STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

In the Matter of:	)	
PROPOSED AMENDMENTS TO *STANDARDS FOR INTERSTATE AND INTRASTATE WATERS,* 20.6.4 NMAC	)	**No. WQCC 14-05 (R)**
New Mexico Environment Department,	)	
Petitioner.		

REBUTTAL TESTIMONY OF KRISTINE PINTADO

I. INTRODUCTION

My name is Kristine Pintado and I am currently employed as the Water Quality Standards Coordinator with the New Mexico Environment Department ("NMED"), Water Protection Division ("WPD") Surface Water Quality Bureau ("SWQB"). My professional resume is included as SWQB Exhibit 14, in the Notice of Intent ("NOI") direct testimony filed on December 12, 2014.

My rebuttal testimony focuses on the Temporary Standards provision proposed by the SWQB as a new Subsection 20.6.4.10.F NMAC, and changes to the review of piscicide applications under Section 20.6.4.16 NMAC. Freeport-MacMoRan Chino Mines ("Chino Mines"), Peabody Energy ("Peabody") and the San Juan Water Commission ("SJWC") commented in their respective NOI testimonies that they generally support SWQB's Temporary Standards proposal, and the SWQB appreciates the support. My rebuttal testimony will first respond to Peabody's recommendation to add language to the SWQB's Temporary Standard

proposal. Second, I will respond to Amigos Bravos' ("AB") proposal to strike completely SWQB's Temporary Standard provision, as well as the language allowing a Temporary Standard be placed into a compliance schedule. Third, I will address specific comments from the SJWC on the SWQB's Temporary Standard proposal. Finally, AB proposes to maintain the requirement that the Water Quality Control Commission ("WQCC") must hold public hearings to review piscicide applications under Section 20.6.4.16 NMAC that are not covered by the federal permit program. My rebuttal testimony will support the SWQB and the New Mexico Department of Game and Fish ("NMDGF") proposal that the review of piscicide applications outside the federal permit should be determined by the WQCC, and that a public hearing for these applications should not be mandatory as proposed by AB.

Each issue related to the SWQB's proposals for the Temporary Standards under Section 20.6.4.10 NMAC and for the review of piscicide applications under Section 20.6.4.16 NMAC will be addressed in the rebuttal testimony below, point by point.

II. PROPOSALS AND REBUTTAL

A. <u>Proposed Subsection F of 20.6.4.10 NMAC – Temporary Standards</u>

Summary of Peabody Testimony and SWQB Rebuttal

Peabody recommended in their NOI testimony that the WQCC should consider extending the Temporary Standards to include language where "significant uncertainties" exist with respect to the underlying water quality standards ("WQS") that can be resolved by additional study. However, Peabody did not include specific language to add to the SWQB proposal. The SWQB does not agree that such language is necessary as such situations can be addressed with the

language currently proposed by SWQB proposal. The SWQB's rebuttal response is presented below.

SWQB Rebuttal Response: The SWQB appreciates Peabody's support for the Temporary Standards provision. If there are uncertainties about the underlying WQS, then the use of the Temporary Standards provision may be one of several possible approaches. In situations where the Temporary Standards provision is appropriate, then the petitioner should anticipate and account for WQS uncertainties in their workplan and timetable, including the need for studies related to evaluating the underlying WQS. Also, if there are uncertainties that arise due to unanticipated or extraordinary circumstances, a Temporary Standard may be extended to allow resolution of the uncertainties, if the requirements in Subsection 20.6.4.10.F(10) NMAC are met.

The SWQB considered the Peabody-suggested temporary modification provision allowed in Colorado ("CO") for *"significant uncertainty regarding the appropriate long-term underlying standard"* (Peabody NOI), however Peabody did not include specific language to add to the SWQB proposal. The CO provision is for existing permitted dischargers with a demonstrated or predicted water quality based effluent limit compliance problem, and where one of two situations exists: (1) significant uncertainty about the WQS needed to protect current and future uses; or (2) significant uncertainty regarding the extent to which existing quality is the result of natural or irreversible human caused conditions. CO Section 31.7(3). Adequate supporting information includes a justification for the interim narrative or numeric standard, any data describing effluent and ambient quality, a plan for eliminating the need for the temporary modification and a justification for the proposed expiration date. The U.S. Environmental Protection Agency ("EPA") has approved temporary modifications in Colorado authorized by Section 31.7(3) based

on their review of evidence in support of the WQS revisions for the temporary modifications. (SWQB Rebuttal Exhibit 8)

First, as pointed out above, if there is uncertainty about the underlying WQS, then the Temporary Standard may be one of several possible approaches. There are several other tools in the WQS to address the uncertainties in such situations (Sections 20.6.4.10 and .15 NMAC). Second, the CO provision limits the uncertainty to one of the 40 CFR §131.10(g) factors, whereas the SWQB's proposal does not impose such limitations. Third, the SWQB proposal does not exclude uncertainties with respect to the underlying WQS. Much of the same information required in support of a temporary modification in CO under Section 31.7(3) would be expected to support a petition under the SWQB's proposal. Therefore, the SWQB considers that language to specifically address WQS uncertainty is unnecessary, and recommends that the WQCC not support the addition of specific language as recommended by Peabody.

Summary of Amigos Bravos Testimony and SWQB Rebuttal

AB rejects SWQB's Temporary Standard and would delete proposed Subsections 20.6.4.10.F and H NMAC entirely. AB alleges Temporary Standards: 1) weaken standards for waters that are already impaired; 2) increase discharges of pollution; 3) are not necessary; 4) prohibit new or increased discharges; 5) exacerbate impairment making attainment more difficult; and 6) reward polluters who cannot obtain a compliance schedule.

The SWQB does not agree: 1) WQS goals are not weakened, WQS stay in place and controls tighten over time to meet the WQS; 2) pollutant loads are reduced over time and progress is demonstrated toward meeting WQS; 3) new and more stringent WQS goals are anticipated and WQS must be met; 4) EPA cannot issue a water discharge permit inconsistent

with the federal Water Pollution Control Act (aka, the Clean Water Act ("CWA")) for any discharger, including new and increased dischargers; 5) Temporary Standards tighten over time to reduce pollutant loads; and 6) the Temporary Standard proposal does not allow for non-compliance with the CWA.

SWQB's rebuttal testimony addresses each of AB's objections in detail below, point by point.

AB: The Temporary Standard would allow polluters to petition the WQCC for weaker standards for receiving waters that are already impaired and not meeting water quality standards. The Temporary Standard is aimed at already impaired waters, and condones the increased concentrations of parameters that are causing impairment, thus exacerbating impairment and making attainment of standards even more difficult.

SWQB Rebuttal Response: The SWQB disagrees with AB's characterization that a Temporary Standard would allow increased concentrations and exacerbating impairment. A Temporary Standard would require the original WQS goals to remain in place and not be weakened, as opposed to permanently downgrading designated uses of a water body. A successful Temporary Standard petition would contain controls with limitations tightening over time and ultimately achieving the original WQS. In cases where a newly established WQS is not yet achievable because of technology-based, or other limitations, but the waterbody has not yet been specifically identified as impaired by the SWQB, the proposed Temporary Standard would proactively lay the groundwork for decreasing pollutant concentrations and potentially prevent future impairment. In all cases, however, the Temporary Standard does not allow additional

pollution that may worsen impairment and the petition must demonstrate continued progress toward reducing pollutant loads and achieving the original WQS.

The proposal is also consistent with guidance in the preamble to the EPA's Advanced Notice of Proposed Rulemaking ("ANPRM") (1998), and the recently proposed federal revisions to 40 CFR §131, which require that Temporary Standards be developed as close to the underlying standard (e.g., numerical criterion) as is possible. The temporary criterion reflects the "highest degree of protection feasible in the short term" and will not cause further impairment or loss of an existing use (40 CFR §131.14 (proposed); 78 FR 171 p. 54545, Sept. 4, 2013).

AB: Allowing a Temporary Standard would result in increased discharges of pollution.

SWQB Rebuttal Response: The SWQB disagrees with this statement. As discussed previously, a Temporary Standard must reduce pollutant loads over time and further must demonstrate continued progress toward achieving the original WQS.

AB: AB claims there is no need for the provision as no facility has ever been denied a National Pollutant Discharge Elimination System ("NPDES") permit because it could not meet effluent limits and compliance schedules can be included in a facility's permit to allow time for compliance.

SWQB Rebuttal Response: Since the EPA cannot issue a NPDES permit that does not comply with the CWA (40 CFR §122.4) and federal regulations require the permittee to comply with all conditions of a permit (40 CFR §122.41(a)), it follows that a facility would not be denied a NPDES permit on the basis that it cannot meet effluent limits upon initial permit issuance.

Where applicable, compliance schedules may be included in the permit and must be adhered to as NPDES permit requirements.

However, the SWQB disagrees there is no need for this provision, as stated in its previous testimony (Pintado NOI Testimony, pp. 18-20). Temporary Standards and compliance schedules serve two distinctly different purposes. A Temporary Standard provision is needed where the criterion supporting a designated use is not attainable today but may be attainable in the future, or to work towards achieving new or revised WQS which are more stringent. In contrast, compliance schedules may be appropriate when the WQS criterion is attainable, but the permittee only needs additional time to modify or upgrade treatment facilities to meet the water quality based effluent limit ("WQBEL").

AB: AB also claims that the CWA regulations and case law prohibit the issuance of discharge permits for new or increased discharges where the imposition of conditions in the permit cannot ensure compliance with water quality standards. See 40 CFR §122.4; Friends of Pint[o] Creek V. EPA, 504 F.3d 1007, 1012 (9th Cir. 2007).

SWQB Rebuttal Response: It is true that as the NPDES permitting authority, the EPA cannot issue a permit which does not comply with the CWA. (40 CFR §122.4). Any permit allowances or conditions made for additional or new dischargers must be consistent with the CWA, including compliance with the underlying WQS. The Temporary Standard provision does not change the EPA's regulations, policies or guidance for writing NPDES permits; it would provide for a Temporary WQS to be adopted that the permit is based on for a limited time. Further, the Temporary Standard requires the discharger to maintain and improve water quality towards compliance with the underlying, original WQS.

AB: AB alleges that the proposal rewards polluters that have been illegally discharging or who have failed or been unable to obtain a compliance schedule.

SWQB Rebuttal Response: As stated above, the EPA cannot issue a permit that does not comply with the CWA (40 CFR §122.4) and a permittee must comply with all conditions of the permit (40 CFR §122.41(a)). Allowances, such as compliance schedules, are assigned under certain conditions by EPA and must be consistent with the CWA. Violations of a NPDES permit and illegal discharges are grounds for enforcement action, permit termination, or denial of a permit renewal. In short, this proposal does not allow for non-compliance with the CWA, and does not reward polluters.

Summary of SJWC Testimony and SWQB Rebuttal

The SJWC[1] has also stated support for the SWQB's Temporary Standard, and rejects Amigos Bravos' proposal that would delete it, but has some concerns about the proposal and suggests several proposals, which are not supported by the SWQB. The SJWC suggests the Temporary Standard: 1) costs more than downgrading the WQS and provides no significant benefit; 2) is not necessary if Use Attainability Analysis ("UAA")-like demonstration must be conducted and UAA-like information should not be required; 3) mimics the EPA's variance procedures and guidance; 4) the WQCC should adopt a Temporary Standards concept through a variance under NMSA 1978, Section 76-6-4. The SWQB finds that these statements do not have merit, and should not be adopted by the WQCC because: 1) cost-benefit analyses or supporting

[1] The San Juan Water Commission (SJWC) member entities include the City of Aztec, City of Bloomfield, City of Farmington, San Juan County, and San Juan County Rural Water Users Association, all of which receive their municipal and industrial water from surface water supplies.

information that shows transactional costs was not provided, nor was it demonstrated why it is more beneficial to downgrade the WQS; 2) the 40 CFR §131.10(g) factor demonstration is necessary to show why the WQS are not achievable; 3) the EPA WQS variance procedures are included in SWQB's proposal; 4) variances under the authority of the WQCC are currently available but apply to pollution abatement for a person as an individual exemption from the state's pollution regulation and do not apply to the WQS; and 5) the factor demonstration is required by the EPA and is consistent with the 1977 EPA general counsel opinion on WQS variances.

The SJWC's statements and proposals are presented below, along with the SWQB's rebuttal testimony for each.

SJWC: The SJWC has stated in testimony that the transactional cost associated with the SWQB proposal counsel against its adoption because it provides no significant benefit to point and non-point source discharges in New Mexico (Nylander Testimony, SJWC NOI). The SJWC points out that the transactional cost of obtaining a Temporary Standard is likely significantly higher than simply downgrading the designated use of a water body.

SWQB Rebuttal Response: First, the SJWC has not provided any cost analyses, examples, or comparisons of transactional costs to support their statements. However, the costs of preparing the required analyses for a successful petition and the costs of those efforts required to achieve compliance with the WQS are obviously not the same, and are not comparable. For example, compliance cost estimates to achieve WQS may include capital costs, operating and maintenance

expenditures, and costs of administration.[2] Second, except where provided for in a Temporary Standard provision such as proposed by the SWQB, the WQS are the required targets, regardless of cost. Third, the removal or downgrade of a designated use such as allowed under the UAA process is not always the appropriate path and is not always allowable; in these cases the WQS must still be met. The SJWC offers no alternative for the Temporary Standard, except to suggest the adoption of a provision under NMSA 1978, Section 76-6-4(H). Finally, the CWA does not allow for downgrading a use based solely on a cost comparison between obtaining a Temporary Standard and performing a UAA.

SJWC: The SJWC maintains that the SWQB proposal is unnecessary and makes little sense from a transactional cost standpoint if a petitioner must first demonstrate that attainment of the associated designated use is not feasible because of one or more of the factors listed in 40 CFR §131.10(g). If that is the case the designated use should be revised because it is unattainable.

SWQB Rebuttal Response: The SWQB maintains that the proposal is necessary. The SWQB agrees that if a use is not appropriate and is unattainable, and this can be demonstrated through a UAA, then the UAA is the appropriate path an affected party should take.

The following 40 CFR §131.10(g) factors will most likely apply exclusively to a UAA proposal:

> *"1. Naturally occurring pollutant concentrations prevent the attainment of the use; or*
>
> *2. Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of*

[2] Guidelines for Preparing Economic Analyses December 2010 (Updated May 2014). National Center for Environmental Economics, Office of Policy, U.S. Environmental Protection Agency. http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-50.pdf/$file/EE-0568-50.pdf

> *sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or…*
>
> *5. Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses;…"*
> (40 CFR §131.10(g)(1), (2) and (5))

However, the Temporary Standard provision provides a path when the use is appropriate and attainable, but the petitioner can demonstrate that it is not achievable in the near-term due to one or more of the factors listed in 40 CFR §131.10(g).

The most likely factors under 40 CFR §131.10(g) that would apply to a Temporary Standards proposal are:

> *"3. Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or*
>
> *4. Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or*
>
> *6. Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact."*
> (40 CFR §131.10(g)(3), (4) and (6))

If the WQS can be achieved within the five-year NPDES permit cycle with modified or updated treatment facilities, then a permit compliance schedule may be the most appropriate tool. However, there may be cases where a new or more stringent WQS for a pollutant (e.g., ammonia) is adopted and must be incorporated into renewed NPDES permits (i.e., WQBELs). The permittee is required to comply upon permit issuance, or within the life of the permit, regardless of their current treatment facilities (40 CFR §131.41(a)). For these situations, and especially where the required treatment removal process is beyond the current limits of technology or will take more than one permit cycle to construct, a Temporary Standard is

appropriate. It is for these situations, where other regulatory tools in the water quality standards are not appropriate, that the SWQB anticipates the Temporary Standard proposal could be applied.

SJWC: The SJWC points out that the SWQB's proposal mimics, in certain respects, the EPA variance procedure utilized since 1977.

SWQB Rebuttal Response: The SWQB appreciates the comment and notes that the SJWC is likely also aware of the 1977 EPA Office of General Counsel legal opinion that a Temporary Standard or variance in the WQS, rather than permanently downgrading a use, is allowable as long as it is consistent with the substantive requirements as a designated use downgrade or removal. (SWQB Rebuttal Exhibit 9) The Temporary Standard provision proposed in this Triennial Review was developed in close consultation with EPA Region 6 and incorporates the most recent EPA guidance, suggestions from multiple stakeholders, and WQS variance procedures and Temporary Standards provisions from other states. The requirements in the current proposal are consistent with those required by the EPA for states to adopt and implement a temporary WQS.

SJWC: The SJWC suggests that the WQCC should adopt a Temporary Standards concept via its statutory authority to grant variances (*see* NMSA 1978, Section 76-6-4(H)).

SWQB Rebuttal Response: As noted in NMED's petition, while EPA's guidance document refers to temporary or interim WQS as a type of "variance", the New Mexico Water Quality Act ("WQA"), NMSA 1978, Sections 74-6-1 to -17 (1967, as amended through 2013), and ensuing regulations, already describe "variance" as an individual discharge permit-specific exclusion

from regulation. Specifically, NMSA 1978, Section 74-6-4(H) states that the WQCC *"may grant an individual variance from any regulation of the commission whenever* ***it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time*** *[emphasis added]. Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted;…"*

Further, the implementing regulations for a variance are found in 20.6.2.1210 NMAC:

20.6.2.1210 VARIANCE PETITIONS:

A. Any ***person seeking a variance*** *[emphasis added] pursuant to Section 74-6-4 (G) NMSA 1978, shall do so by filing a written petition with the commission. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:*

(1) state the petitioner's name and address;
(2) state the date of the petition;
(3) ***describe the facility or activity for which the variance is sought****; [emphasis added]*
(4) state the address or description of the property upon which the facility is located;
(5) ***describe the water body or watercourse affected by the discharge****; [emphasis added]*
(6) identify the regulation of the commission from which the variance is sought;
(7) state in detail the extent to which the petitioner wishes to vary from the regulation;
(8) state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and
(9) state the period of time for which the variance is desired.

B. The variance petition shall be reviewed in accordance with the adjudicatory procedures of 20 NMAC 1.3.

C. The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. The commission shall not grant a variance for a period of time in excess of five years.

D. An order of the commission is final and bars the petitioner from petitioning for the same variance without special permission from the commission. The commission may consider, among other things, the development of new information and techniques to be sufficient justification for a second petition. If the petitioner, or his authorized representative, fails to appear at the public hearing on the variance petition, the commission shall proceed with the hearing on the basis of the petition. A variance may not be extended or renewed unless a new petition is filed and processed in accordance with the procedures established by this Section.

As such, variance procedures have already been adopted for "*a person effecting a particular abatement of water pollution*" where person is defined in Subsection JJ under 20.6.2.7 NMAC as "*an individual or any other entity including partnerships, corporation, associations, responsible business or association agents or officers, the state or a political subdivision of the state or any agency, department or instrumentality of the United States and any of its officers, agents or employees*".

The authorities granted in the New Mexico WQA and regulations provide for variances of any particular abatement of water pollution, where abatement activities are generally defined in NMSA 1978, Section 74-6-4(E) and include discharge permits "other than facilities … for which a permit … has been issued pursuant to the federal act". This authority, however, only applies to "*an unreasonable burden upon a person*" *effecting* "*abatement*" and therefore cannot be used to adopt a water body specific Temporary Standard. Consistent with this interpretation, all variances for permits issued by the Groundwater Quality Bureau ("GWQB") and approved by the WQCC have been related to the permitting regulations for a specific permit issued to a person. Further, New Mexico lacks delegated authority to implement the CWA NPDES program, thus these permits are federally issued and, therefore, are not subject to the variance authority provided under the New Mexico WQA. Finally, the EPA, as the permitting authority, may

consider a variance from the technology-based requirements in a NPDES permit under CWA §301(c), but not from the requirement for compliance with WQS. (SWQB Rebuttal Exhibit 10)

The SWQB's proposal rests on the WQCC's authority to adopt WQS at NMSA 1978, Section 74-6-4(D), which states that the WQCC *"shall adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Act. The standards shall include narrative standards and as appropriate, the designated uses of the waters and the water quality criteria necessary to protect such uses. The standards shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act. In making standards, the commission shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes."*

For these reasons the SWQB finds that the term "Temporary Standard" is appropriate, is within the scope of the WQS, and avoids confusion with other state variance rules and regulations. We urge the WQCC to reject the SJWC's proposal.

SJWC: The SJWC suggests that a Petitioner for a Temporary Standard should not be required to submit UAA-like information.

SWQB Rebuttal Response: As the SJWC notes (Nylander Testimony, SJWC NOI, p. 9), the SWQB Temporary Standard proposal is similar to that proposed by the SJWC in 2003, which included two critical requirements: 1) documentation that one of the conditions for granting the Temporary Standard/variance exists; and 2) variances granted shall be reviewed by the WQCC at least every three years (Nylander Testimony, SJWC NOI, p. 9, K.1.f and K.4, respectively). To

meet the first requirement, the SJWC incorporated by reference all of the factors under 40 CFR §131.10(g) (Nylander Testimony, SJWC NOI, p. 9, K.1.f.). The 2003 SJWC proposal also includes the following requirements under K.2 (viii) and (ix):

> *(viii) documentation that one of the conditions set out in paragraph K(1) exists; (ix) the interim water quality standard sought by petitioner, along with evidence that the interim standard will not impair or otherwise negatively impact existing water quality…*
>
> (Nylander Testimony, SJWC NOI, p. 9)

Consistent with the 1977 EPA Office of General Counsel legal opinion on WQS variances (SWQB Rebuttal Exhibit 9), the 2003 SJWC proposal included EPA's requirements that documentation for a temporary WQS must align with one (or more) of the §131.10 (g) or UAA factors, which was included by reference under paragraph K (1). The SJWC language proposed in 2003, however, provided no information on how these requirements would be met. The current SJWC testimony proposes striking (1)(a), (5) and (6) in the current SWQB proposal, however, these requirements merely provide details on a clear path for both the affected regulated community and the WQCC in consideration of a Temporary Standards proposal. For this reason the SWQB urges the WQCC to reject the SJWC proposal.

SJWC: The Temporary Standard proposal should allow for interim standards for designated uses and not just be limited to applicable criteria.

SWQB Rebuttal Response: The SWQB proposal states the designated use is not to be modified on a temporary basis (Subsection 20.6.4.10.F(3) NMAC). As proposed by the SWQB, a Temporary Standard would affect the criterion for a particular pollutant associated with a designated use for a limited time. According to the EPA guidance in the 2013 proposed WQS

regulations, *"Typically, states find [WQS] variances that apply to a specific pollutant(s) and discharger to be most useful."* (78 FR 54532). The EPA guidance allows that a temporary use, and associated temporary criterion, may be adopted as part of a Temporary Standard. However, as a Temporary Standard is not intended to be a step towards a modification to the designated use, the proposal is limited to a Temporary Standard for a particular criterion. Also, as designated uses carry with them several criteria, this approach avoids any confusion about which criterion is being addressed in the Temporary Standard. The SWQB urges the WQCC not to modify the proposal as suggested by the SJWC.

B. Proposed Changes to Piscicide Applications under 20.6.4.7.16 NMAC

Summary of Amigos Bravos Testimony and SWQB Rebuttal

Amigos Bravos proposes that for piscicide applications not covered under an NPDES permit, the SWQB should keep mandatory the requirements under Subsection 20.6.4.16.C NMAC, specifically that the WQCC must hold a public hearing. The SWQB appreciates the importance of public participation in the review of piscicide applications not covered under the federal permit program, but does not agree with the Amigos Bravos' proposal. The Adjudicatory Procedures under Section 20.1.3 NMAC, which are also cited under Subsection 20.6.4.16.C NMAC allow for the public to request a review during a public hearing, if the reasons support it. The SWQB's rebuttal testimony is presented below.

SWQB Rebuttal Response: As stated in its NOI Testimony, the SWQB, in collaboration with the New Mexico Department of Game and Fish ("NMDGF"), proposes to amend Section 20.6.4.16 NMAC to streamline the piscicide use process for more efficient use of governmental

resources applied to enhance fishery management and conservation activities in New Mexico (Pintado Testimony, p.36). The SWQB's proposed revisions to Subsections 20.6.4.16.C, D and E NMAC provide for a hearing to review the piscicide application not covered by NPDES at the WQCC's discretion. The NMDGF has been required to present piscicide applications to the WQCC for at least six public WQCC hearings over the past ten years. According to the NMDGF, the WQCC has *"heard the same testimony with little new information regarding human or environmental health concerns. Consistent expert testimony indicates the products and their use are safe and effective for fishery management and conservation goals in New Mexico."* (NMDGF memo, SWQB NOI Testimony Exhibit 15)

In the SWQB's proposal, piscicide applications that are not covered under the NPDES will still require a petition to be filed with the WQCC and written notice given to political subdivisions, water planning entities, local conservancy and irrigation districts, and local media outlets. This includes newspaper publication in the locality affected by the proposed application. (Subsections 20.6.4.16.A and C NMAC). This provides information to the public about the proposed application, and allows individuals from the affected locality the opportunity to comment on and participate in the proposed project.

Any petition filed with the WQCC and reviewed by the SWQB is a public document and available for review. The opportunity to provide input in writing and in advance of any decisions has not changed. Additionally, the adjudicatory procedures under Section 20.1.3 NMAC, which are cited in Subsection 20.6.4.16.C NMAC provide for the public in the affected locality to request a hearing when reasons support it. The SWQB recommends that the WQCC should reject the Amigos Bravos proposal to make mandatory a public hearing for piscicide applications.