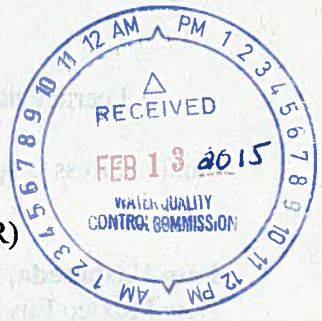
**STATE OF NEW MEXICO**
**WATER QUALITY CONTROL COMMISSION**

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| IN THE MATTER OF THE PROPOSED AMENDMENTS TO STANDARDS FOR INTERSTATE AND INTRASTRATE WATERS, 20.6.4 NMAC | ) | WQCC No. 14-05(R) |

## AMIGOS BRAVOS' REBUTTAL TESTIMOMY

Amigos Bravos, by and through undersigned counsel, hereby submits the rebuttal testimony of Rachel Conn and Dr. Deke Gunderson in accord with the Water Quality Control Commission's July 10, 2014 Scheduling Order.

Amigos Bravos continues to reserve the right to offer additional argument, testimony, and evidence in this proceeding as necessary and appropriate and in accord with the Commission's guidance and rules.

Respectfully submitted this 13th day of February 2015.

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was serviced by regular mail and, where an email address is specified, by email, on February 13, 2015 to:

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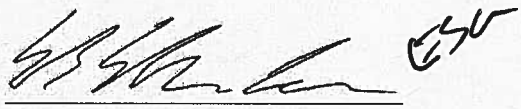

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**STATE OF NEW MEXICO**
**WATER QUALITY CONTROL COMMISSION**

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| IN THE MATTER OF THE PROPOSED AMENDMENTS TO STANDARDS FOR INTERSTATE AND INTRASTRATE WATERS, 20.6.4 NMAC | ) | WQCC No. 14-05(R) |

**REBUTTAL STATEMENT OF RACHEL CONN**
**SUBMITTED ON BEHALF OF AMIGOS BRAVOS**

**Estimated Time for Rebuttal Testimony:** 60 minutes

## I. QUALIFICATIONS

My qualifications were set forth in my direct pre-filed written testimony, provided December 12, 2014.

## II. AMIGOS BRAVOS OPPOSES THE NEW MEXICO ENVIRONMENT DEPARTMENT'S PROPOSAL TO ELIMINATE HEARINGS FOR PISCICIDES APPLICATIONS WHERE SUCH APPLICATIONS HAVE NOT OBTAINED OR DO NOT REQUIRE NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMITS

The New Mexico Environment Department ("NMED") proposes to change 20.6.4.16 NMAC so that WQCC review of piscicide applications that obtain a National Pollution Discharge Elimination System ("NPDES") permit is not required. NMED further proposes to eliminate mandatory public hearings for those situations where piscicide applications do not need a NPDES permit and therefore are not subject to the public participation processes under the NPDES permitting process. As explained in our December 12th submission, Amigos Bravos does not oppose NMED's proposal to remove WQCC review where piscicide applications obtain an NPDES permit. However, Amigos Bravos does oppose eliminating the mandatory public hearing requirement where piscicide applications do not need or receive a NPDES permit.

NMED states in their December 12th NOI that all previous piscicide applications

in New Mexico have been conducted by state or federal agencies (Pintado at 32-89). NMED is presumably including this information under the assumption that state and federal agencies will be the ones applying piscicides into NM waters in the future and that these agencies are somehow more responsible than private parties. There are a number of problems with these two assumptions. First, the water quality standards apply to both government agencies *and* private parties. While, to date, Amigos Bravos is unaware of a private applicant, there very well could be one in the future. Second, state and federal agencies are not infallible. A case in point is the piscicide treatment on Costilla Creek, where the treatment had to be applied numerous times because the proper precautions to protect the treated portion of the stream from repopulation of downstream non-native species were not taken.

The application of piscicides, regardless of whether or not such treatments are well intended, results in the dumping of poison into our rivers and streams. This poison kills *all* of the fish, aquatic invertebrates, and larval aquatic amphibians in a water body, such as frogs, toads, tiger salamanders in the receiving water—not just the non-native fish that are the intended target. While piscicide applications are downplayed by the agencies that advocate for their use, it is a very controversial to many New Mexicans, including to many Amigos Bravos members. As NMED has noted, piscicide applications are often made by governmental agencies on public land. These applications are typically in headwater streams. Many downstream users that use the water for irrigation, recreation, and domestic or public water supply are therefore potentially impacted by piscicide applications. The public should have the opportunity to express concerns or support for proposed applications of poisons to their watersheds.

Moreover, while the piscicides that has been commonly used in New Mexico to date are rotenone and antimycin, the definition of piscicide, as commonly understood, is must broader than these two chemicals:

> *A piscicide is a chemical substance which is poisonous to fish.* The primary use for piscicides is to eliminate a dominant species of fish in a body of water, as the first step in attempting to populate the body of water with a different fish. They are also used to combat parasitic and invasive species of fish.[1]

[1] http://en.wikipedia.org/wiki/Piscicide

A piscicide is, ultimately, *any* chemical that is poisonous to fish and is not limited to rotenone and antimycin. Thus, and putting aside the fact that agency approval and confidence in these two poisons has grown over the years, it must be remembered that this policy applies to *all* potential piscicides—not just the ones that have historically been used in New Mexico. The public has the right to a full and informed public process, including a public hearing, before *any* poisons are discharged into the New Mexico's rivers and streams and certainly with regard to poisons that, to date, have not been used into our rivers and streams.

Amigos Bravos has developed a Pesticide and Chemicals Policy that governs our approach to piscicide applications. *See* Amigos Bravos Exhibit E (attached). Amigos Bravos would like the standards to preserve the opportunity for Amigos Bravos—and its members and other members of the public—to determine if individual piscicide applications meet the requirements of this policy and, if not, to argue against such applications. A public hearing process is essential in making this determination.

NMED states that only 7 hearings have occurred (Pintado at 33-89). This averages to less than 1 hearing per year over the 10-year period that the requirement has been place. Given that NMED is proposing to already eliminate the need for hearings where piscicide applications obtain NPDES permits—a change that Amigos Bravos does not oppose—it is reasonable to conclude that the number of hearings will, going forward, be reduced. Requiring a public hearing for piscicide treatments that do not obtain NPDES permits is therefore more than reasonable and does not impose an undue burden on the WQCC or the proponents, typically agencies, of piscicide treatments.

## III. CLEAN WATER ACT 101(a)(2) AQUATIC LIFE PROTECTIONS SHOULD APPLY TO SEGMENT 128

Los Alamos National Security, LLC and the United States Department of Energy ("LANS/DOE") oppose Amigos Bravos' proposal to apply Clean Water Act 101(a)(2) uses to stream segment 20.6.4.128 ("Segment 128"). That stream segment includes ephemeral and intermittent waters at Los Alamos National Laboratory ("LANL"). LANS/DOE does so on the basis of testimony submitted by Mr. Saladen in LANS/DOE's

December 12, 2014 submittal. Mr. Saladen, in short, contends that the lack of fish in Segment 128 justifies the failure to apply Clean Water Act 101(a)(2) uses to that stream segment. Mr. Salden—and LANS/DOE—are wrong. In fact, Mr. Salden's own testimony attaches, as LANS/DOE Exhibit 4, the WQCC's 2005 Statement of Reasons for Amendment Standards which clearly shows why a Clean Water Act 101(a)(2) aquatic life use, such as "marginal warmwater aquatic life" as Amigos Bravos has proposed, should be applied to stream Segment 128.

As the WQCC's 2005 Statement of Reasons for Amendment Standards explains in paragraph 237, shellfish and macroinvertabrates, just like in Segment 128, are present in perennial waters in a different LANL segment, segment 12.6.4.126 NMAC ("Segment 126"). Clean Water Act 101(a)(2) protections for stream Segment 126 were therefore warranted. The fact that fish were not present in Segment 126 was, as the 2005 Statement of Reasons properly concluded, irrelevant to the question whether Clean Water Act 101(a)(2) uses were appropriately applied:

> 237. The Commission rejects UC's proposal to designate just limited aquatic life because USFWS demonstrated that shellfish typically found in coldwater aquatic communities is present in these streams. Accordingly, the presence of shellfish indicative of coldwater aquatic community establishes an existing use, even in the absence of fish. In addition, the USFWS documented existing macroinvertebrate communities in all of these streams (except Water Canyon). These macroinvertebrate communities (except Sandia Canyon) compare favorably (only slightly impaired or full support – impacts observed) to Upper Los Alamos Canyon, a coldwater fishery at the time of the study. The USFWS also determined that eight species in Los Alamos and Pajarito Canyons (identified by NMED) were classified by the Idaho Department of the Environment Quality (DEQ) as preferring coldwater. Moreover, the Laboratory's invertebrate data included several species that prefer coldwater in Los Alamos, Pajarito, Sandia and Chaquehui Canyons. Finally, to the extent that the absence of fish is relevant to the subcategory designation, the term "existing use" has a broader meaning than "existing on this date". The absence of fish in 2003 is not the benchmark for designation of an aquatic life use."

LANL Exhibit 4, ¶ 237. This explanation justifying the application of CWA 101(a)(2) to Segment 126 exposes the problematic decision—just a few paragraphs later, in paragraph 243—for the WQCC's failure to apply CWA 101(a)(2) aquatic life use when it adopted a

new segment, Segment 128, as proposed by NMED and the University of California/LANL. As paragraph 243 provides:

> 243. The Commission adopts another new segment proposed by NMED and UC, for the same reasons as set out above in paragraphs 235-236. The proposed uses are appropriate as discussed above.

LANL Exhibit 4, ¶ 243.

Thus, in paragraph 237, the WQCC correctly explained that the presence of shellfish and macroinvertebrates is sufficient to warrant application of the CWA 101(a) coldwater aquatic life use to Segment 126, regardless of the presence of fish. However, in paragraph 243, the WQCC, in accepting NMED and UC's proposal to designate Segment 128, incorrectly failed to apply a CWA 101(a)(2) aquatic life use standard and, instead, only applied the lesser "limited aquatic life" standard. EPA, notably, has determined that the limited aquatic life is not protective enough to qualify as a Clean Water Act 101(a)(2) protection. *See* EPA Final ROD for the 2009 Triennial Review, April 12, 2009, page 29; and EPA Final ROD for the 2004 Triennial Review, December 29, 2011, page 36.

There is no explanation for this stark disconnect. In addition, the same basis (provided in paragraph 237) is used to justify two very different decisions, despite the fact that paragraph 237 clearly demonstrates why CWA 101(a)(2) uses should be applied to both Segment 126 *and* Segment 128. Put simply, there is no rational basis provided for applying the weaker, non-CWA 101(a)(2) "limited aquatic life" use to Segment 128.

Exacerbating the problem, the UAA prepared for Segment 128—*after* the WQCC decided to designate Segment 128 and not apply a CWA 101(a) aquatic life use standard (a textbook example of arbitrary *post hoc* decisionmaking)—concedes that macroinvertabrates are present in Segment 128 waters. Again, as the WQCC itself explained in paragraph 237 of its 2005 Statement of Reasons, as the WQCC further explains in its Hydrology Protocol, and as EPA has also determined—the presence of macroinvertebrates warrants application of the Clean Water Act 101(a)(2) aquatic life use protections. *See* New Mexico Hydrology Protocol at 33, 20.6.4.98 NMAC; EPA, Office of Water, Regulations and Standards, Questions and Answers on Antidegradation, Washington DC 20460, August 1985, page 3.

Despite New Mexico and EPA statements and policy that the CWA 101(a)(2)

aquatic life use standard does not hinge on the presence or absence of fish, LANS/DOE nonetheless persists in making the incorrect claim that, because the 2007 UAA concludes that fish were not present, that (erroneously) ephemeral and intermittent streams do not have the habitat requirements to support a fishable use, and that (again erroneously) a CWA 101(a)(2) aquatic life use standard is not attainable in Segment 128 (Saladen at 4). Such a claim cannot stand. In fact, *all* intermittent waters in New Mexico (except those found at LANL) are already given CWA 101(a)(2) protections. *See* 20.6.4.98 NMAC, New Mexico Hydrology Protocol at 33. Does LANS/DOE therefore also claim that the protections at 20.6.4.98 NMAC are not appropriate?

LANS/DOE, perhaps conceding the weakness of their claim, also contend that there is no scientific basis for preparing another UAA for Segment 128 (Saladen at 7). The existing UAA is, however, 8 years old and, further, is based, as discussed above, on the flawed assumption that fish must be present to document a "fishable" CWA 101(a)(2) use and to warrant application of CWA 101(a)(2) aquatic life use protections. The UAA is also scientifically and technically deficient because it: (1) fails to include a list of species found in the waters in question; (2) does not distinguish or even acknowledge the difference between ephemeral and intermittent segments; and (3) does not even clearly define or map which waters the UAA covered. *See* LANS/DOE Exhibit 6. Even putting aside the fact that the existing UAA was created *after* rather than *before* the WQCC decided to designate Segment 128 without CWA 101(a)(2) aquatic life protections, these deficiencies at the heart of the existing UAA demonstrate the reasonableness of Amigos Bravos' proposal that the "marginal warmwater aquatic life" use, which is considered by EPA to be a CWA 101(a)(2) aquatic life protection, should be applied to Segment 128 and that, if LANS/DOE or any other entity chooses to remove those protections, they must do so only on the basis of a new legally, scientifically, and technically sound UAA.

LANS/DOE make three additional arguments, all of which fail.

First, LANS/DOE state that Amigos Bravos, in its 2009 Triennial Review testimony, "appeared to ignore the fact that a UAA for Segment 128 existed and had been approved by EPA" (Saladen at 5). Amigos Bravos did nothing of the sort and reject the implication. Amigos Bravos did not acknowledge the UAA because Amigos Bravos did not know that the UAA existed. Why? Because NMED did not seek public comments on

the UAA, did not hold a public hearing for the UAA, and did not notify the public that the UAA was to be discussed and adopted at a WQCC hearing—despite the fact EPA regulations require a public hearing when uses are changed 40 C.F.R. 131.10(e). To turn around and wield the lack of transparency and public process as a sword to suggest that Amigos Bravos was willfully ignorant is unfair and unreasonable.

Second, LANS/DOE claims that nothing has changed since the previous Triennial Review that would call into question the Commission's Order and Statement of Basis for Amendment of Standard for Segment 128 (Saladen at 6). Of course, to accept that argument, LANS/DOE must first sweep the fatal deficiencies of the Segment 128 designation and the *post hoc* 2007 UAA under the rug and, in effect, suggest that it's perfectly appropriate for New Mexico to allow water quality standards grounded in a deficient basis to remain on the books. Regardless, LANS/DOE is, once again, wrong. The changes since the last Triennial Review are straightforward and compelling. New Mexico, since the last Triennial Review, developed, approved, and began implementing the New Mexico Hydrology Protocol ("Hydrology Protocol"). The Hydrology Protocol: (1) outlines a clear and straightforward process for distinguishing between ephemeral and intermittent streams; and (2) creates a framework for protecting intermittent streams with Clean Water Act 101(a)(2) protections (specifically "marginal warmwater aquatic life" use protections). Application of this protocol through a new UAA would help clarify this situation and, at the least, ensure that whatever protections are afforded to Segment 128 are properly grounded.

Third, LANS/DOE claim that the Segment 128 waters are monitored regularly (Saladen at 9). Of course, just because waters may be monitored does not justify the deficient designation of Segment 128 or the deficient 2007 UAA. Even if that were not the case, just because they are "monitored" does not mean that they are "monitored" in sufficient fashion to support LANS/DOE claim that Segment 128 does not require CWA 101(a)(2) protections. Nowhere does LANS/DOE present a list of aquatic species such as fish, aquatic invertebrates, and or shellfish found in these waters and whether the monitoring work for Segment 128 targets aquatic species or the conditions necessary to support those species. To credibly monitor the Segment 128 waters to determine if Clean Water Act 101(a)(2) uses are occurring, LANS/DOE must establish a monitoring

protocol that directly monitors aquatic life and the conditions necessary to support such life. Thus, while LANS/DOE claim that its monitoring has not revealed any new information that would indicate that the designated uses should be revised (Saladen at 8), this speaks more to potential gaps in LANS/DOE's monitoring protocol and says little to nothing about the need to apply CWA 101(a)(2) aquatic life use protections (such as Amigos Bravos' proposal for a "marginal warmwater aquatic life" use designation) to Segment 128.

Moreover, there have been substantial changes that further support the need to revisit the Segment 128 protections. As a result of NMED's development and approval of the 2014-2016 CWA 303(d) list, many of the waters in Segment 128 were delisted as being impaired for several parameters (*See* Appendix A of the 2014-2016 303d/305b Integrated Report[2]). For example, copper impairments were removed from DP Canyon (LA Canyon to LANL Boundary); LA Canyon (NM4 to DP Canyon); Pueblo Canyon (Los Alamos Canyon to Los Alamos WWTP); Pajarito Canyon (within LANL boundary below Arroyo de la Delfe); Canon de Valle (LANL Gauge E256 to Burning Ground Spring); Sandia Canyon (Within LANL below Sigma Canyon); Ten Site Canyon (Mortandad Canyon to headwaters); and Three Mile Canyon (Pajarito Canyon to headwaters). Gross Alpha Radiation impairments were removed from Guaje Canyon (San Ildefonso bnd to headwaters) Pajarito Canon (Arroyo de la Delfe to Starmers Spring) and Pajarito Canyon (within LANL below Arroyo de la Delfe). Zinc impairments were removed from Acid Canyon (Pueblo Canyon to headwaters); Pueblo Canyon (Los Alamos Canyon to Los Alamos WWTP); Los Alamos Canyon (NM-4 to DP Canyon); and Ten Site Canyon (Mortandad Canyon to headwaters). Mercury impairments were removed from Acid Canyon (Pueblo Canyon to headwaters); LA Canyon (NM4 to DP Canyon); and Arroyo de la Delfe (Pajarito Canyon to headwaters). Arsenic and Silver impairments were removed from Ten Site Canyon (Mortandad Canyon to the headwaters). Overall, these delistings demonstrate an improvement of water quality in Segment 128 and the potential to achieve a higher use—specifically for aquatics—in these drainages that alone warrant reconsideration of the original Segment 128 designation and the failure to apply CWA 101(a) coldwater aquatic life use protections.

[2] http://www.nmenv.state.nm.us/swqb/303d-305b/2014-2016/index.html

To date, Amigos Bravos is unaware of any evidence that NMED or LANS/DOE has taken a hard look to determine if these improvements in water quality represent a change in the highest attainable use in Segment 128 waters.

## IV. NMED'S TEMPORARY STANDARD PROPOSAL IS UNNECESSARY AND SHOULD BE REJECTED OR, IF ADOPTED, SUBJECTED TO REASONABLE CONSTRAINTES TO PROTECT WATER QUALITY AND ENSURE PUBLIC INVOLVEMENT

NMED, in its December 12, 2014 NOI and supporting testimony from Ms. Kristine Pintado, proposes to add a new section that would allow parties to petition the Water Quality Control Commission to adopt temporary standards. Amigos Bravos opposes NMED's proposal in its entirety and thus proposes to delete, also in its entirety, the NMED's proposed addition of 20.6.4.10.F and 20.6.4.10.H NMAC. Amigos Bravos also proposes constraints on temporary standards to protect water quality and ensure public involvement.

### A. Temporary Standards Are Unnecessary Because Flexibility To Achieve Water Quality Standards Is Already Afforded Through Compliance Schedules

Amigos Bravos' basis for opposing NMED's proposal is straightforward: NMED has yet to adequately explain why a temporary standard provision is even needed. The only example that NMED gives is that of implementing the general nutrient criteria (Pintado at 18-89). With this example, NMED contends that the state has no flexibility to allow time for dischargers to meet nutrient controls (Pintado at 18-89 and 19-89). This is not the case. Flexibility is already afforded through authorities providing for the inclusion of compliance schedules into NPDES permits, specifically 20.6.4.12.G NMAC:

> G. Compliance Schedules: It shall be the policy of the commission to allow on a case-by-case basis the inclusion of a schedule of compliance in a NPDES permit issued to an existing facility. Such schedule of compliance will be for the purpose of providing a permittee with adequate time to make treatment facility modifications necessary to comply with water quality based permit limitations determined to be necessary to implement new or revised water quality standards or wasteload allocation. Compliance schedules may be included in NPDES permits at the time of

> permit renewal or modification and shall be written to require compliance at the earliest practicable time. Compliance schedules shall also specify milestone dates so as to measure progress towards final project completion (e.g., design completion, construction start, construction completion, date of compliance).

In addition, the narrative nutrient criteria that NMED cites in their example as potentially being unattainable (Pintado at 18-89) has been in place for over 15 years. Why the need for a temporary standard now, after a decade and a half? NMED provides no explanation. Even if this was not the case, it is inappropriate to carve out an exemption, even if framed as "temporary," to water quality standards on the basis of the single example of nutrient standards. At the least, given that this is the sole rationale presented by NMED in support of its proposal for a temporary standard provision, and assuming that compliance schedules are somehow deemed insufficient, then the temporary standard provision should be limited solely to nutrients. No evidentiary basis is provided for a broader temporary standards provision.

### B. Temporary Standards, If Adopted, Should Not Apply To Impaired Waters

NMED's proposal is also overbroad, applying to all waters, including impaired waters. 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 C.F.R. § 122.4; *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1012 (9th Cir. 2007) (holding that, even with remediation, the CWA forbids issuance of a NPDES discharge permit where the discharge would contribute to violations of water quality standards), cert. denied, 129 S. Ct. 896 (2009). NMED's proposed language does not limit the applicability of temporary standards to existing discharges and thus would allow for temporary—i.e., weakened—standards in impaired waters. Therefore, if adopted, NMED's proposal could allow new or increased discharges of impaired parameters into impaired waters, thus directly contributing to violations of water quality standards. Accordingly, if the Commission moves forward with adopting a temporary standard provision, that provision should expressly prohibit the use of temporary standards where those standards would allow or otherwise justify new,

increased, or continued discharges into impaired waters.

### C. Temporary Standards, If Adopted, Should Not Be Allowed For New Or Increased Discharges

Under NMED's proposed language, a temporary standard, once adopted, would apply broadly to a specific waterbody and therefore would be applicable to both existing discharges and new discharges in that waterbody. Therefore the proposal, if adopted, would allow a new discharger (or dischargers, plural) to secure a temporary standard allowing it to discharge pollution that would cause or contribute to the impairment of the original existing use, which per NMED's proposal (*see* NMED's proposal for 20.6.4.10.F(3) NMAC) is the use that is applicable for 303(d) purposes.

NMED's proposal does include a boilerplate provision, required by Clean Water Act rules (40 C.F.R. § 122.44(d)), providing that adoption of a temporary standard "will not cause the further impairment or loss of an existing use" (proposed 20.6.4.10.F(1)(b) NMAC). Yet, as written, the mechanics of NMED's proposal provide no such assurances and, indeed, compel the opposite conclusion: that temporary standards could, even if unintentionally, "cause the further impairment or loss of an existing use." In effect, NMED's boilerplate language forbidding "the further impairment or loss of an existing use" is disconnected from how NMED's proposal for temporary standards would operate in practice.

To explain, it is impossible to determine at the time of adoption of a temporary standard whether or not the temporary standard will or will not cause the further impairment or loss of an existing use. This is because, as proposed by NMED, temporary standards would apply broadly to a waterbody without any limitations on the applicability of the temporary standard to new discharges. Therefore, a new discharger or dischargers could come along, after the temporary standard has been approved, and start discharging into the waterbody using effluent limits based on the temporary standard. This discharge could cause or contribute to a violation of the original standard, which in turn means that the temporary standard would enable discharges that cause or contribute to a violation of the original, permanent standard. In addition, a current discharger could increase its discharges by reference to the temporary standard which would also cause or contribute

to a violation of the original, permanent standard. Therefore, by not limiting the applicability of temporary standards to existing discharges, it is impossible to determine if the temporary standard will or will not contribute to a violation of water quality standards. In summary, if the WQCC adopts a temporary standard provision, Amigos Bravos strongly recommends that it be limited to existing discharges and that it not apply to new or increased discharges. Alternatively, the commission should adopt a provision that allows individual dischargers to apply for a discharger-specific temporary water quality standard that would apply only to its existing discharges.

### D. Temporary Standards, If Adopted, Should Not Apply Where Technology-Based Effluent Limits Would Secure Compliance With Existing, Permanent Standards

EPA has proposed to prohibit variances where the implementation of technology-based effluent limits required under sections 301(b) and 306 of the Clean Water Act would result in compliance with the existing water quality standard. 78 Fed. Reg. 171, (September 4, 2013). If the Commission adopts a temporary standard provision, it should include language that prohibits temporary standards in cases where implementing technology-based effluent limits would result in compliance with the existing standard. Implementing technology-based effluent limits often does not result in achieving water quality standards, but in cases where they would, they certainly should be implemented. By including this limitation, the Commission will ensure that any New Mexico temporary standard provisions lines up with future EPA regulatory requirements.

### E. Temporary Standards, If Adopted, Should Be Subject To A Three-Year Time Limit, As Originally Proposed By NMED

NMED claims, by definition, that its proposal for temporary standards would only provide for weakened standards on a "temporary" basis but NMED's proposal contains no such limitations. Indeed, NMED has removed the 3-year temporary standard time limit that was included in its original proposal (Pintado at 25-89 and the April 2014 NMED Discussion Draft at proposed 20.6.4.10.F(8)). The discussion draft set a specific time limit (3 years) with the ability to renew the temporary standard at each triennial review. NMED's current proposal does not limit how long such "temporary" standards

would be in place, effectively rendering them—or at least risking that they will become—*de facto* permanent standards. Under the current provision, a "temporary" standard could last 15, 20, 30, 50, or 100 years. The only limitation is a vague and largely illusory reference to an "effective period" (proposed 20.6.4.10.F(10)). Lacking is any real limitation—such as contained in NMED's original proposal—on how long a temporary standard may be in place. Of note, EPA has identified temporary standards as "time-limited" and has proposed to limit all variances to 10 years or less. 78 Fed. Reg. No. 171 (September 4, 2013). If the WQCC adopts a temporary standard provision, it should ensure that the temporary standard provision is in fact temporary and build in safeguards to ensure that it is not abused by adopting NMED's original proposal to impose a 3-year time limit on temporary standards, with the ability to renew that temporary standard at each subsequent Triennial Review.

### F. NMED's Temporary Standards Proposal, If Adopted, Should Include A Public Hearing Requirement

NMED states in their testimony that a temporary standard would be "subject to hearing and public comment" and that petition for a temporary standard "must satisfy the WQCC's public notice, hearing, and appellate procedures" (Pintado at 9-89 and 26-89). Yet NMED's proposal contains neither a public comment period nor a hearing requirement. The only reference to public participation is found at NMED's proposed 20.6.4.10.F(8) NMAC, where the following language is included: "Temporary standards may be implemented only after appropriate public participation, commission approval, and adoption pursuant to this Subsection." There is no description of what constitutes "appropriate public participation." EPA requires a public hearing on proposed changes to water quality standards and a public review of these changes prior to the hearing. 40 C.F.R. § 131.20(b)). In order to meet EPA regulatory requirements, the Commission must include a more rigorous public participation component prior to adoption of a temporary standard provision.

### G. NMED's Temporary Standards Proposal, If Adopted, Should Place The Burden To Justify A Temporary Standard Squarely On The Proponent Of The Temporary Standard

NMED's original proposal (April 2014 Discussion Draft) placed the burden of reviewing and potentially applying for renewal of a temporary standard on the discharger/petitioner. NMED's December 12th proposal appears to place the burden of reviewing the temporary standard on NMED staff (*see* proposed 20.6.4.10.F(9) NMAC). Under NMED's original proposal, which ensured temporary standards expired at each Triennial Review, the burden was placed on the petitioner to demonstrate progress in achieving compliance with the original standard before receiving a renewal of the temporary standard, which reduced the administrative burden on NMED. Protection of water quality standards was also better guaranteed because any proposed renewal of a temporary standard proactively required a petitioner to show progress towards improving water quality prior to renewal. The current proposal does not contain this requirement. In conjunction with NMED's elimination of the 3-year limit on temporary standards, NMED's current proposal effectively requires that other stakeholders (such as NMED or Amigos Bravos) would have to investigate whether progress towards achieving the original, permanent standards has been made and, if not, would impose the burden on those stakeholders to then petition the Commission to revoke the temporary standard.

Based on previous lack of detailed review by NMED of waters that are not meeting Clean Water Act 101(a) uses, it is unlikely that any review under this petition will be detailed or that NMED has the resources to adequately gauge whether progress has been made towards compliance with the original, permanent standard pursuant to workplans created for that temporary standard. If the Commission chooses to adopt a temporary standard proposal, they should therefore adopt something closer to NMED's discussion draft language, which limited temporary standards to 3 years and required that a proponent desiring to renew the temporary standard to do so at each Triennial Review. In addition, there is too little guidance as to what a review of a temporary standard should include and far too much leeway in responding to lack of progress on the temporary standard workplan. For example the NMED's proposal does not require that the temporary standard be revoked if inadequate progress has been made on the workplan. To address this inadequacy Amigos Bravos suggests that the "may" on line 20 of page 14-89 of NMED's December 12th revised proposal for temporary standards should be changed

to "shall."

### H. NMED's Temporary Standards Proposal, If Adopted, Should Be Subjected To The Condition That Failure To Comply With NPDES Permit Conditions Would Result In Termination Of The Temporary Standard

NMED states that failure to comply with the conditions of a NPDES permit could result in termination of the temporary standard (Pintado at 25-89), yet nowhere in either 20.6.4.10.F or 20.6.4.10.H NMAC of NMED's proposal is this condition referenced. If the Commission adopts a temporary standard provision, explicit language that links the validity of a temporary standard to NPDES permit compliance should therefore be included.

## I. SAN JUAN WATER COMMISSION'S POSITION REGARDING NMED'S TEMPORARY STANDARDS PROPOSAL IS UNPERSUASIVE

The San Juan Water Commission ("SJWC") in their December 12, 2014 NOI provided testimony in response to NMED's temporary standard proposal. SJWC expressed concern that the NMED proposal required "Use Attainability Analysis ("UAA") – like" requirements (Nylander at 2) and contrives a proposal that NMED adopt a variance procedure instead of a temporary standard procedure (Nylander at 6). SJWC is referring to the requirements that a petitioner for a temporary standard demonstrate that the attainment of the applicable designated use may not be feasible in the short term due to one or more of the factors listed in 40 C.F.R. § 131.109(g). Yet, as per EPA requirements, any variance procedure "must satisfy the same substantive and procedural requirements as a designated use removal. *See* 40 C.F.R. § 131.10(g); Section 5.3, EPA Water Quality Standards Handbook, Second Edition, 1994).[3]

[3] SJWC also ttempts to re-animate language provided during the 2004 triennial review regarding variances and provides new testimony to support that language. However, this language was not submitted by SJWC as proposed language by the September 30, 2014 deadline imposed by this Commission's July 10, 2014 Scheduling Order and is not a logical outgrowth of NMED's temporary standards proposal. Thus, the Commission should disregard this proposed language and supporting testimony.

SJWC further seems to believe that the sole driving force in adopting and implementing water quality standards should be transactional costs. For example, SJWC questions why NMED would support a temporary standard over a permanent downgrade of a use via a UAA, when a temporary standard, according to SJWC, would represent more costs to NMED (Nylander at 3). First of all, NMED's primary responsibility is to protect the state's natural resources including the quality of the surface waters of the state, not to base surface water quality standards on what represents the cheapest transactional cost. Second, it is not clear that a temporary standard would represent more costs to NMED than a UAA. The same requirements at 40 C.F.R. § 131.10(g) apply to *both* UAA and temporary standard proposals and in addition, all waters that do not meet CWA 101(a)(2) requirements, including those that have been downgraded via UAA or a temporary standard have to be reviewed every three years.

SJWC states that EPA and NMED will most likely utilize temporary standards on existing discharges (Nylander at 12). Amigos Bravos certainly hopes this tool, if passed, would only apply to existing, not new, discharges, but there is nothing in NMED's proposed language that limits temporary standards to existing discharges. Amigos Bravos, as addressed above, has recommended that the Commission do just that: limit any approved temporary standard provision to existing discharges. SJWC is therefore wrong to state that Amigos Bravos has somehow misconstrued NMED's intent in proposing temporary standards by claiming that the proposal could lead to new or additional discharges (Nylander at 13). While Amigos Bravos certainly hopes that temporary standards would not lead to new or additional disharges, there is, again, nothing in the language of the temporary standard proposal that guarantees this. As the proposal is currently written, a temporary standard, if approved, will apply to a whole waterbody. There are no limitations in NMED's language that would limit the applicability of the temporary standard to existing discharges in that waterbody. The temporary standard would apply to the whole waterbody and thus new dischargers would only be required to meet that new weaker standard, not the original, permanent, and more stringent standard. In fact, NMED's proposal could incentivize the location of new discharges on stream segments subject to temporary standards as compliance and operational costs would

presumably be lower on such segments compared segments that are not subject to temporary standards.

SJWC also contends that there is nothing in NMED's standards that awards polluters (Nylander at 13), NMED's proposal, at least indirectly does just that: it awards polluters that have been discharging at levels that are causing or contributing to a violation of water quality standards by giving them the option to secure a temporary, less stringent standard that could enable them to discharge at levels that, to date, have caused otherwise unacceptable impacts to the receiving water that do not satisfy the original, permanent water quality standards—including, as discussed above, waters that are *already* impaired.

## V. PEABODY'S PROPOSAL TO WEAKEN WATER QUALITY PROTECTIONS FOR MAN-MADE PONDS AND WETLANDS SHOULD BE REJECTED

Peabody Energy ("Peabody"), in its December 12, 2014 submittal, proposes to amend language at 20.6.4.900(D) and (E) NMAC, which provides primary and secondary human contact standards. Peabody's submittal amends their September 30, 2014 submittal by proposing a three-tiered approach that weakens both primary and secondary human contact standards for manmade ponds and wetlands.

Amigos Bravos objects to Peabody's tiers 1, 2, and 3, proposed as 20.6.4.900.D(1), (2) and (3) and 20.6.4.900.E(1), (2), and (3), for six primary reasons.

First, Peabody's proposal for tiers 1 and 3 is duplicative of existing provisions. Specifically, regarding Peabody's proposal for 20.6.4.900.D(1) and 20.6.4.900.E(1) NMAC, if the waters are neither waters of the US nor waters of the state, then 20.6.4 NMAC, including 20.6.4.900, does not apply. Regarding Peabody's proposal for 20.6.4.900.D(3) and 20.6.4.900.E(3) NMAC, it is already the case that if a UAA is approved that shows that a Clean Water Act 101(a) human contact use is not attainable, then the associated use/criteria are not applicable. Accordingly, there is no need to qualify through a change to the standards; the proposed language is duplicative.

Second, Peabody's proposal for tier 2 and 3 is based on the idea that human contact standards are only appropriate for waters of the U.S., not surface waters of the

state, such as those in closed basins. Specifically, Peabody's testimony explains that the Clean Water Act—and EPA—does not require New Mexico to adopt standards for surface waters that are not waters of the U.S. (Peabody NOI, Cochran at 6). This is true, but omits a critical fact: that, while the *federal Clean Water Act* may not require protections for surface waters of the U.S., *New Mexico's Water Quality Act* does. As the New Mexico Court of Appeals concluded in 2007, the WQCC must protect *all* surface waters of the state, not just waters of the United States:

> [T]he WQCC's 2005 definition of surface waters of the State extends the definition of surface waters to the limits of the State's territorial jurisdiction, applying a straightforward geographical test that corresponds to the test enacted by the Legislature: is the (surface) water in question situated wholly or partly within or bordering upon the State? The Legislature chose to extend the subject matter jurisdiction of the WQCC to the limits of New Mexico's territorial jurisdiction over surface and ground water, and the Legislature is the law-making body to which Appellants' arguments should be addressed. The WQCC was not required, indeed was not permitted, to re-examine the Legislature's decision to regulate all water located within the borders of New Mexico (with the exception of purely private waters). The WQCC did not act arbitrarily or capriciously in adopting a definition of surface waters of the State that merely acknowledges the extent of the subject matter jurisdiction authorized by the Legislature. To the contrary, the WQCC would have acted in derogation of its responsibilities under the WQA had it failed to adopt a definition of surface waters of the State that allows it to protect surface waters of the State to the full extent contemplated by the Legislature. *See Natural Res. Def. Council, Inc. v. Callaway,* 392 F.Supp. 685, 686 (D.C.1975) (holding that defendant agency and administrators were without authority to adopt a regulation, the effect of which was to "amend or change" a definition adopted by Congress as part of the CWA).

*New Mexico Mining Assoc. v. WQCC*, 142 N.M. 200, 209 (NM Ct. App. 2007).

Accordingly, to the degree that the WQCC adopts Peabody's proposal, it runs the risk of taking action inconsistent with the Water Quality Act's mandate to protect *all* waters of New Mexico, not simply waters of the U.S. In New Mexico, there are myriad surface waters—such as in closed basins—that may not enjoy Clean Water Act protections because they may not be waters of the U.S. but do, as explained above, enjoy Water Quality Act protections. And, in fact, this is appropriate because these surface waters of the state are no less important to New Mexico's ecological and economic well

being then waters of the U.S. In this context, Peabody's proposal risks imposing an overbroad exemption for artificial ponds and man-made wetlands that, while not waters of the U.S., are nonetheless important to water quality in surface waters of the state.

Building on this point, Peabody provides little evidence regarding the practical implications of its proposal. Peabody does not identify how many artificial ponds and man-made wetlands across New Mexico would be impacted by its proposal, where those ponds and wetlands are located to gauge whether or not the exemption it seeks would or would not adversely impact broader water quality across a particular watershed or landscape, whether or not human contact is or is not reasonably foreseeable, etc. It is important to remember, in this context, that Peabody is seeking a *statewide* exemption for artificial ponds and man-made wetlands, not just an exemption for its own ponds and wetlands. Peabody's proposal is therefore not narrowly tailored and does not provide the evidence necessary to support a reasoned and informed finding by the WQCC that a change in New Mexico's *statewide* water quality standards is appropriate.

Third, Amigos Bravos further objects to Peabody's proposal for Tier 2 because the proposal is unclear and overbroad. Are the intended uses referred to in D(2) and E(2) those that are listed in the main paragraphs of Peabody's proposed D and E ("treatment, livestock watering, and/or wildlife habitat"), or does intended use refer to any intended use approved by a state governmental authority? Regardless of which of these two interpretations are intended, Amigos Bravos opposes Peabody's proposal. The proposal is inherently problematic from a water quality perspective because the WQCC is distinctively charged with the responsibility to protect water quality in accord with the Water Quality Act. Allowing *any* "state governmental authority" to have, in effect, *carte blanche* to identify and approve intended uses that trigger an exemption from human contact standards, whatever their underlying statutory mandates, missions, and motivations may be, opens the door to mischief and, if approved, compels the conclusion that the WQCC improperly abdicated its Water Quality Act responsibilities.

Even if this were not the case, Peabody (Cochran at 4) states that NMED, during the last triennial review, testified that livestock watering ponds in general do not pose a regulatory issue (Peabody Exhibit 4). Yet, when reading NMED's testimony it is clear that NMED did *not* say that livestock ponds should not be governed by CWA 101(a)

protections but, rather, that because of the nature, location, and typical use of these ponds, there often is not a regulatory action that would result in a "regulatory issue" such as monitoring or permit limits (Peabody Exhibit 4). Peabody, in their testimony, also quotes an EPA document that says that states are not federally required to adopt standards for any waterbody that is not a water of the U.S. (Cochran at 6). But again, as explained above, just because there is not a federal requirement for protecting waters of the state that are not waters of the U.S. does not mean that the state is relieved of its duties and requirements under state law to protect these waters pursuant to the Water Quality Act.

Fourth, Peabody's proposal for tier 3 is vague and confusing. While Peabody, in their testimony, states that a UAA would not be required unless and until a written determination is made that the water is water of U.S. (Peabody NOI, Cochran at 7), Amigos Bravos does not see how Peabody's proposed standards language does this. It is not clear from the proposed language, except by reference to Peabody's testimony, that a UAA would be required only where a proper written jurisdictional determination has been made that water is a water of the U.S.

Fifth, Peabody's proposal for tier 3, as explained by the testimony (though not clear by the proposed rule language itself), is grounded in the contention that a UAA should only be required where there is written determination that the waters in question are waters of U.S. Where no written determination is made, Peabody's proposal, again as explained by the testimony, would not require a UAA to lift human contact standards. This is problematic because the CWA creates a rebuttable presumption that CWA 101(a)(2) uses—including human contact—are achievable. Peabody's proposal flips this presumption on its head, creating a presumption that CWA 101(a)(2) uses are *not* achievable unless EPA or the Army Corps of Engineers makes an affirmative, written determination that the waters in question are waters of the U.S. While this benefits Peabody's interest in maximizing its bottom line by avoiding water quality protections and could be perceived as administratively expedient, such bottom-line thinking and expedience is of dubious benefit to New Mexicans. And, while Amigos Bravos certainly does not want to impose unnecessary costs on Peabody, Peabody is not exactly a small

entity but, rather, by its own admission, "the world's largest private-sector coal company."[4]

Sixth, Peabody's inclusion of the word "treatment" in the list of uses that would be exempt from human contact standards in 20.6.4.900.D and 20.6.4.900.E NMAC is also either duplicative or, perhaps, indicative (whether intended or not) of a potential "Trojan horse." The definition of "surface water(s) of the state" at 20.6.4.7.S(5) NMAC already excludes "[w]aste treatment systems, including treatment ponds or lagoons designed and actively used to meet requirements of the Clean Water Act...." Assuming that Peabody's proposal is intended to actually change the standards, rather than merely insert duplicative language, this suggests that Peabody, through its proposal, seeks to somehow expand the definition of treatment ponds to include man-made ponds or artificial wetlands used for "treatment" facilities that are designed for a purpose other than "to meet requirements of the Clean Water Act." If so, then Amigos Bravos strongly objects. Before any exemption from water quality standards—in particular human contact standards—is provided, it should be absolutely clear what is, in fact, covered by the exemption. Peabody must clarify this point.

## VI. San Juan Water Commission's Testimony On NMED's Ephemeral Waters Proposal Is Reflects A Policy Preference That Is Not Grounded In Either Law Or Fact

The San Juan Water Commission ("SJWC") provides testimony in their December 12th, 2014 NOI related to NMED's Ephemeral Waters Proposal for 20.6.4.97(C). In their testimony, SJWC suggests that EPA would be receptive to a proposal from NMED allowing New Mexico to return the pre-2009 protections for ephemeral streams (Nylander at 16), including livestock watering, wildlife habitat, secondary contact and limited aquatic life protections. SJWC, however, appears to forget or at least not realize that it was EPA that required the 2009 changes because EPA does not consider the pre-2009 protections—specifically the limited aquatic life use and the

[4] http://www.peabodyenergy.com/content/101/About-Us.

secondary contact use—to be Clean Water Act 101(a)(2) protections.[5] SJWC is therefore wrong that EPA would be receptive to returning to pre 2009 standards; EPA has clearly stated that these pre-2009 standards do not satisfy CWA 101(a)(2) requirements.

Amigos Bravos has no doubt that SJWC would prefer that ephemeral waters receive weakened water quality protections, including that these waters not be considered waters of the U.S. (Nylander at 16). However, Amigos Bravos also has no doubt that, despite this preference, current EPA practice, as well as proposed EPA and U.S. Army Corps of Engineers rules are clear that many non-perennial waters, including ephemeral waters, are in fact waters of the U.S. requiring protection. *See* 79 Fed Reg. 22188 (April 21, 2014). Put differently, SJWC's policy preference, despite uncertainties regarding the precise jurisdictional reach of the CWA (which EPA is attempting to clarify), conflicts with the CWA. Accordingly, SJWC's arguments should properly be targeted to the U.S. Congress, not this Commission.

SJWC also contends, referencing an excerpt from some comments submitted to EPA on its proposed waters of the U.S. rule, somehow reflects a dramatic expansion of federal CWA jurisdiction (Nylander at 17). Of course, that is not a matter for the WQCC, but for EPA (or Congress), to decide. Furthermore, SJWC's arguments are not properly before this Commission because the SJWC never submitted any proposal to change the standards by the September 30, 2014 deadline imposed by the WQCC's July 10, 2014 scheduling order. SJWC is also simply wrong. The EPA, the Scientific Advisory Board that was formed to look into the proposed rule, and numerous organizations across the country have time again and time again proved that SJWC's contentions are little more than myths—and even outright lies. Indeed, EPA has produced a factsheet to dispel these myths (*see* Amigos Bravos Exhibit F (Attached)). In addition, the National Resources Defense Fund ("NRDC") has produced a detailed "mythbuster" document that goes—line by line—through why rhetoric surrounding this rule such as SJWC's is unfounded and untrue (*see* Amigos Bravos Exhibit G (Attached)).

The truth is that the Supreme Court of the United States issued two decisions, the first in 2001 and the second in 2006, that raised important questions regarding the

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[5] EPA Final ROD for the 2004 Triennial Review, April 12th 2009, page 36; and EPA Final ROD for the 2009 Triennial Review, December 29, 2011, page 28-29.

jurisdictional reach of the CWA. In accord with these decisions, CWA protections for some waters that historically had been well within the CWA's jurisdictional reach, such as waters that flow intermittently or are isolated, were rendered uncertain. In this confusion, many of our rivers and streams lost on-the-ground Clean Water Act protection. The proposed EPA rule attempts to clarify the CWA's jurisdictional reach in the wake of these Supreme Court decisions and, furthermore, to respond to calls from Congress for clarification. Specifically, EPA's proposed rule would clarify that some of the rivers, streams, and wetlands that fell through the cracks in the wake of the Supreme Court's decisions in fact still properly require CWA protection and are well within the scope of the CWA's jurisdiction, including as understood by the Supreme Court.

Contrary to the factually untrue fear mongering that SJWC perpetuates with its testimony, and even if this EPA's rule is finalized, *less* water would be protected today than was protected during the Reagan Administration. For example, even if this proposed rule were passed, many of waters in New Mexico that were protected under the Clean Water prior to 2001, such as waters in New Mexico's closed basins, as well as some playa lakes and prairie potholes, would not regain Clean Water Act protections. This creates a huge, adverse impact on water quality in New Mexico since closed basins constitute 20% of the state. *See* Amigos Bravos *et al.*'s Comments on the Proposed Rule, attached as Amigos Bravos Exhibit H. Countless organizations and individuals support the rule, including numerous organizations from New Mexico. *See* Amigos Bravos Exhibit H. The New Mexico Environment Department and former Governor Richardson have supported going further than a rulemaking by passing legislation that would restore pre-2001 protections to the nation's waters. *See* Amigos Bravos Exhibits I and J (Attached). Americans highly value clean water and want strong protections for our nation's rivers and streams. It is estimated that, of the approximately one million comments received by the EPA on the proposed rule, over 800,000 of them are in support of the rule.[6]

Furthermore, and contrary to the rhetoric about this rule, this rule would help farmers. The Rocky Mountain Farmers Union has come out in support of the rule[7] and

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[6] http://switchboard.nrdc.org/blogs/jdevine/big_polluter_agenda_comes_for_.html
[7] http://www.rmfu.org/they-dont-speak-for-me-campaign-launches-2/

EPA has clearly stated—time and time again—that the Rule would keep in place all of the existing agricultural exemptions and in fact *adds* 56 farming related exemptions into the language of the rule itself. *See* Exhibit B. That SJWC would prefer to gut the jurisdictional reach of the CWA does not entitle it to make contrived, ideaological, and factually untrue arguments.

SJWC also claims that 20.6.4.15(C) NMAC elevates the New Mexico Hydrology Protocol to the status of an enforceable regulation (Nylander at 20). Again, SJWC failed to make any proposal to change the standards by September 30, 2014 in accord with this Commission's July 10, 2014 scheduling order and is therefore precluded from not raising this argument at this late date. Moreover, SJWC is, once again, simply wrong. The Hydrology Protocol is a guidance document for determining if a waterbody has ephemeral or intermittent characteristics, not a rule. The regulatory status of a stream is not changed until after a UAA has been prepared and the Commission, through a hearing process, has officially approved the UAA and proposed use change. SWJC's argument—even if it had raised it in a timely fashion as required by this Commission's scheduling order—therefore fails.

**SUBMITTED BY:**

**/s/Rachel Conn**
**February 13, 2015**

Adopted: October 30, 2004

# AMIGOS BRAVOS
# POLICY

## Pesticides and Chemicals

The Mission of Amigos Bravos includes maintenance and restoration of clean unpolluted water and natural biological diversity. Situations arise which may create a conflict, for example, the use of piscicides (i.e., fish toxins) for restoration of native fish and the use of herbicides to control non-native problematic plants.

Generally, it is the policy of Amigos Bravos to oppose the use of pesticides and other chemicals that may contaminate the waters of New Mexico. Exceptions may be considered on a case-by-case basis.

When evaluating potential exceptions to the policy, the following items will be considered:

- Purpose of treatment: Is it necessary to restore or maintain native biological diversity, or natural ecosystem functions?
- Alternatives: Are there reasonable and practical alternatives? Cost alone, should not be the justification for using chemicals.
- All chemicals in a compound or product must be known.
- Has the product been thoroughly researched and approved by the EPA?
- Will any of the chemicals reach the surface or ground water?
- Are any of the chemicals persistent in the ecosystem?
- What are the toxic affects of the product and each chemical, such as direct mortality, carcinogen, endocrine disruption, cholinesterase inhibitor, behavioral or reproductive toxin, etc.?
- Is there a risk of synergism between chemicals?
- How long are the chemicals expected to remain in the system?
- How does each chemical break down and are the resulting chemicals toxic?
- What organisms will be affected? What non-target species will be affected and will they recover to natural population levels?
- Do any of the chemicals bioaccumulate?

EXHIBIT E (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

- Who are the downstream users and will they be affected?

- What safeguards are proposed to protect the public and the environment?

A proponent agency or organization should be able to provide the answers to the above questions that are essential to analyzing the impacts of the project. Amigos Bravos will oppose projects until adequate information is provided.

Amended July 30, 2005 to include the following:
Having undertaken a thorough literature review on the impacts of Fintrol, Amigos Bravos generally approves the use of Fintrol provided the proposed treatment meets the other criteria in the "Pesticide and Chemical Policy". In particular, that the treatment is necessary to restore or maintain native biological diversity or natural ecosystem function; that there are no reasonable and practical alternatives; and that there are no additional unacceptable extenuating circumstances. Amigos Bravos staff, and if requested by the Director, the Board, will review proposed projects and determine the organizations position on a case-by-case basis.

# DITCH THE MYTH

## LET'S GET SERIOUS ABOUT PROTECTING CLEAN WATER

This document addresses concerns and misconceptions about the proposal by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to protect clean water. The proposed rule clarifies protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources. The following facts emphasize that this proposed rule cuts through red tape to make normal farming practices easier while also ensuring that waters are clean for human health, communities, and the economy.
Learn more facts at **www.epa.gov/ditchthemyth**

**MYTH: The rule would regulate all ditches, even those that only flow after rainfall.**
**TRUTH:** The proposed rule actually reduces regulation of ditches because for the first time it would exclude ditches that are constructed through dry lands and don't have water year-round.

**MYTH: A permit is needed for walking cows across a wet field or stream.**
**TRUTH:** No. Normal farming and ranching activities don't need permits under the Clean Water Act, including moving cattle.

**MYTH: Ponds on the farm will be regulated.**
**TRUTH:** The proposed rule does not change the exemption for farm ponds that has been in place for decades. It would for the first time specifically exclude stock watering and irrigation ponds constructed in dry lands.

**MYTH: Groundwater is regulated by the Clean Water Act.**
**TRUTH:** The proposed rule specifically excludes groundwater.

**MYTH: The federal government is going to regulate puddles and water on driveways and playgrounds.**
**TRUTH:** Not remotely true. Such water is never jurisdictional.

**MYTH: EPA is gaining power over farms and ranches.**
**TRUTH:** No. All historical exclusions and exemptions for agriculture are preserved.

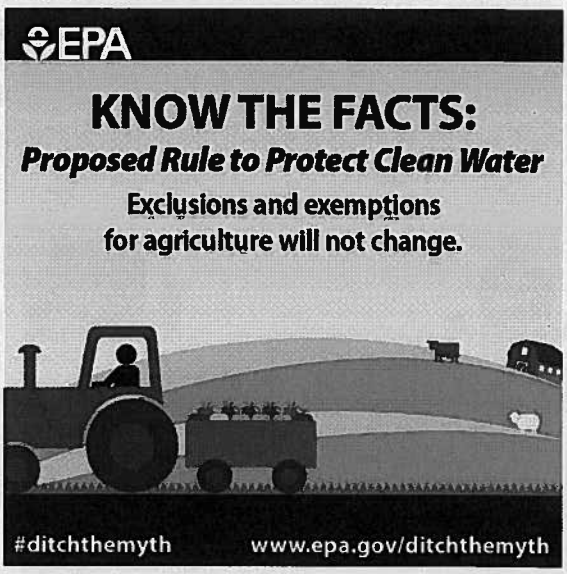
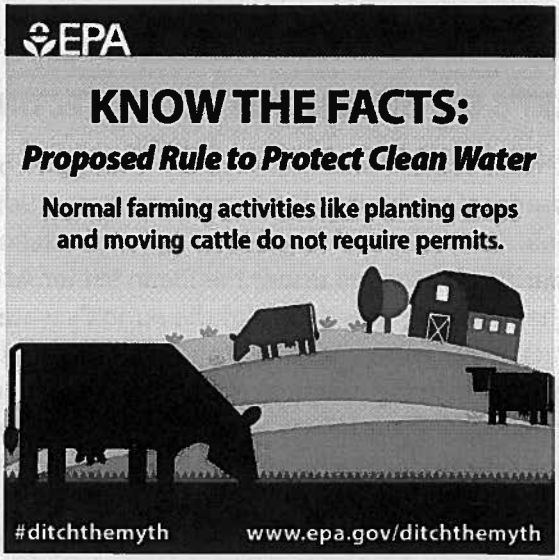



EXHIBIT F (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

**MYTH: Only the 56 conservation practices are now exempt from the Clean Water Act.**
**TRUTH:** No. The proposal did not remove the normal farming exemption. It adds 56 beneficial conservation practices to the exemption, which is self-implementing.

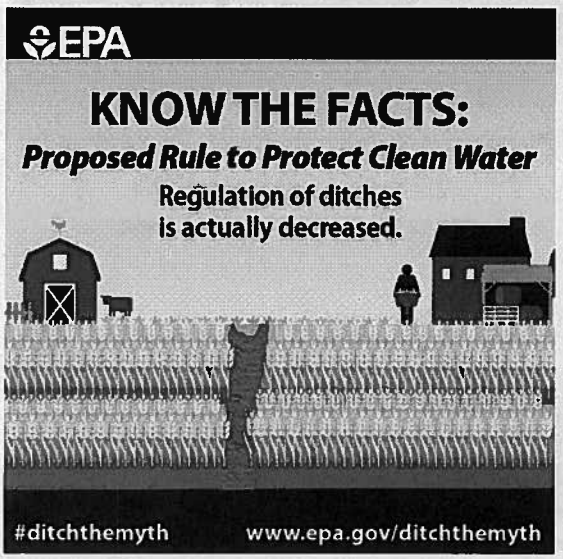



**MYTH: The proposed rule will apply to wet areas or erosional features on fields.**
**TRUTH:** Water-filled areas on crop fields are not jurisdictional and the proposal specifically excludes erosional features.

**MYTH: This is the largest land grab in history.**
**TRUTH:** The Clean Water Act only regulates the pollution and destruction of U.S. waters. The proposed rule would not regulate land or land use.

**MYTH: EPA and the Army Corps are going around Congress and the Supreme Court.**
**TRUTH:** EPA and the Army Corps are responding to calls from Congress and the Supreme Court to clarify regulations. Chief Justice Roberts said that a rulemaking would provide clarification of jurisdiction.

**MYTH: The proposal will now require permits for all activities in floodplains.**
**TRUTH:** The Clean Water Act does not regulate land, and the agencies are not asserting jurisdiction over land in floodplains.

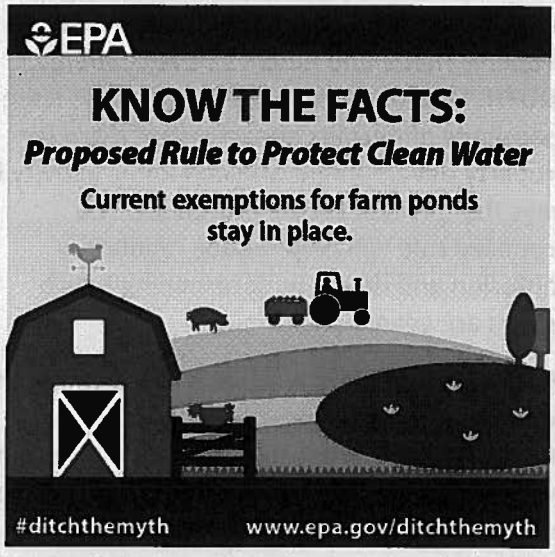



**MYTH: This proposed rule will harm the economy.**
**TRUTH:** Protecting water is vital to the health of the economy. Streams and wetlands are economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

**MYTH: The costs of this proposal are too burdensome.**
**TRUTH:** The potential economic benefits of the proposed rule are estimated to be about double the potential costs – $390 to $510 million in benefits versus $160 to $278 million in costs.

EXHIBIT F (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

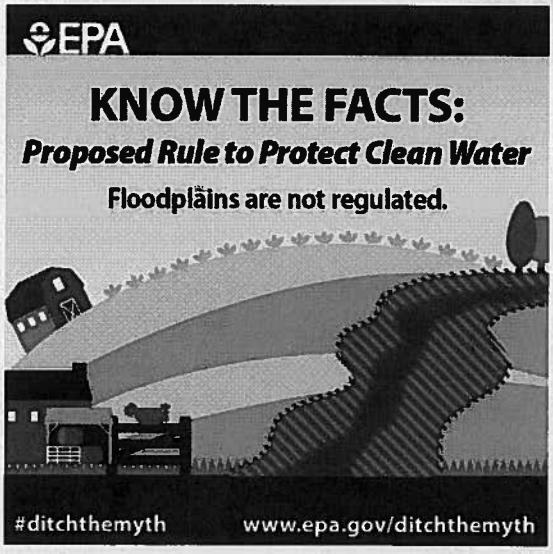
**MYTH: This is a massive expansion of federal authority**
**TRUTH:** The proposal does not protect any waters that have not historically been covered under the Clean Water Act. The proposed rule specifically reflects the more narrow reading of jurisdiction established by the Supreme Court and protects fewer waters than prior to the Supreme Court cases.




**MYTH: This is increasing the number of regulated waters by including waters that do not flow year-round as waters of the U.S.**
**TRUTH:** Streams that only flow seasonally or after rain have been protected by the Clean Water Act since it was enacted in 1972. More than 60 percent of streams nationwide do not flow year-round and contribute to the drinking water supply for 117 million Americans.

**MYTH: Only actual navigable waters can be covered under the Clean Water Act.**
**TRUTH:** Court decisions and the legislative history of the Clean Water Act make clear that waters do not need actual navigation to be covered, and these waters have been protected by the Clean Water Act since it was passed in 1972.

**MYTH: The proposal sets no limits on federal jurisdiction.**
**TRUTH:** The proposed rule does not protect any types of waters that have not historically been covered under the Clean Water Act and specifically reflects the Supreme Court's more narrow reading of jurisdiction, and includes several specific exclusions.



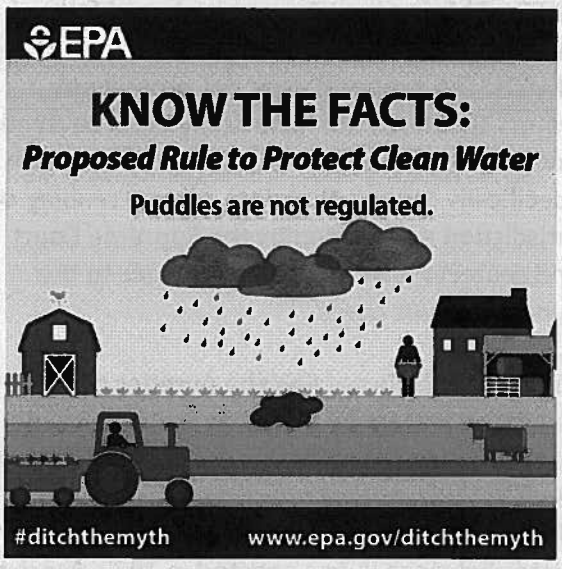

**MYTH: This rule is coming before the science is available.**
**TRUTH:** EPA's scientific assessment is based on more than 1,000 pieces of previously peer-reviewed and publicly available literature. The rule will not be finalized until the scientific assessment is finalized.

**MYTH: This is about little streams in the middle of nowhere that don't matter.**
**TRUTH:** Everyone lives downstream. This means that our communities, our cities, our businesses, our schools, and our farms are all impacted by the pollution and destruction that happens upstream.

EXHIBIT F (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

**MYTH: The proposal infringes on private property rights and hinders development.**
**TRUTH**: EPA, the Army Corps, and states issue thousands of permits annually that allow for property development and economic activity in ways that protect the environment. The proposed rule will help reduce regulatory confusion and delays in determining which waters are covered.

**MYTH: Stakeholders were not consulted in the development of the proposed rule.**
**TRUTH:** This is a proposal. Agencies are seeking public comment and participating in extensive outreach to state and tribal partners, the regulated community including small business, and the general public.




**MYTH: The federal government is taking authority away from the states.**
**TRUTH:** The proposed rule fully preserves and respects the effective federal-state partnership and federal-tribal partnership established under the Clean Water Act. The proposed rule will not affect state water laws, including those governing water supply and use.

**MYTH: Nobody wanted a rulemaking to define Waters of U.S.**
**TRUTH:** A rulemaking to provide clarity was requested by the full spectrum of stakeholders – Congress, industry, agriculture, businesses, hunters and fisherman, and more.

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EXHIBIT F (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

| EPA's Acting Assistant Administrator for Water Claims | AFBF Response | NRDC Analysis of AFBF Arguments |
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| There's been some confusion about EPA's proposed "Waters of the U.S." rule. | That's because the rule doesn't CLARIFY anything except that almost any low spot where rainwater collects could be regulated. The proposed rule defines "tributaries" and "adjacent" in ways that make it impossible for a typical farmer to know whether the specific ditches or low areas at his or her farm will be "waters of the U.S."—but the language is certainly broad enough to give agency field staff plenty of room to find that they are! (79 Fed. Reg. 22206, 22209) | There's not much to respond to here – it's mainly just rhetoric. But, it sounds a common theme in this document – the Farm Bureau repeatedly reads the proposed language in the broadest way possible, often to the point of absurdity, so as to come to the conclusion that the rule would regulate things that the agencies clearly don't have any intent to cover and have not – by any fair reading of the proposal – tried to cover. If the Farm Bureau, however, feels that the proposed definitions could be made clearer, it has the same right as the hundreds of thousands of people who have asked the agencies to finalize a strong rule – it can suggest improvements during the public comment period any time before October 20. |
| The rule keeps intact all CWA exemptions and exclusions for agriculture that farmers count on. But it does more for farmers by actually expanding those exemptions. | It has to! Congress provided those exemptions in the statute, and the agencies can't take them away by regulation. However…<br><br>The categories of exemptions are still there, but because of the expansion of jurisdiction over more small, isolated wetlands and land features like ditches and ephemeral drains, fewer farmers will benefit from the exemptions. The exemptions for activities occurring in "waters of the U.S." have been interpreted by the agencies to be ridiculously narrow (e.g., you can plow and plant in a wetland, but only if you have been farming there since 1977, and only if you do not alter the hydrology of the wetland, and you cannot apply fertilizer or herbicide there without an NPDES permit). *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). | The rule would not be an "expansion" of traditional coverage dating back to the Reagan administration. It would restore coverage to a small percentage more waters than are being protected under policies in place today. But it's important to understand that those policies are more restrictive than required by the Supreme Court, especially given the new compilation of the science supporting broad protections. Most importantly, it will provide clear protections for waters that there should be no question about but are in limbo today.<br><br>There is no 1977 limitation on this exemption, period. The case that the Farm Bureau cites ruled that the discharge in question would so fundamentally alter the watershed hydrology that it would require permitting under a section of the Act that limits the applicability of the exemptions. [*U.S. v. Cumberland Farms of Conn., Inc.*, 647 F.Supp 1166 (D. Mass. 1986) ("Cumberland's activities involve precisely what is prohibited: the wholesale modification of a major aquatic system having an adverse effect, both individually and cumulatively.")]<br><br>The idea that exempted activities lose their exemption if they "alter the hydrology" of covered waters is overstated. Any alteration doesn't trigger permitting, but Congress – not the agencies – required discharges causing significant harm to be |

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| | | permitted. [See Clean Water Act § 404(f)(2); 40 C.F.R. § 232.3(b) ("Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.")]<br><br>Although it is true that certain exemptions only apply to discharges of dredged or fill material, as opposed to pesticides, other exemptions are also available. For example, wetlands qualifying as prior converted cropland are not protected waters. [Proposed 40 C.F.R. § 230.3(t)(2)] Discharges of agricultural stormwater or of water flowing back from irrigated areas do not require permits, even if they contain chemical pollutants like pesticides. [Clean Water Act § 502(14)]<br><br>And, where the activity isn't covered by an exemption, like an industrial livestock operation pumping waste into an on-site stream, it's absolutely appropriate for the Clean Water Act to control that pollution. |
| But it does more for farmers by actually expanding those exemptions. We worked with USDA's Natural Resources Conservation Service and the Army Corps of Engineers to exempt 56 additional conservation practices. | These practices were already exempt (for farmers who have been farming continuously at the location since 1977), but now they are exempt with strings (NRCS standards compliance). | Before the agencies' agriculture exemption rule (with which, to be clear, NRDC has a number of concerns), these 56 activities were not identified as definitively exempt from dredge/fill permitting – there was only a very brief list ("plowing, seeding, cultivating, minor drainage, and harvesting … or upland soil and water conservation practices") of exempted activities. Now, that list has expanded by 56, and the obvious intent of the agriculture exemption rule is to allow certain kinds of activities to go forward without review. In light of push-back from organizations on all sides, the agencies are now re-evaluating how to move forward. The lesson to take from that? Comments matter, and that's why Big Ag should provide substantive and constructive input on the Clean Water Protection Rule, as NRDC and our partners will be doing. |
| The American agriculture economy is the envy of the world, and today's farmers and ranchers are global business professionals – relying on up-to-the-minute science to make decisions about when to plant, fertilize and irrigate crops. | Yes—and they are also families and small business owners who cannot afford tens of thousands of dollars of additional costs for federal permitting of ordinary farming activities.<br><br>Which is why they shouldn't have to wait months or years for a federal permit to plow, plant, fertilize or apply pest or | The Clean Water Act permit programs require a discharge into a water body, so ordinary business that doesn't involve a discharge won't require such a permit.<br><br>"Normal farming" is expressly exempt from the dredge and fill program (except for significantly harmful discharges, as noted above). The Clean Water Act explicitly |

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| | disease control. | includes "plowing" and "seeding" in that exemption, contrary to AFBF's suggestion. [Clean Water Act §404(f)(1)(A)] Other discharges have additional exemptions.<br><br>In the event that a discrete discharge will in fact pollute a water body covered by the law, the discharge can still happen promptly. The Corps has developed several nationwide permits, including a permit for agricultural activities, allowing speedy action, and – by our count – pesticide discharges in 42 states are covered by a general permit for pesticide discharges from the state or EPA. |
| When Congress passed the CWA in 1972, it didn't just defend the mighty Mississippi or our Great Lakes; it also protected the smaller streams and wetlands…But two Supreme Court cases over the last 15 years confused things, making it unclear which waters are "in," and which are "out." | And yet, Congress chose to authorize federal regulatory power over "navigable waters," which the Supreme Court has said means EPA cannot regulate the entire "vast, interconnected system" of waters.<br><br>The Supreme Court didn't "confuse things." It ruled that the agencies' pre-2001 regulation of all waters to the full extent of the U.S. commerce power – even based only on the use of waters by migratory birds – was illegal. EPA's proposed rule doesn't make it clear which features are "in" and which are "out," but it does provide a rationale for agency or citizen enforcers to claim that almost any ditch or low spot is "waters of the U.S." This creates confusion and risk—not clarity. | The Supreme Court has said three essential things about this issue:<br>• "[T]he term 'navigable' as used in the Act is of limited import." [*U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)]<br>• The Act does not protect a water body solely based on its function as habitat for migratory birds [*Solid Waste Agcy. of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001)]<br>• At least those kinds of water bodies that collectively have a significant impact on the condition of downstream waters can be protected. [*Rapanos v. U.S.*, 547 U.S. 715 (2006)]<br><br>By basing the scope of the clean water proposal on the science that shows the connectivity between different kinds of waters and ones downstream, the agencies are well within the Court's directions. Indeed, because the Court didn't strike down any piece of the agencies' regulations, NRDC has concerns that the proposal does not protect all of the water bodies that it could, particularly with respect to waters outside of the floodplain of covered waterways. |
| That confusion added red tape, time and expense to the permitting process under the Clean Water Act. The Army Corps of Engineers had to make case-by-case decisions about which waters were protected, and decisions in different parts of the country became inconsistent. | The Supreme Court rulings didn't complicate the permitting process. That was already a morass of red tape. They only made it more difficult for the Corps and EPA to assert jurisdiction over small, isolated waters and "waters" that are dry most of the time. The proposed rule will make it easier for the Corps and EPA to make "desktop determinations" that any wetlands across huge swaths of the countryside are categorically jurisdictional. (79 Fed. Reg. 22195, | Wrong. Even organizations that have urged a narrow scope of clean water protections agree that the case-by-case process that exists today is unworkable. For example, in 2009, a witness testifying in Congress on behalf of the Associated General Contractors of America said: "Proceeding on a case-by-case basis is unacceptable to AGC."<br><br>We also see delays in effective implementation of the law regularly. |

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| | 22214) | Consider a case in which the defendant had filled streams and wetlands that flow into the actually-navigable Weweantic River in MA between 1979-1999. Resolution of the case was hung up for years in court fights about whether the waters were protected by the law. The Supreme Court finally denied review in 2007. [*U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006)]<br><br>In asking the Supreme Court to review a federal appeals court decision effectively requiring case-by-case review of individual water bodies, the Bush administration noted that in just the three states covered by the court, "approximately 28,215 additional hours of agency time would have been expended" in a single year using the case-by-case approach. [Petition for a Writ of Certiorari, *U.S. v. McWane, Inc.*, at 30 (Aug. 2008).] |
| EPA's proposal will bring clarity and consistency to the process, cutting red tape and saving money. | A rule that regulates all "waters" lying within a "floodplain" but leaves to case-by-case judgment whether it's a two-year floodplain or a 100-year floodplain does not promote clarity or consistency. (79 Fed. Reg. 22208-9) The only reduction in red tape and cost will be for regulators who can categorically regulate small, isolated and mostly dry features. Red tape and cost for farmers and any other entity building on or using the land will INCREASE. | Actually, the definition of "floodplain" in the proposal is virtually identical to the technical definition from the scientific analysis of the connectivity of water bodies. [U.S. EPA Office of Research and Development, *Connectivity of Streams and Wetlands to Downstream Waters*, at p. A-5 (Sept. 2013)] And that analysis concludes that waters located in the floodplain "serve an important role in the integrity of downstream waters…." [p. 1-3]<br><br>Of course, if the Farm Bureau has a better way of defining the floodplain that is scientifically-based and that still ensures that it includes the waters that have these important functions, that's exactly why the proposed rule is out for public comment. |
| The proposed Waters of the U.S. rule does not regulate new types of ditches, does not regulate activities on land, and does not apply to groundwater. | Ditches - Current rules do NOT INCLUDE ditches. Agencies have informally interpreted rules to include ditches as "tributaries." We disagree! Now, the new rule would categorically define almost all ditches as "tributaries." (79 Fed. Reg. 22203-4)<br><br>Activity on land - Yes, the proposed rule would regulate activities on land that is usually dry but where water channels and flows or ponds when it rains. The rule calls these areas "ephemeral streams," "wetlands" and "seasonal ponds" – but to most people, they look like LAND. | Ditches – The Farm Bureau is wrong. The existing rules absolutely cover manmade and man-altered features as tributaries, as discussed below. In addition, the U.S. Court of Appeals for the D.C. Circuit specifically rejected the idea that covering ditches is novel, noting instead "the Corps's persistent view that some upland ditches may be jurisdictional…." [*Nat'l Assn. of Home Builders*, 663 F.3d 470 (D.C. Cir. 2011)] Also, if ditches couldn't be tributaries, then the Supreme Court should've ruled in its 2006 case that the wetlands at issue, "which lie near ditches or man-made drains that eventually empty into traditional navigable waters," were not subject to the regulations applicable to wetlands adjacent to tributaries, but it |

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| | | didn't. [*Rapanos v. U.S.*]<br><br>Activity on land – Note the trick here, which is echoed throughout the Farm Bureau's piece. They take recognized and scientifically-understood terms like "ephemeral stream" and "wetland" and call them "land." Don't be fooled – these features have long been understood to be protected by the law. The question of whether wetlands could be protected by the Act was answered "yes" by a unanimous Supreme Court in 1985 [*Riverside Bayview*] and streams have been understood to be covered even when they dry up since the early days of the Act. [*See, e.g., U.S. v. Phelps Dodge Corp.*, 391 F. Supp 1181 (D. Ariz. 1975); *U.S. v. Zanger*, 767 F.Supp 1030 (N.D. Cal. 1991); *U.S. v. Sheyemme Tooling & Mfg. Co., Inc.*, 952 F.Supp. 1414 (D.N.D. 1996)] |
| The proposal does not change the permitting exemption for stock ponds, does not require permits for normal farming activities like moving cattle, and does not regulate puddles | Stock ponds - The proposed rule makes the exemption for stock ponds meaningless because it would regulate the low spots where farmers typically build ponds. The rule would *only* allow farm ponds built by diking "upland." This is a farm pond that only a Washington bureaucrat would build.<br><br>Normal farming activities - This is false. Under the rule, Section 402 permits would be necessary for common farming activities like applying fertilizer or pesticide—or moving cattle—if materials (fertilizer, pesticide or manure) would fall into low spots or ditches. Section 404 permits would be required for earth-moving activity, such as plowing, planting or fencing, except as part of "established" farming ongoing at the same site since 1977.<br><br>Puddles - The rule would not categorically regulate all puddles—but it would regulate low spots that puddle often enough to meet the broad definition of "wetlands" if those low spots are in a "floodplain" or a "riparian area" or if they, combined with other low spots in the region, have a "significant nexus" to any other "water of the U.S." Clear as mud, right? Here is what the proposal says about "puddles:"<br><br>(79 Fed. Reg. 22218) | Stock ponds – the Farm Bureau's claims are wrong. First, discharges of dredged or fill material into protected waters associated with "construction or maintenance of farm or stock ponds" will typically be exempt under the law. [Clean Water Act §404(f)(1)(C)] Second, discharges into the stock ponds themselves will not be covered, as the rule *for the first time* adds to the regulation a provision saying that "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing" are not protected waters. [Proposed 40 CFR 230.3(t)(5)(ii)] This section of the proposal does not use the term "upland," but even if it did, it doesn't mean a hillside, as the Farm Bureau implies. Again, consider the scientific terminology from the connectivity report: "Uplands—(1) Higher elevation lands surrounding streams and their floodplains. (2) Within the wetland literature, specifically refers to any area that is not a water body and does not meet the Cowardin et al. (1979) three-attribute wetland definition."<br><br>Normal farming activities – the Farm Bureau is wrong again. The proposal does not change in any way the way that application of pesticides or other agricultural chemicals are regulated (or not) under the Clean Water Act. These activities, when they involve spraying |

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| | | "directly to waters of the United States, or where a portion of the pesticide will unavoidably be deposited to waters of the United States," require a permit. Rainfall or irrigation water that washes pesticides or other agricultural products into protected waterways does not require permitting. [Clean Water Act §502(14)]<br><br>Puddles – Notice what the Farm Bureau does here. It calls "wetlands," which are widely-understood hydrological features, "puddles," despite their enormous importance for flood control, pollutant filtration, groundwater recharge, and wildlife habitat. In doing so, they mislead farmers and others who care about protecting water quality that this rule would cover far more than it would. As for real "puddles" as all of us understand that term, the agencies' proposal says "a relatively small, temporary pool of water that forms on pavement or uplands immediately after a rainstorm, snow melt, or similar event … cannot reasonably be considered a water body or aquatic feature at all." [79 Fed. Reg. at 22,218] |
| The proposed rule does NOT protect any waters that have not historically been covered under the Clean Water Act, and the proposed rule is consistent with Supreme Court decisions. | The Supreme Court said twice that EPA's "historical" scope of regulation was unlawful. Prior to the Supreme Court decisions, EPA used the "migratory bird rule" to regulate nearly all waters. EPA's proposed new rule based on the "connectivity" of all waters is just as broad and just as unlawful. The proposed rule is a cynical attempt to overcome the Supreme Court decisions by finding that virtually all waters have a "substantial nexus" to navigable waters. | The Farm Bureau is wrong. The proposed rule is neither over-broad nor unlawful; if anything, the science and law demand that the agencies ensure that more aquatic resources are protected.<br><br>According to the agencies' analysis of the proposed rule's impact, approximately 17-26% of "other waters" (generally non-wetland adjacent waters and water bodies outside the floodplain of other covered waters) would be protected, as compared to the near-100% coverage under the traditional approach. [Economic Analysis, p. 44, Exhibit 28] The Farm Bureau is entitled to its opinions, but it can't make 26 equal 100.<br><br>As for its legality, the Supreme Court has established that the law protects *at least* those kinds of waters that the science demonstrates have significant downstream effects, when considered collectively, and the copious science that the proposal relies upon shows that tributaries and nearby waters easily meet this test. We believe additional categories of waters do as well, a point we will be making in our public comments on the rule; if the Farm Bureau thinks these |

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| | | waters don't matter, it should take advantage of the fact that the agencies have sought relevant scientific evidence in a number of ways. |
| **The EPA and the Army Corps are NOT going to have greater power over water on farms and ranches.** | The only way the agencies can believe this is if they believe they already have power over almost every low spot where water flows or stands after rain. We disagree—and so does the Supreme Court. | The law does already apply -- though there is significant uncertainty about its application to any given location because of policies adopted under the prior administration -- at least to those waters that, in the aggregate, significantly affect downstream waters' physical, chemical, or biological integrity. The proposal would provide far more clarity about where those conditions are satisfied. |
| • The Clean Water Act and its regulations have multiple exclusions and exemptions from jurisdiction and permit requirements. The rule does not change or limit any of them. | Congress wrote many exemptions to prevent federal permit requirements for farming. But Congress used language that assumed farming happens on land, not in "waters of the U.S." By defining land to be "waters of the U.S.," the rule would result in federal permit requirements for countless farming activities. | Congress plainly knew that agricultural pollution would be discharged into covered waters due to activity on land, and that's why it sought to exclude some activities from permitting. (It should be noted that this choice was not without consequences -- many water bodies are unable to meet state-established standards for water quality because of agricultural pollution.) The final sentence of the Farm Bureau's statement here is just a repetition of its fallacious and doctrinaire suggestion that wetlands and certain kinds of streams are "land." |
| **The proposed rule will NOT bring all ditches on farms under federal jurisdiction.**<br>• Some ditches have been regulated under the Clean Water Act since the 1970s. | Oh, really? Point to a ditch that was regulated as a water of the U.S. in the 1970s. **The CWA DOES NOT regulate ditches as waters of the United States.** The Corps informally (not in regulation) said that *some ditches could be regulated as waters under the 404 program on a case-by-case basis*. **The rule goes much further by broadly defining almost all ditches as waters of the U.S. under all CWA programs.** Technically, even mowing the grass in a ditch would require a federal permit under the rule. | Can do. Here are three:<br>• Arlington Canal, "an earthen irrigation ditch which flows roughly parallel to the Gila River" [U.S. EPA, Office of General Counsel, *In re Buckeye, Ariz.*, 1977 WL 28254 (Nov. 11, 1977)]<br>• Non-navigable, artificial mosquito canals connected to Papy's Bayou in Florida [*U.S. v. Holland*, 373 F. Supp. 665 (D. Fla. 1974)]<br>• A Louisiana canal adjacent to (and from which water was periodically pumped into) protected wetlands [*U.S. v. St. Bernard Parish*, 589 F. Supp. 617 (E.D. La. 1984) (Note: case involved discharges during 1970s and 1980s)]<br><br>The longstanding regulations also clearly encompass these features, since they include "tributaries" as well as "[a]ll other waters … the use, degradation or destruction of which could affect interstate or foreign commerce…." [Existing regulations at 40 C.F.R. §§230.3(s)(3) & (5)]<br><br>No, mowing a ditch wouldn't require a permit; maintenance of drainage and |

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| | | irrigation ditches are covered by an exemption in the Act. [Clean Water Act §404(f)(1)(C)] |
| • The proposed rule does not expand jurisdiction. | This is false. Non-navigable features that do not contain water most of the time are not currently regulated without a case-by-case finding that the particular feature has a significant effect on navigable waters—taking into account the volume, frequency and duration of flow and proximity to navigable waters. The proposed rule will categorically regulate as "tributaries" all non-navigable "ephemerals" that ever carry any amount of water that finds its way to a navigable water—regardless of the volume, frequency and duration of flow and regardless of the distance to actual navigable waters.<br><br>This alone is a huge expansion. (But there are other examples, too.) Here is just one example of how broad the definition of a "tributary" will be:<br><br>"These effects occur even when the tributaries flow infrequently (such as ephemeral tributaries) and even when the tributaries are large distances from the (a)(1) through (a)(3) water (such as some headwater tributaries). When all the tributaries in a watershed are considered together, these effects are significant."<br><br>"Tributaries that are small, flow infrequently, or are a substantial distance from the nearest (a)(1) through (a)(3) water (*e.g.*, headwater perennial, intermittent, and ephemeral tributaries) are essential components of the tributary network and have important effects on the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters, contributing many of the same functions downstream as larger streams." (79 Fed. Reg. 22205-6) | As indicated above, this "expansion" question comes down to where you begin your analysis. It is not an expansion over traditional coverage, which the Farm Bureau acknowledges protected virtually all surface waters. It will protect slightly more than is being protected today, though it is hardly true that it is a "huge expansion." The agencies estimate about 3% additional water bodies will be covered as a consequence of the rule. With respect to tributary streams, that'll increase coverage by about 2%, and nearby wetlands by about 1.5%. [Economic Analysis, p. 11]<br><br>It is not true that every feature that carries any amount of water that ever gets to a navigable water is covered. The proposed rule would expressly exempt non-wetland swales, gullies, and rills. [Proposed 40 C.F.R. §230.3(t)(5)(vii)] and would also require a feature that contributes flow downstream to have a bed and bank and an ordinary high water mark to be considered a tributary. [Proposed 40 C.F.R. §230.3(u)(5)]<br><br>The passages the Farm Bureau quotes are indisputable. The reason tributary streams would be covered is precisely because they have these important impacts. And this isn't a novel revelation; federal law has regulated discharges of refuse matter into navigable waters "or into *any tributary* of any navigable water from which the same shall float or be washed into such navigable water" *since 1899*! [33 U.S.C. §407 (emphasis added)] |
| • For the first time, the agencies are clarifying that all ditches that are constructed in dry lands and drain only dry lands are not "waters of the U.S." This includes roadside ditches and ditches collecting runoff or drainage from crop fields. | If water ever flows to a ditch from any "wetland" area (often just a small low spot), or from any "ephemeral" drain, or from any overflow of a pond during very heavy rains, the ditch will not qualify for this exclusion (because it does not drain only "uplands"). Also, if the ditch itself has "wetland" characteristics—which tends to happen because ditches do, after all, carry water when it rains—the ditch | Does the Farm Bureau have any data to back this up? Any quantification of the number of ditches that replace or drain water bodies such as wetlands? And, with such a quantification, does the Farm Bureau have any assessment of the water quality impact of allowing their destruction or pollution? If so, it has the perfect opportunity – the currently-open comment period – to identify concerns it |

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| | will not qualify and will be regulated. Very few ditches will qualify for this exclusion—most ditches will be jurisdictional. (79 Fed. Reg. 22203-4) Here is just one part of EPA's justification for defining "tributary" to include "ditches" and "canals:" "Ditches and canals, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. It is the agencies' position that ditches that meet the definition of tributary (which does not include ditches excluded under paragraphs (b)(3) and (b)(4)) provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule." (79 Fed. Reg. 22206) | might have and show that cutting certain features out of the Clean Water Act will be harmless. |
| • Ditches that are IN are generally those that are essentially human altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches. | False. Ditches that are IN are all ditches that flow to any stream or river (through any number of other ditches), except those that contain no "wetland" areas along their entire length, and that drain only "upland" (no stormwater from wetlands or ponds or other waters ever flows to the ditch). The vast majority of ditches are IN. (79 Fed. Reg. 22203-4)<br><br>The ditches that are "in" are far more than "human altered streams." A ditch that happens to sometimes receive rainwater overflows from nearby wetlands is not a human altered stream. A ditch that displays wetland characteristics due to the presence of water is not a human altered stream. A ditch excavated in a low area that naturally channels rainwater is also not a human altered stream. "Ditches may have been created for a number of purposes, such as irrigation, water management or treatment, and roadside drains. In order to be excluded, however, the ditch must be excavated wholly in uplands, drain only uplands, and have less than perennial flow." (79 Fed. Reg. 22203-4) | Not "all ditches" that meet the Farm Bureau's description will be covered. Rather, the rules use scientific indicia of flow or permanence to potentially include waterways in the law's coverage. To be a tributary, a flowing waterway needs to have an ordinary high water mark and a bed and bank. [Proposed 40 C.F.R. §230.3(u)(5)] Likewise, a ditch that has water from time to time is not going to magically turn into a wetland; to be a wetland, the rule would define "wetlands" to mean "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." [Proposed 40 C.F.R. §230.3(u)(6)] |
| • Ditches that are OUT are those that are dug in dry lands and don't flow all the time, or don't flow into a jurisdictional water. | Again, false. Ditches that are OUT are those that are "upland" (not wetland or water) along their entire length, and that drain only "upland" (no water ever flows to the ditch from wetlands or ponds or other waters). These are mythical | They're not "mythical," at least according to the Farm Bureau's anti-clean water coalition partner, the National Association of Home Builders. In litigation challenging an Army Corps general permit authorizing discharges into |

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| | ditches. People don't dig ditches along ridges. Any other ditch that ever carries rainwater that ever makes its way (through any number of other ditches) to navigable waters is IN. (79 Fed. Reg. 22203-4) | certain "upland ditches," NAHB said that "NAHB"s members often construct 'upland ditches' to control stormwater runoff from construction sites or to drain roads" and alleged that there are "millions of miles of non-tidal upland ditches found throughout the nation…." [Appellants' Opening Brief, *National Association of Home Builders v. U.S. Army Corps of Eng'rs*, No. 10-5169, at 8 & 35 (D.C. Cir. Mar. 25, 2011)] |
| • Farmers, ranchers and foresters are exempt from Clean Water Act Section 404 permitting requirements when they construct and maintain those ditches, even if ditches are jurisdictional. | This is contradicted by Corps' interpretation and enforcement under Section 404. If the "flow" of jurisdictional features is altered, the Corps views the activity as regulated (i.e., permit required). 33 CFR Section 323.4 | The Act generally exempts discharges of dredged or fill material from the permit obligation when they are associated with "construction or maintenance of farm … irrigation ditches, or the maintenance of drainage ditches." [Clean Water Act §404(f)(1)(C)] However, Congress – not the Corps – specified that discharges with more serious impacts "shall be required to have a permit" even if they are otherwise exempt. It is perfectly appropriate to ensure that such activities are closely reviewed, and EPA and the Corps couldn't change this legal requirement even if they wanted to. |
| **The proposed rule does NOT mean permits are needed for walking cows across a wet field or stream.** | Technically, EPA could absolutely require a permit for this. Manure is a Clean Water Act "pollutant." If a low spot on a pasture is a jurisdictional "wetland" or "ephemeral stream" under the new rule, EPA or a citizens group could sue the owner of cows that "discharge" manure into those jurisdictional waters without a Section 402 permit. Seriously. | This is not serious. A cow is not a "point source" under the law. [*Oregon Natural Desert Assn. v. Dombeck*, 172 F.3d 1092, 1099 (9th Cir. 1998) ("It would be strange indeed to classify as a point source something as inherently mobile as a cow.")] The Farm Bureau's fight to hold on to even its most absurd and false allegations about this rule should make anyone pause before trusting anything the Farm Bureau claims the proposal does. |
| • Normal farming and ranching activities are not regulated under section 404 of the Clean Water Act. | Only partially true. The "normal" farming exemption only applies to discharges of "dredged or fill material" under Section 404. It does not apply to discharges of other "pollutants" (e.g., dust, manure, fertilizer, herbicide) regulated under Section 402. Also, EPA and the Corps have interpreted the normal farming exemption to only apply where farming has been ongoing at the same location since 1977. *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). | It is true that not all agricultural discharges are exempt from the law; that is how Congress wrote it. However, the Farm Bureau doesn't mention here that discharges of things like fertilizer and pesticides are routinely excluded under separate exemptions in the law for "agricultural stormwater discharges and return flows from irrigated agriculture." [Clean Water Act §502(14)]<br><br>As noted above, the claim that the agencies require farming to occur on an ongoing basis since 1977 to trigger the "normal farming" exemption is false. |
| **The proposed rule will NOT apply to wet areas on fields or erosional features on fields.** | So you say now. How will enforcement inspectors later know the difference between a "water-filled area on a crop | Again, ephemeral streams and wetlands have defined meanings – distinct from simple wet areas -- based on scientific |

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| • Water-filled areas on crop fields are not jurisdictional. | field" and a "seasonal pond" or "wetland" or "ephemeral stream"—any of which can be regulated? The rule says that even small and temporary waters can be regulated. Isolated waters are categorically regulated if they are in floodplains or nearby ditches. (79 Fed. Reg. 22209) | indications of flow and permanence. With respect to ponds, it is reasonable to expect that the agencies will similarly require some indication that the water body is a defined feature on the landscape; for instance, the Corps' regulations already specify that the limits of jurisdiction of all non-tidal waters is the ordinary high water mark (or the extent of any adjacent wetland). [Existing 33 C.F.R. § 328.4(c)]<br><br>But, if the Farm Bureau believes that this approach is not right for some reason or another, it should by all means make its views known during the currently-open comment period. |
| • The proposal specifically excludes erosional features from being "waters of the U.S." | The proposal also says it can be hard to tell the difference between an erosional feature and an "ephemeral stream," which is regulated. (79 Fed. Reg. 22219) That leaves it for enforcement inspectors and lawyers to decide later! | Or, the final rule could – with the Farm Bureau's and others' constructive input – define these terms further. Indeed, the agencies specifically asked for public comment on this very subject: "The agencies request comment on how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional." [79 Fed. Reg. at 22,219] |
| **EPA is <u>NOT taking control of ponds in the middle of the farm</u>.**<br>• The proposed rule <u>does not change jurisdiction over farm ponds.</u><br>• The rule <u>does not affect the existing exemption Congress created for construction and maintenance of farm or stock ponds</u>.<br>• The proposed rule would for the first time <u>specifically exclude stock watering ponds</u> from jurisdiction. | We've <u>already</u> seen EPA enforcement claiming farm ponds were built illegally because they were built in low spots where water naturally channeled. (EPA couldn't wait until the proposed rule becomes final to go ahead with these enforcement actions.)<br><br>• Maybe that's because EPA has already started illegally enforcing jurisdiction over farm ponds built in low spots.<br>• False. The rule makes the farm pond exemption meaningless, because the exemption does not apply to impoundments of "navigable waters." By regulating low spots as "navigable waters," the rule would prevent building a farm pond on a low spot without a Section 404 permit. 33 CFR Section 323.4(a)(3)<br>• Like the farm pond exemption, this exclusion would only apply if the watering pond is built "by diking dry land." It also has to be used "exclusively for" stock watering. What if it is also used for other purposes? Can a row crop farmer | Where? It is hard to address claims about which the Farm Bureau won't provide any specifics. However, the <u>conservative media</u> and certain <u>members of Congress</u> have claimed that an EPA enforcement action with respect to a Wyoming landowner that dammed a perennial stream to create a stock pond is an example of agency overreach. If that is the case that the Farm Bureau refuses to identify, then it is not at all about discharges into the pond, but rather the <u>filling 40 feet of a stream called Six Mile Creek with "sand, gravel, clay, and concrete blocks"</u> to create a dam, and doing so without getting any kind of Clean Water Act permit for the discharge.<br><br>Note again here the Farm Bureau's rhetorical trick of referring to wetlands as "low spots," rather than long-understood hydrological features.<br><br>The Farm Bureau leaves out key pieces of the proposal in its last objection – the pond need not only be for stock watering but "exclusively for such purposes as stock watering, irrigation, settling basins, |

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| | have one of these ponds? | or rice growing." So, yes, a row crop farmer can construct an irrigation pond in dry land and, because it would not be a protected water body, he or she can discharge pollutants into it without a permit. Actually, even if an irrigation pond was a protected water body, a farmer could discharge into it with the proper authorization from the appropriate state or federal pollution control officials. |
| **The interpretive rule does NOT redefine normal farming as only those 56 conservation practices.** | By suggesting that "clarification" was needed to exempt these 56 practices because they are not listed in the Clean Water Act, the interpretive rules casts doubt over the exempt status of all other farming practices that are not listed in the statute. The statute lists only "plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices."<br><br>Normal farming, ranching and forestry practices that are regularly implemented on the farm are classified as conservation practices by the IR. For example, building a terrace or a fence, planting cover crops and prescribed cattle grazing are all normal farming activities that have not been subject to permits or NRCS standards until now. The IR does not distinguish between these normal farming activities and the same activities conducted solely for conservation purposes – making them subject to compliance with NRCS standards. | Although NRDC has concerns of its own that the interpretive rule goes too far in exempting practices from Clean Water Act permitting that do not appear to be "normal farming," the Farm Bureau's claim here protests too much. The interpretive rule says on its face that it "identifies additional activities considered exempt from permitting," and does not say anything about any other activities. |
| • If a permit was not needed for a particular practice before, a permit won't be needed now. | False. The 56 listed conservation practices will now only be exempt from permit requirements if they comply with NRCS standards. For other farming practices, most will require either a Section 402 or 404 permit under the proposed rule if they occur in or near a newly regulated "ephemeral" or ditch or low spot ("wetland"). (If Ms. Stoner truly believes this statement, it may be because she already thinks most farming in or near any ditch or ephemeral or small isolated wetland already requires a Clean Water Act permit. We disagree.) | For starters, ephemeral streams and wetlands will not be "newly regulated" by this rule. These features have been protected under the law consistently; the only question is whether they are categorically protected or whether they are almost always protected, but subject to a time-consuming and resource-intensive process to make that determination.<br><br>With respect to the role of the NRCS standards, we understand EPA and the Corps intend that, to qualify for the exemption the agencies are seeking to create for projects that benefit water quality, the NRCS standards need to be followed, but that does not mean that the same activities (fence-building, e.g.) will |

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| | | require permits if not undertaken in compliance with the NRCS standards – they might still be considered "normal farming." Nevertheless, if the interpretive rule stays in effect, we agree with the Farm Bureau that this particular point could be clarified. |
| • These 56 practices clarify and add to all of the practices that are being implemented in the field today and currently considered normal farming and exempt from permitting. The interpretive rule adds to what is exempt. | That is not clear from the interpretive rule. | As noted above, it's not only clear, it stresses this point specifically. |
| • The "normal farming" exemption is broader than these 56 practices. So if farmers implement other practices, or don't use NRCS funds, they would continue to be exempt in the same way they are now. | The "normal" farming exemption does include more than these 56 practices, but according to longstanding Corps and EPA interpretations, it only exempts farming that has been ongoing at the same site since 1977. That's true for these 56 practices and other practices. That is why regulating land as if it were "waters" under the proposed rule will result in federal permit requirements for many commonplace and essential farming practices.<br><br>Nothing in the interpretive rule says that the requirement to meet NRCS standards is limited to farmers using NRCS funds. | Again, there is no basis for the claim that the "normal farming" exemption extends only to those operations where farming has been ongoing since 1977. |
| • This rule is self-implementing, which means that a farmer is not required to seek approval from or consult with any agency (including USDA, EPA, and the Corps) to implement a conservation practice and be exempt from permitting. | Farmers have never had to seek pre-approval from any federal agencies to conduct exempt farming practices. The difference is that now farmers are more likely to be sued by the government or citizens groups claiming they did not fully comply with NRCS standards or that their practices are not all listed in the statute and in the interpretive rule. | As indicated earlier, NRDC understands the agencies' intent in issuing the interpretive rule to provide clarity that these activities undertaken in accordance with NRCS standards are exempt (unless they have impacts such that they are required to be permitted under the Act), nothing more, nothing less. However, the suite of practices the agencies exempted is so broad and in many cases seems far removed from "normal farming," and it was done without taking public comment, unlike the separate clean water rule. Consequently, NRDC actually agrees with the Farm Bureau – albeit for entirely different reasons – that the interpretive rule should be withdrawn. |
| **NPDES permits will NOT be required for the application of fertilizer to fields or surrounding ditches or seasonal streams.** | False. If there are jurisdictional "wetlands" (low spots) or ephemerals (drainage areas) within farm fields or ditches beside or within farm fields, and if even miniscule amounts of pesticide or fertilizer fall into those features (intentionally or not), this would be an | The Farm Bureau is exaggerating again. For one, runoff from treated fields due to rainfall or irrigation return flow is not required to be permitted. [Clean Water Act §502(14)] In addition, wetlands in farm fields, if they qualify as "prior converted cropland," are not covered |

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| | unlawful "discharge" of "pollutant" that would trigger liability of up to $37,500 per discharge per day without an NPDES permit. | waters, nor are various ditches dug in dry land or ponds used for specified agricultural purposes. |
| • All ditches constructed in dry land and that drain only dry land, and flow only part of the year, are not jurisdictional and thus would not need a permit for any action. | See above—the vast majority of ditches will NOT qualify for this exclusion. Most ditches will be deemed "tributaries" and therefore "waters of the U.S.," even at times when they are completely dry. | Again, the Farm Bureau provides no support for its allegations here, and it it important to remember that a "ditch" will only qualify as a tributary if it has indicia of sufficient flow (ordinary high water mark and bed and bank) *and* if it is not otherwise exempt. And, of course, not all discharges into even those man-made features that qualify as tributaries need permits; many activities are exempt. Where permits are required, general permits are available for the most common kinds of agricultural discharges.<br><br>And it bears noting that a discharge into a tributary that happens to be dry at the time of the discharge doesn't render it harmless; pollutants will be carried downstream when rain falls. |
| • The pesticide general permit only requires an NPDES permit where pesticides are applied directly to a water of the U.S. | A pesticide general permit does not "require" NPDES permits at all—it is just the most readily available permit for many pesticide dischargers. If the pesticide general permit for your state applies only to "direct" application of pesticide into waters, then farmers would need to go through the very costly and time-consuming process of obtaining individual permit coverage for any pesticide that might fall incidentally or be blown by wind into the "ephemerals" and ditches within and around farm fields. | The discharge of pesticides to waters protected by the law needs to be permitted when a pesticide is applied directly to waters or when "application is made such that a portion of the pesticide will be unavoidably deposited to waters of the United States and result in a discharge (for example, an application is made on a creek bank)…." This is perfectly appropriate, given how harmful pesticides can be to aquatic life, among other things, and it is clearly required by the Clean Water Act. [*National Cotton Council of America v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009)] |
| • Pesticide applicators can avoid direct contact with jurisdictional waters when spraying crop fields. | Sounds like EPA doesn't have much experience with farming! In much of our most productive farmlands (areas with plenty of rain), it would be extremely difficult to entirely avoid the small wetlands, ephemerals and ditches in and around farm fields. Any accidental spray—of any amount—into these features (even at times when the features are completely dry) would be an unlawful discharge (with penalties of up to $37,500). | There are clearly protected features on farm land today – things like perennial streams and nearby wetlands – and the requirement to obtain permits for discharges of pesticides to them exists today. Agricultural producers and pesticide applicators are working with this requirement already. If this proposal is finalized, and the coverage of the law increases over today's level by 3% (though, as noted above, this would still be less than the coverage during the Reagan administration), these applicators will likely need to get permits for pesticide use near 3% more waters – hardly a mammoth upheaval. That's especially true given the wide availability of general permits for pesticide |

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| | | application. |
| **Federal agencies are NOT asserting regulatory authority over land use.** | False. When federal agencies have the power to grant, deny or VETO a federally enforceable permit to plow, plant, build a fence, apply fertilizer or spray pesticide or disease control products on crops, that IS regulatory authority over land use.<br><br>If a landowner cannot build a house on, build a fence over or plow through a jurisdictional wetland or ephemeral drain that runs across his or her land, then that is regulating land use. If a farmer cannot redirect a ditch to improve drainage on his soybean farm, then that is regulating land use.<br><br>In addition, note the following quote from Secretary Darcy during a hearing on June 11 before the House Transportation & Infrastructure Water Resources and Environment Subcommittee – "*Once implemented, this rule will enable the Army Corps of Engineers to more effectively and efficiently protect our nation's aquatic resources while enabling appropriate development proposals to move forward.*" Congress did not give either EPA or the Army Corps the authority to determine "appropriate" land uses. | There are too many unfounded claims in this statement to rebut them all. Suffice it to say that the Farm Bureau ignores the numerous statutory exemptions available to agricultural dischargers, to say nothing of the exemptions that EPA and the Corps have created for water bodies on agricultural land.<br><br>Also, the implication that permits might be denied or vetoed as a regular matter is simply belied by the facts. The Corps, for instance, denies fewer than 3% of requests for permits across the country.<br><br>Finally, the point EPA is making and that the Farm Bureau would apparently rather ignore is that the Clean Water Act's permit programs apply when there is a discharge of pollutants into protected waters. Of course the law allows for the regulation of activities on land that pollute water; a sewage treatment plant must have a permit under the law that requires it to meet certain standards. |
| • The CWA only regulates the pollution and destruction of waters. | Actually, it is "navigable waters" or waters so closely connected to navigable waters that they have a significant effect on those navigable waters. Whether you like it or not, the Supreme Court has said this does not mean all waters (even "waters" that are usually dry). | The Farm Bureau can't seem to keep its story straight about what the law protects. In 2005, it said the Act only includes "waters that are 'navigable'—that 'were or had been navigable in fact or which could reasonably be so made.'" [Brief for American Farm Bureau Fed., *Rapanos v. U.S.*, No. 04-1034 (U.S., Dec. 2005)] In 2009, it joined a letter that was broader and said: "The undersigned organizations fully support the protection of navigable waters of the United States. We also fully understand that, to achieve that goal, we need to protect rivers and streams that flow to navigable waters." [Letter from Waters Advocacy Coalition to Senators Boxer & Inhofe (June 12, 2009)] The statement to the left appears to go further still, acknowledging that the law can protect those waters that significantly affect downstream waters. In light of this concession, the Farm Bureau should be embracing, not attacking, the proposed rule, which is based on a peer-reviewed scientific assessment of more than 1,000 |

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| | | pieces of peer-reviewed literature looking at the effects of various waters on downstream ones. |
| • The Clean Water Act protects waters, the life blood of communities, businesses, agriculture, energy development, and hunting and fishing across the nation. | Yes—and the Clean Water Act created non-regulatory programs to address water quality impacts of land uses like farming. Those programs have been and can continue to be very effective. We don't need to require a federal permit for everything in order to protect waters. | The Gulf of Mexico "dead zone," which is fueled in significant part by agricultural pollution, is an example of how a hands-off approach to such pollution can have major adverse consequences. At a bare minimum, as Justice Kennedy pointed out in the most recent Supreme Court case, it is a case study in how "[i]mportant public interests are served by the Clean Water Act in general and by the protection of wetlands in particular," given that "[s]cientific evidence indicates that wetlands play a critical role in controlling and filtering runoff." [*Rapanos v. U.S.*, 547 U.S. at 777] Thus, protecting those waters that have important effects on downstream water quality is essential to ensuring that clean water is achieved, despite discharges from less-regulated sectors like agriculture. |
| • The agencies expect that a very small number of additional waters—3.2 percent—will be found jurisdictional compared to current practice because of greater clarity regarding whether waters are protected or not. | Actually, EPA's poorly done economic analysis concludes that the new rule will result in regulation over an additional 2.7 percent of waters; the 3.2 percent figure Stoner cited wasn't used in the final calculations. Either way, the figure is absurdly low and according to EPA will only lead to an additional 1,332 acres under EPA's control.<br><br>EPA arrived at this figure by analyzing permit information for the Section 404 (dredge and fill) program exclusively and by focusing on FY09/10, a period of significant economic contraction. EPA looked at the number of acres evaluated by the Corps that year that were determined *not* jurisdictional, and then estimated how many of those acres *would become* jurisdictional under the proposed rule. EPA did not even attempt to determine the number of acres of ephemeral drains, ditches and isolated wetlands nationwide that will be newly regulated under the rule. If it had done so, the agency's numbers would have been much larger. After all, more than 106 million acres of wetlands are currently being used for agricultural purposes. Even if only 2.7 percent of those acres become newly regulated under this rule, that would be more than 2.8 million additional regulated farm acres. | This analysis was developed by experts in the field and reviewed by staff of the Office of Management & Budget. But, anyone, including the Farm Bureau, who has remaining criticisms has an opportunity to put them forward as part of comments on the proposal.<br><br>With respect to the wild estimate of 2.8 *additional* million acres of wetlands covered by the law, the Farm Bureau again misleads people. Its calculations imply that none of the wetlands being used for agricultural purposes today are covered by the law. In fact, many wetlands are actually protected by the law today, but it takes a significant amount of time and resources to establish those protections. Moreover, to the extent that any of these wetlands are "prior converted cropland," they are exempt from being considered covered waters, and that exemption would continue under the proposal. And, finally, the Farm Bureau's estimate of 106 million acres of wetlands in agriculture today appears to be unreliable; the most recent U.S. Fish & Wildlife Service report on wetlands trends found that there are only about 110 million wetland acres *total* in the continental U.S. |

Amigos Bravos • Food and Water Watch • Gila Conservation Coalition
Gila Resources Information Project • New Mexico Environmental Law Center
New Mexico Interfaith Power and Light • San Juan Citizens Alliance
Western Environmental Law Center • WildEarth Guardians

November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460
E-mail: OW-Docket@epa.gov

Re: EPA-HQ-OW-2011-0880, Proposed Clean Water Act Waters of the US Rule

To Whom It May Concern:

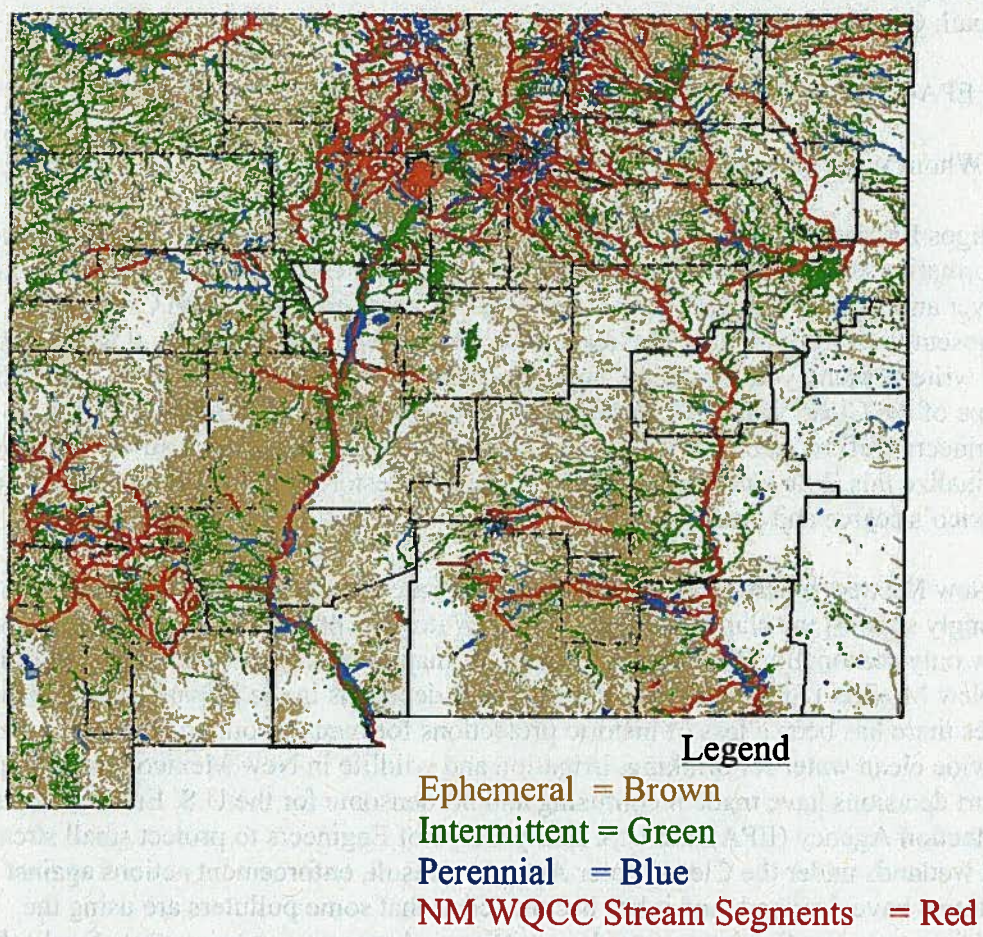
Amigos Bravos, Food and Water Watch, Gila Conservation Coalition, Gila Resources Information Project, New Mexico Environmental Law Center, New Mexico Interfaith Power and Light, Western Environmental Law Center and WildEarth Guardians represent thousands of New Mexicans who care about healthy rivers and water supplies. We write to thank you for taking steps to protect New Mexico's waters by clarifying the scope of the Clean Water Act through the proposed EPA and U.S. Army Corps of Engineers Definition of the Waters of United States Proposed Rule (Rule). We urge you to finalize this Rule and to take additional steps to restore clean water protections to New Mexico's scarce and precious waters.

In New Mexico, where up to 94% of our waters are intermittent and ephemeral,[1] we strongly support the clarification that Clean Water Act protections apply to streams that flow only seasonally. (See Figure 1 below for map of intermittent and ephemeral waters in New Mexico.) Since the US Supreme Court decisions in the Rapanos and Carabell cases there has been a loss of historic protections for many of our small streams which provide clean water for drinking, irrigation and wildlife in New Mexico. These Supreme Court decisions have made it confusing and burdensome for the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers to protect small streams and wetlands under the Clean Water Act. As a result, enforcement actions against polluters have declined, and it has become clear that some polluters are using the decisions as a justification to avoid permitting and reporting requirements for discharging pollutants into our waters. The Rule would clarify that some of the waters that have lost protections in the confusion after the Supreme Court decisions, namely ephemeral and intermittent tributaries, are once again protected under the Clean Water Act.

[1] See 2010-2012 State of New Mexico Clean Water Act 303d/305b Integrated Report, page 4. Available at: http://www.nmenv.state.nm.us/swqb/303d-305b/2010-2012/

Ephemeral and intermittent waters, waters in closed basins, wetlands, and playa lakes all serve critical functions to both wildlife and people in New Mexico. As an arid state, we rely upon all of our water resources and depend upon those resources staying clean and healthy for drinking, irrigating, wildlife habitat, cultural practices and industrial uses. Since we are a non-delegated state under the NPDES program we rely even more than other states on EPA and USACE to regulate discharges to our state's water resources, thus making it all the more critical that essential Clean Water Act Protections are applied accurately and in a manner that protects water quality across the state.

Figure 1: Types of New Mexico Surface Waters




(Figure taken from NMED exhibit at New Mexico's 2004 Triennial Review of Water Quality Standards. Almost all of the red stream segments are perennial)

**I. Importance of Ephemeral and Intermittent Waters in New Mexico**

Ephemeral waters are critically important for the health of New Mexico's communities, wildlife and economy. A search of the New Mexico Department of Game and Fish's BISON-M database shows that almost one fifth of NM vertebrate species, excluding fish, (127 species) use ephemeral and/or intermittent waters (list attached as Exhibit 1). These

127 vertebrate species include: 9 taxa classified as State and/or federal threatened, endangered or candidate; 8 taxa classified as State and/or federal sensitive or species of concern 24 taxa classified as State "Species of Greatest Conservation Need"; 25 game species; 1 taxa endemic to NM; and 10 species listed as of cultural importance to Pueblo Tribes (Exhibits 2 and 3). Even some fish use ephemeral waters. For example, Pecos Pupfish and White Sands Pupfish (both State Threatened, State "Species of Greatest Conservation Need", and federal Species of Concern) are exploiters which will move into ephemeral waters when available. The New Mexico Department of Game and Fish (NMDGF) actively manages 17 isolated wetlands and five intermittent streams (Mimbres River, Running Water Draw, Tularosa Creek, Three Rivers,Tajique Creek) to provide fishing opportunities for resident and non-resident anglers. [2]

Ephemeral waters are essential for all three species of spadefoot toads in New Mexico. Spadefoots stay burrowed in the soil (several years has been documented) until conditions are suitable for breeding. Emergence from burrows is triggered by thunderstorms and breeding occurs quickly (as short as one night) in ephemeral waters. Eggs hatch in as little as 15 hours, and tadpoles metamorphose and leave the ephemeral waters in as little as 13 days. Ephemeral waters also appear to be important to Box Turtles, Garter Snakes, and tiger salamanders. Many of crustaceans and insects also occur in ephemeral and intermittent streams.

Protecting ephemeral and intermittent waters in New Mexico is essential for protecting public health. EPA estimates that 280,000 people in New Mexico receive drinking water from sources that rely at least in part on ephemeral, intermittent or headwater streams (Exhibit 4). [3] These impacts are not hypothetical as there have been numerous instances of ephemeral waters being found not jurisdictional in New Mexico.[4]

Bitter Lake Playa Lake, NMED File Photo

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[2] Letter from Larry Bell, Director of the New Mexico Department of Game and Fish to EPA (NMDGF comment letter on the 2003 ANPRM), April 15, 2003, at 5.

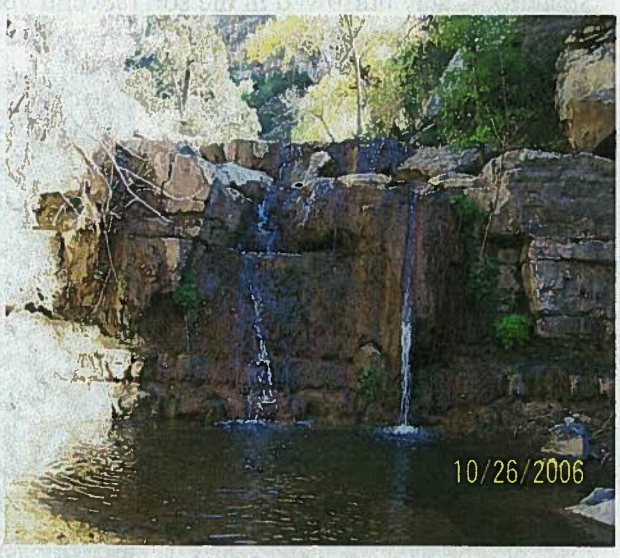
[3] Note that this analysis was conducted in 2006 prior to the surface water diversions for the cities of Albuquerque and Santa Fe going online, so this number is most likely substantially greater now.

[4] See SPA-2007-636-ABQ, SPA-2007-00677-ABQ, SPA-2007-442-ABQ, SPA-2007-3540-ABQ, SPA-2008-54-AQB (research was conducted only for 2007 and 2008 and is not comprehensive)

**II. The Need for Protections for Playa Lakes and Closed Basins in New Mexico**

We are concerned that the proposed Rule does not do enough to protect isolated waters like playa lakes and waters in closed basins. Waters within the closed basins in New Mexico (Tularosa, Mimbres, Estancia, San Augustine, Salt, Southwestern and North Plains Basins) cover up to one fifth of New Mexico and include 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas and isolated wetlands.[5] There are over 20,000 playa lakes in eastern New Mexico and west Texas, a region that supports some of the most concentrated areas of playa lakes in the country.[6]

Playa lakes provide habitat for many New Mexican animal species. At least 37 mammal species use playas nationwide for some or all of their life cycle. In addition, there are 185 bird species in 41 families reported in playas. [7] In New Mexico, there are 131 species that are documented as using playas and closed basins which include 28 game species and 10 species that are considered culturally important to Pueblo Tribes (Exhibit 5) In addition, there are 3 federally endangered (Interior Least Crane, Whooping Crane, and the Brown Pelican) and 2 federally threatened species (Mountain Plover and Piping Plover) that are found in NM playa lakes (Exhibit 6). New Mexico playas are also a primary recharge for the Ogallala aquifer of the southern high plains. Photos of many of New Mexico's playa lakes can be found in Exhibit 7.




Sacramento Closed Basin

There is a wastewater treatment plant located on the floodplain of the Tularosa River, a river located in one of New Mexico's closed basins, that has a history of discharges to the river. Because New Mexico is a non-delegated state, without Clean Water Act coverage there would be no enforcement options or protections under the NPDES program for the river and downstream communities. The Mescalero Tribe uses drinking water from springs at the headwaters of the Rio Tularosa, and the residents of Nogal and Bent depend on the local shallow water table associated with the Tularosa for their drinking

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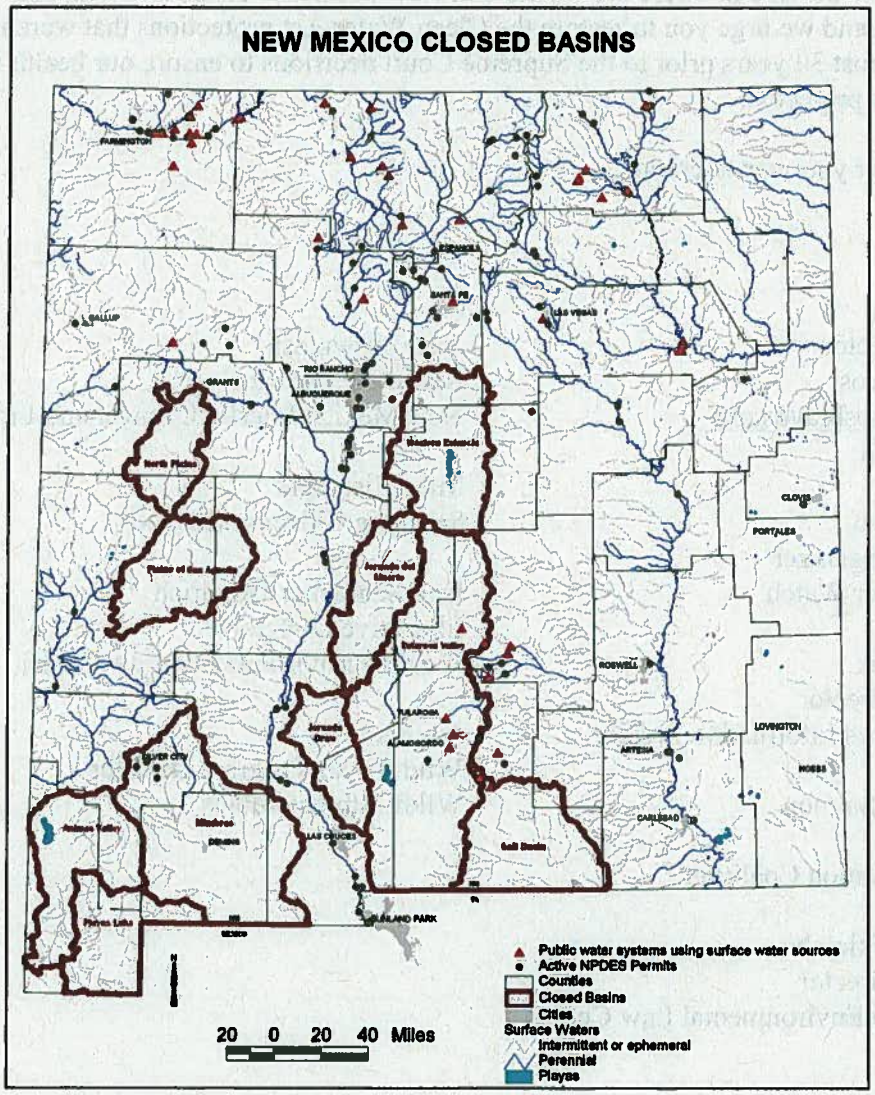
[5] Written Testimony of Ron Curry, Secretary of the New Mexico Environment Department, before the United States House of Representatives' Transportation and Infrastructure Committee Regarding the Clean Water Restoration Act (HR 2421) July 17, 2007

[6] Haukos, D. A. and L. M. Smith. 1994. The importance of playa wetlands to biodiversity of the Southern High Plains. Landscapeand Urban Planning 28:83–98.

[7] Id

water. Some residents drink directly from the river.[8] The Mimbres River, another closed basin waterbody, starts in the Aldo Leopold Wilderness area providing fishing and recreational opportunities for many locals and visitors alike. The Mimbres then leaves the wilderness area and flows through the Mimbres Valley providing essential water for irrigation (hay, alfafa and apples) and livestock.

Figure 2: Map of New Mexico Closed Basins




Closed basins are essential to New Mexico's economy and are essential to interstate commerce. The Department of Game and Fish has stated that they believe a significant

[8] Letter from Governor Bill Richardson to the EPA (New Mexico comment letter on the 2003 ANPRM), April 7, 2003, at 6.

portion of wildlife viewing in New Mexico, which brings in about 550 million annually, is conducted by out of state recreationists in the closed basins of New Mexico. [9]

**V. Conclusion**

The undersigned organizations strongly support the proposed Rule and urge you to quickly finalize it and then take additional steps to ensure that waters in closed basins and playa lakes are protected. These are waters that New Mexicans drink, swim in, and irrigate from and we urge you to restore the Clean Water Act protections that were in place for almost 30 years prior to the Supreme Court decisions to ensure our health and way of life is protected.

Thank you for your consideration.

Sincerely,


Rachel Conn
Projects Director
Amigos Bravos
rconn@amigosbravos.org
575-758-3874

Eleanor Bravo
Southwest Organizer
Food & Water Watch

Allyson Siwik
Executive Director
Gila Resources Information Project

M.H. Dutch Salmon
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Gila Conservation Coalition

Douglas Meiklejohn
Executive Director
New Mexico Environmental Law Center

Joan Brown,osf
Executive Director
New Mexico Interfaith Power and Light

Mike Eisenfeld
San Juan Citizens Alliance

Erik Schlenker-Goodrich
Executive Director
Western Environmental Law Center

Jen Pelz
Wild Rivers Program Director
WildEarth Guardians


[9] Letter from Larry Bell, Director of the New Mexico Department of Game and Fish to EPA (NMDGF comment letter on the 2003 ANPRM), April 15, 2003, at 6.

Written Testimony of
Ron Curry
Secretary of the New Mexico Environment Department

Before the

United States House of Representatives
Transportation and Infrastructure Committee
Regarding the Clean Water Restoration Act (HR 2421)
July 17, 2007

Washington, DC

EXHIBIT I (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

**Introduction**

My name is Ron Curry and I am the Cabinet Secretary of the New Mexico Environment Department in the administration of Governor Bill Richardson. Thank you for the opportunity to provide testimony regarding the importance of restoring Clean Water Act protections to many of America's rivers, lakes and streams.

The Clean Water Act has been our nation's main tool in ensuring the continued protection of the water we drink, enjoy for recreation and that wildlife communities rely upon. Unfortunately, the effectiveness of this tool has been blunted by two recent Supreme Court decisions. The court's rulings in *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers* (SWANCC) in 2001 and *Rapanos v. US* (Rapanos) in 2006 severely limited waters that receive protection under the Clean Water Act. This is especially troubling in New Mexico, an arid state that has relied on the Clean Water Act to help us protect our limited but precious water resources.

It is important for us to remember that the passing of the Clean Water Act is one of our nation's successes. Waters that thirty years ago were thick with waste discharges now support thriving recreational and economic activities. The U.S. Environmental Protection Agency's broad policy of ensuring protection for nearly all waters was a benefit to us all. Our quality of life improved and so too has the sustainability of aquatic species and wildlife. But now those protections are mired in widespread confusion and bureaucratic gridlock because it is no longer clear what waters will continue to be protected. My objective today is to urge your support for a solution that clears waters that have been muddied and encourage you to join Governor Bill Richardson in supporting the Clean Water Restoration Act (HR 2421).

**The Problem**

Prior to those Supreme Court decisions, the scope of the Clean Water Act was interpreted broadly to provide protection for of all of the nation's water bodies. Those bodies include small upland streams that flow intermittently in response to storm events and numerous wetlands that provide shelter for wildlife and create a natural filtration system for our aquifers. Those waters were valued, just as we place value on the large rivers that are conduits for commerce and industry. First in 2001, and again last year, the courts scaled back those broad protections, defining "navigable waters" narrowly. Those decisions have created great uncertainty regarding what waters are protected for federal, state and local officials as well as communities and landowners.

In effect, the Supreme Court ruled that there are two classes of water, one that is tied directly to "navigability" and deserves federal protection from pollution, and a second class that is completely abandoned or must undergo a case by case "significant nexus" test. That test requires that tributaries or wetlands would be dropped from protection if the government cannot directly prove they empty into navigable waters.

As the man charged by Governor Richardson with protecting New Mexico's limited water supply from pollution, I can tell you that basing the decision on what water deserves to be clean on whether you can float a boat on it is an extremely limited view. Quite simply, it's lunacy. There are times during summer months when you can't even float a boat down the mighty Rio Grande, New Mexico's main surface water resource.

To put it another way, many of you today have glasses of water before you. As an analogy, imagine that those glasses collectively made up the waters of the United States. Before the 2001 SWANCC decision, the water in those glasses was protected by the Clean Water Act. However, today, because of the SWANCC and Rapanos decisions, as much as half of those glasses may no longer be protected.

I want you to have good, clean water in those glasses but if those Supreme Court decisions stand, I just can't say for sure.

The Clean Water Restoration Act solves this problem by replacing the term "navigable waters of the United States" with "waters of the United States." That fix simply restores protections that were in place for three decades when the quality of America's rivers, lakes, wetlands and streams improved dramatically. The Act also restores Congress' original intent when it passed the Clean Water Act in 1972. That intent was to protect our nation's water resources for future generations.

**Local Impact**

Nowhere have the limitations created by these two recent Supreme Court decisions been felt more acutely than in the desert Southwest. We simply have no water to waste. The water we do have — and its quality — is of utmost importance to the continued health of our citizens and the future economic development of our region. By excluding isolated, intrastate, non-navigable waters from protections previously guaranteed under the Clean Water Act, those decisions could remove federal protections from more than 90 percent of our state's waterbodies because they flow only intermittently. Additionally, waters within closed basins that cover up to one fifth of New Mexico would also be left vulnerable to pollution. That includes 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas and isolated wetlands. Threatened basins include the Tularosa, Mimbres, San Augustine, Estancia and Salt in central, south central and southwestern New Mexico.

Those misguided court rulings also threaten New Mexico's precious, limited groundwater resources — the source of 90 percent of our clean drinking water. Surface water bodies are often directly linked to groundwater resources. Unregulated, damaging surface dumping will therefore ultimately lead to pollution in the aquifer. We cannot allow this to happen. The water beneath just one of those basins — the Salt Basin — has been estimated by the U.S. Geological Survey to contain as much as 57 million acre feet of water, including 15 million acre feet that is potable. That could prove to be a vital and needed future water supply for the rapidly growing City of Las Cruces in southern New

Mexico. However, if this aquifer is allowed to be polluted by surface dumping, its benefits for future New Mexicans will be severely curtailed.

Finally, the Southwest is currently in the grips of a years-long drought, putting our already limited water resources at an even higher premium. To weaken environmental oversight now is to invite disaster. That is why Governor Richardson has taken an aggressive leadership position on this issue.

**State Actions**

Governor Richardson has fought to restore protections to New Mexico's waters. In March 2003, he filed formal comments with the EPA petitioning that New Mexico's closed basins and other imperiled waters remain protected under the federal Clean Water Act. He also strongly supported the Clean Water Authority Restoration Act of 2003, a precursor to the legislation before you today.

More recently, Governor Richardson successfully opposed oil and gas drilling in the Valle Vidal or Northern New Mexico, and in order to protect its world class trout streams, he had this area's streams listed as Outstanding National Resource Waters. He is also fighting to protect the Salt Basin Aquifer, whose untapped water resources I mentioned before, from energy development at Otero Mesa. Finally, Governor Richardson recently launched a multi-million dollar effort — the first in state history — to provide a state funding source for river ecosystem restoration. But without lasting federal Clean Water Act protection, the state's efforts to restore and defend its waters could be severely eroded.

**Clean Water Restoration Act**

To remove protection afforded by the Clean Water Act from critical portions of our Nation's aquatic systems and to protect only selected reaches of our waters will result in real costs for our citizens — costs to the economy, the environment and to our quality of life.

The Clean Water Authority Restoration Act of 2007 provides a logical and practical solution by restoring the traditional scope of the Clean Water Act and clarifying the purpose of the Act based on long-standing regulatory definitions. This is not an expansion of federal authority but a return to a clear and comprehensive common goal enjoyed during the previous thirty years. This action will also allow continued state-federal partnerships to provide streamlined and efficient regulatory programs such as those that had been in operation prior to the recent Supreme Court cases.

The Citizens of New Mexico depend on the protection of a clean environment and sustainable water supply. If we are to ensure that New Mexico's and the Nation's waters are protected now and for future generations, we must act together to restore the purpose, scope, clarity and predictability of the Clean Water Act so that it will once again serve as the primary and comprehensive protection of our Nation's waters.

Thank you for inviting me here today to testify on this important issue. I look forward to your questions.

EXHIBIT I (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

EXHIBIT J (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

# State of New Mexico

*Office of the Governor*

Bill Richardson
*Governor*

July 12, 2007

The Honorable John D. Dingell
United States House of Representatives
Washington, DC 20515

The Honorable James L. Oberstar
United States House of Representatives
Washington, DC 20515

Dear Representatives Dingell and Oberstar:

The citizens of New Mexico recognize that our State's waters are essential to our culture, our health and well-being, and to our economic future. Therefore, I offer my support for the Clean Water Authority Restoration Act of 2007 and join you in protecting our Nation's waters in accordance with the original intent of the federal Clean Water Act.

In the southwest, water is in particularly limited supply, which underscores the need for well-defined robust federal protection under the Clean Water Act. In New Mexico alone, the aftermath of Supreme Court decisions *SWANCC (2001)* and *Carabel* and *Rapanos (2006)* have left 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas and isolated wetlands with limited federal protection. In addition, closed basins which comprise 20 percent of New Mexico's land area are considered to now fall outside of the jurisdiction of the Clean Water Act. Loss of federal protection leaves these and a significant portion of the Nation's critical waters exposed to destruction and pollution. In addition, the recent Supreme Court rulings have led to confusion regarding the scope of federal protection under Clean Water Act programs, which in turn has caused uncertainty and the potential for environmental degradation.

The goal of the Clean Water Act is clear and necessary: to restore and protect the chemical, physical, and biological integrity of the waters of the United States. This is a goal that can be achieved only through cooperative efforts that include all states, comprehensive protection at the federal level to support state's efforts, and by careful and vigilant attention to our aquatic ecosystems. To remove protection afforded by the Clean Water Act from critical portions of our Nation's aquatic systems and to protect only selected reaches of our waters will result in real costs for our citizens – costs to the economy, the environment and to our quality of life.

EXHIBIT J (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

The Clean Water Authority Restoration Act of 2007 provides a logical and practical solution by restoring the traditional scope of the Clean Water Act and clarifying the purpose of the Act based on long-standing regulatory definitions. This is not an expansion of federal authority but a return to a clear and comprehensive common goal. This action will also allow continued state-federal partnerships to provide streamlined and efficient regulatory programs such as those that have been in operation for more than 30 years.

The Citizens of New Mexico depend on the protection of a clean environment and sustainable water supply to serve our needs and the quality of life for future generations. If we are to ensure that New Mexico's waters and the nation's waters are protected now and for future generations, we must act collectively to restore the purpose, the scope, the clarity and the predictability of the Clean Water Act so that it will once again serve as the primary and comprehensive protection of our Nation's waters.

Therefore, I fully support the Clean Water Authority Restoration Act of 2007.

Sincerely,

Bill Richardson

Bill Richardson
Governor of New Mexico

BR/zw

Cc: NM Congressional Delegation:
Senator Pete Domenici
Senator Jeff Bingaman
Representative Steve Pearce
Representative Heather Wilson
Representative Tom Udall

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

| | | |
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| IN THE MATTER OF THE PROPOSED AMENDMENTS TO STANDARDS FOR INTERSTATE AND INTRASTRATE WATERS, 20.6.4 NMAC | ) | WQCC No. 14-05(R) |

**REBUTTAL STATEMENT OF DR. DEKE GUNDERSEN**
**SUBMITTED ON BEHALF OF AMIGOS BRAVOS**

**Estimated Time for Rebuttal Testimony:** 30 minutes

## I. QUALIFICATIONS

My qualifications were set forth in my direct pre-filed written testimony, provided December 12, 2014.

## II. CMI'S RESPONSE TO THE PROPOSED CHANGE OF THE ALUMINUM CRITERIA TO PRE-2009 TRIENNIAL REVIEW LEVELS—TESTIMONY BY DR. ROBERT W. GENSEMER

Dr. Gensemer states on page 3, line 23 that "*several*" acute and chronic aluminum studies were published post 1988 (date of the development of the original aluminum criteria). He goes on to state that "*these studies also demonstrated that the toxicity of aluminum to aquatic life is hardness-dependent.*"

First of all, it is not hardness that is protective against aluminum toxicity at some pH levels to aquatic species but, rather, calcium. When looking at GEI's summary of acute aluminum ("Al") data that were deemed acceptable for standards derivation and added to the updated Al acute and chronic database, only three studies were added to the acute database that specifically looked at the effects of hardness on aluminum toxicity. None of the new studies added to the chronic database specifically looked at the effects of hardness on aluminum toxicity.

In addition, one of the three studies used in the acute database (Gundersen et al. 1994) suggests that hardness may not be protective against aluminum toxicity at weakly alkaline pH to a commercially important New Mexico species (rainbow trout). In this study multiple regression analysis (looking at filterable aluminum, total aluminum, pH and hardness) showed that pH was the most important independent variable affecting aluminum-induced mortality in 96-hour test. In addition, the 96-hour LC50s (Concentration that kills 50% of the population) determined for filterable and total aluminum were not significantly different at each of the hardness levels tested (23.2 – 115.8 mg/L as $CaCO_3$). This was also seen in 16-day subacute tests, where the 16-day LC50s were not statistically different at low hardness (20.3 mg/L as $CaCO_3$) versus high hardness (103.0 mg/L as $CaCO_3$).

This is problematic since the aluminum criteria are based on a pH range of 6.5 – 9.0 and it is not clear that hardness protects aquatic species at pH levels above 8.0 (pH levels often seen in New Mexico waters that have rainbow trout in them). Using the current New Mexico aluminum acute criteria developed by GEI ($Acute = e^{(1.3695[\ln(hardness)] + 0.9161)}$) at a hardness of 103 mg/L as $CaCO_3$, the level of aluminum allowed in New Mexico surface waters would be 1,435 µg/L total recoverable aluminum.

Gundersen et al. (1994) found that, at weakly alkaline pH (8.10), a 16-day exposure of rainbow trout to 2,750 µg aluminum/L resulted in mortality of 45% of the population and a negative specific growth rate. This aluminum concentration (2,750 µg aluminum/L) is just above the allowable limit based on the New Mexico criteria—criteria derived from chronic studies lasting at least 30 days. The point is that there is not enough information to be certain that a hardness based equation will be protective of aquatic species over the broad pH range of 6.5 – 9.0, particularly if other water quality parameters are considered (i.e. temperature), that would exacerbate the effects of aluminum on an important recreational species like rainbow trout.

On page 4, line 18, Dr. Gensemer also states that "*Adequate and acceptable studies did exist to update the Al criteria at the time of the 2009 Triennial.*" If these studies did indeed exist then why were studies used that do not meet the EPA requirements? For example, GEI's proposed final Al acute database (Table 4. March 2010 report) list *Tubifex tubifex* (Khangarot 1991) as the 4th most sensitive species

(GMAV 5,698 ug/liter. The GMAV from this species is used to calculate the final acute value ("FAV"). However there are significant problems with this study. First the exposure water hardness listed in this study (245 mg/L as $CaCO_3$) does not correspond to the listed calcium and magnesium concentrations (160 and 90 mg/L respectively). Based on these values the hardness should be 769 mg/L as $CaCO_3$, which is over 3-fold higher than the listed hardness. In addition, the aluminum that was added to exposure water was $Al(NH_4SO_4)2•12H_20$ (aluminum ammonium sulfate). There is concern that the aluminum ammonium sulfate would contribute ammonia to the exposure solutions (2 ammonia/ammonium ions for every one aluminum ion). The level of aluminum in exposure chambers was not measured in this study as well. Therefore this study should not be used, particularly when this species represents the 4th most sensitive species based on acute toxicity.

Data from a study looking at the toxicity of a variety of metals (including aluminum) on *D. magna* were used to calculate the pooled-hardness slope, final acute value, and final acute-chronic ratio (Biesinger and Christensen 1972). However there are at least four problems with this study that warrants omission from the database. First, the exposure water (Lake Superior water had other metal contaminants in addition to the added aluminum (range; Cr = 2-20 ppb, Al 1-26 ppb, Zn 1-2.7 ppb, Cu 0.3-3.2 ppb, Sr 12-27ppb, barium 8-22 ppb, Fe 2-83 ppb, Mn 0.2-11.5 ppb) and the aluminum concentration was not measured in exposure water. Second, the number of test concentrations was not listed, and the pH of the exposure water (before addition of metals had a large range (7.4 – 8.2), and was not reported for the acute test chambers. Third, the authors reported that in the chronic chambers with added aluminum the pH changed from 6.5 – 7.5, which suggests that the pH likely changed in the acute exposures as well but this was not measured or reported (pH has a very significant effect on aluminum speciation/toxicity). This certainly warrants the omission of this data for the derivation of both acute and chronic criteria and in fact is likely why the EPA omitted this study from the original aluminum criteria chronic database (Ambient Water Quality Criteria for Aluminum 1988). Finally, the study by Kimball (1978 manuscript), was used to calculate the slope value from *D. magna* data, and provided the acceptable hardness range for the species. This study does not seem to be validated in any way (master's thesis, dissertation

etc.). Moreover, looking at the unpublished manuscript a hardness value was not reported, only alkalinity was measured and it was not measured in the acute *D. magna* aluminum exposures. However, in the GEI analysis a hardness value of 220 mg/L was reported along with a rather high LC50 value of 38,000 mg/L. Based on EPA guidelines this study cannot be used without a measured hardness value. Even more troubling, in the acute *D. magna* aluminum exposure chambers there was a huge difference in the measured pH values between the lowest and highest aluminum exposures (control pH = **8.18**, 4 mg/L Al = **7.95**, 6 mg/L Al = **7.61**, 9 mg/L Al = **7.2**, 22 mg/L Al = **6.85**, 34 mg/L Al = **6.39**, 43 mg/L Al = **5.14**). This is unacceptable and these data should not be used. Overall the quality of this manuscript is poor and does not seem to be validated by any means.

On page 5, line 3, Dr. Gensemer states "*that returning to the 1988 AWQC Al as the basis of New Mexico's water quality standards for Al would represent a retreat to an outdated scientific approach that does not address the important influence of hardness on Al toxicity in freshwater.*" We agree that hardness has an influence on aluminum toxicity at certain pH values but many studies have indicated that other water quality parameters have a more pronounced influence on aluminum toxicity. Several studies have shown that other water quality parameters have a more significant effect on aluminum toxicity. There are a number of studies that indicate that pH has a more pronounced effect on aluminum toxicity than hardness. Gundersen et al. (1994) found that based on multiple regression analysis, pH was determined to be the most important independent variable affecting aluminum-induced mortality in rainbow trout (a recreationally important species in New Mexico) in 96-hr tests when looking at the effects of hardness and pH on aluminum toxicity.

In addition, the authors noted that the best predicting model for the effects of aluminum on specific growth rate in rainbow trout included pH, filterable and total aluminum. Specific growth rate was affected most at near-neutral pH (where insoluble polymeric forms of aluminum predominate) and that hardness did not protect fish from the toxic affects of aluminum on growth. Stubblefield et al. (2012) looked at the effects of various water quality parameters on the toxicity of aluminum to eight different aquatic species (representing 5 groups) at pH 6. They found that pH, dissolved organic matter,

and temperature had the largest influence on aluminum toxicity with calcium, sodium and fluoride having only having a minor influence.

Lydersen et al. (2002) found that in brown trout exposed to aluminum in natural waters that mortality increased with increasing temperature and that temperature had a more significant affect on aluminum toxicity versus total organic carbon. Poleo et al. (1991) and Poleo and Muniz (1993) saw a similar relationship between aluminum toxicity and temperature for Atlantic salmon. The observed increase in toxicity was explained by enhanced aluminum polymerization with increased temperature and an increase in fish metabolism (higher $O_2$ demand) and decrease in surface water dissolved oxygen levels. This could be particularly significant for salmonid species (species that are sensitive to water temperature and dissolved oxygen levels) that inhabit surface waters where temperature and dissolved oxygen levels can be limiting late in summer (i.e. some New Mexico waters). Again, this shows that there are other water quality parameters (dissolved organic carbon, temperature, and pH) that play significant role (perhaps more so than hardness) in influencing aluminum toxicity to aquatic species and these must be considered along with calcium if you want to protect all species in all situations.

On page 7, line 14, Dr. Gensemer states that "*these hardness-based criteria are fully protective of aquatic life in New Mexico (within the intended pH range of 6.5 - 9.0).*" Once again, however, only by looking at multiple water quality parameters can we be certain that the criteria will be full protective. In addition, since studies were not used that include recreational important species (i.e. rainbow trout) we cannot be certain that criteria will be fully protective. An example of the significance of using a recreationally important species in the derivation of hardness-based equations is as follows: Using LC50s that were calculated by Gundersen et al. (1994) at different hardness values for a recreationally important species (rainbow trout) in flow-through toxicity tests at weakly alkaline pH (8.06 – 8.56), we calculated a slope of 0.1822, which is lower than the slope calculated for the New Mexico criteria (1.3695), suggesting that LC50s (based on total aluminum) are less dependent on hardness at weakly alkaline pH when looking at a recreational important species (rainbow trout).

Notably, Section IV, (Final Acute Value), part P. of the: USEPA Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic

Organisms and Their Uses (Stephan et al. 1985) states that "*If for a commercially or recreationally important species the geometric mean of the acute values from flow-through tests in which the concentrations of the test materials were measured is lower than the calculated Final Acute Value, then that geometric mean should be used as the Final Acute Value instead of the calculated Final Acute Value.*" If this study was included in the calculations for the New Mexico hardness-based aluminum criteria, then it would have only contributed to the FAV. Of course, the FAV calculated from the data of Gundersen et al. 1994, would not be appropriate for the entire 6.5 - 9.0 range, either, as it only relates to weakly alkaline conditions. However, the current New Mexico standard was stated to be valid across the entire 6.5 - 9.0 pH region. Using the data of Gundersen et al. 1994 shows that this is not correct.

Overall the process of developing New Mexico's aluminum water quality criteria is flawed and not based on sound science. Some of the studies used to calculate the parameters are either not peer-reviewed or they do not meet the criteria set by the EPA. In addition, it is not scientifically sound to assume that hardness is protective at alkaline pH, particularly when there are very few studies to support this. Finally other water quality parameters need to be considered along with hardness, particularly when some of these parameters (pH, dissolved organic carbon, temperature) have been shown to be more influential than hardness on influencing the toxicity of aluminum to aquatic life.

**SUBMITTED BY:**

**/s/Dr. Deke Gundersen**
**February 13, 2015**