

I. AMIGOS BRAVOS' EXCEPTIONS TO THE HEARING OFFICERS' PROPOSED STATEMENT OF REASONS AND FINAL ORDER

Amigos Bravos hereby submits the following exceptions regarding the proposed Statement of Reasons and Final Order (hereinafter "PSOR").

1. As a general proposition, the PSOR fails to articulate the required basis for a lawful final order by this Commission and thus risks rendering any final order by the Commission arbitrary and capricious because it glosses over and fails to address the substantial evidence, objections, and legal arguments of the other parties, in particular, but not exclusively, those presented by Amigos Bravos. The PSOR does this by virtue of cutting-and-pasting, with little change, the recommended statement of reasons of only two parties, the New Mexico Environment Department ("Department") and, relative to proposed site-specific copper criteria in the Mimbres Basin, Freeport-McMoran Chino Mines. As a consequence, the PSOR further fails to acknowledge all issues that were properly presented to the Commission by the parties through written filings and oral testimony and how those issues were resolved.

2. The PSOR, if adopted, would set a problematic precedent undermining the credibility of the Commission's hearing process, suggesting that it does not provide a forum where the public's issues are fairly, fully, and forthrightly acknowledged and resolved. This could have the unintended and unfortunate consequence of: (a) intensifying the politicization of the Commission's hearing process; and (b) shifting the public's efforts to protect or otherwise engage in implementation of the Clean Water Act and Water Quality Control Act towards the legislature and courts. The Commission should therefore ensure that its deliberative process, final statement of reasons, and final order respects the parties' significant investment in these proceedings and provides the public with confidence that the Commission is functioning objectively and impartially and is not simply a rubber stamp for the Department's or any other

parties' proposals.

3. The PSOR mischaracterizes Amigos Bravos' position regarding the New Mexico Environment Department's Temporary Standards proposal. Amigos Bravos neither "prefer[s] the EPA's variance" nor agrees "that there is significant interest in the temporary standards provision in New Mexico." PSOR ¶ 44. Instead, Amigos Bravos repeatedly stated throughout these proceedings, and explicitly in its closing arguments, that "the Department has not demonstrated a need for temporary standards." Pleading Log #44, p. 3 (citing Direct Testimony of Rachel Conn at 6-8; Rebuttal Testimony of Rachel Conn at 9-10; Tran., p. 783, line 16 thru p. 784 line 11).

4. As further stated in Amigos Bravos' January 19, 2016 Closing Arguments (Pleading Log #44, pp. 3-8), Amigos Bravos argued that, even if the Commission concluded that a temporary standards provision was appropriate for New Mexico, the Commission should still reject the Department's temporary standards proposal. In its closing arguments, Amigos Bravos asserted three primary bases in support of this position, none of which are acknowledged let alone addressed by the PSOR:

- (a) Because the Department's representation that a temporary standard would only be used as a "last consideration" is not reflected in the text of the Department's proposed standards. Pleading Log #44, pp. 3-4.
- (b) Because the Department's temporary standards proposal fails to address how a temporary standard would achieve the original, permanent standard in waters with multiple dischargers. Pleading Log #44, pp. 4-5.
- (c) Because the Department's representation that a temporary standard would be constrained to "the minimum time necessary" is not reflected and is

entirely and perplexingly absent from the text of the Department's proposed standards. Pleading Log #44, pp. 6-7.

5. The PSOR arbitrarily and capriciously also ignores Amigos Bravos' constructive recommendations and proposed language to remedy serious deficiencies in the Department's temporary standards proposal—recommendations based on Amigos Bravos' underlying concerns and reflecting the testimony and arguments presented during the public hearing. Specifically, the PSOR ignores Amigos Bravos' recommendations and proposed language to:

- (a) Conform the temporary standards proposal to New Mexico's antidegradation protections (Pleading Log #44, pp. 8-9). Specifically, Amigos Bravos proposed the following language, as supported by our referenced closing arguments, which the PSOR fails to acknowledge or address:

20.6.4.10.F(1)(b) NMAC (Amigos Bravos proposed language):

(b) the proposed temporary standard represents the highest degree of protection feasible in the short term, complies with antidegradation protections in 20.6.4.8 NMAC ~~limits the further degradation of water quality to the minimum necessary....~~

- (b) Clearly limit temporary standards to “the minimum time necessary,” as the Department itself represented, or to impose a ten-year maximum (Pleading Log #44, pp. 10-11). Specifically, Amigos Bravos' proposed the following language, as supported by our referenced closing arguments, which the PSOR fails to acknowledge or address::

20.6.4.10.F(1)(b) NMAC (Amigos Bravos proposed language):

(b) the proposed temporary standard represents the highest degree of protection feasible in the short term, complies with antidegradation protections in 20.6.4.8 NMAC ~~limits the further degradation of water quality to the minimum necessary,~~ is limited to the minimum time necessary to achieve the original standard by the expiration date of the temporary standard, and adoption will not cause the further impairment or loss of an existing use;

20.6.4.8.F(2) NMAC (Amigos Bravos proposed language):

(2) A temporary standard shall apply to specific pollutant(s), and to specific water body segment(s). A temporary standard shall be approved for the minimum time necessary and for no more than ten years, including renewal periods. The adoption of a temporary standard does not exempt dischargers from complying with all other applicable water quality standards or control technologies.

- (c) Limit application of temporary standards to discharges subject to a Commission-approved work plan (Pleading Log #44, pp. 12-14). Specifically, Amigos Bravos' proposed the following language, as supported by our referenced closing arguments, which the PSOR fails to acknowledge or address::

20.6.4.10.F(2) NMAC (Amigos Bravos proposed language)

(2) A temporary standard shall apply to specific pollutant(s), ~~and to specific water body segment(s),~~ and to the specific discharges subject to the work plan prepared pursuant to Subparagraph 20.6.4.10.F(5) and approved by the commission. The adoption of a temporary standard does not exempt dischargers from complying with all other applicable water quality standards or control technologies.

- (d) Prohibit temporary standards in impaired waters (Pleading Log #44, pp. 14-15). Specifically, Amigos Bravos' proposed the following language, as supported by our referenced closing arguments, which the PSOR fails to acknowledge or address::

20.6.4.10.F(2) NMAC (Amigos Bravos proposed language):

(2) A temporary standard shall apply to specific pollutant(s), and to specific water body segment(s). A temporary standard shall not apply to specific pollutant(s) for which a water body segment is impaired. The adoption of a temporary standard does not exempt dischargers from complying with all other applicable water quality standards or control technologies.

- (e) Clarify and strengthen the work plan requirements, in particular by including, *inter alia*, language to address concerns regarding multiple dischargers (Pleading Log #44, pp. 15-18). Specifically, Amigos Bravos' proposed the following language, as supported by our referenced closing arguments, which the PSOR fails to acknowledge or address::

20.6.4.10.F(5) NMAC (Amigos Bravos proposed language):

(5) As a condition of a petition for a temporary standard, in addition to meeting the requirements in this Subsection, the petitioner shall prepare a work plan in accordance with Paragraph (4), and submit the work plan to the department and the public for review and comment. The work plan to support a temporary standard shall identify the factor(s) listed in 40 CFR 131.10(g) or Subparagraph 20.6.4.10.F(1)(a) NMAC affecting attainment of the standard that will be analyzed and the timeline for proposed actions to be taken to achieve the uses attainable over the term of the temporary standard, including baseline water quality, and any investigations, projects, facility modifications, monitoring, or other measures necessary to achieve compliance with the original standard. The work plan shall identify and account for each individual discharge within the specific surface water body segment(s) of the state to which the temporary standard would apply, including by identifying specific actions applicable to each discharge or, where discharges share particular characteristics or technical and economic scenarios, each group of discharges. The work plan shall include provisions for review of progress in accordance with Paragraph (8), public notice and consultation with appropriate state, tribal, local and federal agencies. Once prepared, the work plan shall be submitted to the commission for review and approval and be made available to the public.

20.6.4.10.F(6) NMAC (Amigos Bravos proposed language):

(6) The commission may condition the approval of a temporary standard and associated work plan by requiring additional monitoring, relevant analyses, the completion of specified projects, submittal of information, or any other actions.

20.6.4.10.F(7) NMAC (Amigos Bravos proposed language):

(7) Temporary standards and work plans prepared to support temporary standards may be approved, adopted, and implemented after a thirty-day public review and comment period before a petition is submitted to the commission for approval and adoption, a public hearing before the commission ~~appropriate public participation~~, commission approval and adoption pursuant to this Subsection for all state purposes, and EPA Clean Water Act Section 303(c) approval for any federal action.

- (f) Require that the written progress report for a temporary standard, to foster public involvement, must be submitted 90 days prior to the deadline to submit proposed changes to the water quality standards in each succeeding triennial review (Pleading Log #44, pp. 19-20). Specifically, Amigos Bravos' proposed the following language, as supported by our referenced closing arguments, which the PSOR fails to acknowledge or address::

20.6.4.10.F(8) NMAC (Amigos Bravos proposed language):

(8) All temporary standards are subject to a required review during each succeeding review of water quality standards conducted in accordance with Subsection A of 20.6.4.10 NMAC. The petitioner shall provide a written report to the commission documenting the progress of proposed actions ninety days prior to the deadline to submit proposed changes to the water quality standards in each succeeding triennial review conducted pursuant to section 303(c) of the Clean Water Act and NMSA 1978 74-6-6.B, ~~pursuant to a reporting schedule stipulated in the approved temporary standard~~. The purpose of the review is to determine progress consistent with the original conditions of the petition for the duration of the temporary

standard. If the petitioner cannot demonstrate that sufficient progress has not been made the commission may revoke approval of the temporary standard or provide additional conditions to the approval of the temporary standard.

- (g) Limit application of temporary standards to discharges existing at the time the temporary standard was approved (Pleading Log #44, pp. 20-23).

Specifically, Amigos Bravos' proposed the following language, as supported by our referenced closing arguments, which the PSOR fails to acknowledge or address::

20.6.4.12.H NMAC (Amigos Bravos proposed language):

H. It is a policy of the commission to allow a temporary standard approved and adopted pursuant to Subsection F of 20.6.4.10 NMAC to be included in the applicable NPDES permit for discharges for discharges existing at the time the temporary standard was approved and adopted and subject to a commission approved work plan as enforceable limits and conditions. The temporary standard and schedule of actions may be included at the earliest practicable time, and shall specify milestone dates so as to measure progress towards meeting the original standard. A temporary standard shall not be applied to Clean Water Act permits for new or increased discharges, and any new or increased discharges must comply with the original standard. Further, a temporary standard shall not be applied to a discharge that is already meeting effluent limitations and other required conditions of either a Clean Water Act section 402 or section 404 permit.

33 [20.6.4.12 NMAC - Rp 20 NMAC 6.1.1104, 10-12-00; A, 10-11-02; Rn, 20.6.4.11 NMAC, 05-23-34 05; A, 05-23-05; A, 12-01-10; A, XX-XX-XX]

- (h) Ensure enforceability of any temporary standard in all Clean Water Act permits, not just 402 National Pollution Discharge Emission System permits (Pleading Log #44, pp. 23-24) (indeed, it does not appear that the PSOR at all addresses the relevant Department proposal for 20.6.4.12.H

NMAC pertinent to this recommendation). Specifically, Amigos Bravos' proposed the following language, as supported by our referenced closing arguments, which the PSOR fails to acknowledge or address::

20.6.4.12.H NMAC (Amigos Bravos proposed language):

H. It is a policy of the commission to allow a temporary standard approved and adopted pursuant to Subsection F of 20.6.4.10 NMAC to be included in the applicable Clean Water Act permit for discharges as enforceable limits and conditions. The temporary standard and schedule of actions may be included at the earliest practicable time, and shall specify milestone dates so as to measure progress towards meeting the original standard.

33 [20.6.4.12 NMAC - Rp 20 NMAC 6.1.1104, 10-12-00; A, 10-11-02; Rn, 20.6.4.11 NMAC, 05-23-34 05; A, 05-23-05; A, 12-01-10; A, XX-XX-XX]

6. Regarding aluminum toxicity concerns raised by Amigos Bravos, the PSOR fails to acknowledge let alone address Amigos Bravos' recommendations that this Commission direct the New Mexico Environment Department to: (1) assess the protectiveness of New Mexico's hardness-based aluminum criteria, 20.6.4.900 NMAC, relative to New Mexico mollusks, gastropods, and other species that may be vulnerable to aluminum toxicity within eight months of this Commission's final decision for this Triennial Review; and, separately, (2) assess the protectiveness of New Mexico's hardness-based aluminum criteria, 20.6.4.900 NMAC, within eight months of EPA's publication of revised nationally-recommended aluminum criteria pursuant to Section 304(a) of the CWA. In each instance, Amigos Bravos requested that the Commission direct the Department to summarize their assessment in a written report to the Commission and that the Department, before each report is finalized, vet it through a public review period of at least 60 days. Pleading Log #44, pp. 29-32. Again, the PSOR fails to acknowledge let alone address these proposals.

7. The PSOR fails to acknowledge let alone address the fundamental dispute between Amigos Bravos' and Freeport-McMoran Chino Mines' over the legal interpretation of standards governing a petition for adoption of site-specific criteria. Amigos Bravos contends, based on the plain language of the standards, that a "[a] petition for the adoption of site-specific criteria shall... present and respond to the public input received." 20.6.4.10.D(3)(c) NMAC; Pleading Log #44 at pp. 32-36. Or, put simply, Amigos Bravos argues that Chino Mines' petition failed to satisfy the petition requirements by failing to include, in the petition itself, sufficient evidence regarding how they presented and responded to public input. Chino Mines' contends, conversely, that it need not present this information in its petition and may, despite the plain language of 20.6.4.10.D(3)(c) NMAC, instead satisfy this requirement during the hearing on the petition. The PSOR glosses over this dispute, merely pointing to testimony and reaching the conclusory determination, without reference to or resolution of the fundamental dispute over 20.6.4.10.D(3)(c) NMAC's legal meaning, that Chino Mine's satisfied 20.6.4.10.D(3)(c) NMAC. *See* PSOR ¶¶ 149-151.

8. The PSOR fails to acknowledge that Amigos Bravos proposed changes regarding Segment 128, a proposal that was resolved through a joint stipulation signed by Amigos Bravos, the U.S. Department of Energy, Los Alamos National Security LLC, and the New Mexico Environment Department. While resolved independently of Commission action, it is nonetheless important for the Commission to acknowledge this resolution to create an accurate record of these proceedings.

//

//

//

II. CONCLUSION

Given the above-stated reasons, this Commission should not adopt the PSOR and should ensure that all of the parties' evidence, objections, and legal arguments are fairly, fully, and forthrightly acknowledged and resolved in the final statement of reasons and order.

Respectfully submitted this 15th day of April 2016.

By:



Erik Schlenker-Goodrich
eriksg@westernlaw.org

Kyle Tisdel
tisdel@westernlaw.org

Western Environmental Law Center
208 Paseo del Pueblo Sur, #602
Taos, NM 87571
575.613.4197 (p)
575.751.1775 (f)

Counsel for Amigos Bravos

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading, including Amigos Bravos proposed Statement of Reasons, was served to the parties by email, and that the original and fifteen hard copies of this filing was served to the Commission via U.S. mail, on April 15, 2016 to:

Pam Castaneda, Boards & Commissions Administrator

New Mexico Environment Department
1190 S. St. Francis Drive, S2102
P.O. Box 5469
Santa Fe, New Mexico USA 87502
E-mail: Pam.Castaneda@state.nm.us

Kathryn S. Becker, Esq.

John Verheul

Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
P.O. Box 5469
Santa Fe, New Mexico 87502
kathryn.becker@state.nm.us
john.verheul@state.nm.us

Dalva L Moellenberg, Esq.

Germaine R. Chappelle, Esq.

1239 Paseo de Peralta
Santa Fe, NM 87501
dln@gknet.com
germaine.chappelle@gknet.com

Stuart R. Butzier, Esq.

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
P.O. Box 9318
Santa Fe, New Mexico 87504-9318
sbutzier@modrall.com

Louis W. Rose

Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307
rose@montand.com

Lara Katz

Montgomery & Andres, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307
lkatz@montand.com

Kari E. Olson
Montgomery & Andres, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307
kolson@montand.com

Jolene L. McCaleb
Taylor & McCaleb, P.A.
P.O. Box 2540
Corrales, NM 87048-2540
jmccaleb@taylormccaleb.com

Timothy A. Dolan
Office of Laboratory Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, NM 87545
tdolan@lanl.gov

Lisa Cummings
Staff Attorney
Office of Counsel
Los Alamos Site Office
U.S. Department of Energy
528 35th Street
Los Alamos, NM 87544-2201
lisa.cummings@nnsa.doe.gov



Erik Schlenker-Goodrich
Western Environmental Law Center