

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



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

WQCC No. 14-05(R)

AMIGOS BRAVOS' PROPOSED STATEMENT OF REASONS

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I. INTRODUCTION

Amigos Bravos hereby submits its proposed statement of reasons.

II. THE DEPARTMENT'S TEMPORARY STANDARDS PROPOSAL

A. Proposed Statement of Reasons if the Commission Rejects the Department's Temporary Standards Proposal

1. The Department has proposed to adopt a temporary standards provision. This proposal purports to provide flexibility to the regulated community to achieve original water quality standards where compliance cannot be achieved within the lifetime of a permit through, for example, adherence a compliance schedule.

2. Amigos Bravos opposes the Department's temporary standards proposal on the grounds that it is unnecessary and, further, because the text of the proposal is confusing and disconnected from the Department's own testimony. These grounds are well founded. In particular, we are concerned with the design of the proposal's text and the text's failure to adequately explain and justify when a temporary standard would be used, how a temporary standard would apply to multiple dischargers within a particular water body, and to impose reasonable constraints on the duration of a temporary standard. Accordingly, the Department's proposal is rejected.

B. Proposed Statement of Reasons if the Commission Adopts the Department's Temporary Standards Proposal and Amigos Bravos' Recommendations Pertaining to the Proposal

1. The Department has proposed to adopt a temporary standards provision. This proposal purports to provide flexibility to the regulated community to achieve original water quality standards where compliance cannot be achieved within the lifetime of a permit through, for example, adherence a compliance schedule.

2. Amigos Bravos has, however, raised concerns regarding the text of the

Department's proposal and offered constructive recommendations to remedy those concerns. These recommendations are a logical outgrowth of the Department's proposal, the Department's testimony, and Amigos Bravos own testimony, written and oral.

3. Amigos Bravos' recommendations pertain to the need for: (a) consistency between a temporary standard and New Mexico's antidegradation protections; (b) clear constraints on the duration of a temporary standard; (c) a requirement that the temporary standard apply only to those dischargers that obtain Commission approval of a work plan demonstrating the actions the discharger will take to achieve the original standard; (d) a prohibition against application of a temporary standard to impaired waters; (e) strengthened requirements for what must be included in a work plan relative to multiple dischargers, how the public is involved in the preparation of a work plan, and the Commission's role in approving a work plan; (f) the timing of the submission of a progress report regarding a temporary standard in advance of each successive Triennial Review; (g) a prohibition against application of a temporary standard to new or increased discharges; and (h) enforceability of limits imposed on a temporary standard through inclusion of those limits in all Clean Water Act permits.

4. We find that a temporary standard provides an important tool for the regulated community where additional time, beyond the life of a permit, is required to achieve an original standard and hereby approve the use of temporary standards in New Mexico. However, we also find that Amigos Bravos' recommendations regarding the text of the Department's proposal are well founded as they would improve the functionality and application of temporary standards in New Mexico, in particular to protect water quality and ensure that the water quality of a water body subject to the temporary standard improves and, as quickly as possible, comes into compliance with the original standard.

5. We accordingly adopt the following temporary standards provision:

20.6.4.10.F. Temporary Standards.

(1) Any person may petition the commission to adopt a temporary standard applicable to all or part of a surface water of the state as provided for in this section and applicable to Subsections in 40 CFR Part 131.14. The commission may adopt a proposed temporary standard if the petitioner demonstrates that:

(a) attainment of the associated designated use may not be feasible in the short term due to one or more of the factors listed in 40 CFR 131.10(g), or due to the implementation of actions necessary to facilitate restoration such as through dam removal or other significant wetland or water body reconfiguration activities as demonstrated by the petition and supporting work plan requirements in Paragraphs (4), and (5) below;

(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, is limited to the minimum time necessary to achieve the original standard and for no longer than ten years, and adoption will not cause the further impairment or loss of an existing use;

(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 shall limit downstream impacts, and if applicable, existing or proposed discharge control technologies shall be in place consistent with Subparagraph (c).

(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) NMAC and approved by the commission. 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.

(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 standard and not on a temporary standard.

(4) A petition for a temporary standard shall:

(a) identify the currently applicable standard(s), the proposed temporary standard for the specific pollutant(s) and the specific surface water body segment(s) of the state to which the temporary standard would apply;

(b) include the basis for any factor(s) specific to the applicability of the temporary standard (for example critical flow under Subsection B of 20.6.4.11 NMAC)

(c) demonstrate that the proposed temporary standard meets the

requirements in this Subsection;

(d) present a work plan and with timetable of proposed actions for achieving compliance with the original standard in accordance with Paragraph (5);

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

(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.

(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.

(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, 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.

(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. 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.

(9) The commission may consider a petition to extend a temporary standard. The effective period of a temporary standard shall be extended only if demonstrated to the commission that the factors precluding attainment of the underlying standard still apply, that the petitioner is meeting the conditions required for approval of the temporary standard, and that reasonable progress towards meeting the underlying standard is being achieved.

(10) A temporary standard shall expire no later than the date specified in the approval of the temporary standard. Upon expiration of a temporary standard, the original standard becomes applicable.

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

[20.6.4.10 NMAC - Rp 20 NMAC 6.1.1102, 10-12-00; Rn, 20.6.4.9 NMAC, 05-23-05; A, 05-23-05; A, 12-01-10; A, XX-XX-XX]

20.6.4.12 NMAC

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]

III. AMIGOS BRAVOS' ALUMINUM CRITERIA PROPOSAL

1. Amigos Bravos proposed that the Commission revise 20.6.4.900 NMAC.

Specifically, Amigos Bravos proposed that New Mexico eliminate its current hardness-based aluminum criteria and revert back to the CWA 304(a) nationally recommended criteria for aluminum of 87 ug/l (chronic) and 750ug/l (acute), including for waters with a pH of less than 6.5. Amigos Bravos, however, withdrew its proposal for waters at all pH levels.

2. Amigos Bravos has nonetheless raised concerns regarding the level of protection afforded by New Mexico's hardness-based aluminum criteria, in particular relative to mollusks, gastropods, and other species that may be vulnerable to aluminum toxicity. Amigos Bravos also raises concerns given the EPA's review of Clean Water Act Section 304(a) nationally recommended aluminum criteria, a review that is assessing the potential of, *inter alia*, use of a Biotic Ligand Model to determine appropriate aluminum criteria. Further, Amigos Bravos raises concerns, echoed in the testimony of both Amigos Bravos' and Chevron Mining, Inc.'s experts, regarding the dearth of technical and scientific evidence regarding aluminum toxicity.

3. On this basis, Amigos Bravos requests that this Commission direct the New Mexico Environment Department to assess the protectiveness of New Mexico's hardness-based aluminum criteria through two separate reports, one to be prepared immediately after this Triennial Review dealing with mollusks, gastropods, and other species, and the second to be prepared once the EPA publishes its revised, nationally-recommended aluminum criteria.

4. We conclude that Amigos Bravos' concerns are well founded and their request for the Department to look into the aluminum toxicity issue reasonable. Accordingly, we direct the 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, we request 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.

IV. CHINO MINES' SITE-SPECIFIC COPPER CRITERIA PROPOSAL

1. Freeport-McMoran Chino Mines has petitioned this Commission to amend the Commission's standards in 20.6.4.902 NMAC. Specifically, Chino Mines has requested that this Commission add site-specific criteria for copper for certain surface waters located within the Mimbres River Closed Basin (hydrologic unit code HUC8-13030202).

2. New Mexico's water quality standards provide that "any person may petition the commission to adopt site-specific criteria." 20.6.4.10.D(3) NMAC. However, "[a] petition for the adoption of site-specific criteria shall," *inter alia*:

(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;

20.6.4.10.D(3)(c) NMAC (emphasis).

3. By its plain language, 20.6.4.10.D(3)(c) NMAC contains two distinct petition requirements pertaining to public involvement. First, the petition must describe methods to notify and solicit input from stakeholders. Second, the petition must specifically present and respond to the public input received.

4. Chino Mines' petition satisfied the first, but not the second, requirement. While Chino Mines provided a bulleted and summarized list of questions that were raised at public meetings, there is a lack of specifics regarding those questions and, in particular, how Chino Mines responded. For example, while Chino Mines identified at least eight questions that were raised at one of its meetings, the evidence supplied by Chino Mines

provides only a short, insufficient explanation regarding how Chino Mines responded to two of those questions. Chino Mines has thus failed to comply with the plain language requirements of 20.6.4.10.D(3)(c) NMAC. Accordingly, Chino Mines proposal to add site-specific criteria for copper for certain surface waters located within the Mimbres River Closed Basin is rejected.

Respectfully submitted this 15th day of January 2016.

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