendment or repeal thereof shall be adopted until after a public hearing." NMSA § 74-6-6(A).

In particular, we are concerned that such temporary site-specific standards could allow for discharges that could cause or contribute to violations of water quality standards, or for temporary degradation of waterways, without adherence to the protections provided by having to go through a process like the Triennial Review, or for consideration of the cumulative impacts of such changes.

We therefore request that when NMED circulates these proposals that it addresses these issues.

• Updates to aquatic life, primary contact recreation and wildlife habitat criteria based on EPA's most recent recommendations.

Amigos Bravos supports NMED's decision to revisit these standards in light of EPA's most recent recommendations. We note, however, that EPA's recommendations should be viewed as guidance for establishing a minimal standard; NMED has the authority to establish stricter standards as necessary to protect New Mexico's people and species. When updating human health standards, such as for primary contact, the state should base criteria on protecting the health of vulnerable populations including children and pregnant mothers. When updating aquatic life and wildlife habitat criteria NMED should take emerging pollutants into consideration, such as pharmaceuticals and personal care products (see further discussion below) -- including the over 150 pollutants identified by EPA.

• Listing of unclassified waters determined to be ephemeral waters (20.6.4.97 NMAC) pursuant to Subsection C of Section 20.6.4.15 NMAC.

Amigos Bravos will provide comment on the reclassification of waters once we have the opportunity to review NMED's proposal.

• Conduct review of waters designated with limited aquatic life and secondary contact uses to ensure these designations are still correct.

Amigos Bravos supports NMED's adherence to the CWA by reviewing waters that are not meeting the fishable/swimmable goals of the CWA to determine whether more protective standards could be added to these waters' designated uses. CWA regulations provide that even if there has been a use attainability analysis ("UAA") conducted on a water body segment that downgrades the uses of segment to uses less protective than those specified in section 101(a)(2) of the CWA, that water body must be reexamined every three years to determine if any changes have occurred in the water body or new information has become available that would create conditions where 101(a)(2) uses are attainable. 40 C.F.R. § 131.20(a). By ensuring this review is completed, NMED can ensure that the UAA process does not become a vehicle for writing off a water body that does not presently meet the goals of the CWA.

• Revisions to clarify applicability of criteria or to correct grammatical errors.

Amigos Bravos of course supports NMED's efforts to clarify and correct the standards.

AMIGOS BRAVOS' ADDITIONAL COMMENTS AND SUGGESTIONS

This section includes initial suggestions. Although we have endeavored to be thorough, as you noted to us in response to our request for an extension of scoping comments, there will be numerous opportunities for public involvement, and we may have additional suggestions as the

process proceeds.

• Acequia Protections

Many New Mexican families use our state's ditches and acequias as places to go fishing, swimming, and, in one outlandish story from the South Valley of Albuquerque, water skiing! In places like Albuquerque, where much of the Rio Grande is fenced off prohibiting public access, many families picnic next to and recreate in acequias. There are many existing uses of these waters that need protections to ensure public safety and health. The exemption, listed under 20.6.4.11(I)(2), exempting pollution caused by the "reasonable operation of irrigation and flood controls facilities" from numeric criteria for temperature, dissolved solids, dissolved oxygen, sediment or turbidity could remain intact and could potentially be expanded to always apply to acequia/ditch waters. We recommend that NMED consider proposing standards for acequia/ditch waters that include protections for E.coli and toxic pollutants such as PCBs and heavy metals.

• Biocriteria

Amigos Bravos supported the Department's proposals regarding nararive biocriteria in the last Triennial Review. We noted, however, that while establishing narrative biocriteria is a very good start, both narrative *and* numeric biocriteria are essential for protecting the health of New Mexico's rivers and other waterbodies. We therefore request that NMED consider developing numeric biocriteria.

• Climate Change

Amigos Bravos again urges NMED to consider the future, long reaching effects of climate change on water quality in New Mexico's rivers and streams. Amigos Bravos' proposal regarding climate change in the last Triennial Review sparked a robust discussion about climate change and its impacts. Although Amigos Bravos withdrew its proposal in the last Triennial Review, we again note that science regarding climate change is becoming only more dire, and the impacts we are feeling and will continue to feel must be addressed. Climate change will result in changed precipitation patterns, a likely decrease in water supply, and at the very least, will add another pressure to already over-allocated water resources in the state. NMED must address how best to protect our scarce water resources in the face of these changes.

• E. coli Standard

E. coli has become an issue in many of our state's waters. Amigos Bravos recommends that NMED consider a general numeric standard for E. coli instead of only segment-specific standards.

• Flow

Amigos Bravos requests that NMED address the issue of flow – which can prevent the attainment of all manner of water quality standards – so that it does not become the elephant in the room. The Department has recognized that "the lack of flow is a significant cause for impairment in New Mexico's waters," and that the 303(d)/305(d) Integrated Report identifies water bodies that do not support aquatic life uses due to low-flow conditions. Indeed, the Department has even acknowledged, that while unenforceable, a planning document "could potentially identify strategies for augmenting the flow, e.g., acquisition of water rights, voluntary agreements with water right holders, negotiations with federal water managers." Amigos Bravos urges the Commission to address the issue of flow to ensure that water quality and water quantity are not artificially separated.

• "Limited Aquatic Life" Use

As noted in the last Triennial Review, Amigos Bravos believes that this designated use is ambiguous and confusing. We should return to the pre-2005 policy of setting segment specific uses in the rare case where the other aquatic life uses are not attainable. For instance, in the case of Sulphur Creek, Section 20.6.4.124 it would be simple to say under paragraph B(3) that, except for subsections I and J of 20.6.4.900, the chronic aquatic life criteria do not apply. The limited aquatic life use adds one more layer of confusion to the standards requiring members of the public to flip back and forth between the segment and the back of the standards. In addition, the limited aquatic life use could be abused to lower water quality standards. It is more appropriate to make segment specific changes in cases where the natural conditions have resulted in an impairment associated with either the chronic or acute aquatic life criteria. This method would allow for more fine tuned standards. For example, in some cases it may be that none of the chronic life criteria are attainable, and therefore all the criteria could be listed as not applying, but, in some other cases, it may be that only a couple of the chronic life criteria do not apply and in those cases these constituents could be listed individually. Getting rid of the limited aquatic life use would not require a large overhaul to the standards as presently only three segments have the limited aquatic life designated use.

Also as Amigos Bravos explained in detail in its comments and proposals in the last Triennial Review, Amigos Bravos does not believe that the Limited Aquatic Life designated use is appropriate for the waters at Los Alamos National Laboratories ("LANL"). Although this use was approved, as noted above, each water body that is not meeting the CWA 101(a)(2) uses must be reexamined every three years to determine if any changes have occurred in the water body or new information has become available that would create conditions where 101(a)(2) uses are attainable. 40 C.F.R. § 131.20(a). We request that NMED revisit the Limited Aquatic Life designated use for the waters at LANL.

• Mixing Zones

As in the last Triennial, Amigos Bravos requests that NMED revisit the standards that allow

mixing zones. We first recommend that mixing zones be eliminated completely in New Mexico' water quality standards. In the alternative, we recommend that NMED at least ensure that New Mexico's mixing zone criteria are at least in line with Environmental Protection Agency ("EPA") regulations. At present, New Mexico's mixing zone policy does not comport with EPA regulations which allow mixing zones only where the mixing zones (1) do not impair the integrity of the water body as a whole; (2) prevent the death of organisms passing through the mixing zone; and (3) do not cause significant health risks. Environmental Protection Agency, Water Quality Handbook, § 5.1 (2007) (available at: http://www.epa.gov/waterscience/standards/handbook/). The water quality standards now do not meet these limitations on mixing zones, and should be revisited.

• Nutrients

NMED should develop nutrient limits to protect New Mexico's waters. Under the current system wastewater treatment plants are only required to treat to secondary treatment technology limits. This needs to be stopped, especially in some of our smaller streams where there is little to no dilution.

• Perchlorate Standard

To protect public health and safety, New Mexico should adopt a Perchlorate standard of 1 ug/L for domestic water supply. Criteria for irrigation, wildlife habitat and livestock watering should be developed as well. New Mexico has increasing problems with perchlorate contamination as is evidenced by the numerous perchlorate hits in both ground and surface water in the past ten years. In the spring of 1999, perchlorate was identified at Holloman Air Force Base when the U.S. Geological Survey collected a surface water sample from the Lost River for the National Park Service and found perchlorate at 16,000 ug/L. In 1995, perchlorate was found in shallow alluvial groundwater in Los Alamos at 180 ug/L. At Fort Wingate, perchlorate was found in one groundwater monitoring well at 2,860 ug/L. Although there is currently no federal drinking water standard for perchlorate, the EPA has considered a reference dose of 1ug/L for perchlorate in drinking water. New evidence shows that many Americans are now consuming large quantities of perchlorate in the vegetables that they eat. It is reasonable to assume that the level of perchlorate that is safe in drinking water will have to be lowered as the amount of perchlorate we ingest from others sources increases. Vegetables irrigated with perchlorate contaminated water concentrates the contaminant by many factors. For example lettuce concentrates perchlorate by an average factor of 65 at levels found in water of 10 to 130 ppb.

• Pharmaceuticals and Personal Care Products

Amigos Bravos supports the development of new water quality standards for Pharmaceuticals and Personal Care Products ("PPCPs"). EPA's lack of action to protect public health from PPCPs by not setting national standards means that the Department and the Commission must take responsibility to protect New Mexico water quality and public health by developing and

proposing PPCPs standards. Amigos Bravos urges the Commission to adopt water quality standards for key PPCPs, such as sulfamethoxazole, loxacin, caffeine, DEET, TDCPP, and tris (2-chlorethyl) phosphate, all of which have been detected in New Mexico's waters. We recommend that the Department test the river at the parts per trillion level for chemicals including but not limited to: chemotherapy drugs, hormones, antidepressants, anti-epileptics, antibiotics, pain relievers, blood pressure diuretics, and plasticizers. Alternatively, a list of chemicals for which to test could be derived from demographics of most commonly used PPCPs in NM. We recommend the prioritization of hormones & plasticizers (such as bisphenol-A) which can be endocrine disruptors at very low doses. A resource to calculate health based screening levels for detected contaminants that do not have US EPA maximum contaminant levels could be the USGS' collaborative project with the US EPA New Jersey Department of Environmental Protection and Oregon Health and Science University. Conducting screening level testing will help NMED identify pollutants of concern and assist in developing water quality standards in the future.

• Piscicides

Amigos Bravos has ongoing concerns about the application of piscicides in New Mexico's waters. We have attached our current piscicide policy as a reference. We urge NMED to address the issues mentioned in our policy in section 20.6.4.16 of the standards.

• Public Water Supply Use

Amigos Bravos urges the commission to adopt use-specific criteria for the public water supply use. Many contaminants listed in 20.6.4.900.J are not removed with conventional treatment practices and thus criteria to protect for this use, taking into account the effectiveness of standard treatment technology, should be adopted.

Please let me know if you have any questions about our comments or suggestions. We thank you for the opportunity to provide scoping comments. We look forward to participating in and working with NMED throughout the Triennial Review process.

Sincerely,

Megan Anderson
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anderson@westernlaw.org

cc. Rachel Conn, Projects Director, Amigos Bravos

From: Saladen, Michael T
To: Pintado, Kristine, NMENV
Cc: Saladen, Michael T; Veenis, Steve; Turner, Gene E
Subject: Triennial Review Soping Period
Date: Wednesday, May 15, 2013 4:48:42 PM

Kristine,

The Department of Energy and Los Alamos National Security, LLC (DOE/LANS) appreciate the opportunity to participate in the next Triennial Review of water quality standards in New Mexico.

DOE/LANS look forward to collaborating with NMED during the upcoming review, including potentially on the evaluation of Pueblo Canyon and associated drainages (Bayo, Rendija, and Guaje canyons) for listing as ephemeral waters in 20.6.4.97 NMAC pursuant to Subsection C of 20.6.4.15 NMAC, and on the development of site-specific water quality criteria for metals under 20.6.4.10 NMAC.

DOE/LANS are interested in participating in the informal pre-rulemaking activities, public meetings, and public hearings for the Triennial Review. Public participation and open discussions are instrumental in keeping the State of New Mexico in step with recent developments in science and EPA guidance. Please call Gene Turner at (505) 667-5794 or Mike Saladen at (505) 665-6085 if you would like to discuss this in more detail. Thank you.

Mike Saladen

From:	Eastep, Tim
To:	Pintado, Kristine, NMENV
Cc:	Hall, E. L. (Ned)
Subject:	Freeport comments on the Triennial Review
Date:	Wednesday, May 15, 2013 3:12:23 PM
Attachments:	FCX Trienninal Review Comments.pdf

Ms. Pintado,
See attached comments.

Please let me know if you have any questions.
Thanks!
Tim

Timothy E. Eastep
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May 15, 2013

Via Electronic Mail (Kristine.Pintado@state.nm.us)

Certified Mail #70121640000216034694
Return Receipt Requested

Kristine L. Pintado
Water Quality Standards Coordinator
Surface Water Quality Bureau
New Mexico Environment Department
P.O. Box 26110
Santa Fe, New Mexico 87502

Re: Freeport-McMoRan Comments On Triennial Review of New Mexico's Surface Water Quality Standards

Dear Ms. Pintado:

Freeport-McMoRan Chino Mines Company, Freeport-McMoRan Tyrone Inc., and Freeport-McMoRan Cobre Mining Company (collectively "Freeport") respectfully submit the following comments on the Surface Water Quality Bureau's ("SWQB") recent public notice on the scoping phase for the upcoming triennial review of New Mexico's Surface Water Quality Standards. We appreciate the opportunity to submit these comments and would welcome the opportunity to meet with you and other SWQB personnel to discuss these comments.

Temporary Site-Specific Standards

SWQB states in its public notice on the triennial review that it is considering procedures to allow temporary site-specific standards to be proposed, adopted and implemented. Freeport supports this proposal for several reasons. First, NMED committed to address this issue during the last triennial review. Second, the proposal to adopt and implement temporary site-specific standards is consistent with current EPA guidance and policy (*see, e.g.,* 63 Fed. Reg. 36759-61 (Jul. 7, 1998); http://water.epa.gov/learn/training/standardsacademy/upload/2007_11_15_standards_academy_basic_course_15-variances-11-15-07.pdf; & Section 5.3 of EPA's Water Quality Standards Handbook 2nd ed., 1994). Third, similar provisions have been adopted and implemented by other western states, and approved by EPA (*see, e.g.,* 5 Colo. Code Regs. 1002 Sec. 31.7(3) & Montana Code 75-5-312). Fourth, temporary site-specific standard procedures would give the SWQB significant flexibility similar to that employed by other western states to address correctable impacts to surface waters, including impacts other than natural background.

Based on past discussions with the SWQB, enclosed is recommended temporary site-specific standards rule language that Freeport proposes that SWQB include in its proposed changes to New Mexico's surface water quality standards.

Criteria for Classifying Waters as Outstanding National Resource Waters

The current criteria in New Mexico's surface water quality standards (*see* 20.6.4.9 NMAC) for identifying waters as "Outstanding National Resource Waters" ("ONRWs") should be narrowed to allow only perennial surface waters to be designated as ONRWs. Given the regulatory and permitting limitations placed on waters designated as ONRWs, ephemeral and intermittent waters should not be subject to such designations. Accordingly, 20.6.4.9 NMAC should be revised as follows:

> **20.6.4.9 OUTSTANDING NATIONAL RESOURCE WATERS:**
> **A. Procedures for nominating an ONRW:** Any person may nominate a PERENNIAL surface water of the state for designation as an ONRW by filing a petition with the commission pursuant to the guidelines for water quality control commission regulation hearings. A petition to designate a surface water of the state as an ONRW shall include:
> **(1)** a map of the PERENNIAL surface water of the state, including the location and proposed upstream anddownstream boundaries;
> **(2)** a written statement and evidence based on scientific principles in support of the nomination, including specific reference to one or more of the applicable ONRW criteria listed in Subsection B of this section;
> **(3)** water quality data including chemical, physical or biological parameters, if available, to establish a baseline condition for the proposed ONRW;
> **(4)** a discussion of activities that might contribute to the reduction of water quality in the proposed ONRW;
> **(5)** any additional evidence to substantiate such a designation, including a discussion of the economic impact of the designation on the local and regional economy within the state of New Mexico and the benefit to the state; and
> **(6)** affidavit of publication of notice of the petition in a newspaper of general circulation in the affected counties and in a newspaper of general statewide circulation.
> **B. Criteria for ONRWs:** A PERENNIAL surface water of the state, or a portion of a PERENNIAL surface water of the state, may be designated as an ONRW where the commission determines that the designation is beneficial to the state of New Mexico, and:
> **(1)** the water is a significant attribute of a state special trout water, national or state park, national or
> state monument, national or state wildlife refuge or designated wilderness area, or is part of a designated wild river under the federal Wild and Scenic Rivers Act; or
> **(2)** the water has exceptional recreational or ecological significance; or
> **(3)** the existing water quality is equal to or better than the numeric criteria for protection of aquatic life and contact uses and the human health-organism only criteria, and the water has not been significantly modified by human activities in a manner that substantially detracts from its value as a natural resource.
> **C.** Pursuant to a petition filed under Subsection A of this section, the commission may classify a PERENNIAL surface water of the state or a portion of a PERENNIAL surface water of the state as an ONRW if the criteria set out in Subsection B of this section are met.

Site-Specific Standards for Irreversible Man-Induced Conditions

Consistent with the reasoned approach of Colorado, SWQB should consider amending the site-specific standard provisions (*see* 20.6.4.10(D) NMAC) to allow for setting of site-specific standards to account for irreversible man-induced conditions. Colorado's surface water quality standards allows its Water Quality Control Commission to "adopt site-specific . . . standards equal to the existing quality of . . . state surface waters where evidence has been presented that . . . irreversible man-induced ambient water quality levels are higher than [the default standards] but are determined adequate to protect classified uses." 5 Colo. Code Regs. 1002-31.7(1)(b)(ii). This approach would help to avoid unnecessary impaired water listings, TMDL development and implementation, and other wasted resources in attempting to address issues that not only cannot be remedied, but do not impair the designated use to which the site-specific criteria apply.

Freeport recommends that 20.6.4.10(D) NMAC be revised as follows:

D. Site-specific criteria.
(1) The commission may adopt site-specific numeric criteria applicable to all or part of a surface water of the state based on relevant site-specific conditions such as:
(a) actual species at a site are more or less sensitive than those used in the national criteria dataset;
(b) physical or chemical characteristics at a site such as pH or hardness alter the biological availability and/or toxicity of the chemical;
(c) physical, biological or chemical factors alter the bioaccumulation potential of a chemical;
(d) the concentration resulting from natural background exceeds numeric criteria for aquatic life, wildlife habitat or other uses if consistent with Subsection E of 20.6.4.10 NMAC;
(e) THE CONCENTRATION RESULTING FROM IRREVERSIBLE HUMAN-INDUCED AMBIENT WATER QUALITY LEVELS EXCEEDS NUMERIC CRITERIA FOR AQUATIC LIFE, WILDLIFE HABITAT OR OTHER USES; or
(~~e~~f) other factors or combination of factors that upon review of the commission may warrant modification of the default criteria, subject to EPA review and approval.
(2) Site-specific criteria must fully protect the designated use to which they apply. In the case of human health-organism only criteria, site-specific criteria must fully protect human health when organisms are consumed from waters containing pollutants.
(3) Any person may petition the commission to adopt site-specific criteria. A petition for the adoption of site-specific criteria shall:
(a) identify the specific waters to which the site-specific criteria would apply;
(b) explain the rationale for proposing the site-specific criteria;
(c) describe the methods used to notify and solicit input from potential stakeholders and from the general public in the affected area, and present and respond to the public input received;
(d) present and justify the derivation of the proposed criteria.
(4) A derivation of site-specific criteria shall rely on a scientifically defensible method, such as one of the following:
(a) the recalculation procedure, the water-effect ratio for metals procedure or the resident species procedure as described in the water quality standards handbook (EPA-823-B-94-005a, 2nd edition, August 1994);

(b) the streamlined water-effect ratio procedure for discharges of copper (EPA-822-R-01-005, March 2001);
(c) the biotic ligand model as described in aquatic life ambient freshwater quality criteria - copper (EPA-822-R-07-001, February 2007);
(d) the methodology for deriving ambient water quality criteria for the protection of human health (EPA-822-B-00-004, October 2000) and associated technical support documents;
(e) A DETERMINATION OF THE AMBIENT WATER QUALITY LEVEL AS A RESULT OF IRREVERSIBLE HUMAN-INDUCED CONDITIONS; or
(~~e~~f) a determination of the natural background of the water body as described in Subsection E of
20.6.4.10 NMAC.

Application of Wildlife Habitat to Ephemeral Waters

Freeport questions the application of the wildlife habitat use (and corresponding criteria) to unclassified ephemeral waters (*see* 20.6.4.97 NMAC). Such a use should not be presumed and should be imposed only on a segment-specific basis when such a use has actually been demonstrated. Accordingly, 20.6.4.97 NMAC should be revised as follows:

20.6.4.97 EPHEMERAL WATERS - Ephemeral unclassified waters of the state as identified below and additional ephemeral waters as identified on the department's water quality standards website pursuant to Subsection C of 20.6.4.15 NMAC.
A. Designated Uses: livestock watering, ~~wildlife habitat,~~ limited aquatic life and secondary contact.
B. Criteria: the use-specific criteria in 20.6.4.900 NMAC are applicable to the designated uses.
C. Waters:

Compliance with Chronic Water Quality Criteria

Freeport believes that more specificity should be placed in the standards (*see* 20.6.4.12(B) NMAC) regarding compliance with chronic water quality criteria. Currently, the standards simply state that compliance will be determined from the arithmetic mean of the analytical results of samples collected using applicable protocols. There is no definition around how many samples must be collected or what are the applicable protocols. Without more specificity, the standards are not clear or scientifically credible.

20.6.4.12(B) NMAC should be revised as follows:

20.6.4.12 COMPLIANCE WITH WATER QUALITY STANDARDS:

B. Compliance with chronic water quality criteria shall be determined from the arithmetic mean of the analytical results of THE LAST FOUR samples TAKEN AT LEAST 24-HOURS APART AND collected using applicable protocols. Chronic criteria shall not be exceeded more than once every three years.

Thank you again for the opportunity to submit the above comments in response to the SWQB's triennial review scoping public notice.

Sincerely,

Timothy E. Eastep, Senior Manager
New Mexico Administration

TEE
Enclosure
20130515-003

c. w/ Enclosure

Sherry Burt-Kested, Freeport-McMoRan Copper and Gold
Martin Soltero, Freeport-McMoRan Copper and Gold
Ned Hall, Freeport-McMoRan Copper and Gold
Lee Decker, Gallagher & Kennedy

FREEPORT PROPOSED LANGUAGE
FOR TEMPORARY SITE-SPECIFIC CRITERIA PROVISION

1. The Commission may adopt temporary site-specific criteria applicable to all or part of a surface water of the state if achieving one or more of the otherwise-applicable criteria is not feasible in the short term due to one of the factors listed in 40 CFR 131.10(g). All other criteria remain applicable to the surface water.

2. Temporary site-specific criteria do not exempt any discharge from compliance with applicable technology-based effluent limits.

3. Any person may petition the Commission to adopt temporary site-specific criteria. A petition shall include:

   a. An identification of the specific criteria and surface waters for which temporary site-specific criteria are being sought;

   b. A demonstration that achieving the otherwise-applicable criteria is not feasible in the short term due to one or more of the factors listed in 40 CFR 131.10(g);

   c. Identification and justification of the proposed temporary criteria based on a demonstration that the proposed temporary criteria reflect the application of feasible technology and practices;

   d. A discussion of the progress expected to be achieved during the term of the temporary criteria and a plan for tracking progress; and

4. The Commission may include conditions to the approval of site specific criteria.

5. Temporary site-specific criteria shall be reevaluated during each triennial review of the state surface water quality standards. The Commission may renew temporary site-specific criteria during the triennial review if the requirements of paragraph 3 are met. Upon expiration of any temporary criterion, the petitioner shall comply with the otherwise applicable criterion unless the temporary criterion has been renewed.

From:	Joshua G. Rosenblatt
To:	Pintado, Kristine, NMENV
Cc:	Hogan, James, NMENV; Adrienne Widmer
Subject:	Triennial Review 2013 Comments Las Cruces Utility
Date:	Wednesday, May 15, 2013 5:07:09 PM
Attachments:	LCU Triennial Review Comments NMED15May2013.pdf

Ms. Pintado:

Attached please find an electronic copy of initial comments towards the Triennial Review with regards to the Lower Rio Grande and the segment flowing through the City of Las Cruces.
I appreciate this opportunity to comment at this initial phase and will continue to work closely with NMED as this process proceeds locally and regionally.

Thank you,

Joshua Rosenblatt
Regulatory Environmental Analyst
Las Cruces Utilities
Regulatory Environmental Services & Technical Support
(575)528-3704

City of Las Cruces
PEOPLE HELPING PEOPLE

May 13, 2013

Ms. Kristine L. Pintado
Water Quality Standards Coordinator / Surface Water Quality Bureau
New Mexico Environment Department (NMED)
PO Box 26110, Santa Fe, NM 87502
Kristine.Pintado@state.nm.us

RE: Triennial Review, Proposed Revisions for NMED's Consideration.

Dear Ms. Pintado;

Pursuant to the Public Notice published on the NMED's Surface Water Quality Bureau's Web Site, Las Cruces Utilities (LCU) submits herein formal comments on proposed revisions to The Water Quality Standards (20.6.4 NMAC).

LCU proposes the following revisions to be advanced:

Revise NMAC 20.6.4.101, *Section A,* ***Rio Grande Basin, Designated Uses*** to reflect the result of the 2008 Judicial Proceedings on the lower Rio Grande within the City Limits. LCU reminds NMED of the 2008 ruling by judicial proceedings on the lower Rio Grande within the City Limits that Secondary Contact is the official contact designation. A copy of this ruling shall be provided.

A proposed revision is the addition of the following highlighted language in the current rule; 20.6.4.101 A. *Designated Uses: irrigation, marginal warm water aquatic life, livestock watering, wildlife habitat and primary contact* ***except for the segment within the Las Cruces City Limits where secondary contact is the applicable contact designation.***

Provide revisions to the definitions in 20.6.4 NMAC that are reflective of time periods when there is a persistent drought. The proposed revisions consist of the inclusion of a definition for stream flow that is external to the three existing stream flow definitions (ephemeral, intermittent, and perennial), and is reflective of the absence of stream flow during droughts with the sole exception of intermittent released from a reservoir. Suggested language reads as: ***"Drought Flow" when used to describe a surface water of the state means the water body segment typically does not contain water throughout the year other than the effluent flow from a POTW.***

LCU submits these comments with the understanding that further comments are allowed to be submitted for NMED's consideration during the time period allowed for Public Input.

LCU appreciates the opportunity to provide these comments to the NMED. It is LCU's intent to continue good-faith, constructive dialogue with NMED during this Triennial Review Process regarding issues specific to the section of the Rio Grande that are applicable to LCU. In addition, LCU formally supports the comments and positions of the New Mexico Municipal Leagues Environmental Quality Association as they advance considerations specific to the discharge locations of their individual Member's Point Sources.

If you have any questions with the information contained in these comments, please don't hesitate to contact me to discuss further.

Sincerely,

Joshua Rosenblatt, MPA
Regulatory and Environmental Analyst
Board Member NMML EQA

CC: Dr. Jorge Garcia, P.E., Utilities Director
Ms. Adrienne L. Widmer, P.E., Administrator, RES-TS
Mr. Eric Lopez, Administrator, Water Resources, LCU
Mr. Mark Rodriguez, Manager Pollution Prevention Programs, LCU
NMMLEQA Members

From:	Jennifer A. Clements
To:	Pintado, Kristine, NMENV
Cc:	Stuart R. Butzier
Subject:	Triennial Review of Water Quality Standards - Comments from Peabody Energy
Date:	Wednesday, May 15, 2013 3:37:35 PM
Attachments:	L.to SWQB with Scoping Phase Comments (SRB Letterhead) (W1928110).PDF

Dear Ms. Pintado,

Please find attached Peabody Energy's comments for the Triennial Review of Water Quality Standards.

Thank you,
Jennifer Clements

MODRALL SPERLING

Jennifer A. Clements
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MODRALL SPERLING

LAWYERS

May 15, 2013

Stuart R. Butzier
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sbutzier@modrall.com

Sent Via E-Mail and U.S. Mail

Kristine L. Pintado, Water Quality Standards Coordinator
Surface Water Quality Bureau
PO Box 26110, Santa Fe, NM 87502
Fax: 505-827-0160
Email: Kristine.Pintado@state.nm.us

Re: Triennial Review Scoping Phase Comments

Dear Ms. Pintado:

The New Mexico Environment Department's Surface Water Quality Bureau ("Bureau") announced that it has begun preparations for the next Triennial Review of New Mexico's Surface Water Quality Standards and has invited the public to identify issues of concern, propose revisions for consideration and to comment on specific issues already identified by the Bureau. Peabody Energy ("Peabody") appreciates the opportunity to comment and give input during this scoping phase of the Triennial Review.

Proposal to Exclude Certain Man-Made Ponds from Human Contact Standards

Peabody encourages the Bureau to propose and support a revision to New Mexico's Surface Water Quality Standards that will clarify that human contact standards do not apply to man-made ponds and wetlands that are currently used or will eventually be used for livestock watering and/or wildlife habitat purposes and which were originally built for livestock watering and/or wildlife habitat purposes or for water control purposes as provided for under various environmental statutes. Specifically, Peabody proposes the following amendment:

> Notwithstanding the listing of designated uses for ephemeral, intermittent or perennial unclassified waters in 20.6.4.97-.99, or any other provisions in these regulations, it is not the intent of these regulations to require man-made ponds or man-made wetlands which are used or intended to be used for livestock watering and/or wildlife habitat purposes and that were built for such purposes or for wastewater treatment, stormwater treatment, surface water control, flood control, erosion control, diversion of water from disturbed areas, reclamation, contamination containment, or environmental mitigation or remediation purposes pursuant to either the federal CWA, CERCLA, RCRA, or SMCRA, or New Mexico's Mining Act or Water Quality Act, to meet primary or secondary human contact standards. This exclusion does not

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> include man-made ponds or man-made wetlands that are waters of the United States, as defined by the CWA, unless they no longer remain a water of the United States because they have been legally converted

This amendment was also proposed by Peabody during the last Triennial Review, and the reasons supporting its adoption were discussed fully in Peabody's testimony and other filings. This letter will therefore only briefly address why this proposed amendment is necessary and important to the mining and ranching communities in New Mexico. For more information and reasons supporting this proposal, Peabody invites the Bureau to review its filings in the last Triennial Review, including the Pre-Filed Testimony of Mr. John Cochran, A Witness on Behalf of Peabody Energy (and accompanying exhibits), the Pre-Filed Rebuttal Testimony of Mr. John Cochran, A Witness on Behalf of Peabody Energy (and accompanying exhibits), and Peabody Energy's Proposed Statement of Reasons and Closing Legal Argument. While the Commission did not adopt Peabody's proposal in the last Triennial Review, Peabody believes the Commission had sufficient evidence and reasons to support its adoption. In addition, Peabody notes that the Commission was ultimately supportive of Peabody's concern that its man-made ponds should not be subjected to human contact standards.

Peabody, along with other mining companies, utilizes impoundments to treat or contain water at its surface coal mining operations in New Mexico. While these man-made impoundments are currently used to primarily ensure water quality standards are maintained at its mining facilities, they are also opportunistic sources of water for livestock grazing and wildlife habitat. At Peabody's mine sites, surface owners who currently use the ponds to water their livestock have specifically requested Peabody to leave as many ponds as possible after active mining to enhance the land for the post-mining use of livestock grazing. Peabody's permitted reclamation and post mining land use plans therefore include leaving impoundments on the land for livestock and wildlife purposes.

Even if a man-made pond on a mining site is categorized as a waste treatment system during active mining and reclamation (and hence exempt from water quality standards), the waste treatment exclusion will likely expire when the pond is turned over to the prospective landowner for the sole uses of livestock and wildlife. As such, there is considerable uncertainty and a real threat that these man-made ponds would need to meet human contact standards post-mining regardless of the fact that they have been regulated in the past to meet the designated uses of livestock watering and wildlife habitat and will be used solely for such purposes in the future. Applying human contact standards at the post-mining stage could render these ponds unsuitable, force their removal or create additional time consuming and expensive reclamation requirements that will delay the return of the land to the surface owner. Thus, without this proposal, mining companies like Peabody may be incentivized to remove their impoundments as part of their reclamation programs and thereby essentially do away with water that has been opportunistically collected in these impoundments.

Peabody's proposal is a chance to clarify or even make a reasonable accommodation to recognize the reality of ponds and wetlands used solely for livestock watering and wildlife. Ponds that are made for and used for livestock

watering and wildlife habitat purposes almost by definition are not going to be able to achieve human contact standards. Livestock watering ponds, where cattle walk, drink and excrete, simply are not compatible with recreational human uses, particularly swimming. While it has been argued that livestock ponds do not pose a regulatory issue, and thus owners may avoid enforcement of water quality standards, providing certainty that man-made livestock ponds will not be required to meet incompatible human contact standards is important to the mining and ranching communities in New Mexico. Moreover, if such ponds do not pose a regulatory issue, this only supports that Peabody's proposed amendment is reasonable and consistent with the State's water quality goals.

Peabody also recognizes that the State must ensure that all "waters of the United States" meet human contact standards. This amendment explicitly states that it does not apply to "waters of the United States," and thus it is consistent with the Clean Water Act's requirements and the Environmental Protection Agency should have no basis to object this revision.

Listing of Unclassified Waters Pursuant to 20.6.4.15(C) NMAC

In June 2012, the New Mexico Environment Department completed a use attainability analysis known as the *UAA for Unclassified Non-Perennial Watercourses with NPDES Permitted Facilities* (hereafter "NPDES UAA"), which, among other watercourses, examined the Mulatto Canyon Arroyo in Peabody's Lee Ranch Mine and the Inditos Draw and an Unnamed Tributary to Kim-me-ni-oli Wash within Peabody's El Segundo Mine. The NPDES UAA ultimately determined that these three specific watercourses within Peabody's mines were "ephemeral" in nature, and therefore downgraded the designated uses to livestock, limited aquatic and secondary contact. Peabody agrees that these watercourses are neither intermittent nor perennial and therefore supports the listing of these three surface waters as ephemeral pursuant to Subsection C. of 20.6.4.15 NMAC.

Again, Peabody appreciates the opportunity to provide preliminary comments and looks forward to participating in the upcoming Triennial Review. Peabody is available to answer any questions and welcomes the opportunity to meet with Bureau representatives to discuss its proposed amendment.

Very truly yours,

Stuart R. Butzier

cc: Jennifer A. Clements
John Cochran
Mark Hiles

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New Mexico Environment Department

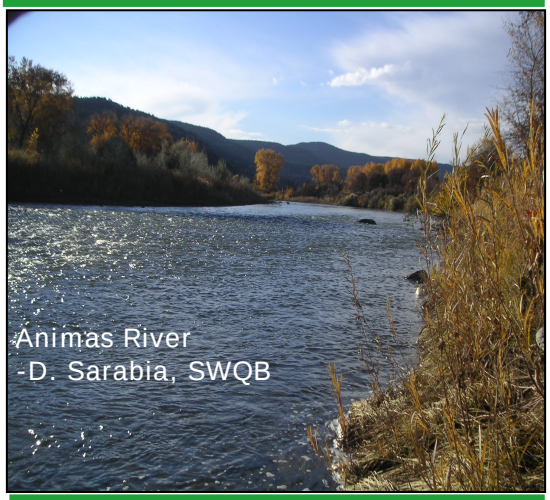
PROTECTING OUR ENVIRONMENT, PRESERVING THE ENCHANTMENT

2013 Triennial Review of the Water Quality Standards

The Clean Water Act
33 U.S.C. § 1251

"...restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

"...provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water."



Animas River
-D. Sarabia, SWQB

Public Comment Periods

Scoping Period

April 3 – May 15, 2013

Public Discussion Draft

April 1- May 30, 2014

Comment Contributors

Citizens

Municipalities/Water Districts

Industrial/Trade Groups

Conservation Groups

New Mexico Department of Game and Fish

EPA

Public Discussion Draft Comments

Comment Period: April 1 – May 30, 2014 (60 days)

The request for public input was announced via Bureau website, emails to interested parties list (>800 recipients) and a public service announcement.

- Draft of revised water quality standards proposals released with request for public input.
- Comments received from:
  - Citizens
  - Municipalities/Water Districts
  - Industrial/Trade Groups
  - Conservation/environmental groups
  - EPA
- All timely comments received are attached in alphabetical order.

Additional information about New Mexico's water quality standards and the Triennial Review is available on NMED's website:

http://www.nmenv.state.nm.us/swqb/Standards/

Because Water Matters
P.O. Box 238, Taos, NM 87571
Telephone: 575.758.3474
Fax: 575.758.7345

May 22, 2014

Via Electronic Mail

Kristine L. Pintado
Water Quality Standards Coordinator
Surface Water Quality Bureau
PO Box 26110
Santa Fe, NM 87502
Kristine.Pintado@state.nm.us

Re: NMED's 4/1/14 Discussion Draft for the New Mexico Triennial Review

Dear Ms. Pintado,

Amigos Bravos is a statewide river conservation organization guided by social justice principles. Amigos Bravos' mission is to protect and restore the rivers of New Mexico, and ensure that those rivers provide a reliable source of clean water to the communities and farmers that depend on them, as well as a safe place to swim, fish, and go boating. Amigos Bravos works locally, statewide, and nationally to ensure that the waters of New Mexico are protected by the best policy and regulations possible. In this capacity, Amigos Bravos works to make sure that New Mexico's water quality standards are protective enough to support the diverse human and non-human uses of our state's water resources.

Below, we provide both comments on NMED's proposed changes as well as some additional changes that we believe will protect and enhance water quality in New Mexico.

1. 20.6.4.10.F - Temporary Criteria Proposal

The Department's temporary criteria provision provides a process through which polluters can petition for receiving waters that are already impaired and not meeting water quality standards to be downgraded to less protective standards for 3 years with potential for renewal. As a result of lowered standards, polluters may obtain weaker associated permit limits. We have numerous concerns about allowance for temporary

criteria in New Mexico, and recommend that the provision be deleted from NMED's proposal.

As an initial matter, why does New Mexico need this provision? Amigos Bravos is not aware of any facility in New Mexico being denied a permit to discharge because it could not meet effluent limits. This lack of need may be due to the fact that there are already mechanisms in place to address situations where a permitting facility truly cannot meet standards. EPA may include a compliance schedule in a facility's permit allowing the permittee time to come into compliance with effluent limits. For example, in the case of Los Alamos National Laboratory, a facility with hundreds of discharges and complex problems of legacy pollution, EPA designed a compliance schedule that gave the facility time to come into compliance, while still maintaining water quality standards of the receiving waters. In addition, the standards already include provision for site-specific criteria equal to the concentration of natural background, *see* NMAC 20.6.4.10(D), thus providing a mechanism to ensure that natural background is taken into account. If the Department decides to include this proposal, we request that additional information be included in the basis for change as to why this proposal is necessary.

We also request that the Department explain why it is fashioning the temporary criteria provision as a water-body or water segment based approach instead of a discharger or multiple-discharger based model. Although the water-body approach is one way to approach a variance provision, it raises some complications about implementing the provision – as we note in our comments below – and thus we would like more information about the Department's approach. For example, we are concerned that one polluter on a stream segment can apply for temporary criteria that will then be applied to all dischargers on that segment. If, instead, the Department used a discharger-based approach, it could address the variance to an individual discharger rather than having the criteria for the entire water body changed. This approach would require that other dischargers on the water-body at issue also demonstrate their need for the variance, rather than having dischargers which do not need the variance getting a free pass to discharge additional pollution into an impaired stream that should be receiving less pollution as a result of its impaired status.

We would also like additional information as to why the Department is proposing a variance provision aimed at already impaired waters. Our understanding is that the Department feels that these are the waters for which an alternate plan to meet water quality standards is necessary, but the proposal also specifically notes that adoption of temporary criteria "will not cause loss or impairment of an existing use." Clean Water Act regulations define "existing use" to mean "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." We do not understand how the Department intends to implement temporary criteria without causing a loss or impairment of an existing use, in particular given that the water-bodies subject to the temporary criteria are already impaired.

While we appreciate the Department limiting this pollution-allowing provision so that it does not apply to all water-bodies in the state, it seems counterintuitive that impaired

water-bodies are the category of waters in which more pollution will be facilitated. The on-the-ground reality is that this provision will result in the discharge of increased concentrations of parameters that are causing the impairment in the first place, which will only exacerbate the problem and make use attainment even more difficult. In fact, Amigos Bravos has a hard time imagining a scenario where a temporary criterion will not result in contributing to the impairment of an existing use, especially since 20.6.4.10(3) rightly outlines that use attainment will be based on the original criteria.

Furthermore, it is not clear from the proposal whether new discharges will be allowed to impaired waters as a result of relaxed criteria. CWA regulations and case law prohibit discharge permits for new or increased discharges where the imposition of conditions in the permit cannot ensure compliance with water quality standards. 40 C.F.R. § 122.4; *Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007 (9th Cir. 2007), cert. denied, 129 S. Ct. 896 (2009); EPA has also counseled that "the interim requirements do not replace the designated use and criteria for the water body as a whole, therefore, any implementation of CWA section 303(d) to list impaired waters must continue to be based on the designated uses and criteria for the waterbody rather than the interim requirements." *Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers FAQs*, EPA Publication No. EPA-820-F-13-012 (March 2013); *see also Water Quality Standards; Clarifications*, 78 Fed. Reg. 54518 (September 4, 2013) (any implementation of CWA section 303(d) must continue to be based on the underlying designated uses and criteria for the water body rather than the interim requirements). As such, the Department cannot allow for new permits based on relaxed standards; rather, the Department must continue to seek to restore water quality to its designated uses, and original criteria. Consistent with these interpretations, and the mandates of the CWA, any variance provision should be specific in disallowing new or increased discharges.

We are also very concerned that this provision essentially provides a shield to polluters from Clean Water Act citizen lawsuits, and therefore takes away the public's ability under the Clean Water Act to ensure that their rivers and streams are not being polluted. Sometimes it is only through citizen action that progress is made towards meeting the goals of the Clean Water Act. Amigos Bravos would hope that the Department would like to maintain all possible avenues provided under the Clean Water Act to achieve New Mexico's water quality goals. While we understand that the Department feels the need for this provision to facilitate compliance with the anticipated numeric nutrient criteria, Amigos Bravos believes that this proposal is too broad and likely will be used in a much more far-reaching capacity than just for nutrient criteria. If indeed this provision is specifically for nutrients and the Department plans to include this provision in its final petition, which we hope they will not, Amigos Bravos suggests modifying the provision to apply only to nutrients. This could be done under F(1), with a list of what constitutes a nutrient (Phosphorus, Nitrate, etc..).

If the Department includes this provision in its final proposal, we recommend that the Department make the following changes, which we feel will make the proposed provision more protective of water quality:

- **20.6.4.10(F)(1)**; Consistent with 40 C.F.R. § 131.10(g), temporary criteria should not be allowed where the designated use is also an existing use. Amigos Bravos does not believe downgrading criteria where the waterbody is being used as designated is appropriate or advisable. Although we understand that the Department has limited the variance provision to situations where the waterbody is already on the 305(b)/303(d) list, every effort should be made to bring a waterbody into compliance where the water quality is threatening existing uses, and no allowance should be given for delay.

- **20.6.4.10.F(1)**: EPA's proposed rule regarding variances includes a provision that, "a state or tribe must include an identification and documentation of any cost-effective and reasonable BMPs for nonpoint sources related to the pollutant(s) and location(s) specified in the variance that could be implemented water body wide to make progress towards attaining the designated use and criterion." *Water Quality Standards; Clarifications*, 78 Fed. Reg. 54518 (September 4, 2013). Given that the Department is styling its variance provision for use for waterbodies or water segments, and given EPA's proposed rule, we recommend that the Department include a requirement, as section (1)(d), that before a variance can be granted the petitioner must demonstrate: "the state has identified and documented any cost-effective and reasonable BMPs for nonpoint sources related to the pollutant(s) and location(s) for which the variance is being requested that could be implemented waterbody-wide to make progress towards attaining the designated use and criterion, that those measures have been implemented, and that the proposed temporary criterion still represents the highest degree of protection feasible in the short term." This recommendation is consistent with EPA's proposal: "Because other sources of pollution (e.g., nonpoint sources) can have a significant bearing on whether the designated use and associated criterion for the entire water body are attainable, it is essential for states and tribes to consider and provide information to the public regarding the impact that controlling other sources through application of cost-effective and reasonable BMPs could have on water quality before granting a waterbody variance." *Id.*; *see also* 40 C.F.R. § 131.10(d) and (h)(2). To ensure that these BMPs are not just paper tigers, the Department should also require that the nature and extent of the BMPs are publicly available, that they are enforceable, and that failure to implement the BMPs results in penalties.

- **20.6.4.10.F(2)**: It is Amigos Bravos' understanding that this provision is not intended to weaken standards on a statewide basis but rather is intended to be used for specific waterbodies and pollutants on a case-by-case basis. Amigos Bravos proposes to replace the "or" found in the first sentence of this paragraph with an "and" to ensure that this provision is used in a targeted capacity and not used to downgrade standards on a regional or statewide basis.

- **20.6.4.10.F(4)**: We understand the Department plans to include such additional requirements for petitions for temporary criteria such that there are clear guidelines by which to judge initial proposals as well as petitions for renewal. We support the inclusion of such guidelines. Specifically, the requirement included at 20.6.4.10.F(4)(c) to submit a plan and timetable for achieving compliance with the original criterion should be expanded upon to include specific conditions. These specific conditions should become prerequisites that must be met before a petitioner is eligible for a temporary criteria renewal. Progress on achieving water-body wide measures to decrease non-point source pollution as detailed above in our comments on 20.6.4.10.F(1) should be one of these renewal conditions.

- **20.6.4.10.F(8)** While New Mexico is traditional very responsible about holding triennial reviews on a timely basis, other states are not so responsible and often there are much longer periods in between triennial reviews. There is no guarantee that New Mexico will always be timely in conducting the triennial review, therefore Amigos Bravos suggests including the following language "Unless renewed, a temporary criterion shall expire no later than the effective date of the next triennial review required by Subsection A of 20.6.4.10 NMAC **or 5 years, whichever occurs first**."

- **Inclusion of an Appeal process***:* Other state with variance provisions include in those provisions an appeal process by which an individual variance may be appealed. We understand that a decision by the WQCC would be reviewable as other decisions of the WQCC presently are, but we request that the Department confirm, and reference any review procedures.

Appropriate protections are ones that serve to maintain and restore the quality of water 33 U.S.C. § 1251(a). The temporary criteria proposal does neither and therefore should not be included in the Department's final proposal.

2. 20.6.4.16 - Planned Use of a Piscicide

Amigos Bravos is opposed to the Department's proposal to eliminate the requirement for a public hearing for piscicide petitions. Hearings are essential opportunities for the public to participate in protecting their watersheds and it is not appropriate to deny the public this opportunity, especially when an action to discharge poison in the state's rivers and streams is involved.

In addition, the commission should maintain the ability as provided in 20.6.4.16.A(10) to require additional information if necessary in cases where an NPDES permit has been obtained for piscicide application. In the Department's current proposal in 20.6.4.16.F the commission only maintains the ability to require post treatment assessment and monitoring as required in 20.6.4.16.A(9) but does not maintain the ability to require additional information. Section 20.6.4.16 should be modified to include this authority.

3. Proposal to reclassify segments previously designated with a secondary contact use with a primary contact use / Review of 101(a)(2) uses as per 40 CFR 131.20(a)
In previous triennial reviews and in our scoping comments for this triennial review, Amigos Bravos, as per 40 C.F.R. § 131.20(a), requested that the Department conduct analyses of New Mexico waters with uses that are not consistent with 101(a)(2) uses to ensure that these water-bodies had an approved Use Attainability Analysis (UAA), and in cases where there was an UAA, determine whether 101(a)(2) uses could now be attainable. Amigos Bravos is thrilled that the Department has undertaken such an effort for several water-bodies and supports the reclassifications from secondary to primary conduct in these waters. These reclassifications will result in better protection of public health across the state.

The Clean Water Act (CWA) requires that states periodically review water-bodies that are not meeting the fishable/swimmable goals ("101(a)(2) uses"). CWA regulations provide that even if there has been a use attainability analysis ("UAA") conducted on a water-body segment that downgrades the uses of segment to uses less protective than those specified in section 101(a)(2) of the CWA, that water-body must be reexamined every three years to determine if any changes have occurred in the water body or new information has become available that would create conditions where 101(a)(2) uses are attainable. 40 C.F.R. § 131.20(a). By ensuring this review is completed, NMED can ensure that the UAA process does not become a vehicle for forever writing off a water body that does not presently meet the goals of the CWA.

In addition to reviewing the water-bodies presented in the Department's discussion draft, Amigos Bravos wonders if the Department has revisited 101(a)(2) use attainment of waters included in sections 20.6.4.113, 20.6.4.124, 20.6.4.126 and 20.6.4.128, all of which do not have 101(a)(2) uses. A review of sections 20.6.4.124, 20.6.4.126 and 20.4.5.128 would be required pursuant to 40 C.F.R. § 131.20(a) as it has been over three years since 101(a)(2) uses were removed from these segments. Especially in light of the new Hydrology Protocol, which was adopted since the uses for these segments were removed, Amigos Bravos requests, if it has not already done so, that the Department undertake a review of 101(a)(2) uses for these segments.

The current UAA for 20.6.4.126 and 20.6.4.128 ("LANL UAA") lists lack of flow as the reason for non-attainment of 101(a)(2) uses. Section 20.6.4.128 has a limited aquatic associated with it and clumps intermittent and ephemeral waters together. The LANL UAA does not distinguish between these two types of waters, yet the current Hydrology Protocol characterizes ephemeral and intermittent waters differently, and calls for marginal warmwater aquatic life protections for intermittent waters and limited aquatic life protections for ephemeral waters (limited aquatic life has substantially weaker applicable criteria). The New Mexico Hydrology Protocol specifically identifies itself as a "guideline to distinguish ephemeral channels from non-ephemeral ones unless there are aquatic macroinvertebrates and/or fish, in which case at least one of the Clean Water Act Section 101(a)(2) objectives is attainable and the stream is at least intermittent (NM

Hydrology Protocol at p.33).” This statement asserts correctly, that if there are macroinvertebrates present, then 101(a)(2) uses are present and the stream deserves corresponding marginal warmwater aquatic life, not limited aquatic life, protections. The LANL UAA is falsely based on the presumption that the presence of fish is the only indicator for a 101(a)(2) aquatic life use (LANL UAA at p. 5 and p. 6). The LANL UAA also states that “a number of non-fish aquatic life populations are sustained along these streams” indicating that the UAA found presence of macroinvertebrates in this segment, which under the current Hydrology Protocol would be evidence of a 101(a)(2) use and therefore an aquatic life use (not a limited aquatic life us) designation would be merited. The Department should conduct a review of 101(a)(2) uses for 20.6.4.128 by implementing the Hydrology Protocol on non-perennial waters at LANL to determine which waters are ephemeral and which waters are intermittent. The current 20.6.4.128 segment should then be separated out into 2 segments, one for intermittent waters and one for ephemeral waters. During the current Triennial review the Department should adopt these 2 segments and then once the Hydrology Protocol has been conducted, the Department should populate the intermittent LANL segment accordingly. This would be similar to what the Department did during the last triennial review by adopting an ephemeral category (section 20.6.4.99) that remained empty until Hydrology Protocols were conducted to populate it.

4. Aluminum Criteria

Amigos Bravos has comments and recommendations on two issues related to Aluminum criteria. a) The proposed change to the NMED WQCC water quality standards with respect to aluminum for pH <6.5, as requested by the EPA, Region Six, and b) The hardness-based standard for aluminum pH 6.5 to 9.0, previously approved by NM WQCC and EPA, Region 6.

a) *Amigos Bravos has several objections to adopting the Department’s proposed change to the NMED WQCC water quality standards with respect to aluminum for pH <6.5*

   -There is no provision in the nationally recommended standard for aluminum for pH conditions 6.5 or less, and the criteria for analysis is for total recoverable, not dissolved.
   -There was no scientific rational stated for such a standard to be implemented; even though there have been many studies published regarding the effects of aluminum on aquatic life under acidic conditions.
   - In the State of Oregon there was a similar situation, where there had been different standards for aluminum in the two pH regions, pH6.5 to 9.0 and less than 6.5, one not hardness-based and one with a hardness qualification. The EPA, Region 10, in its review regarding Oregon’s water quality standards published in January 30, 2013, disallowed the standard for pH less than 6.5. The rational for the disapproval was stated, in part, to be: “This is inconsistent with EPA’s recommendation, which provides that the same numeric concentrations apply at pH values of 6.5 to 9.0 (see Ambient Water Quality Criteria for Aluminum-1988, EPA 440/5-86-008, August 1988).

-In the State of Colorado: “Where pH is less than 7.0 in the receiving water after mixing, either the 87 ug/l chronic total recoverable aluminum criteria or the criteria resulting from the chronic hardness-dependent equation will apply, whichever is more stringent.”

b) *The current hardness-based criteria for aluminum pH 6.5 to 9.0, previously approved by NM WQCC and EPA, Region 6, is not protective of aquatic life and should be replaced with the USEPA recommended dissolved Aluminum criteria of 87 ug/l and 750ug/l that New Mexico had in place prior to 2010, until such time that there is sufficient scientific data to develop a hardness based criteria that is appropriate in western waters.*

- USEPA has not recommended a hardness-based standard for aluminum, at present. One should be developed when adequate studies exist to do so. There is a particular need to investigate the relationships of hardness-based effects of aluminum regarding chronic (long term) conditions and that of pH variance effects under those conditions.
- Montana, Wyoming, and Utah use the current national standard.
- The only states that have adopted hardness-based standards for aluminum (Colorado and New Mexico) did so at the request of mining companies who benefit from the standards, and these standards were based only on a study prepared for those same companies who stood to benefit.
- New Mexico approved the hardness-based standard for aluminum, without modification, as requested by Chevron Mining Inc. EPA, Region 6, while expressing serious reservations about the proposal, approved it with the exception relative to pH <6.5. There are several problems with the NM hardness based standard including:
    - There is no consideration of Al speciation with respect to pH.
    - The chronic standards derivation was simply the result of applying an acute-to-chronic ratio (ACR), as there was not sufficient data to develop a chronic standards derivation independently.
    -
    - The U.S. Fish and Wildlife Service is required to review the proposal, but Amigos Bravos is not aware that such an analysis has been done.
- Colorado approved a similar proposal (No consideration of pH dependent speciation, and a total recovery analysis for Al concentration.) that was requested by the Colorado Mining Association. However, that standard included the following crucial differences: Unlike the NM proposal, Colorado recognized that the standard formulation relative to chronic effects should be different than that for acute effects. The result is that all chronic concentration values allowed for Al at different hardness values is 1/3 that allowed in NM. Also, the pH region begins at 7.0 not 6.5.
-Oregon, at present, only has a narrative standard for aluminum. Oregon’s previous standards for aluminum were disallowed by EPA, Region 10. The result has been that Oregon DEQ has declined to propose a new set of standards and EPA now has the task of developing new Al standards.
- The current hardness-based standard does not address important pH effects where the pH is >7.5, a condition prevalent in many New Mexico streams.

- Hardness protects against, but does not eliminate, lethality at low concentration dissolved Al. over long periods. According to one study a mortality of 50% would be projected at a little more than 3 mo.(109d): at 100 mg/l CaCO3, 0.16mg/l dissolved Al, pH=8.6.[1]

5. Listing of Ephemeral Waters (20.6.4.97 NMAC)

a) *General Concerns:* The intention of both the national Clean Water Act and the NM Water Quality Act is to protect water quality for all existing uses of a stream, regardless of the stream's hydrologic characteristics. The UAAs associated with these listings do not satisfy the rigors of a scientifically-based Use Attainability Study (UAA) as required in Clean Water Act regulations at 40 C.F.R. § 131.10(g), (j) and (k), in EPA's Water Quality Standard Handbook at chapter 2.9, and EPA's 1983 Technical Support Manual: Water body Surveys and Assessments for Conducting Use Attainability Analyses (EPA Number: 440486037). As outlined in all three of these references, a use cannot be removed if it is an existing use. An existing use is defined as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards" 40 C.F.R. § 131.3(e). This definition does not require that the use must be occurring in the present moment. Neither the HP nor the associated Expedited UAA Cover Sheet provides adequate analysis of existing uses, and therefore all the UAAs conducted by the department are sorely lacking the appropriate information to make a use determination.

To determine existing uses (which, as outlined above, contrary to the common definition of "existing", means any use that has existed, or the water quality was good enough for it to exist, in the stream since 1975) would involve speaking to local landowners and local, state, or federal land management representatives about historical (1975-Present) conditions of the stream. Land use practices (both current and historic) should be documented and their impact on the conditions of the stream should be examined. In addition, historic flow data could be collected if available, or the water body in question could be examined for signs that uses, while they may not currently be occurring, occurred since 1975. By only examining the current conditions in the streams proposed here to be formally listed as ephemeral, the associated UAAs cannot make a determination whether the 101(a)(2) uses are existing uses. Determining existing 101(a)(2) uses, or if 101(a)(2) uses could be supported, is not a trivial matter. Some of the data/information needed in a UAA to be able to make a determination about currently supported or potentially supported 101(a)(2) uses includes answering the following questions:

- Are there any sections of the stream with surface flows (especially during the monsoon, season) that last long enough to support aquatic life?
- Are there any tinajas present in the stream?

[1] Gunderson, et.al.1994. pH, Hardness, and Humic Acid Influence Aluminum Toxicity to Rainbow Trout (Oncorhynchus mykiss) in Weakly Alkaline Waters. Can. J. Fish. Aquat. Sci. 51: 1345-1355

- Are there any springs or seeps in/along the stream? If so, proper biological surveys need to be conducted.
- Are there any areas where water ponds (including stock ponds/dirt tanks) long enough to support aquatic life, including amphibian reproduction, peaclams, etc. (especially during monsoon season)? Note that peaclams are shellfish that are adapted to periods of desiccation if they can reach moist soil.
- What is the upstream and downstream connectivity? Are there perennial or intermittent waters upstream (ephemeral streams can act as travel ways for organisms, including amphibians, during flow events)? What is the downstream connection? Can fish move into the stream during flows (ephemeral streams are used by some fish during high water flows)?
- Does the stream connect to a playa? Intermittent and ephemeral playas are some of the most biologically productive in the State because of blooms of large brachiopods (shellfish), which support thousands of shorebirds and waterfowl. Reducing water quality in an ephemeral stream that feeds a playa may destroy the productivity of the playa.
- If there are areas of ponded water (above), there need to be proper surveys to determine if any 101(a)(2) uses are currently supported, including amphibian reproduction. These surveys will need to be conducted at the appropriate time of year, generally the monsoon season. Note that many ephemeral drainages contain stock ponds/dirt tanks, which support amphibian reproduction, including state and federal endangered species.
- Have local residents and others with potential knowledge been surveyed to determine historic biological uses or recreational uses? Do people drink from this stream or use the water for domestic purposes? Do livestock use the stream?
- If there are no current 101(a)(2) uses supported, data will need to be gathered to determine if the stream can support any of these uses.

The UAAs at question here have not provided enough information to state conclusively that fish do not and cannot use the streams in question. The UAAs only confirm that fish and macroinvertebrates were not present at the specific survey locations at the time of the surveys, which in some cases was during the dry time of year. The downstream connection has not been examined; appropriate sections of the streams have not been sampled during high water; and water quality/chemistry data have not been collected. In addition, proper surveys have not been conducted during proper conditions (i.e., wet season & flowing) and you cannot state conclusively that recreation is not and cannot be supported by these streams. Residents and others with personal and/or long term knowledge of the streams have not been interviewed to determine if the streams are used or have been used in the past for recreational and aquatic life uses. Amigos Bravos does not believe enough information has been gathered to categorize these streams as ephemeral.

b) *Chino Mine Drainages:* Amigos Bravos has several concerns about the rationale for downgrading the standards for these drainages. The section of the associated UAA that covers how/if the drainages have been influenced by mining activities seems to focus only on groundwater influences to the flow regime, which is of course very

important. There is no mention of surface water influences such as whether or not mine stormwater controls detain water that would otherwise reach these drainages. In addition there are only three sampling locations for Subwatershed E and these sampling locations are all at the top of the drainages. The area that is being proposed for ephemeral classification runs up to five miles downstream of these sampling locations. Where did the drainage names (Subwatersheds A-E) come from? Are these names that the mine is proposing? Are these drainages known by any other name locally? If these are informal names, known only to the mining company, by adding these names to the standards, the Department will formalize them. Using the names Subwatershed A-E is very impersonal and certainly does not inspire any connection or conservation ethic to these drainages by the general public or local stakeholders. At the very least it would be better to call these drainages "unnamed tributaries".

6. Rio Pueblo de Taos – Phosphate and Conductivity Standard Needed

The lower segment of the Rio Pueblo de Taos (from the Rio Grande del Rancho down to the confluence with the Rio Grande) deserves the protections that are afforded other rivers and streams in Taos County. To protect designated uses that apply to this segment, the Rio Pueblo de Taos the Department should propose a conductivity criterion of 400 microsiemens/cm, which is the same criterion applied to other segments of the Rio Pueblo de Taos. The wastewater effluent discharge from the Taos wastewater facility discharges into this segment of the Rio Pueblo. Sampling conducted by Amigos Bravos and Sentinels Rios de Taos (submitted periodically to NMED) show conductivity levels in the effluent to consistently be above 700 microsiemens/cm. A conductivity limit in this lower segment of the Rio Pueblo will protect the river from excess conductivity loading from the wastewater treatment plant. In addition, to protect designated uses in the Rio Pueblo de Taos the Department should propose a .1mg/L phosphate criterion for the entire Rio Pueblo de Taos watershed (same criterion that applies to the Red River and the Rio Hondo). The lower segments of the Rio Pueblo de Taos and many of its tributaries are listed as impaired for Nutrient/Eutrophication Biological Indicators. A phosphate criterion will help to control nutrient loading and the associated impairment.

7. Pharmaceuticals and Personal Care Products

Amigos Bravos supports the development of new water quality standards for Pharmaceuticals and Personal Care Products ("PPCPs"). EPA's lack of action to protect public health from PPCPs by not setting national standards means that the Department and the Commission must take responsibility to protect New Mexico water quality and public health by developing and proposing PPCPs standards. Amigos Bravos urges the Commission to adopt water quality standards for key PPCPs, such as sulfamethoxazole, loxacin, caffeine, DEET, TDCPP, and tris (2-chlorethyl) phosphate, all of which have been detected in New Mexico's waters. We recommend that the Department test the river at the parts per trillion level for chemicals including but not limited to: chemotherapy drugs, hormones, antidepressants, anti-epileptics, antibiotics, pain relievers, blood pressure diuretics, and plasticizers. Alternatively, a list of chemicals for which to test could be derived from demographics of most commonly used PPCPs in NM. We recommend the prioritization of hormones & plasticizers (such as bisphenol-A) which can be endocrine disruptors at very low doses. A resource to calculate health based

screening levels for detected contaminants that do not have US EPA maximum contaminant levels could be the USGS' collaborative project with the US EPA New Jersey Department of Environmental Protection and Oregon Health and Science University. Conducting screening level testing will help NMED identify pollutants of concern and assist in developing water quality standards in the future.

8. Biocriteria and Numeric Nutrient Criteria

Amigos Bravos supported the Department's proposals regarding narrative biocriteria in the last Triennial Review. We noted, however, that while establishing narrative biocriteria is a very good start, both narrative *and* numeric biocriteria are essential for protecting the health of New Mexico's rivers and other water-bodies. We therefore request that NMED move as quickly as possible to develop and finalize nutrient criteria for New Mexico.

9. Climate Change

Amigos Bravos again urges NMED to consider the future, long reaching effects of climate change on water quality in New Mexico's rivers and streams. Amigos Bravos' proposal regarding climate change in the last Triennial Review sparked a robust discussion about climate change and its impacts. Although Amigos Bravos withdrew its proposal in the last Triennial Review, we again note that science regarding climate change is becoming only more dire, and the impacts we are feeling and will continue to feel must be addressed. Climate change will result in changed precipitation patterns, a likely decrease in water supply, and at the very least, will add another pressure to already over-allocated water resources in the state. *See, e.g.*, Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: *Climate Change Impacts in the United States: The Third National Climate Assessment*. U.S. Global Change Research Program (available at: http://nca2014.globalchange.gov/). NMED must address how best to protect our scarce water resources in the face of these changes.

10. "Limited Aquatic Life" Use

As noted in the last Triennial Review, Amigos Bravos believes that this designated use is ambiguous and confusing. We should return to the pre-2005 policy of setting segment-specific uses in the rare case where the other aquatic life uses are not attainable. For instance, in the case of Sulphur Creek, section 20.6.4.124, it would be simple to say under paragraph B(3) that, except for subsections I and J of 20.6.4.900, the chronic aquatic life criteria do not apply. The limited aquatic life use adds one more layer of confusion to the standards requiring members of the public to flip back and forth between the segment and the back of the standards. In addition, the limited aquatic life use could be abused to lower water quality standards. It is more appropriate to make segment-specific changes in cases where the natural conditions have resulted in an impairment associated with either the chronic or acute aquatic life criteria. This method would allow for more fine tuned standards. For example, in some cases it may be that none of the chronic life criteria are attainable, and therefore all the criteria could be listed as not applying, but, in some other cases, it may be that only a couple of the chronic life criteria do not apply and in those cases these constituents could be listed individually.

If the Department chooses to maintain the limited aquatic life use, the definition should be updated to match the Department's current hydrology protocol and the policy of assigning ephemeral waters with the limited aquatic life use assigning intermittent waters the marginal warmwater aquatic life use (see 20.6.4.97 and 20.6.4.98). Amigos Bravos proposes to change the definition to:

20.6.4.L(2) "Limited aquatic life" as a designated use, means the surface water is capable of supporting only a limited community of aquatic life. This subcategory includes surface waters that support aquatic species selectively adapted to take advantage of naturally occurring rapid environmental changes, ephemeral **~~or intermittent~~** water, high turbidity, fluctuating temperature, low dissolved oxygen content or unique chemical characteristics.

11. Mixing Zones

As in the last Triennial, Amigos Bravos requests that NMED revisit the standards that allow mixing zones. We first recommend that mixing zones be eliminated completely in New Mexico's water quality standards. In the alternative, we recommend that NMED at least ensure that New Mexico's mixing zone criteria are at least in line with EPA regulations. At present, New Mexico's mixing zone policy does not comport with EPA regulations which allow mixing zones only where the mixing zones (1) do not impair the integrity of the water body as a whole; (2) prevent the death of organisms passing through the mixing zone; and (3) do not cause significant health risks. Environmental Protection Agency, Water Quality Handbook, § 5.1 (2007) (available at: http://www.epa.gov/waterscience/standards/handbook/). The water quality standards now do not meet these limitations on mixing zones, and should be revisited.

12. Perchlorate Standard

To protect public health and safety, New Mexico should adopt a Perchlorate standard of 1 ug/L for domestic water supply. Criteria for irrigation, wildlife habitat and livestock watering should be developed as well. New Mexico has increasing problems with perchlorate contamination as is evidenced by the numerous perchlorate hits in both ground and surface water in the past ten years. In the spring of 1999, perchlorate was identified at Holloman Air Force Base when the U.S. Geological Survey collected a surface water sample from the Lost River for the National Park Service and found perchlorate at 16,000 ug/L. In 1995, perchlorate was found in shallow alluvial groundwater in Los Alamos at 180 ug/L. At Fort Wingate, perchlorate was found in one groundwater monitoring well at 2,860 ug/L. Although there is currently no federal drinking water standard for perchlorate, the EPA has considered a reference dose of 1ug/L for perchlorate in drinking water. New evidence shows that many Americans are now consuming large quantities of perchlorate in the vegetables that they eat. It is reasonable to assume that the level of perchlorate that is safe in drinking water will have to be lowered as the amount of perchlorate we ingest from others sources increases. Vegetables irrigated with perchlorate contaminated water concentrates the contaminant by many factors. For example lettuce concentrates perchlorate by an average factor of 65 at levels found in water of 10 to 130 ppb.

13. Public Water Supply Use
Amigos Bravos urges the commission to adopt use-specific criteria for the public water supply use. Language under the Fish Culture and Water Supply use found at 20.6.4.900.A states: "Water quality adequate for these uses is ensured by the general criteria and numeric criteria for bacterial quality, pH and temperature," yet there are no numeric criteria that are specific to this use. What would happen in a situation where there is a public water supply use, or a fish culture use for that matter, where a UAA has been conducted to remove 101(a) uses and thus their associated bacterial, pH and temperature criteria? The Department should propose use specific criteria for bacteria, pH, and temperature for this use. In addition, many contaminants listed in 20.6.4.900.J are not removed with conventional treatment practices and thus criteria to protect for this use, taking into account the effectiveness of standard treatment technology, should be adopted.

In conclusion, we note that the State's obligations pursuant to the Clean Water Act ("CWA") are to "protect the public health or welfare, enhance the quality of water," and wherever possible, to ensure that water quality allows for the "protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1313(c)(2)(A); 33 U.S.C. § 1251(a)(2). Similarly, the New Mexico Water Quality Act ("WQA") directs the Commission to adopt standards that "shall *at a minimum* protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act." NM Stat. 74-6-4(D) (emphasis added). These goals, in particular the emphasis on standards that *enhance* the quality of water, represent what is a fundamental truth in New Mexico—that water is the lifeblood of our communities, ecosystems, economy, and way of life. We call upon NMED to keep these goals in mind as it proceeds with the Triennial Review process.

Please contact us if you have any questions about our comments or suggestions. We thank you for the opportunity to provide comments on your discussion draft. We look forward to participating in and working with NMED throughout the Triennial Review process.

Sincerely,

Rachel Conn
Projects Director
Amigos Bravos
rconn@amigosbravos.org

[Amigos Bravos Constituency letters]

April 24-May 3, 2014

Dear Ms. Pintado:

As a New Mexico citizen who is concerned about water quality, I ask that your protect our waters.

Protecting the quality of New Mexico's rivers and streams is essential for the health and future of our state and of our communities. I would respectively like to submit the following comments to be considered during the New Mexico Triennial Review of water quality standards.

Temporary Criteria – Allowing Polluters To Hurt our Most Sensitive Waters - *This pollution-allowing proposal from the New Mexico Environment Department (Department) does nothing to protect or enhance the quality of our state's waters. The only thing this provision does is to allow polluters a way out of protective permit limits. The mandate of the Department is to protect our natural resources, not to facilitate industrial development and I therefore request that the Department drop this provision from their petition.*

Phosphate and Conductivity Standards are Needed for the Rio Pueblo de Taos - *The lower segment of the Rio Pueblo de Taos (from the Rio Grande del Rancho down to the confluence with the Rio Grande) deserves the protections that are afforded other rivers and streams in Taos County and should have a conductivity standard of 400 microsiemens/cm to protect the designated use of coldwater aquatic life. To protect the applicable designated uses the entire Rio Pueblo de Taos watershed should have a phosphate criteria of .1mg/L (same criteria that applies to the Red River and the Rio Hondo).*

Ensuring our Rivers Are Safe for Swimming - *I support the Department's proposal to ensure that nine New Mexico rivers, that historically have not had standards that are protective for swimming, are now protected for swimming and other full body immersion recreation.*

Both the Current and Proposed Aluminum Standards are Not Based on Science- *There is no scientific rational stated for the Department's proposed change to the Aluminum standard in low pH waters. I am writing to request that a scientific rationale be provided before any changes to numeric standards are adopted. Moreover, the current Aluminum standard for waters within the normal pH range that was adopted in 2010 is flawed; not based on adequate scientific data; does not address important pH effects where the pH is >7.5, a condition prevalent in many New Mexico streams; and should be revisited. I urge the Department to revert to the pre-2010 Aluminum standard, or at the very least, to propose a hardness based Aluminum standard similar to Colorado's which is 2/3s more protective than New Mexico's current hardness based chronic criteria standard.*

Thank you for the opportunity to submit comments.

Sincerely,

[Signatories to letter under separate cover]

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Ms. Linda Sperling PO Box 23346 Santa Fe, NM 87502-3346 sperlinda@gmail.com	Mr. Ethan Sockwell 719 Upper Ranchitos Taos, NM 87571 skipsockwell@q.com	Mr. Joel Goldblatt PO Box 39 Angel Fire, NM 87710 joel@bluenergyusa.com
Mr. Alford Johnson 120 Sangre de Cristo Mountain Dr. Arroyo Hondo, NM 87513 alfordjohnson@taosnet.com	Mr. James O'Donnell 222 #2 Hind Street Taos, NM 87571 huajatollas@hotmail.com	Mr. Robert Keaty 33 Rancho Manana Santa Fe, NM 87506 bob.keaty@gmail.com

Buckman Direct Diversion Project

A joint regional project of the City of Santa Fe and Santa Fe County to build a reliable and sustainable water supply.

May 30, 2014

Submitted via email

To: Kristine Pintado, Water Quality Standards Coordinator
Surface Water Quality Bureau, NMED
P.O. Box 5469
Santa Fe, NM 87502-5469
Fax: 505-827-0160
Email: Kristine.Pintado@state.nm.us

From: Daniela Bowman, Regulatory Compliance Officer
Buckman Regional Water Treatment Plant
341 Caja del Rio Road
Santa Fe, NM 87506

Subject: Comments on NMED SWB 2013 Draft Triennial Review of Water Quality Standards
Buckman Regional Water Treatment Plant, City of Santa Fe

Dear Ms. Pintado:

The Buckman Regional Water Treatment Plant is submitting its comments on the SWB 2013 Draft Triennial Review of the NM Water Quality Standards. Our comments refer to New Mexico Environment Department (NMED) proposed rulemaking of 20.6.4.10.F NMAC, "Temporary Criteria." Thank you for the opportunity to comment. If you have any questions concerning these comments please contact me at 505-955-4504.

Comment 1. In the *Basis for Change* to 20.6.4.10.F NMAC, the NMED does not clearly state which statute authorizes the proposed rules and what is the purpose for promulgating the proposed rules. Even though, NMED quotes the document EPA-820-F-13-012 (EPA guidance), NMED neither quotes a New Mexico statute, nor states whether the proposed rules are aligned with the quoted EPA guidance.

EPA is very clear about its intent (EPA-820-F-13-012): the goal of the document is to "streamline the adoption and approval of water quality standards (WQS) variances" by the states, which is a "time limited designated use and criterion (i.e. interim requirements) that is targeted to a specific pollutant(s), source(s), and/or waterbody segment(s) that reflects the highest attainable condition during the specified time period."

The NMED needs to revise its *Basis for Change* to quote the specific New Mexico statute authorizing the rules, clarify whether the proposed rules reflect the EPA guidance (EPA-820-F-13-012) in whole or in part, and state whether any state-specific goals were accomplished as part of the proposed rulemaking.

Comment 2. In the *Basis for Change* to 20.6.4.10.F NMAC, the NMED gives its justification for not using the term "variance" as used by EPA in EPA-820-F-13-012 ("water quality standards (WQS) variances") by stating that "regulations already define "variance" as an individual discharge permit-specific exclusion from regulation. See generally NMSA 1978 §74-6-4(h)." This statement is incorrect. The New Mexico statutes (NMSA) and rules (NMAC) have not defined "variance" at all and much less have implied for a "variance" to be a permit-specific exclusion from regulation. Exclusion from regulations implies exemptions, and they are listed under "exemptions" in the corresponding rules (20.6.2 NMAC), and a person does not need to have a permit to request a variance. EPA use of the term *water quality standards variances* is in complete agreement with the WQCC understanding of variance as expressed in 20.6.2.1210 NMAC, ("vary from regulation" and being temporary).

If NMED is trying to imply that the above mentioned New Mexico statute, NMSA 1978, §74-6-4(H), applies only to regulations, not WQS, then we will quote the New Mexico Supreme Court opinion on this subject:

"{41}…In Section 14-4-2(C), the State Rules Act defines "rule" as meaning any "rule, **regulation,** order, **standard**, statement of Policy...." (Emphasis added.)…

{42} Thus, it is clear that the standards contained in the regulations adopted by the Commission, after the required notice, hearing and filing, are exactly what the Legislature calls them: "rules". A standard is a rule, if the proper procedure has been followed in promulgating it. If the "standards" adopted by the Commission in this case did not constitute rules under the State Rules Act, they would have no efficacy, validity or enforceability…" (Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 1979-NMSC-090 546, 603 P.2d 285 (S. Ct. 1979))

NMED needs to be transparent in justifying the use of different term in the rules instead of simply calling them what they represent, *WQS variances*. NMED needs to revise its *Basis for Change* to better justify introducing a different term than the one already used by EPA and WQCC. If the NMED intent is different than EPA intent for allowing "variances" (Comment 1) then NMED needs to describe its intent to the regulated community.

Comment 3. The proposed rule 20.6.4.10.F(1)(a) NMAC requires that applicants demonstrate that "attainment of the associated designated use is not feasible in the short term … by means of a use attainability analysis [UAA]." We have a couple of comments on this proposed rule:

a. The expression used, "not feasible in the short term", is vague. NMED needs to clarify in a reasonably specific manner what considers to be a "not feasible in the short term", or provide definition for this term in their proposed rules and specify the criteria/standard for judging "not feasible in the short term."

EPA recently published a definition of "infeasible" in the April 1, 2013 proposed "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category" rule. According to that document "infeasible means not technologically possible, or not economically practicable and achievable in light of best industry practices" (Federal Register Volume 78, Number 62, Page 19437). Some state agencies (i.e. State of Colorado) require that applicants apply the tests for "technologically feasible," "economically feasible," and "environmentally feasible" test when applying for temporary criteria. What is the NMED position on this definition and the feasibility tests? Does NMED intend to develop guidance on feasibility tests as part of this rulemaking, if feasibility tests are the determining factor?

b. In the mentioned proposed rule, NMED requires a demonstration that "attainment of associated designated use is not feasible" with a use attainability analysis (UAA). The temporary criteria is not intended to change a designated use (as explained in EPA-820-F-13-012), therefore, it should not be a requirement of the demonstration that a temporary criterion is needed. If a segment is on the 303(d) list (as required in this rulemaking), then it has already been determined by NMED and approved by EPA that designated uses are not supported. No further demonstration should be necessary. The EPA guidance <u>does not require UAA</u> and we recommend that the language of 20.6.4.10.F(1)(a) "by means of a use attainability analysis completed pursuant to 20.6.4.15 NMAC" is replaced with:

   "by means of monitoring, process knowledge and relevant analyses of the applicant's discharge in conjunction with evaluation of the receiving water"

Comment 4. The proposed rule 20.6.4.10.F(1)(b) NMAC is inconsistent with the proposal. It states "the proposed temporary criterion represents the highest degree of protection feasible in the short term and adoption will not cause <u>loss</u> or <u>impairment</u> of an existing use." (Emphasis added). An AU that is already on the 303(d) list has already been determined to be impaired and it does not support the designated use(s). If this subparagraph is adopted as proposed, no AUs that are on the 303(d) list would be eligible for the temporary criterion even though petitions can only be made for AUs on the 303(d) list. We recommend the following revision to this subparagraph:

"the proposed temporary criterion represents the highest attainable condition that is both feasible to attain in the short term and is closest to the protection afforded by the original criterion, and its adoption will not impair further existing use(s) of the receiving water." (In addition, NMED needs to include definition of *short term* and *feasible* in terms of technological, economical, and environmental feasibility.)

Comment 5. In 20.6.4.10.F NMAC, NMED proposes a 7-step variance process that is burdensome, costly, and time consuming only to expire "no later than the effective date of the next triennial review" (20.6.4.10(F)(8) NMAC). The proposed rules require:

- Development of a Work Plan by the potential applicant with no guarantees that the applicant will be heard by the WQCC (20.6.4.10.F(6) NMAC);
- Review and approval of the Work Plan by NMED and EPA with no guarantees that the applicant will be heard by the WQCC (20.6.4.10.F(6) NMAC);

- Conducting monitoring, analyses, studies at the expense of the applicant, including performing an expensive and lengthy UAA with no guarantees that the applicant will be heard by the WQCC (20.6.4.10.F(6) NMAC);
- Completion of the work and submission of results to NMED for approval with no guarantees that the applicant will be heard by the WQCC (20.6.4.10.F(6) NMAC);
- Determination by NMED (not WQCC) that variance is warranted or rejection of the results and performed work (20.6.4.10.F(6) NMAC);
- If all previous pre-requisites are met, submittal of variance request to WQCC presenting another plan and timetable pursuant to 20.6.4.10.F(4)(c) NMAC;
- Potential conditional approval by WQCC requiring more "monitoring, relevant analyses, the completion of specified projects, submittal of information, or other actions" as proposed in 20.6.4.10.F(5) NMAC.

The proposed rules imply that NMED's intent is to discourage variance applications for Temporary Criteria only to confirm the Department's determination that a WQS standard in a specific AU cannot be attained (only AUs on the 303(d) list are eligible for variance petitions). The process described above would impose an unreasonable burden to any business and would be the basis for filing petitions for variance from 20.6.4.10.F NMAC in front of the WQCC pursuant to NMSA 1978, §74-6-4(H). It appears the NMED's intent clearly diverges from EPA's intent to "streamline the adoption and approval of water quality standards (WQS) variances" (EPA-820-F-13-012) and such rules will pose economic burden on the regulated community and administrative burden on the WQCC.

Comment 6. The proposed rule 20.6.4.10.F(6) NMAC requires that there is prior NMED approval of the analyses supporting any petition application before the applicant can present the petition to the WQCC. We understand that NMED's role is to advise the Commission on proposals at the time of the application and to indicate whether the application meets the corresponding rules. However, our opinion is that after investing the time and funding in developing the petition and supporting data, the petitioner should have the option of presenting the petition to the WQCC without regard for the Department's position.

If NMED rejects a petition and such petition is not considered by WQCC, will that constitute a rejection by the WQCC since the rules grant powers to NMED to act on behalf of the Commission, and, therefore subject to appeal in court pursuant to NMSA 1978, §74-6-7?

Our understanding is that according to the law, the decision of granting or not granting a variance lies ultimately with the WQCC. In its *Basis for Change,* NMED needs to clarify the authority of each entity for variance applications, NMED and WQCC, and revise the proposed rules accordingly, to honor those authorities.

Fr**om:** jocare@hotmail.com
Sent: Monday, April 28, 2014 8:15:30 AM (UTC-07:00) Mountain Time (US & Canada)
To: Pintado, Kristine, NMENV
Subject: Triennial Review Comments

April 28, 2014

Dear Ms. Pintado:

I have lived in Taos NM for 44 years and have brought up my children along the Rio Grande and Rio Pueblo. I taught my kids to fish in these rivers and every summer, still, I and family and friends find comfort and enjoyment gathering at these rivers to fish and swim. If anything we would ALL like the pollution standards to be even tighter, and certainly NEVER loosened. Tourists and locals alike come to these rivers for renewal and fun. My son irrigates his tiny farm off the Rio Pueblo and is already very concerned about his children playing in the acequias. ..something all children love to do. Protecting the quality of New Mexico's rivers and streams is **essential** for the health and future of our state and of our communities.

Temporary Criteria – Allowing Polluters To Hurt our Most Sensitive Waters - This pollution-allowing proposal from the New Mexico Environment Department (Department) does nothing to protect or enhance the quality of our state's waters. The only thing this provision does is to allow polluters a way out of protective permit limits. **The mandate of the Department is to protect our natural resources**, not to facilitate industrial development and I therefore request that the Department drop this provision from their petition.

Phosphate and Conductivity Standards are Needed for the Rio Pueblo de Taos - The lower segment of the Rio Pueblo de Taos (from the Rio Grande del Rancho down to the confluence with the Rio Grande) deserves the protections that are afforded other rivers and streams in Taos County and should have a conductivity standard of 400 microsiemens/cm to protect the designated use of coldwater aquatic life. To protect the applicable designated uses the entire Rio Pueblo de Taos watershed should have a phosphate criteria of .1mg/L (same criteria that applies to the Red River and the Rio Hondo).

Ensuring our Rivers Are Safe for Swimming **- Every summer my family meets to swim in the Rio Grande...for over 40 years. My friends gather there in the cooling waters for absolute enjoyment of the river, the scenery and serenity.** I support the Department's proposal to ensure that nine New Mexico rivers, that historically have not had standards that are protective for swimming, are now protected for swimming and other full body immersion recreation.

Both the Current and Proposed Aluminum Standards are Not Based on Science- There is no scientific rational stated for the Department's proposed change to the Aluminum standard in low pH waters. I am writing to request that a scientific rationale be provided before any changes to numeric standards are adopted. Moreover, the current Aluminum standard for waters within the normal pH range that was adopted in 2010 is flawed; not based on adequate scientific data; does not address important pH effects where the pH is >7.5, a condition prevalent in many New Mexico streams; and should be revisited. I urge

the Department to revert to the pre-2010 Aluminum standard, or at the very least, to propose a hardness based Aluminum standard similar to Colorado's which is 2/3s more protective than New Mexico's current hardness based chronic criteria standard.

Thank you for the opportunity to submit comments. I am counting on you to be in our corner on this issue. You are the one protecting the people of New Mexico. Don't let us down. **Come and join us sometime along the Rio. Bring your lawn chair, a book, a fishing pole and jump into our cool waters. If you do, you will see how they MUST be protected!**

Sincerely,

Ms. Mary Jo Carey
24 Wisdom Way
El Prado, NM 87529

26 April 2014

RECEIVED
APR 30 2014
SURFACE WATER
QUALITY BUREAU

Dear Ms. Pintado:

I live in a rural agricultural village in northern New Mexico. We are very concerned about water quality here since we depend on our traditional acequias to irrigate our fields, water our animals and orchards, maintain our riparian vegetation, and replenish our wells. As a commissioner on the Acequia de Atalaya, I often listen to local people's concerns about the amount and quality of these waters.

So as a New Mexican resident, I want to comment on the proposed changes to our state water quality standards. I hope that the temporary criteria that loosen environmental safeguards will be dropped. The previous standards were important protections and should not be weakened. I also oppose a weakening of the aluminum standard.

"My" river (the Rio Hondo) has benefited from the current standards that have helped to maintain a satisfactory water quality in our valley, which incidentally supports nine acequia communities. I hope that all of our local streams will enjoy the same full measure of protection.

Thank you for your consideration.

jai cross

jai cross

PO Box 612

Arroyo Hondo, NM 87513

Law Office of Steven L. Hernandez, P.C.

2100 North Main Street
P.O. Box 13108
Las Cruces, New Mexico 88013
Phone: (575) 526-2101

May 30, 2014

Kristine Pintado
Water Quality Standards Coordinator
NMED SWQB
P.O. Box 5469
Santa Fe, NM 87502

Via Email to Kristine.Pintado@state.nm.us

Re: **Comments of Elephant Butte Irrigation District (New Mexico) on the Proposed Triennial Amendments to New Mexico's Surface Water Quality Standards.**

Dear Ms. Pintado,

The Elephant Butte Irrigation District (EBID), located in southern New Mexico, hereby submits its comments on the proposed triennial amendments to New Mexico's Surface Water Quality Standards (the "Triennial Review") as follows.

General Comments

This document could, and in EBID's opinion should, include procedures for delisting impaired streams in areas where compliance has been consistently attained. EBID is also interested in working with NMED to determine delisting procedures for streams designated as "impaired" but which have been rehabilitated to a point where they may be considered for delisting. EBID further recommends delisting the reach of the Lower Rio Grande from Caballo to Leasburg Dam for *E. Coli*.

Section Specific Comments

Section 20.6.4.10(F)(6): "Any person" should read "any affected person or entity" to allow political subdivisions to participate as a person would under this section. Further, others affected by such a temporary criteria request should be notified of the request by "any affected person or entity" to allow full and complete participation by interested and affected parties and to ensure due process is provided to them. The notification language can be the same as that found in Section 20.6.4.16(C).

Section 20.6.4.16(C), (D), and (E): The recommendation that the "shall" language regarding holding a public hearing be eliminated should not be accepted where the action is not covered by an NPDES permit. Instead, the proposed language should make clear that notice shall be provided to those entities under C(1-4) and a hearing shall be held for all actions not covered by an NPDES permit.

Sections 20.6.4.98(A), 99(A), 101(A), 102 (A) and 103(A): Should the "and" be an "or" to make one or more of the uses acceptable, or should it be an "and" to require each use be met? In other words, should it read as it does, or as follows: "warmwater aquatic life, livestock watering, wildlife habitat, or primary contact."

Section 20.6.4.101(A): EBID believes "secondary contact" designation for this area of the Rio Grande is more appropriate.

Sincerely,

LAW OFFICE OF STEVEN L. HERNANDEZ, P.C.

By _____
Samantha R. Barncastle, Esq.

Xc: Gary Esslinger, Treasurer-Manager Elephant Butte Irrigation District (via email)
Dr. Fernando Cadena (via email)
SRB/jlc

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

April 8, 2014

RECEIVED
APR 14 2014
SURFACE WATER
QUALITY BUREAU

Kristine Pintado
Standards Planning and Reporting
Surface Water Quality Bureau
New Mexico Environment Department
Harold Runnels Building (N2110)
P.O. Box 5469
Santa Fe, NM 87502-5469

Dear Ms. Pintado:

As the New Mexico Environment Department continues to develop its proposed triennial revisions for the *New Mexico Standards for Interstate and Intrastate Surface Waters*, the Environmental Protection Agency (EPA) Region 6 would like to share some comments and recommendations on the latest public discussion draft. The comments and recommendations provided in the enclosure are part of the water quality standards development process and do not represent a finding under §303(c) of the Clean Water Act or Standards Regulation (40 CFR 131). Any decisions on new and revised water quality standards will be made by EPA following their adoption and submission to Region 6 by the New Mexico Water Quality Control Commission.

The Region would also like to take this opportunity to recognize the Surface Water Quality Bureau's efforts in the development of these draft revisions. It is clear that a significant amount of work has gone into the development of these draft proposals. If you have any questions, please contact me at nelson.russell@epa.gov or (214) 665-6646.

Sincerely,

Russell Nelson

Russell Nelson
Regional Standards Coordinator
Watershed Management Section (6WQ-EW)

Enclosure

cc: James Hogan, Bureau Chief
SWQB (N2107)

Jeff Scarano, Program Manager Monitoring Assessment and Standards Section
SWQB (N2106)

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EPA Comments and Recommendations on the 2014 Discussion Draft of the New Mexico's Surface Water Quality Standards

Part 4. Standards for Interstate and Intrastate Surface Waters

General Comments

The following comments are specific to those sections of the New Mexico standards where the New Mexico Environment Department (NMED or Department) has proposed modifications. General recommendations have been provided previously.

20.6.4.7 - Definitions

Region 6 does not have specific comments on the proposed new and revised definitions. It should be noted however, that definitions may or may not be considered to be a water quality standard depending on how a particular definition supports or is integral to the understanding or application of a provision or criterion.

20.6.4.10 - Review of Standards: Need for Additional Studies

20.6.4.10 F. – Temporary Criteria

EPA guidance explains that variance procedures involve the same substantive and procedural requirements as removing a designated use, but unlike use removal, variances are both discharger and pollutant specific, are time-limited, and should be used instead of removal of a use where the State believes the standard can ultimately be attained. In its public discussion draft, the NMED explains that this proposed provision allows for the adoption of temporary criteria that are implementable by the State to advance pollution controls where the water quality standards are not immediately achievable. Although generally consistent with EPA guidance on variances, as detailed in discussions and prior comments related the state's antidegradation provisions and implementation, particularly 20.6.4.8 A (4)(b) NMAC, the Region explained that it believes that the currently proposal limits the state's flexibility and how extensively such a provision could be applied .

The Region recommends that the provision refer to temporary standards rather than limiting it to the term "criteria." In actions elsewhere, EPA has approved temporary standard provisions. While the state's originally proposed language allows the state to address discharger and pollutant specific issues where a 3-year time-limitation may be appropriate, the recommended language that follows is intended to allow for instances where the duration of temporary

standards can be tailored to site-specific circumstances. Region 6 believes that these recommendations expand the state's flexibility to provide a process to address shorter term situations, as well as restore and remediate damaged water resources that are not meeting their designated uses that may require more time to implement and the waterbody to recover. Such an approach is consistent with the Clean Water Act (CWA) 'restore and maintain' objectives.

F. Temporary ~~Criteria~~ Standards.

(1) Any person may petition the commission to adopt a temporary standard ~~criterion~~ applicable to all or part of a surface water of the state as provided for in this section. The commission may adopt a proposed temporary standard ~~criterion~~ if the applicable criterion is not being attained as reported in the CWA Section 305(b)/303(d) Integrated Report and the petitioner demonstrates that:

By stating that any person may petition the Commission to adopt a temporary standard without a qualifier may lead some entities to petition the Commission even though the Commission's approval will limited to uses/criteria identified in the state's 305(b)/303(d) Integrated Report as not attained. Similarly, there are no qualifiers as to what NMED would be obligated to review in such an instance, leading to possible confusion over what the Department is and is not obligated to review.

The intent of the Commission limiting its approval of such petitions to all or part of a surface water that has been identified in the state's 305(b)/303(d) Integrated Report is likely to ensure that well documented problems are addressed. However, this approach may limit the incentive by "good Samaritan" groups to consider restoration and remediation that may not be clearly tied to a specific discharger or parameter. It may also limit the state itself where problems that may not as yet be identified in the state's Integrated Report that could be addressed through these provisions.

(a) attainment of the associated designated use may not be ~~is not~~ feasible in the short term due to one or more of the factors listed in 40 CFR 131.10(g) as demonstrated though a petition and supporting work plan as detailed in paragraphs **(4)** and **(6)** below. ~~by means of a use attainability analysis completed pursuant to 20.6.4.15 NMAC~~;

State procedures contained in its water quality standards must be consistent with the substantive requirements of 40 CFR 131. EPA has approved State-adopted provisions like the one proposed here when, among other requirements, the state (or 3rd-party proponent) demonstrates that meeting the standard is unattainable based on one or more of the factors outlined in 40 CFR 13 1.10(g) for removing a designated use (see Water Quality Standards Handbook, 2nd Ed.). This should not be interpreted to mean that a use attainability analysis (UAA) is required to support a variance or temporary standard. A UAA has a specific regulatory purpose of supporting the removal of a designated use. The intent of a variance or temporary standards is to preserve the use and temporarily modify applicable criteria to detail how incremental progress will be made in ultimately meeting that use. This provision should make it clear that proposals and work plans developed in support of a temporary standard as detailed in subsequent paragraphs

*clearly describe the basis for a temporary standards supported by documentation that shows meeting the current standard is unattainable based on one or more of the factors outlined in 40 CFR 13 1.10(g). See paragraphs **(4)** and **(6)** below.*

(b) the proposed temporary standard ~~criterion~~ represents the highest degree of protection feasible in the short term and adoption will not cause loss or impairment of an existing use; ~~and~~

(c) for point sources, existing or proposed discharge control technologies will comply with applicable technology-based limitations and feasible technological controls and other management alternatives, such as a pollution prevention program: and~~.~~

(d) for restoration activities, nonpoint source or other control technologies to limit downstream impacts and existing or control technologies consistent with subparagraph (c) if applicable.

*The suggested language in subparagraphs **(c)** and **(d)** is intended to differentiate between those instances where a temporary standard is appropriate for a discharger and parameter specific situations and those where a project may be broader in scope, such as a restoration or remediation project that may or may not include a defined point source.*

(2) A temporary standard ~~criterion~~ shall apply to a specific pollutant(s), or to a specific water body segment(s). The adoption of a temporary criterion does not exempt dischargers from complying with all other applicable criteria or control technologies.

(3) Designated uses shall not be modified on a temporary basis. Designated use attainment as reported in the CWA Section 305(b)/303(d) Integrated Report shall be based on the original criteria, not on temporary standard ~~criteria~~.

(4) A petition for a temporary criterion shall:

(a) identify the current applicable criterion, the proposed temporary standard~~criterion~~ and the surface water(s) of the state to which the temporary standard~~criteria~~ would apply;

(b) demonstrate that the proposed temporary standard~~criterion~~ meets the requirements in this Subsection;

(c) present a plan and timetable for achieving compliance with the original standard or criterion, including any investigations, projects, facility modifications, monitoring, or other measures;~~ and~~

(d) implement 122.44(d)(1)(i), by identifying the level currently achievable and the schedule of specific actions approved by EPA in the variance including review during triennial reviews will be included in the permit as enforceable limits and permit conditions; and

(e~~d~~) include any other information necessary to support the petition.

*By including the recommended subparagraph **(d)**, this provision would ensure that the requirements of a temporary standard are enforceable. Failure to comply would result in termination of the temporary standard(s) during a triennial review as outlined in paragraph **(8)**. See other related comments on paragraph **(6)** below.*

(5) The commission may condition the approval of a temporary standard ~~criterion~~ by requiring monitoring, relevant analyses, the completion of specified projects, submittal of information, or other actions.

(6) Any person may submit notice to the department stating the intent to propose a temporary standard~~criterion~~. The proponent shall develop a work plan to conduct the analyses required in this Subsection, and shall submit the work plan to the department ~~and region 6 EPA~~ for review and comment. The work plan shall identify the factors affecting attainment of the criterion that will be analyzed and timetable for specific actions to be taken to achieve the uses that are attainable over the term of the temporary standard, including baseline water quality, identification of threatened and endangered species, investigations, projects, facility modifications, monitoring, or other measures necessary to achieve compliance with the original standard/criterion. The work plan shall include ~~and the~~ provisions for public notice and consultation with appropriate state and federal agencies. Upon approval of the work plan by the department, the proponent shall conduct the analyses in accordance with the approved work plan. The cost of such analyses shall be the responsibility of the proponent. Upon completion of the analyses, the proponent shall submit the conclusions to the department. The department or the proponent may petition the commission to adopt a temporary criterion if the department determines the conclusions of the analyses support such action.

*This provision states that a proponent may submit notice of the intent to propose a temporary standard, and then requires the proponent to submit a work plan to both NMED and EPA in support of that proposal. By allowing the proponent the option of submitting notice of the intent but not requiring a work plan to accompany that proposal could result in proposals with no advanced notice by only following the requirements in paragraph **(4)**.*

In those instances where a proponent develops a work plan to conduct supporting analyses, this provision requires that the work plan be submitted to NMED and EPA Region 6. While the provision requires the proponent to submit pre-decisional work plan, it cannot bind EPA Region 6 to review such documents. The state has primacy in developing and adopting its water quality standards and would be the primary reviewer for such 3rd-party proposals. NMED has consistently provided high quality comments and recommendations on pre-decisional regulatory documents. NMED's comments and recommendations play an essential role in informing Region 6 as to the appropriateness of pre-decisional proposals and their consistency with state law. Region 6 may be able review proposed workplans and provide NMED with comments and recommendations, but cannot assure that resources will be available prior to adoption. However, as part of its oversight authority, EPA is required to review and act on state water quality standards actions once submitted for approval pursuant to section 303(c) of the Act.

*The reference to a plan and required actions are vague. To be effective, the provision should include the recommended language or something similar, specifying the basis for a temporary standard, the applicable uses that can be attained during the variance and the timeline for specific actions that will be taken to ultimately achieve the original standard. This paragraph could potentially be merged into paragraph **(4)** under subparagraph **(b)** and **(c)**.*

(7) Temporary standards~~criteria~~ may be implemented only after appropriate public participation, commission approval and adoption pursuant to this Subsection, and EPA Clean Water Act Section 303 (c) approval.

(8) ~~Unless renewed, a~~ A temporary standard ~~criterion~~ shall expire no later than the ~~effective~~ date specified in the EPA approval. A temporary standard is subject to review to determine progress consistent with the original conditions during succeeding~~of the~~ next triennial reviews for the duration of the temporary standard as required by Subsection A of 20.6.4.10 NMAC. The commission may consider a petition to extend ~~for renewal~~ an existing temporary standard. The effective period of a temporary criterion shall be extended only if the factors precluding attainment of the underlying criterion still apply, if the petitioner is meeting the conditions for approval of the interim criterion, and if reasonable progress towards meeting the underlying criterion is being achieved.

*The recommended language in paragraph **(8)** is intended to be consistent with and support paragraphs **(4)** and **(6)**. The recommended language is intended to make it clear that a temporary standard expires consistent with the duration described in the original petition as established in the supporting work plan. In addition, the recommended language is also intended to make it clear that a temporary standard is subject to triennial review no matter what its original duration or whether it is associated with a permitted discharge or not. This keeps the provision consistent with the 3-year limit derived from the requirements of section 303(c) of the Act.*

(9) Upon expiration of a temporary standard~~criterion~~, the original criterion becomes applicable.

(10) Temporary standards~~criteria~~ shall be identified in 20.6.4.97 – 899 NMAC as appropriate for the surface water affected.

20.6.4.15 - Use Attainability Analysis

Although no amendments are proposed for this section, as noted in our December 2013 recommendations, Region 6 believes NMED should address the inconsistencies with how "classified" and "unclassified" waters are treated in the state's standards. Given that there are no functional differences between existing classified segments, reassessed classified segments and assessed unclassified waters, Region 6 recommended that the state amend §20.6.4.15.C to explain that assessed unclassified waters only will be retained in §§20.6.4.97-99 NMAC or identified under these sections on the NMED website as an interim step until NMED petitions and the Commission incorporates these waters into classified segments in §§20.6.4.101- 899 NMAC consistent with the river/closed basin structure that currently exists in the standards.

20.6.4.16 - Planned Use of a Piscicide

The U.S. Sixth Circuit held in *National Cotton Council, et al. v. EPA* (2009) that the application of a pesticide to a water of the U.S. was a pollutant and is subject to NPDES permit requirements. Following that decision, EPA issued a nationwide Pesticide General Permit (PGP)

to cover pesticide applications in states, including those without NPDES permit authorization. Since that decision, NMDGF has relied upon the nationwide general permit and approval from the Water Quality Control Commission (Commission) when conducting piscicide applications to remove unwanted species from various waters within the state.

Given the Sixth Circuit's decision, NMDGF is eligible for and covered under EPA's NPDES PGP, making some of the requirements in 20.6.4.16 NMAC redundant. As a result, Region 6 previously recommended that the SWQB consider revisions to include an exemption for those portions now covered under EPA's NPDES PGP and address those requirements in the state's rules that don't appear to be covered under the PGP. The proposed revisions appear to address these recommendations. It may be useful to consider if the amended language should refer specifically to the NPDES PGP where appropriate rather than only NPDES permit(s).

20.6.4.97 - Ephemeral Waters

The amendments found in §20.6.4.97 NMAC indentifies waters where NMED has sought Region 6 technical approval for beneficial use modifications consistent with federal regulations at 40 CFR 131.10, state regulations at §20.6.4.15 NMAC and implementation contained in the state's Quality Management Plan/CPP (WQMP/CPP) document.

Region 6 has granted technical approval for the majority of the waters that are proposed to be listed under §20.6.4.97 C. NMAC with the exception of those waters associated with the Freeport MacMoRan/Chino Mines proposal at §20.6.4.97 C (6)(b). Following an initial review, Region 6 does not believe it can grant technical approval at this time given the limited detail in the body of the ARCADIS report. Based on the lack of detail in the body of the report, it is difficult to follow and determine if ongoing or past activities affect the assessed waters and at points, and what specific waters are being discussed in what is clearly a complex site. NMED's UAA for the Animas River is currently under review and should be completed soon.

For those waters that Region 6 has granted technical approval, those actions are not a final actions under §303(c) of the CWA, but are interim actions relying the previously approved performance-based approach (*See* 65 FR 24647, 24648 ((April 27, 2000)) outlined in §20.6.4.15 NMAC and the state's WQMP/CPP document. This approach is intended to allow the state to make water quality management decisions for the assessed water(s) during what may be a significant time frame between the assessment by NMED and final action and submission to Region 6 by the Commission.

20.6.4.97, 98 and 99 – Ephemeral, Intermittent and Perennial Waters

Based on the draft proposals, related to Region 6's recommendations on §20.6.4.15 NMAC, NMED is considering removal of the term "unclassified" for those waters which have been characterized as ephemeral, and adding the term "surface" to be consistent with the term "surface water(s) of the state" defined in Subsection S of 20.6.4.7 NMAC. This proposal would be a welcome addition to the Region 6's earlier recommendations and reiterated in §20.4.6.15 NMAC above.

Proposed Revisions to Sections 20.6.4.100 - 807

20.6.4.100, 102, 103, 110, 116 and 124 – Rio Grande Basin

Region 6 supports the proposed amendments to these segments in the Rio Grande Basin. These include proposed amendments consistent with EPA recommendations for recreational contact and CWA 101(a) goals (77 FR71191, November 29, 2012). In some instances, revising the designation from secondary to primary contact for compatibility with downstream waters is consistent with 40 CFR 131.10(b). Region 6 supports the proposed amendments replacing the word 'below' with the hydrologic term 'downstream of' in these segment descriptions appropriate and a useful clarification.

20.6.4.204, 206, 207, 213 and 219 – Pecos River Basin

Region 6 supports the proposed amendments to these segments in the Pecos River Basin. As noted for segments in the Rio Grande Basin, Region 6 supports NMED's recommendation to designate these segments based on field survey results and consistent with the latest EPA recommendations for recreational contact and CWA 101(a) goals. Region 6 also considers the proposed amendments replacing the word 'below' with the hydrologic term 'downstream of' in these segment descriptions to be appropriate and a useful clarification.

20.6.4.305, 308 and 317 – Canadian River Basin

No comments are necessary concerning the amendments to 20.6.4.305. As noted above, Region 6 supports NMED's recommendation to designate these segments for primary contact consistent with the latest EPA recommendations.

20.6.4.403 and 404 – San Juan River Basin

The editorial changes to the segment descriptions, adding the word 'river' and referring to the correct jurisdiction boundary for Southern Ute Indian Tribe are appropriate. NMED has developed a draft use attainability analysis (UAA), *Aquatic Life Uses for the Animas River in New Mexico*, to support the proposed designated amendments outlined for these segments. NMED has submitted and early draft UAA and is expected to submit a final draft to Region 6 for technical approval. The preliminary review suggests that the use and related temperature criteria may be appropriate. When the review the final document is complete, Region 6 will notify NMED of its decision on technical approvability.

20.6.4.502 and 503 – Gila River Basin

As noted for segments discussed previously, Region 6 supports replacing the word 'below' with the hydrologic term 'downstream of' in these segment descriptions. The proposed correction to

the segment description for 20.6.4.503 NMAC to accurately reflect where site-specific conductivity criteria should apply is reasonable. The analysis of the conductivity in this segment should be submitted in support of this amendment if adopted by the Commission.

20.6.4.803, 804 and 807 – Closed Basins

NMED is developing a draft UAA supporting the proposed amendments to the aquatic life designated uses and criteria for segments 20.6.4.803, 804 NMAC and the addition of a new segment 20.6.4.807 NMAC. Once a draft UAA is developed, Region 6 anticipates that NMED will present it for public comment. Based on its findings and those comments, Region 6 anticipates NMED preparing and submitting a UAA and supporting documentation for technical review prior to proposing these amendments or as supporting documentation as part of their triennial submission.

20.6.4.900 - Criteria

20.6.4.900 D. Primary and E. Secondary Contact

Region 6 appreciates NMED's proposal to update its standards and previously approved testing methodology for sampling, analyzing and reporting bacteria levels in ambient water consistent with current EPA recommendations.

20.6.4.900 H. Aquatic Life

The proposed amendments in subparagraphs **(3)**, **(5)** and **(6)** have been revised to show decimal places, consistent with dissolved oxygen criteria for the other aquatic life designated uses. No comment is necessary.

20.6.4.900 I. (1) Acute and (2) Chronic aquatic life criteria for metals

EPA approved the revised acute and chronic hardness-based formulae and criteria for chromium III, copper, lead, manganese, nickel and silver, cadmium, and zinc but limited the approval of aluminum in its action on New Mexico's 2010 triennial revision. In that action, EPA recognized the significant variability in both pH and hardness in waters in New Mexico, but noted that it does not believe that the hardness-based equations the state had adopted for aluminum were appropriate as a basis for statewide criteria and may not be protective of beneficial uses in all Waters of the State. EPA believes that that the hardness-based equations for aluminum would be protective for waters within the pH range of 6.5 to 9.0, particularly at low hardness levels, but would not be protective for waters below that pH range. As a result, EPA approved the hardness-based equation for aluminum for only those waters of the State where pH is equal to or greater than 6.5, but disapproved the use of these equations in waters where the pH is less than 6.5.

To resolve this disapproval, EPA recommended that the State adopt a footnote for these equations specifying that where pH is equal to or greater than 6.5 in the receiving water after mixing, the chronic hardness-dependent aluminum equation will apply, and where pH is 6.5 or less in the receiving water after mixing, the more stringent of either the 87 µg/L chronic total recoverable aluminum criterion or the criterion resulting from the chronic hardness-dependent equation will apply.

The currently proposed language for both 20.6.4.900 I. (1) and (2) states that the hardness-based equation for total recoverable aluminum as applicable only where pH is equal to or greater than 6.5 in the receiving stream after mixing, but also appears to says that when pH is less than 6.5 in the receiving stream after mixing, that the 750 µg/L acute and 87 µg/L chronic criteria for aluminum found in subsection J are applicable. This approach would not resolve EPA's disapproval in situations where the 87 µg/L chronic standard applies. In those instances, the more stringent of either the 87 µg/L chronic total recoverable aluminum criterion or the criterion resulting from the chronic hardness-dependent equation should be applied. Without this minor additional change, EPA will continue to apply the more stringent of the 87 µg/L chronic total recoverable aluminum criterion or the criterion resulting from the chronic hardness-dependent equation.

20.6.4.900 I. (3), J. (1) and L. – Criteria Tables

The modifications to the tables in 20.6.4.900 I. (3), J. (1) and L. do not require comment.

20.6.4.901 H. – Publication References

No comment is necessary on the update to the Colorado River Basin Salinity Control Forum reference.

FREEPORT-MCMORAN
COPPER & GOLD

Chino Mines Company
Box 10
Bayard, NM 88023

May 30, 2014

Certified Mail #70123050000053966469
Return Receipt Requested

Ms. Kristine Pintado
Water Quality Standards Coordinator
New Mexico Environment Department
Surface Water Quality Bureau
P.O. Box 5469
Santa Fe, New Mexico 87502

Re: Comments on Public Discussion Draft Proposed Triennial Amendments to New Mexico's Surface Water Quality Standards (April 2014)

Dear Ms. Pintado:

The following comments regarding the public discussion draft of proposed triennial amendments to New Mexico Surface Water Quality Standards are submitted on behalf of Freeport-McMoRan Chino Mines Company, Freeport-McMoRan Tyrone Inc. and Freeport-McMoRan Cobre Mining Company (collectively "Freeport-McMoRan"). We appreciate the opportunity to present these comments on the draft amendments.

Freeport-McMoRan in general either supports or has no comments at this time on the proposed amendments, subject to the recommended changes discussed below. Freeport-McMoRan appreciates the science-based approaches taken by the New Mexico Environment Department's ("NMED") Surface Water Quality Bureau ("SWQB") to develop the proposed amendments. Of particular interest to Freeport-McMoRan are the designation of five drainages in the Chino Mine Investigation Area as ephemeral based upon the Hydrology Protocol UAA's submitted to NMED for the five drainages, as reflected in the proposed amendment to 20.6.4.97(C)(6)(b)(ii) to (vi). Freeport-McMoRan intends to propose additional amendments, as the SWQB is aware, including site-specific criteria for certain water bodies. These proposed amendments will be presented at the appropriate time based upon the scheduling order anticipated to be issued by NMED's Hearing Officer. Freeport-McMoRan reserves the right to present specific comments and technical testimony on any and all amendments proposed by NMED or other parties during the formal hearing process.

Freeport-McMoRan also supports the proposed addition of "Temporary Criteria," proposed 20.6.4.10(F), subject to the following comments.

1. Draft 20.6.4.10(F)(1): It is not necessary, and is an undue restriction, to limit the ability of the Commission to adopt a temporary criterion to circumstances where a criterion is identified in a 305(b)/303(d) Integrated Report as not being attained. NMED has limited resources and relies upon limited data in making determinations whether criteria are being met in surface waters of the state. This limitation is not identified in EPA guidance or proposed regulations.

2. The U.S. EPA has published proposed amendments to its regulations governing water quality standards that would clarify the requirements for the type of relief contemplated by the proposed Temporary Criteria provision. 78 Fed. Reg. 54517 (Sept. 4, 2013). The SWQB should review and consider the proposed rule, recognizing that EPA still is reviewing public comments and could adopt a final rule different from the proposed rule. The proposed Temporary Criteria in general appears to be fairly consistent with EPA proposed rule (proposed as 40 C.F.R. 131.14), but there are some differences, including (i) EPA's proposed rule (and existing guidance) would authorize a temporary criterion if attainment of the associated designated use [*and criteria]* is not feasible due to factors in addition to those specified in 40 C.F.R. 131.10(g); (ii) EPA's proposed rule and existing guidance does not expressly require a UAA as a basis for determining the feasibility of attaining a designated use; and (iii) the language in proposed 20.6.4.10(F)(1)(b) and (c) and the specific petition requirements in proposed 20.6.4.10(F)(4) does not quite track the EPA proposed rule language. Freeport-McMoRan is not recommending that the SWQB wait for EPA final action on its proposed rule before proposing the Temporary Criteria provision, as the timing of EPA's final action is uncertain and much of the proposed rule reflects existing guidance on the subject. Freeport-McMoRan suggests, however, that EPA's proposed rule may serve as guidance for the structure and language of the Temporary Criteria provision. Obviously, once EPA adopts a final rule, it will serve as the basis for EPA's review and approval of the New Mexico Temporary Criteria provision.

3. Another useful analysis and source of information to guide development of the Temporary Criteria provision is a recent guidance document issued by the Colorado Water Quality Control Commission, Policy 13-1, Interim Guidance for Implementation of Discharger Specific Variance Provisions (approved October 7, 2013). While Colorado and New Mexico may take different approaches to water quality standards issues, this particular guidance document contains some specific and reasoned analysis regarding implementation of a similar provision.

4. The Temporary Criteria provision should clearly reflect the differences between the adoption of temporary criteria and a change in the designated use based upon a use attainability analysis. For example, the Temporary Criteria provision, in application, may apply only to a small portion of a surface water.

5. Proposed 20.6.4.10(F)(4)(c) requires a plan and timetable for achieving compliance with the original criterion. However, many of the factors in 40 C.F.R. 131.10(g) that are the basis for consideration of Temporary Criteria reflect conditions that are outside the control of a discharger who may be petitioning for Temporary Criteria and may be outside anyone's control, such as a condition resulting from natural conditions. In that case, it may not be possible to develop a plan and timetable

for achieving compliance with the original conditions, in which case a petition might be denied even though the petitioner demonstrates that all reasonable actions will be taken.

Based upon these comments, Freeport-McMoRan suggests the following changes to the proposed Temporary Criteria language.

F. Temporary Criteria.

(1) Any person may petition the commission to adopt a temporary criterion applicable to all or part of a surface water of the state as provided for in this section. The commission may adopt a proposed temporary criterion if the ~~applicable criterion is not being attained as reported in the CWA Section 305(b)/303(d) Integrated Report and the~~ petitioner demonstrates that:

(a) attainment of the associated designated use is not feasible in the short term due to one or more of the factors listed in 40 CFR 131.10(g) ~~as demonstrated by means of a use attainability analysis completed pursuant to 20.6.4.15 NMAC~~;

(b) the proposed temporary criterion represents the highest degree of protection feasible in the short term and adoption will not cause loss or impairment of an existing use; and

(c) existing or proposed discharge control technologies will comply with applicable technology-based limitations and feasible technological controls and other reasonable management alternatives, such as ~~a pollution prevention program~~ implementation of best management practices.

(2) A temporary criterion shall apply to a specific pollutant(s), or to a specific water body segment(s). The adoption of a temporary criterion does not exempt dischargers from complying with all other applicable criteria.

(3) Designated uses shall not be modified on a temporary basis. ~~Designated use attainment as reported in the CWA Section 305(b)/303(d) Integrated Report shall be based on the original criteria, not on interim criteria~~.

(4) A petition for a temporary criterion shall:

(a) identify the current applicable criterion, the proposed temporary criterion and the surface water(s) of the state to which the temporary criteria would apply;

(b) demonstrate that the proposed temporary criterion meets the requirements in this Subsection;

(c) ~~present a plan and timetable for achieving compliance with the original criterion, including any investigations, projects, facility modifications, monitoring, or other measures~~ provide a discussion of the progress expected to be achieved toward meeting the original criteria during the term of the temporary criteria and how progress will be tracked; and

(d) include any other information necessary to support the petition.

(5) The commission may condition the approval of a temporary criterion by requiring monitoring, relevant analyses, the completion of specified projects, submittal of information, or other actions.

(6) Any person may submit notice to the department stating the intent to propose a

temporary criterion. The proponent shall develop a work plan to conduct the ~~analyses~~demonstration required in this Subsection, and shall submit the work plan to the department and region 6 EPA for review and comment. The work plan shall identify the factors affecting attainment of the criterion that will be analyzed, and the provisions for public notice and consultation with appropriate state and federal agencies. Upon approval of the work plan by the department, the proponent shall conduct the ~~analyses~~ demonstration in accordance with the approved work plan. The cost of such ~~analyses~~ demonstration shall be the responsibility of the proponent. Upon completion of the ~~analyses~~ demonstration, the proponent shall submit the
conclusions to the department. The department or the proponent may petition the commission to adopt a temporary criterion if the department determines the conclusions of the ~~analyses~~demonstration support such action.

(7) Temporary criteria may be implemented only after appropriate public participation, commission approval and adoption pursuant to this Subsection, and EPA Clean Water Act Section 303 (c) approval.

(8) ~~Unless renewed, a temporary criterion shall expire no later than the effective date of the next triennial review required by Subsection A of 20.6.4.10 NMAC.~~ The commission may consider a petition for renewal. The effective period of a temporary criterion shall be extended only if the factors precluding attainment of the underlying criterion still apply, if the petitioner is meeting the conditions for approval of the interim criterion, and if reasonable progress towards meeting the underlying criterion is being achieved within the capability of the petitioner.

(9) Upon expiration of a temporary criterion, the original criterion becomes applicable.

(10) Temporary criteria shall be identified in 20.6.4.97 – 899 NMAC as appropriate for the surface water affected.

Again, thank you for the opportunity to review this draft and to provide comments. Freeport-McMoRan looks forward to participating in the formal triennial review process.

Sincerely,

Timothy E. Eastep, Senior Manager
New Mexico Administration

TEE:sbk
20140530-003

From:	Joshua G. Rosenblatt
To:	Pintado, Kristine, NMENV
Cc:	Hogan, James, NMENV
Subject:	City of Las Cruces Utilities Comments - Triennial Review of Water Quality Standards
Date:	Friday, May 30, 2014 5:05:27 PM

Kristine:
First I want to thank you and the SWQB for extending the time frame for discussions regarding the scope and intent of the proposed revisions. I feel the discussions were very helpful to all parties.

The Las Cruces Utilities (LCU) has reviewed the collective comments assembled and submitted by Larry Webb , President NMML Environmental Quality Association and is in full support of the comments provided.

The LCU would like to see the departments consideration of effluent-dependent waters and water quality based limits to the discharge of wastewater to ephemeral waters as identified in the groups submission.

The development of standards and the development of variances vs pipeline compliance to waters of the State discharges to include by example

- presence of baseline minimum flows to determine CWA applicability. This should not require a UAA but as the site may deem the need for a UAA where applicable.
- The burden of cleaning up upstream dischargers some in the case of agricultural who remain exempt should not be penalized to un attainable in stream criteria. If it's a water shed approach that is desired then *everybody* is in. Baseline values to meet should be appropriate to the stream segment and all the dischargers.
- Variances / Seasonal permits as part of drought response and again the baseline of minimum or no flows that support no aquatic habitat should be provided for compliance to a Groundwater DP then requiring NPDES criteria to the pipe in the absence of receiving "waters".

Other than these few additional remarks, LCU supports the recommendations of the EQA submission and the opportunity to continue our collaborative efforts in the safeguarding of water quality and quantity of the State of New Mexico, and those federal waters within our State.

Thank you.

Joshua R

Joshua Rosenblatt
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Las Cruces Utilities
Regulatory Environmental Services & Technical Support
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LAS CRUCES
UTILITIES
Gas • Water • Wastewater • Solid Waste
City of Las Cruces

Environmental Protection Division
Environmental Compliance Programs (ENV-CP)
PO Box 1663, K490
Los Alamos, New Mexico 87545
(505) 667-0666

Date: May 30, 2014
Symbol: ENV-DO-14-0120
LAUR: LAUR-14-23806

Ms. Kristine Pintado
Water Quality Standards Coordinator
Surface Water Quality Bureau
New Mexico Environment Department
1190 South St. Francis Drive
Santa Fe, NM 87505

Dear Ms. Pintado:

Subject: Los Alamos National Security, LLC's Comments on the New Mexico Environment Department's Public Discussion Draft for the Triennial Review of Water Quality Standards

Los Alamos National Security, LLC ("LANS") appreciates the work done by the Department's Surface Water Quality Bureau ("SWQB") in developing the Discussion Draft for the Triennial Review. Based on its review of the draft, LANS has no comments or requested changes to the Department's proposed amendments. LANS will closely monitor other interested party comments and proposed changes, and intends to fully participate in public hearings on the Triennial Review.

Additionally, LANS is currently evaluating whether it will submit proposed changes to the Water Quality Standards during this Triennial Review. Possible areas of interest include reclassification of certain Los Alamos National Laboratory streams from Section 20.6.4.98 intermittent to Section 20.6.4.97 ephemeral, pursuant to Section 20.6.4.15 NMAC, and expansion of the ability to use the biotic ligand model. In the event it decides to pursue any changes, LANS will arrange a meeting with appropriate SWQB representatives to discuss its proposals prior to submitting a petition.

Please contact Michael T. Saladen at (505) 665-6085 of the Environmental Compliance Programs (ENV-CP) if you have questions.

Sincerely,

Anthony R. Grieggs
Group Leader
Environmental Compliance Programs (ENV-CP)
Los Alamos National Security, LLC

ARG:RMG/lm

Cy: Gene E. Turner, NA-LA, (E-File)
Eric L. Trujillo, NA-LA, (E-File)
Carl A. Beard, PADOPS, (E-File to aosburn@lanl.gov)
Michael T. Brandt, ADESH, (E-File to lindasalazar@lanl.gov)
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From: murlock@raintreecounty.com
To: Pintado, Kristine, NMENV
Subject: Triennial Review Comments
Date: Monday, April 28, 2014 9:57:21 AM
April 28, 2014

Dear Ms. Pintado,

Below are my comments on the New Mexico Triennial Review of water quality standards:

The Temporary Criteria exempts polluters from protective permit limits, thus undermining the ED's purpose to protect our natural resources. This is not right.

Phosphate and Conductivity Standards are Needed for the lower segment of the Rio Pueblo de Taos and should have a conductivity standard of 400 microsiemens/cm to protect the designated use of coldwater aquatic life.

I support the Department’s proposal to ensure that nine New Mexico rivers gain standards that are protective for swimming.

There needs to be scientific rationale stated for the Department's proposed change to the Aluminum standard in low
pH waters. Best would be for the ED to use the pre-2010 Aluminum standard.

Sincerely,

Mr. Ross Lockridge, III
12 Waldo St.
Cerrillos, NM 87010-0022From: murlock@raintreecounty.com

NMMA

New Mexico Mining Association

May 30, 2014

Kristine Pintado, Water Quality Standards Coordinator
Surface Water Quality Bureau
PO Box 5469
Santa Fe, NM 87502
Email: Kristine.Pintado@state.nm.us

Re: NMMA Comments on Triennial Review

The NM Mining Association (NMMA), on behalf of our Coal Members, is submitting the following comments on the New Mexico Surface Water Quality Standards as part of the New Mexico Environment Department (NMED) Triennial Review process.

During active mining, coal mine operations typically use sediment ponds and impoundments as the primary mechanism for controlling and treating stormwater runoff. Following mining, often times landowners request that these ponds and impoundments be left behind for use as livestock watering. These comments focus on four primary issues surrounding these permanent impoundments: 1) application of recreation standards (primary or secondary contact) to permanent impoundments used for livestock watering, 2) application of chronic aquatic life water quality standards to livestock watering impoundments on or adjacent to ephemeral drainages, 3) modification of the wildlife standard for selenium, and 4) NMED's proposed modification of the aquatic life standard for aluminum.

Application of Recreation Standards

The current policy is to apply the designated uses of aquatic life, wildlife, livestock, and recreation (primary or secondary contact) to newly created permanent impoundments meant to provide beneficial post-mining land-uses, such as livestock watering. The recreation designated uses contain a water quality standard for *E. coli*. This water quality standard conflicts with the other designated uses of livestock and wildlife. Use of the impoundments by livestock and wildlife is a source of *E. coli* and may create attainment issues with the recreation standards. It is logical that the *E. coli* standards should not be applied to permanent impoundments that are used by livestock and wildlife. A large number of livestock ponds currently in existence on agricultural properties would not meet the secondary contact standard for *E. coli* and are not required to do so thus, it is not clear why a small number of new livestock ponds would have this requirement. Imposing this requirement is a disincentive to leaving post-mining ponds and impoundments for agricultural use.

Application of Chronic Aquatic Life Standards

Livestock ponds and impoundments that are located on or adjacent to ephemeral streams should be subject to the same aquatic life standards as the ephemeral streams themselves, which are designated limited aquatic life (acute only). Because there are no fish in ephemeral drainages, there is no potential for migration of fish to the livestock ponds and impoundments. Limited aquatic life standards (acute only) would therefore be protective of the limited, opportunistic aquatic life expected to be in both ephemeral drainages and any instream or adjacent ponds and impoundments.

Modification of Wildlife Standard for Selenium

The current selenium water quality standard for the protection of wildlife habitat is 5.0 µg/L (total recoverable), which is identical to and duplicative of the chronic aquatic life water quality standard. The 5.0 µg/L concentration is based on the original EPA derivation of the selenium standard and was based on the protection of fish, which were determined to be more sensitive than other aquatic life species (e.g. macroinvertebrates). There is no need to impose this limitation as a wildlife standard, since the chronic aquatic life standard is applied anytime there are chronic exposure conditions. Rather, the wildlife standard should be based on wildlife that is present in the area *other than aquatic life*.

While aquatic life spend their entire lives or significant life stages in the water, aquatic-dependent wildlife use water only for drinking or through incidental consumption during feeding. Thus, different standards are appropriate for terrestrial wildlife, and could include a combination of water column-based standards to protect animals that may drink the water (e.g., the livestock watering standard of 50 µg/L could be considered) and bird egg-based standards to ensure protection of egg-laying terrestrial vertebrates who drink and feed from the water. Such an approach would allow NMED to apply appropriately protective wildlife standards based on the uses of a given waterbody (e.g., waters used for livestock watering may also be used by wildlife).

NMED Proposed Modification of Aquatic Life Aluminum Standard

NMED has proposed to add a footnote to the aquatic life aluminum standard that would limit the application of the hardness based aluminum standard to waters with a pH greater than 6.5 standard units. All waters with a pH less than 6.5 standard units would revert to the previous standards of 87 µg/L (chronic) and 750 µg/L (acute), which are equal to the national criteria. This approach of reverting back to the previous standards is not scientifically justified. In fact, neither the hardness based standard nor the previous standards are applicable at a pH below 6.5 standard units and the addition of the footnote would not be scientifically defensible.

CMI and Los Alamos National Security (LANS) supported the development of New Mexico's current hardness-based aluminum criteria, which were approved as part of New Mexico's last triennial review. GEI Consultants, Inc. (GEI) provided Direct Testimony in support of these criteria on behalf of CMI and LANS (GEI 2009, Parametrix 2009).

New Mexico is beginning its next triennial review and has presented its proposed changes in the 2013 Triennial Review Discussion Draft. One of these changes is related to the aluminum criteria. Specifically, the SWQB is recommending re-adding the old aluminum criteria (acute: 750 µg/L and chronic: 87 µg/L; USEPA 1988) to the NMAC 20.6.4.900 Section J.1 criteria table; these criteria were deleted and replaced by the new hardness-based criteria in 2009. In addition, the SWQB is proposing to add language stating

"For aluminum, where the pH is 6.5 or less in the receiving water after mixing, the acute and chronic dissolved criteria in the table will apply." That is, when pH is less than 6.5, the old aluminum criteria will apply. The basis for this addition was USEPA's disapproval of the hardness-based criteria at pH less than 6.5. However, GEI's experts did not agree with USEPA's basis for the disapproval during the last triennial review and do not support the SWQB's current proposal.

The proposal to apply the 1988 USEPA aluminum criteria of 750 µg/L and 87 µg/L to waters with pH less than 6.5 is not scientifically valid. First, it should be pointed out that the USEPA (1988) aluminum criteria document states that:

> *"This document addresses the toxicity of aluminum to freshwater organisms in waters in which the pH is between 6.5 and 9.0, because the water quality criteria for pH (EPA 1976) states that a pH range of 6.5 – 9.0 appears to adequately protect freshwater fishes and bottom-dwelling invertebrate fish food organisms from effects of the hydrogen ion."*

In addition, the USEPA's current Al criteria were not developed using data conducted at low pH. All of the useable acute toxicity data were conducted at pH ranging from 6.5 to 8.17 (USEPA 1988). The chronic criterion of 87 µg/L is based on two studies testing aluminum toxicity to brook trout (*Salvelinus fontinalis*) and striped bass (*Morone saxatilis*) at pH ranging from 6.5 to 7.2. The brook trout study (Cleveland et al. 1989) was conducted in a test water with a hardness of 12.3 mg/L and pH of 6.5 to 6.6. The striped bass study (Buckler et al. 1987) was conducted in a test water with a hardness of approximately 14 mg/L and pH of either 6.5 or 7.2.

Therefore, it is clearly inappropriate to apply the USEPA 1988 aluminum criteria outside the pH range of 6.5 to 9.0. In addition, it is inappropriate to apply the scientifically outdated fixed values (USEPA 1988) when scientifically advanced and relevant hardness-based criteria are available. The values from USEPA (1988) are no longer relevant, as they are not "hardness-adjusted" and therefore have no comparability to expected toxic effects of aluminum. However, neither the existing USEPA aluminum criteria nor New Mexico's aluminum criteria were intended for more acidic (i.e., pH < 6.5) or basic (i.e., pH > 9.0) waters. All of New Mexico's (and USEPA's) other water quality criteria are intended to apply between pH 6.5 – 9.0 (or 6.6 – 8.8 for cold waters); it is inappropriate to adopt low-pH criteria for only aluminum, especially when the criteria were not developed using low-pH toxicity data.

Furthermore, the issue of the relationship between pH and aluminum toxicity was addressed in detail by CMI and LANS when it was first raised during the 2009 triennial review. In rebuttal testimony, Steve Canton (of GEI, for CMI) and Robert Gensemer (formerly of Parametrix, now of GEI, for LANS) both agreed that pH can have a strong influence on aluminum solubility and toxicity, but noted that no reliable statistical relationship between toxicity and pH in the pH range of 6.5 – 9.0 (the range required by EPA guidance for toxicity testing) had yet been demonstrated for most aquatic organisms at that time. In addition, GEI has recently participated in additional toxicity studies and modeling for aluminum to assist with regulatory chemical registration in Europe. While these data have not yet been published and to some extent are not directly applicable for derivation of AWQC according to USEPA guidance, they provided enough new data (i.e., since New Mexico's last Triennial Review) to allow a much more thorough evaluation of possible pH effects on aluminum toxicity to fish, invertebrates, and algae over a wide range of pH and hardness conditions. Results indicated that the effect of hardness was confirmed, and showed that the New Mexico chronic hardness equation would be fully protective of aquatic life over the intended pH range of 6.5 – 9.0.

May 30, 2014

Ms. Kristine Pintado

Water Quality Standards Coordinator

New Mexico Environment Department

Surface Water Quality Bureau

PO Box 5469

Santa Fe, NM 87502

Subject: New Mexico Municipal League Environmental Quality Association Comments on the Public Discussion Draft for the Triennial Review of Water Quality Standards (April 2014)

Ms. Pintado:

The New Mexico Municipal League Environmental Quality Association (NMMLEQA) appreciates the opportunity to review and comment on the discussion draft for the Triennial Review of Water Quality Standards (April 2014). The NMMLEQA represents the 104 local municipal entities in the State of New Mexico in regards to environmental issues, with a particular focus on water quality protection. The NMMLEQA offers the following comments for your consideration:

Comment 1:

Section 20.6.4.10. F. Temporary Criteria

NMMLEQA concurs with the benefit of having a mechanism for requesting and granting a variance from a water quality criteria for a defined length of time. However, NMMLEQA is concerned that the proposal for "Temporary Criteria" is unnecessarily onerous and would be applicable only to a limited set of potential petitioners. NMMLEQA strongly urges that a mechanism for a variance be added to the standards rather than the temporary criteria. Language proposed in the 2003 Triennial Review process is a good starting place. Specific concerns with the Temporary Criteria proposal are:

· 20.6.4.10.F.1(a) requires a Use Attainability Analysis (UAA) to support a request for a temporary criteria. The need for a UAA is not clear because 20.6.4.10.F.3 states that this Temporary Criteria is <u>not</u>

a change in a designated use. There is no need for a UAA to show the use is not being supported because the UAA requirement is in addition to the requirement in 20.6.4.10.F.1 that "the applicable criterion is not being attained as reported in the CWA Section 305(b)/303(d) Integrated Report". If the segment is listed as impaired in the 305(b)/303(d) report, no further documentation should be needed to request a temporary criteria. *NMMLEQA recommends deleting this requirement.*

· 20.6.4.10.F.1 (b) "the proposed temporary criterion represents the highest degree of protection feasible in the short term and adoption will not cause loss or impairment of an existing use". Again, if the segment is already listed as impaired it is not clear how adoption will not cause impairment of an existing use. *NMMLEQA recommends that the statement be revised to: "adoption will not cause further loss or impairment of an existing use."*

· 20.6.4.10.F.1 (c) "existing or proposed discharge control technologies will comply with applicable technology-based limitations and feasible technological controls and other management alternatives, such as a pollution prevention program." NMMLEQA is unaware of where applicable technology-based limitations and feasible technological controls are defined or listed. *NMMLEQA recommends adding a reference to where these can be found.*

· 20.6.4.10.F (8) "Unless renewed, a temporary criterion shall expire no later than the effective date of the next triennial review required by Subsection A of 20.6.4.10 NMAC." The expiration of a temporary criterion after 3 years is a risk for permittees in these segments, because the temporary criterion could expire within the effective period of an NPDES permit. *NMMLEQA recommends that this be changed to the temporary criterion continuing unless the criterion is discontinued by the commission after review at a Triennial.*

Comment 2

20.6.4.16 Planned Use of a Pesticide.

NMMLEQA supports the proposed changes because they are consistent with the EPA's NPDES Pesticide General Permit (PGP). However, NMMLEQA questions when the state procedure remaining in this section would be legal to use in light of the new NPDES Pesticide General Permit (PGP).

Comment 3

20.6.4.97 Ephemeral Waters

The Hydrology Protocol should recognize the distinction between water created by discharges into an otherwise ephemeral water course and natural streams. These are effluent dependent waters. As with truly ephemeral streams, there should not be the expectation that effluent streams can support the primary contact and chronic aquatic life designated uses that natural streams do. NMMLEQA suggests that an additional designated use be adopted that is "Effluent Dependent Water". As an example, the

definition of “effluent dependent” and a description of the designated use from the Arizona State water quality standards are shown below:

Definition from Arizona Water Quality Standards:

17. “Effluent-dependent water (EDW)” means surface water, classified under R18-11-113, that consists of a point source discharge of wastewater An effluent-dependent water is a surface water that, without the point source discharge of wastewater, would be an ephemeral water. R18-11-113. Effluent-Dependent Waters

Effluent Dependent Designated Use from Arizona State Water Quality Standards

R18-11-113

A. The Director shall classify a surface water as an effluent-dependent water by rule.

B. The Director may adopt, under R18-11-115, a site-specific water quality standard for an effluent-dependent water.

C. Any person may submit a petition for rule adoption requesting that the Director classify a surface water as an effluent-dependent water. The petition shall include:

1. A map and a description of the surface water;

2. Information that demonstrates that the surface water consists of a point source discharge of wastewater; and

3. Information that demonstrates that, without a point source discharge of a wastewater, the receiving water is an ephemeral water.

D. The Director shall use the water quality standards that apply to an effluent-dependent water to derive water quality-based effluent limits for a point source discharge of wastewater to an ephemeral water.

Comment 4

20.6.4.900 Criteria Applicable To Existing, Designated or Attainable Uses Unless Otherwise Specified In 20.6.4.97 Through 20.6.4.899 NMAC.

NMMLEQA supports the use of most probable number (MPN) for reporting *e coli* results.

Comment 5

20.6.4.900.I(1) Acute aquatic life criteria for metals.

NMMLEQA supports the proposed addition of the hardness-based equation for total recoverable aluminum where pH is equal to or greater than 6.5 in the receiving stream after mixing.

Again, the NMMLEQA appreciates the opportunity to comment on the draft New Mexico Water Quality Standards. NMMLEQA is willing to provide additional clarification regarding concerns identified in this letter.

Sincerely,

Larry Webb

Larry Webb

NMMLEQA President

From:	San Juan Water Commission
To:	Pintado, Kristine, NMENV
Subject:	5-27-14 Comments of SJWC - re Triennial Review of Water Quality Standards
Date:	Tuesday, May 27, 2014 12:03:47 PM
Attachments:	5-27-14_NMED.pdf

Ms. Pintado,

Please find for your review the attached Comments of San Juan Water Commission on the Surface Water Quality Bureau's Discussion Draft for the Triennial Review of Water Quality Standards.

Thank you,
Jacqueline

San Juan Water Commission
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MEMBERS:
City of Aztec
City of Bloomfield
City of Farmington
San Juan County
S.J. County Rural Water Users Assoc.

May 27, 2014

Kristine Pintado
Water Quality Standards Coordinator
Surface Water Quality Bureau
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502

Via U.S. Mail and E-mail (*Kristine.Pintado@state.nm.us*)

Re: Comments of San Juan Water Commission on the Surface Water Quality Bureau's Discussion Draft for the Triennial Review of Water Quality Standards

Dear Ms. Pintado:

Thank you for publishing, and accepting public comment on, the Surface Water Quality Bureau's ("SWQB") 2013 Triennial Review Discussion Draft, Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC (the "Discussion Draft"). SJWC appreciates the opportunity provided by SWQB to remark on the Discussion Draft. The SWQB should be commended for the thorough and detailed manner in which the Discussion Draft was prepared. SJWC has several comments and recommendations concerning SWQB's proposals for temporary criteria (20.6.4.10(F) NMAC), piscicide use (20.6.4.16 NMAC), ephemeral waters (20.6.4.97 NMAC), and classified waters (20.6.4.101-503 NMAC), as follows.

§ 20.6.4.10(F) NMAC: Temporary Criteria

SWQB's proposed additions to Section 20.6.4.10 NMAC would allow any person to petition the Water Quality Control Commission ("WQCC") to adopt a temporary water quality criterion applicable to all or part of a surface water of the state. Although presumably well-intentioned, the proposed new language beginning on page 5 provides no significant benefit to point and non-point source dischargers in New Mexico. As currently proposed, a petitioner for a temporary criterion must demonstrate:

1. "attainment of the associated designated use is not feasible in the *short term*" because of one or more of the factors listed in 40 CFR 131.10(g), as demonstrated by a Use Attainability Analysis ("UAA") (emphasis added);

2. "the proposed temporary criterion represents the highest degree of protection feasible in the *short term* and adoption will not cause loss or impairment of an existing use" (emphasis added); and

3. "existing or proposed discharge control technologies will comply with applicable technology-based limitations and feasible technological controls and other management alternatives, such as a pollution prevention program."

SJWC believes that SWQB's temporary criteria proposal is unnecessary because, if a petitioner must first demonstrate that attainment of the associated designated use is not feasible due to one or more factors listed in 40 CFR 131.10(g) as demonstrated by means of a UAA performed by the petitioner, then the designated use should be revised for that segment of the surface water given the UAA justification for an unattainable designated use. SWQB's reference to "short term" infeasibility presupposes future feasibility of attainment and does not benefit a petitioner who already has proven, through a UAA, that a designated use is not attainable.

Next, the Discussion Draft language states that a temporary criterion shall apply to a specific pollutant or to a specific water body segment, and it does not allow the temporary modification of a designated use. Although the EPA defines an interim or temporary water quality criterion as a "time limited designated use [or] criteria" (EPA Publication No. EPA-820-F-13-012, March 2013), the SWQB proposal does not similarly allow temporary modification of a designated use. Thus, there is no demonstrable benefit for point and non-point source dischargers.

Finally, the proposed new language states that a petition for a temporary criterion must present a plan and timetable for achieving compliance with the original criterion and, unless renewed, a temporary criterion shall expire no later than the effective date of the next Triennial Review. In essence, SWQB is proposing a variance process applicable to surface water quality standards. SJWC has argued in the past that the Water Quality Act authorizes variances from water quality standards because standards may be enforced by criminal penalties, thus making standards equivalent to regulations. *See generally* §§ 74-6-4(H), 74-6-10.2 NMSA 1978. Adoption of a variance standard similar to that previously proposed by SJWC would obviate the need for SWQB's temporary criteria proposal, comport with EPA guidance, and provide greater benefit to dischargers.

§ 20.6.4.16 NMAC: PLANNED USE OF A PISCICIDE

Beginning on page 8 of the Discussion Draft, SWQB proposes to exempt piscicide users who have a National Pollutant Discharge Elimination System ("NPDES") permit for piscicide application from further review and approval by the WQCC. SJWC believes relief from WQCC approval for piscicide application is warranted to relieve NPDES permit holders from duplicative federal and state permitting requirements.

However, SJWC disagrees that the WQCC should retain authority to authorize piscicide use in the absence of an NPDES permit because applicable federal regulations require that any person proposing to use (discharge) a piscicide in waters of the U.S. obtain an NPDES permit. The WQCC, therefore, should require an NPDES permit rather than provide an alternative process for approval of piscicide use in contradiction to federal law. If SWQB is concerned that EPA's NPDES Pesticide General Permit may be revoked, and therefore a state "back-up plan" is warranted, SJWC urges SWQB to modify its proposal to clarify that WQCC approval of piscicide use can occur only if EPA's General Permit is revoked.

§ 20.6.4.97 NMAC: EPHEMERAL WATERS

SWQB proposes adding approximately 30 new stream segments to the list of ephemeral waters set out in section 20.6.4.97(C) NMAC based on UAA's conducted pursuant to 20.6.4.15(C) NMAC and the New Mexico Environment Department's ("NMED") Hydrology Protocol for the Determination of Uses Supported by Ephemeral, Intermittent, and Perennial Waters (the "Hydrology Protocol"). These waters are the first to be expressly classified as ephemeral out of thousands of miles of ephemeral watercourses in the state. Once classified as ephemeral, a surface water is assigned the designated uses of livestock watering, wildlife habitat, limited aquatic life and secondary contact. Unclassified ephemeral waters not yet the subject of a UAA, on the other hand, are presumed to be intermittent waters and are assigned the more stringent designated uses of primary contact and marginal warmwater aquatic life. 20.6.4.98 NMAC.

SJWC has no objection to the classification of these stream segments as ephemeral waters. However, SJWC believes a UAA should not be required before an unclassified stream segment can be classified as ephemeral. For the reasons set forth in the following discussion of unclassified non-perennial waters, SJWC urges SWQB to request that the WQCC amend the water quality standards to replace the designated uses for all unclassified waters with wildlife habitat, secondary contact and limited aquatic life.

Eighteen of SWQB's proposed ephemeral surface water classifications result from a 2012 UAA performed by NMED and its contractor, Daniel B. Stephens & Associates, pursuant to section 20.6.4.15 NMAC and the Hydrology Protocol: Use Attainability Analysis for Unclassified Non-Perennial Watercourses with NPDES Permitted Facilities (June 2012). That UAA contains the following "Background and Objectives" (at 1):

> The Clean Water Act (CWA) §101(a)(2) and Section 20.6.4.6 NMAC declares that wherever attainable, water quality shall provide for the protection of fish, shellfish and wildlife and for recreation in and on the water. In accordance with this,

> federal regulation at 40 CFR 131.10(j) effectively establishes a "rebuttable presumption" that CWA §101(a)(2) uses ("§101(a)(2) uses") are attainable. According to federal regulation at 40 CFR 131.10(j), to remove a §101(a)(2) use, a state must conduct a UAA. Relevant to this UAA, an aquatic life use may be removed or changed to a use with less stringent criteria if the use is unattainable due to one or more of six factors listed in 40 CFR 131.10(g).
>
> Waters that are not included in a classified Water Quality Standards segment (§20.6.4.101-899 NMAC) are considered unclassified waters of the State (§20.6.4.97-99 NMAC). Water quality standards and the appropriate use specific criteria for unclassified waters are dependent on the existing hydrologic condition (e.g., ephemeral, intermittent or perennial). In New Mexico, unclassified non-perennial waters are by default subject to §20.6.4.98 NMAC, with designated uses of wildlife habitat, livestock watering, primary contact, and marginal warmwater aquatic life. The uses of wildlife habitat, primary contact and marginal warmwater aquatic life are consistent with the presumption that §101(a)(2) uses are attainable. New Mexico Water Quality Standards at §20.6.4.15 NMAC provides for an UAA process for certain ephemeral waters based on the Hydrology Protocol which can be used to change the applicable designated uses and water quality standards for unclassified streams as part of the UAA process.

During the 2009 Triennial Review, NMED proposed, and the WQCC adopted, amendments to the surface water quality standards that, by default, apply Clean Water Act ("CWA") section 101(a)(2) uses (a/k/a "fishable swimmable uses") to all unclassified waters in New Mexico—an estimated 110,000 miles of ephemeral and intermittent watercourses. In other words, all unclassified waters are assigned the designated uses of wildlife habitat, primary contact and marginal warmwater aquatic life, and those uses can be altered only through the performance of a UAA. SJWC believes this requirement places an unreasonable economic burden on the state and its citizens that is simply unnecessary.

First, under 40 CFR 131.10(j):

> A State must conduct a use attainability analysis as described in §131.3(g) whenever:

> (1) The State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the Act, or
>
> (2)The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act or to adopt subcategories of uses specified in section 101(a)(2) of the Act which require less stringent criteria.

Wildlife habitat, secondary contact and limited aquatic life designated uses meet the CWA §101(a)(2) national goals regarding wildlife and recreation in and on the water and should therefore be deemed to meet the federal requirements in 40 CFR 131.10(j)(1). For example, secondary contact includes wading, which is an activity "in" the water. Also, wildlife will take advantage of any water present for any amount of time in an unclassified watercourse. SJWC therefore encourages SWQB to propose, or at least support, amending the water quality standards to replace the current designated uses for unclassified waters with wildlife habitat, secondary contact, and limited aquatic life. It is simply too costly to require a UAA to demonstrate that a watercourse is, in fact, ephemeral and does not support the designated uses of primary contact and marginal warmwater aquatic life. The rebuttable presumption that primary contact and marginal warmwater aquatic life are attainable uses in thousands of miles of unclassified watercourses (many of which usually are dry arroyos), which was adopted by the WQCC in 2009, should be scrapped. Just consider the costs incurred by NMED to secure a contractor to examine the 18 non-perennial stream segments that are the subject of the 2012 UAA and the Discussion Draft.

Second, section 20.6.4.15(C) NMAC has elevated the Hydrology Protocol, which is nothing more than a guidance document, to the status of an enforceable regulation. Although the Hydrology Protocol may indeed represent good guidance and may establish a sound methodology, NMED-written guidance documents (*e.g.*, Hydrology Protocol, Assessment Protocol, Nutrient Criteria, Above Ground Use of Domestic Reclaimed Wastewater, etc.), should not be made enforceable via their citation in the water quality standards, in Total Maximum Daily Loads (leading to enforceable NPDES permits), or in regulatory permits such as groundwater discharge permits. SJWC urges that all guidance, protocol and criteria documents be subject to the WQCC rulemaking process if they are going to be used as *de facto* water quality standards, TMDLs, or permit limitations that will be enforced by the WQCC or EPA. Circumvention of the rulemaking process violates the due process rights of those against whom the guidance documents are applied. Simple reference to guidance documents, protocols, and criteria in the New Mexico Water Quality Management Plan does not meet the public hearing requirements of the Water Quality Act regarding the adoption of regulations and standards.

Finally, as a result of the WQCC's adoption of the "rebuttable presumption"/ CWA §101(a)(2) uses approach, and the corresponding UAA/Hydrology Protocol requirement, certain NPDES discharges previously made into "ephemeral" waters now are made into "perennial" waters because a watercourse has been redesignated as perennial based solely on the discharge. When those NPDES permits are renewed, the permit conditions are more stringent in order to meet the upgraded designated uses, such as primary contact. More stringent permit conditions typically mean increased economic burdens on the discharger.

Arizona has a very reasonable approach to unclassified waters, particularly ephemeral waters. During previous Triennial Reviews of the state's surface water quality standards, several parties have proposed that New Mexico adopt water quality standards similar to those adopted by the State of Arizona that specifically address "effluent dependent waters." The adverse economic impacts on New Mexico NPDES dischargers resulting from the state's current unclassified waters scheme could be ameliorated by incorporating the Arizona concept of effluent dependent waters into the surface water quality standards. The following Arizona Water Quality Standards illustrate this point and provide a foundation for development of similar standards in New Mexico:

R18-11-101. Definitions

17. "Effluent-dependent water (EDW)" means a surface water, classified under R18-11-113, that consists of a point source discharge of wastewater. An effluent-dependent water is a surface water that, without the point source discharge of wastewater, would be an ephemeral water.
18. "Ephemeral water" means a surface water that has a channel that is at all times above the water table and flows only in direct response to precipitation.

R18-11-105. Tributaries; Designated Uses

The following water quality standards apply to a surface water that is not listed in Appendix B but that is a tributary to a listed surface water.

1. The aquatic and wildlife (ephemeral) and partial-body contact standards apply to an unlisted tributary that is an ephemeral water.
2. The aquatic and wildlife (cold water), full-body contact, and fish consumption standards apply to an unlisted tributary that is a perennial or intermittent surface water and is above 5000 feet in elevation.
3. The aquatic and wildlife (warm water), full-body contact, and fish consumption standards apply to an unlisted tributary that is a perennial or intermittent surface water and is below 5000 feet in elevation.

R18-11-113. Effluent-Dependent Waters

A. The Director shall classify a surface water as an effluent-dependent water by rule.

B. The Director may adopt, under R18-11-115, a site-specific water quality standard for an effluent-dependent water.

C. Any person may submit a petition for rule adoption requesting that the Director classify a surface water as an effluent-dependent water. The petition shall include:
   1. A map and a description of the surface water;
   2. Information that demonstrates that the surface water consists of a point source discharge of wastewater; and
   3. Information that demonstrates that, without a point source discharge of a wastewater, the receiving water is an ephemeral water.

D. The Director shall use the water quality standards that apply to an effluent-dependent water to derive water quality-based effluent limits for a point source discharge of wastewater to an ephemeral water.

E. The Director may use aquatic and wildlife (edw) acute standards only to derive water quality based effluent limits for a sporadic, infrequent, or emergency point source discharge to an ephemeral water or to an effluent-dependent water. The Director shall consider the following factors when deciding whether to apply A&Wedw (acute) standards:
   1. The amount, frequency, and duration of the discharge;
   2. The length of time water may be present in the receiving water;
   3. The distance to a downstream water with aquatic and wildlife chronic standards; and
   4. The likelihood of chronic exposure to pollutants.

F. The Director may establish alternative water quality-based effluent limits in an AZPDES permit based on seasonal differences in the discharge.

§ 20.6.4.101-503 NMAC: CLASSIFIED WATERS

SWQB proposes upgrading the secondary contact recreation designated use to primary contact recreation for numerous classified stream segments throughout New Mexico. In many instances, the rationale for the upgraded designated use is attributed to observations that primary contact recreation is indeed an existing use. However, in most instances, the following rationale is provided in the Discussion Draft to support the upgraded use:

> The State is required, from time to time or at least every three years such as during the Triennial Review, to regularly conduct an evaluation of all water bodies with uses not consistent with CWA Section 101(a) goals and if new information indicates the goals are attainable, revise its standards to reflect those uses (40 CFR 131.20). The Department has no evidence that this use is not attainable and information provided above would indicate that primary contact use is existing and likely attainable. To be consistent

> with the latest EPA recommendations for recreational contact and CWA 101(a) goals (77 FR71191, November 29, 2012), the designated use for secondary contact is upgraded to the primary contact use with corresponding criteria.

The number of wholesale upgrades from the designated use of secondary contact recreation to primary contact recreation without evidence that primary contact use is an existing use is over-reaching. For years, EPA has approved the secondary contact use for these classified waters. The presumption that the primary contact recreation use is attainable, without any supporting evidence, will place a burden on dischargers to either upgrade wastewater treatment for bacteria or technically and legally rebut the presumption that primary contact recreation is attainable. Because the current designated use of secondary contact recreation meets the CWA § 101(a)(2) goals, *i.e.*, recreation in and on the water, there is no reason to impose such additional burdens on dischargers.

§ 20.6.4.404 NMAC: SAN JUAN RIVER BASIN

This classified stream segment, at page 22 of the Discussion Draft, includes a proposed downgrade in designated use from marginal warmwater to coolwater based on a November 2013 Public Discussion Draft UAA Aquatic Life Uses for the Animas River in New Mexico. For the reasons set forth in SJWC's comments on that draft UAA, SJWC supports this proposal.

Thank you for your consideration of these comments. If you have any questions about SJWC's position, or would like to discuss these issues in more detail, please do not hesitate to call me. SJWC looks forward to receiving your response to these comments and to participating in the upcoming Triennial Review.

Sincerely,

L. Randy Kirkpatrick
Executive Director
San Juan Water Commission

Gila/Rio Grande Chapter (780), Trout Unlimited
105 Pecan Drive
Las Cruces, NM 88001

May 30, 2014

Kristine Pintado, Water Quality Standards Coordinator
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Subject: **Proposed changes to 20.6.4.16 NMAC use of a piscicides**

These comments concern the proposed changes to 20.6.4.16 NMAC which governs the planned use of a piscicide. For the reasons stated below, the Gila/Rio Grande Chapter (780) of Trout Unlimited strongly supports the proposed changes. The GRG-TU Chapter is based in Las Cruces, NM, and has 155 members. Our group strongly supports watershed conservation projects in New Mexico, and the restoration of native fish species. Representatives from our organization have attended WQCC public hearings and Commission meetings to voice their support for using piscicides to restore native Rio Grande cutthroat and Gila trout to watersheds where they once were found.

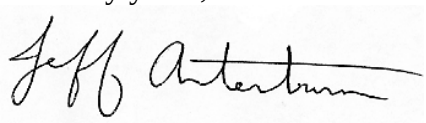
Our comments are as follows:

1) Rio Grande cutthroat and Gila trout can only exist in streams, or stream segments, that are free of non-native trout, including rainbow trout originating from stocking that are able to interbreed and genetically hybridize with both of these native trout species, and introduced brown trout and brook trout that compete the native trout. The use of piscicides is the only effective method for accomplishing the complete removal of non-native trout so that native trout can be restored.
2) The procedures used for piscicide treatment are well defined and straightforward. Drip stations that disperse a measured amount of piscicide into the stream are deployed above a natural or artificial barrier that prevents the upstream migration of non-native fish. The drip stations release the piscicide into the stream at a measured and very low concentration, in the range of 40 parts per billion. Where appropriate, a detoxification station is deployed at the downstream terminus of the treatment area to detoxify the stream using potassium permanganate, a substance that is used to treat drinking water where chlorine treatment is not practicable.
3) Rotenone, which is the active ingredient of the piscicides currently on the market, is a derivative of plants in the pea family. It has been used for millennia by Native Americans in South America to harvest fish for consumption. Rotenone rapidly breaks down into non-toxic substances in moving water and sunlight. It does not penetrate the substrate and thus poses no

risk to ground water. In the concentrations used to restore native trout, rotenone is not toxic to mammals, birds, reptiles or other air-breathing organisms. Numerous studies have shown that although piscicide treatments temporarily depress aquatic insect populations, these populations typically rebound to pre-treatment levels within about a year. The evidence presented at WQCC hearings and the scientific literature lead to the conclusion that when used as directed, the use of piscicides does not pose a risk to human health or the environment.

4) The WQCC's current rule requires the filing of a formal petition, Environment Department review, extensive public notice, a public hearing, and then a Commission meeting before the use of a piscicide to restore native trout can be approved. The process is time-consuming and costly. Expenses include legal fees, court reporting fees, hearing location rental, publication of notice, and sometimes expert witness fees.
5) Since the WQCC's current rule governing the planned use of a piscicide was adopted, federal law has changed, so that now in virtually all case, the use of a piscicide requires the agency proposing the treatment to obtain an EPA NPDES discharge permit. In addition, native trout restoration projects in New Mexico typically take place in whole or in part National Forests where they are subject to review under the NEPA process, which includes public notice and comment. The current WQCC rule is essentially duplicative of these other review processes, and in our view it is no longer necessary.
6) The Gila/Rio Grande Chapter (780) of Trout Unlimited supports the proposed change in the Commission's piscicide rule because it will eliminate a costly, time-consuming and duplicative layer of review. The proposed rule also provides that in those rare instances where a proposed piscicide application is not subject to an NPDES discharge permit, the applicant must file a petition with the Commission and that the Commission may required a public hearing, if it deems it appropriate. Under the current rule, public hearings are mandatory in all cases.
7) The Gila/Rio Grande Chapter (780) of Trout Unlimited believes that the proposed rule will streamline the process for deploying piscicides to restore New Mexico's native trout without compromising the protection for human health and the environment. The proposed rule will allow native trout restorations to be accomplished faster and at a significantly lower cost. We strongly support the proposed changes to 20.6.4.16 NMAC and urge the Commission to adopt them.

Sincerely yours,



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This letter contains the comments of the Truchas Chapter of Trout Unlimited concerning the proposed changes to 20.6.4.16 NMAC which governs the planned use of a piscicide. For the reasons stated below, the Truchas Chapter strongly supports the proposed changes to the rule.

Trout Unlimited ("TU") is a national 501(c)(3) conservation organization with more than 150,000 volunteer members, including 1,200 in New Mexico. TU's mission is to conserve, protect and restore North America's cold water fisheries and their watersheds. The Truchas Chapter is based in Santa Fe and represents TU members in the northern portion of New Mexico. Our members are active sportsmen and women who care about conserving and improving New Mexico's trout fisheries. They participate in a broad range of conservation and education activities that are related to TU's core mission.

Over the years in which the current rule, 20.6.4.16 NMAC, and its predecessor have been in effect, representatives of TU's New Mexico's Chapters, individual TU members and representatives of TU's New Mexico State Council have appeared at WQCC public hearings and Commission meetings to voice their support for using piscicides to restore native Rio Grande cutthroat and Gila trout to watersheds where they once were found.

The scientific literature and the experience of our members in the field is clear that sustainable populations of Rio Grande cutthroat and Gila trout can only exist in streams, or stream segments, that are free of non-native trout, including brown trout from Europe, brook trout from the eastern part of the United States, and rainbow trout from the west coast. Brown trout and brook trout out-compete the native fish and rainbow trout interbreed with them. The use of piscicides is the only effective method for accomplishing the complete removal of non-native trout so that native trout can be restored.

The mechanics of piscicide treatment are straightforward. Drip stations that disperse a measured amount of piscicide into the stream a deployed above a natural or artificial barrier that prevents the upstream migration of non-native fish. The drip stations release the piscicide into the stream at a measured and very low concentration, in the range of 40 parts per billion. Where appropriate, a detoxification station is deployed at the downstream terminus of the treatment area to detoxify the stream using potassium permanganate, a substance that is used to treat drinking water where chlorine treatment is not practicable.

Rotenone, which is the active ingredient of the piscicides currently on the market, is a derivative of plants in the pea family. It has been used for millennia by Native Americans in South America to harvest fish for consumption. Rotenone rapidly breaks down into non-toxic substances in moving water and sunlight. It does not penetrate the substrate and thus poses no risk to ground water. In the concentrations used to restore native trout, rotenone is not toxic to mammals, birds, reptiles or other air-breathing organisms. Numerous studies have shown that although piscicide treatments temporarily depress aquatic insect populations, these populations typically rebound to pre-treatment levels within about a year. The evidence presented at WQCC

hearings and the scientific literature lead to the conclusion that when used as directed, the use of piscicides does not pose a risk to human health or the environment.

The WQCC's current rule requires the filing of a formal petition, Environment Department review, extensive public notice, a public hearing, and then a Commission meeting before the use of a piscicide to restore native trout can be approved. The process is time-consuming and costly. Expenses include legal fees, court reporting fees, hearing location rental, publication of notice, and sometimes expert witness fees.

Since the WQCC's current rule governing the planned use of a piscicide was adopted, federal law has changed, so that now in virtually all case, the use of a piscicide requires the agency proposing the treatment to obtain an EPA NPDES discharge permit. In addition, native trout restoration projects in New Mexico typically take place in whole or in part National Forests where they are subject to review under the NEPA process, which includes public notice and comment. The current WQCC rule is essentially duplicative of these other review processes, and in our view it is no longer necessary.

The Truchas Chapter supports the proposed change in the Commission's piscicide rule because it will eliminate a costly, time-consuming and duplicative layer of review. The proposed rule also provides that in those rare instances where a proposed piscicide application is not subject to an NPDES discharge permit, the applicant must file a petition with the Commission and that the Commission may require a public hearing, if it deems it appropriate. Under the current rule, public hearings are mandatory in all cases.

The Truchas Chapter believes that the proposed rule will streamline the process for deploying piscicides to restore New Mexico's native trout without compromising the protection for human health and the environment. The proposed rule will allow native trout restorations to be accomplished faster and at a significantly lower cost. The Truchas Chapter strongly supports the proposed changes to 20.6.4.16 NMAC and urges the Commission to adopt them.

Thank you for your consideration.

Sincerely

Michael Rearick
President
Truchas Chapter Trout Unlimited