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January 14, 2016

Via Fed-Ex

Pam Castañeda
WQCC Administrator
New Mexico Environment Department
1190 S. St. Francis Dr., Suite S-2102
Santa Fe, NM 87502

Re: WQCC No. 14-05(R) In the Matter of the Triennial Review of Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC
San Juan Water Commission's Closing Legal Arguments and Proposed Statement of Reasons

Dear Ms. Casteñeda:

Please find enclosed for filing an original and 16 copies of the above-referenced document. Please endorse one copy and return it to our office in the self-addressed stamped envelope provided for your use.

If you have any questions or need further information, please do not hesitate to call.

Very truly yours,

Lou Ann Fike
Assistant

LF/

Enclosure

cc: San Juan Water Commission

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW OF STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC

WQCC No. 14-05(R)

SAN JUAN WATER COMMISSION'S

CLOSING LEGAL ARGUMENTS AND PROPOSED STATEMENT OF REASONS

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STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW OF STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC

WQCC No. 14-05(R)

SAN JUAN WATER COMMISSION'S CLOSING LEGAL ARGUMENTS AND PROPOSED STATEMENT OF REASONS

COMES NOW San Juan Water Commission ("SJWC"), by and through its counsel of record, Taylor & McCaleb, P.A., and in accordance with Paragraph 405(A) of the Hearing Officer's July 10, 2014, Procedural Order, Paragraph J of the Hearing Officer's August 7, 2015, Procedural Order, the November 9, 2015, Notice of Transcript Filing, and the December 14, 2015, Order Granting Motion for Extension of Time, hereby submits its Closing Legal Arguments and Proposed Statement of Reasons for the Triennial Review hearing held in Santa Fe, New Mexico, from October 13, 2015, through October 16, 2015.

I. SJWC'S INTERESTS AND POSITIONS IN THIS TRIENNIAL REVIEW

SJWC is a political subdivision of the State of New Mexico formed in 1986 under the New Mexico Joint Powers Agreements Act, NMSA 1978, Sections 11-1-1 to -7 (1961, as amended through 2009). SJWC's purpose is to acquire and protect raw water supplies for municipal, industrial and domestic use for almost all water users in San Juan County living outside of tribal lands. Currently, San Juan County has a population of approximately 130,000 residents.

SJWC is comprised of fourteen (14) other political subdivisions of the State of New Mexico: (i) the cities of Aztec, Bloomfield and Farmington; (ii) San Juan County; and (iii) a Rural Water Users Association comprised of ten community water users associations, each of

which is a nonprofit mutual domestic association organized under the Sanitary Projects Act, NMSA 1978, Sections 3-29-1 to -21 (1965, as amended through 2013). To fulfill its mission, SJWC is a participant in the Animas-La Plata Project ("ALP Project"), and it holds a permit for 20,800 acre feet of water diversions from that Project. SJWC also holds permits for water diversions totaling more than 10,000 acre feet per year from the San Juan River Basin unassociated with the ALP Project. These water rights are separate from, and in addition to, the water rights of SJWC's individual member entities. The State's surface water quality standards directly impact the operations of SJWC's member entities (some of which discharge into the surface waters of the State), the health of San Juan County's citizens, and the economy of the region. For that reason, SJWC has participated in the Triennial Review process since the 1990s.

The purpose of this submission is six fold:

1. to set forth the legal standards that govern this proceeding;

2. to support adoption of the Surface Water Quality Bureau's ("SWQB") temporary standards proposal for 20.6.4.10(F) and 20.6.4.12(H) NMAC, with the modifications proposed by SJWC;

3. to support SWQB's proposal to downgrade certain designated uses for 29 ephemeral water body segments based on Use Attainability Analyses ("UAA") conducted since the last Triennial Review;

4. to oppose SWQB's proposal to upgrade the recreational designated use for nine water body segments from secondary contact to primary contact on the ground SWQB has failed to provide sufficient credible scientific or other evidence to meet the regulatory requirements for upgrading the designated use;

5. to highlight its concerns about the adverse impacts of blind adherence to EPA's relatively recent rebuttable presumption that all waters are fishable/swimmable unless proved to be otherwise after a UAA, and to encourage the Water Quality Control Commission ("WQCC") to form a working group to consult with EPA to develop a less onerous method of establishing appropriate designated uses for the tens of thousands of miles of ephemeral streams in New Mexico that are not, and never will be, fishable and swimmable; and

6. to provide reasons that may be adopted by the WQCC for its decisions concerning the issues addressed by SJWC herein.

For ease of discussion and reference, this submission is organized by water quality standards section number set out in the New Mexico Administrative Code, Title 20, Chapter 6, Part 4.

II. GENERAL LEGAL PRINCIPLES GOVERNING THE WQCC'S ADOPTION OF A NEW, OR MODIFICATION OF AN EXISTING, WATER QUALITY STANDARD

Under Section 303(c) of the federal Clean Water Act, the WQCC is required to adopt water quality standards for "navigable" New Mexico waters. 33 U.S.C. § 1313(c) (2014). The Clean Water Act and EPA regulations define the scope of "navigable" waters, which are "waters of the United States." 33 U.S.C. § 1362(7) (2014); 40 C.F.R. § 122.2 (2015). Further, under the New Mexico Water Quality Act, the WQCC, as the state's water pollution control agency, is given authority to adopt standards for certain other waters within the state. NMSA 1978, §§ 74-6-2(H) (1967, as amended through 2003), 74-6-3(E) (1967, as amended through 2007), 74-6-4(D) (1967, as amended through 2009). However, that state authority is limited in two respects. First, Section 74-6-2(H) excludes "private waters that do not combine with other surface or subsurface water" from WQCC jurisdiction. Second, Section 74-6-12(C) prevents the WQCC

from adopting "any regulation with respect to any condition or quality of water if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters." NMSA 1978, § 74-6-12(C) (1967, as amended through 1999). Any water quality standard adopted by the WQCC must comply with both the federal Clean Water Act and the state Water Quality Act. *See generally* NMSA 1978, §§ 74-6-3(E), 74-6-4(C), (D); *New Mexico Pharm. Ass'n v. State*, 1987-NMSC-054, ¶ 9, 106 N.M. 73 (agency's rule or regulation "must yield" to statutory guidelines); *Gallegos v. State Bd. of Educ.*, 1997-NMCA-040, ¶ 23, 123 N.M. 362 (statute prevails over conflicting regulation).

A. The WQCC Has Discretion to Consider All Facts and Circumstances When Promulgating a New Water Quality Standard or Amending an Existing Standard But Must Base Its Decision on Credible Scientific Evidence.

The boundaries of the WQCC's discretion in adopting water quality standards are set by both the federal Clean Water Act and the state Water Quality Act. As noted in the Water Quality Act, the WQCC

> shall adopt water quality standards for surface and ground waters of the state based on *credible scientific data and other evidence* appropriate under the Water Quality Act. The standards shall include narrative standards and as appropriate, the designated uses of the waters and the water quality criteria necessary to protect such uses. The standards shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act. In making standards, the [C]ommission shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes.

NMSA 1978, § 74-6-4(D) (emphasis added). This language mimics federal law governing the adoption of water quality standards under the Clean Water Act. *See, e.g.*, 33 U.S.C. §§ 1251, 1313(c); 40 C.F.R. §§ 131.2, 131.10 (2015). "Credible scientific data" includes peer-reviewed

scientific studies and supporting data. *See N.M. Mining Ass'n v. WQCC*, 2007-NMCA-010, ¶¶ 30-34, 141 N.M. 41 (finding substantial evidence existed in record to support WQCC action based on credible scientific data in the form of peer-reviewed studies and epidemiological data). Further, as established by federal regulation, all water quality criteria adopted by the WQCC "must be based on sound scientific rationale . . . ." 40 C.F.R. § 131.11(a)(1) (2015). In sum, the WQCC has reasonable discretion to consider all appropriate facts and circumstances when adopting or amending water quality standards, so long as its decisions are based on credible scientific evidence.

B. The WQCC May Promulgate a New Water Quality Standard or Modify an Existing Standard Only If the Standard Is Supported by Substantial Evidence.

However, the WQCC's discretion is not limitless. Under the Water Quality Act, any standard adopted by the WQCC that is found to be "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law" will be set aside on appeal after a whole record review. NMSA 1978, § 74-6-7(B) (1967, as amended through 1993); *see Tenneco Oil Co. v. WQCC*, 1987-NMCA-153, ¶¶ 3-6, 107 N.M. 469 (upholding water quality standards after whole record review as supported by substantial evidence); *Kerr-McGee Nuclear Corp. v. WQCC*, 1982-NMCA-015, ¶ 16, 98 N.M. 240 (upholding definition of "toxic pollutant" as supported by substantial evidence after whole record review). Thus, if the evidence presented at the Triennial Review does not, as a whole, support a decision made by the WQCC, then the decision is not supported by substantial evidence and will not be upheld on appeal. *Tenneco Oil Co.*, 1987-NMCA-153, ¶¶ 38-39 (agency decision will not be upheld if evidence "as a whole" does not support decision because decision must be based on substantial evidence; "substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *cf. Colonias Dev.*

Council v. Rhino Envtl. Servs., Inc., 2003-NMCA-141, ¶ 5, 134 N.M. 637, *rev'd on other grounds*, 2005-NMSC-024, 138 N.M. 133 (action is arbitrary and capricious if there is "no rational connection between the facts found and the choices made"); *Pacheco v. Sullivan*, 931 F.2d 695, 697 (10th Cir. 1991) (decision is not supported by substantial evidence if there is overwhelming evidence to contrary or if there is only mere scintilla of evidence supporting decision). The WQCC's discretion in weighing the evidence is further limited by the fact that the WQCC cannot disregard expert testimony that is either uncontradicted or is only contradicted by lay witness testimony. *See Bokum Resources Corp. v. WQCC*, 1979-NMSC-090, ¶ 51, 93 N.M. 546 (testimony of expert witness cannot be disregarded when contradicted only by lay witness); *City of Albuquerque v. Browner*, 865 F. Supp. 733, 737 (D. N.M. 1993) (existence of conflicting technical opinions gives agency broad discretion).

C. The SWQB's Positions Are Not Entitled to Special Deference.

On June 25, 2014, the SWQB filed a lengthy petition to amend the State's surface water quality standards. Soon thereafter, several other parties submitted narrower proposed modifications to the surface water quality standards. In deciding whether to adopt an amendment proposed by any party, the WQCC is required to consider the whole record. NMSA 1978, § 74-6-7(B). The positions advocated by the SWQB, including its own proposed modifications to the surface water quality standards, are not entitled to any special deference because the SWQB carries the same burden as every other party. NMSA 1978, §§ 74-6-9(F), (G) (1967, as amended through 1993) (New Mexico Environment Department, as constituent agency, carries same burden as any other person proposing change to existing water quality standards).

III. PROPOSED STATEMENTS OF REASON FOR SPECIFIC WATER QUALITY STANDARDS PROPOSALS PRESENTED DURING THE TRIENNIAL REVIEW ON WHICH SJWC HAS TAKEN A POSITION

Sections 20.6.4.10(F) and 20.6.4.12(H) NMAC (SWQB's Temporary Standards Proposal)

SWQB proposes adoption of a new provision of the New Mexico surface water quality standards allowing the WQCC to adopt temporary standards. [Pintado Direct at 8-89 (SWQB Ex. 13)] SJWC generally supports the concept of temporary standards, as articulated in SWQB's proposed additions of 20.6.4.10(F) and 20.6.4.12(H) NMAC to the New Mexico surface water quality standards. However, SJWC encourages the WQCC to modify SWQB's proposal and apply temporary standards not only to criteria, but also to designated uses, as authorized by EPA. The following reasons support the WQCC's adoption of SWQB's temporary standards proposal, as modified by SJWC.

A. SJWC Generally Supports SWQB's Temporary Standards Proposal.

1. SWQB has proposed a procedure, at 20.6.4.10(F) NMAC, to petition the WQCC to adopt a temporary water quality standard, which EPA refers to as a water quality standards variance. [SWQB Second Revised Petition at 3-5 (Sep. 4, 2015); Pintado Direct at 8-89 (Ex. SWQB-13); Hearing Transcript ("Tr.") at 42:3-8, 121:2-7 (Pintado)]

2. SJWC has supported adoption of a "variance" or "temporary standards" provision since the 2003 Triennial Review, when it proposed variance language meeting all then-current EPA requirements set forth in EPA's *Water Quality Standards Handbook.* [Nylander Direct at 6-9 (Ex. SJWC-C)]

3. Under SWQB's proposal, a temporary standard would be "a time limited and less stringent water quality standard for a specific pollutant" that would apply to a particular water body. The underlying, original water quality standard would remain in place during the term of

the temporary standard. (Pintado Direct at 8-89 to 9-89 (Ex. SWQB-13); Tr. at 42:9-12, 19-21, 47:2-5 (Pintado)]

4. A temporary standard represents the highest degree of water quality protection feasible in the short term and is needed when a standard is not attainable in the near term but will be attainable in the future. [Pintado Rebuttal at 6-18 (Ex. SWQB-Rebuttal-7); Nylander Rebuttal at 4-6 (Ex. SJWC-D); EPA *Discharger-Specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers*, Pub. No. EPA-820-F-13-012 (March 2013) (at 2) (Ex. SJWC-C-2); EPA *Water Quality Standards Handbook*, § 5.3 (Ex. SJWC-D-1); Tr. at 42:13-16, 43:9-11, 923:5-14 (Pintado); 40 C.F.R. § 131.14 (2015)]

5. A temporary standard is a unique tool that allows modification of a water quality standard for a specific period of time while steps are taken to achieve the original standard. It provides flexibility while progress is made toward achieving underlying designated uses and criteria as soon as possible. [Pintado Direct at 8-89 to 9-89 (Ex. SWQB-13); Tr. at 43:25-44:3, 50:9-21, 97:11-24, 129:25-130:3, 133:24-134:2, 281:4-22 (Pintado)]

6. A temporary standard is tailored to the minimum time necessary to achieve the underlying standard. EPA advised not to incorporate a definite time frame for a temporary standard to accommodate restoration projects or remediation projects that may require "more time to achieve the underlying criteria or standard." [Tr. at 133:24-134:18, 924:4-8, 925:1-14 (Pintado)]

7. Other tools, such as UAAs or site-specific criteria, are used to permanently change water quality criteria that are not attainable. [Pintado Rebuttal at 5-18 (Ex. SWQB-Rebuttal-7); Nylander Rebuttal at 4-6 (Ex. SJWC-D); EPA *Discharger-Specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple*

Dischargers, Pub. No. EPA-820-F-13-012 (March 2013) (at 2-3) (Ex. SJWC-C-2); EPA *Water Quality Standards Handbook*, § 5.3 (Ex. SJWC-D-1); Tr. at 43:17-44:7, 168:4-9 (Pintado)]

8. SWQB has provided examples of the need for temporary standards. For example, "[t]he control and removal of nutrients in wastewater" to meet New Mexico's narrative nutrient criteria in 20.6.4.13(E) NMAC "in some cases is beyond the capabilities of currently known technology [and] is likely to cause significant economic impacts in New Mexico." Currently, there is no provision in the New Mexico surface water quality standards "to allow flexibility while progress is being made toward achieving the water quality based effluent limits ("WQBELs") required in permits or Total Maximum Daily Loads ("TMDLs") for nutrient controls, or for other new and more stringent water quality standards as a result of recent recommendations from the EPA, such as for ammonia or selenium." [Pintado Direct at 18-89 to 19-89 (Ex. SWQB-13); Nylander Rebuttal at 4 (Ex. SJWC-D); Tr. at 126:8-127:3 (Pintado)]

9. A temporary standard also will be a useful tool when water quality standards are unattainable because of environmental stressors, such as the Cerro Grande fire. [EPA *Water Quality Standards Regulatory Revisions Final Rule*, 80 Fed. Reg. 51020 at 51035 (Aug. 21, 2015) ("*EPA Final Rule*"); Tr. at 892:7-24 (Nylander)]

10. NPDES permittees will not be the only entities benefiting from a temporary standards tool. Any person may petition for adoption of a temporary standard. Watershed groups and land management agencies likely will seek temporary standards in order to conduct watershed restoration projects. [*EPA Final Rule*, 80 Fed. Reg. at 51035-36; Tr. at 572:23-573:25, 586:12-588:18, 890:23-892:6 (Nylander)]

11. SWQB has limited its temporary standards proposal to criteria only; it does not apply to designated uses, even though EPA authorizes temporary designated uses. [SWQB

Second Revised Petition (Sep. 4, 2015) at 4 ("Designated uses shall not be modified on a temporary basis"); Pintado Direct at 8-89 to 9-89, 16-89 to 17-89 (Ex. SWQB-13); Nylander Rebuttal at 2 (Ex. SJWC-D); EPA *Water Quality Standards Regulatory Clarifications Proposed Rule*, 78 Fed. Reg. 54518 at 54532 (Sep. 4, 2013) ("*EPA Proposed Rule*") (Ex. SJWC-C-3); *EPA Final Rule*, 80 Fed. Reg. at 51035, 51047; EPA *Water Quality Standards Handbook*, § 5.3 (Ex. SJWC-D-1)]

12. EPA's recently adopted water quality standards regulations in 40 C.F.R. Sections 131.3(o) and 131.14 authorize use of temporary standards, and EPA prefers adoption of temporary standards to permanent downgrades of designated uses based on UAAs. [Tr. at 44:4-7, 44:23-45:3, 97:25-98:3 (Pintado); *EPA Final Rule*, 80 Fed. Reg. at 51035, 51047]

13. Water quality improvement or restoration projects may not be feasible in the absence of time-limited temporary standards, to the detriment of water quality and economic conditions in affected communities. [Tr. at 44:12-22 (Pintado)]

14. To ensure enforceability of a temporary standard, SWQB proposes addition of a new subsection "H" to 20.6.4.12 NMAC to allow EPA to incorporate a temporary standard into an NPDES permit, as authorized by EPA guidance. [SWQB Second Revised Petition (Sep. 4, 2015) at 5; Pintado Direct at 10-89 (Ex. SWQB-13); Nylander Rebuttal at 8-9 (Ex. SJWC-D); EPA *Water Quality Standards Handbook*, § 5.3 (Ex. SJWC-D-1); Tr. at 47:21-22, 128:3-5, 138:21-24 (Pintado)] A temporary standard also would be enforceable in a Clean Water Act Section 404 dredge and fill permit. [Tr. at 142:22-143:16 (Pintado)]

15. A temporary standard will not cause increased water quality impairment, increased pollutant loading or loss of an existing use. [Pintado Direct at 9-89 (Ex. SWQB-13); Pintado Rebuttal at 5-18 to 6-18 (Ex. SWQB-Rebuttal-7); Tr. at 42:13-16 (Pintado), 192:21-

193:16 (Lemon)] By EPA rule, a temporary standard may not lower currently attained ambient water quality except when a short-term lowering is necessary for restoration activities. [*EPA Final Rule*, 80 Fed. Reg. at 51036; Tr. at 892:25-895:1 (Nylander)]

16. A temporary standard will not alter New Mexico's antidegradation policy and implementation plan. [Tr. at 141:19-22 (Pintado)]

17. At least 42 other states have adopted temporary water quality standards procedures (often referred to as variances). [Tr. at 45:12-17 (Pintado)]

18. The provisions of SWQB's temporary standards proposal are consistent with the EPA's Water Quality Standards Regulatory Revisions Final Rule issued on August 21, 2015, as well as other EPA rules and guidance. The new EPA rule makes it clear that a temporary standard is a legal tool and is itself a water quality standard. [Tr. at 45:18-24, 95:22-96:25, 97:1-10, 102:19-25, 121:14-18 (Pintado), 584:23-585:7, 890:7-25 (Nylander); 40 C.F.R. § 131.14; *EPA Final Rule*, 80 Fed. Reg. at 51048]

19. A temporary standard must be adopted by the WQCC like any other water quality standard after appropriate public participation process and public hearing. [Pintado Direct at 9-89 (Ex. SWQB-13); Tr. at 136:18-137:11, 138:15-18, 925:16-926:7 (Pintado), 520:17-521:13, 584:23-585:7 (Nylander)] An applicant's petition and work plan will be available for public review in advance of the public hearing. [Tr. at 926:10-19, 933:1-3 (Pintado), 896:8-897:2 (Nylander)]

20. Amigos Bravos opposes adoption of SWQB's temporary standards proposal, contending that compliance schedules should be used instead of temporary standards. [Amigos

Bravos Proposed Amendments and Statement of Basis at 4 (Sep. 30, 2014); Conn Direct at 7 (attached to Amigos Bravos' Notice of Intent to Submit Technical Testimony (Dec. 12, 2014)][1]

21. EPA has compared a temporary standard (or variance) with a compliance schedule and recognized that a temporary standard is a useful tool, especially where "the designated use and criterion are unattainable today (or for a limited period of time)." A compliance schedule is appropriate when a use is attainable, but a permittee needs additional time to upgrade treatment facilities. A temporary standard is appropriate when technology will not meet effluent limits prescribed through a TMDL or a new water quality standard. [Pintado Rebuttal at 7-18 (Ex. SWQB-Rebuttal-7); Nylander Direct at 11 (Ex. SJWC-C); *EPA Proposed Rule*, 78 Fed. Reg. at 54532 (Ex. SJWC-C-3); Tr. at 947:25-948:23 (Lemon)]

22. Amigos Bravos also opposes adoption of SWQB's temporary standards proposal because it is concerned about the impact of the tool on "new or increased discharges" and believes temporary standards "would condone the discharge of increased concentrations of parameters that are causing the impairment in the first place . . . ." [Amigos Bravos Proposed Amendments and Statement of Basis at 5; Conn Direct at 6-7]

23. According to EPA, a temporary standard will lead to improved water quality over time, and perhaps full attainment of designated uses, because it provides time to implement adaptive management approaches that will improve water quality. A temporary standard provides a "more direct link to the CWA Section 101(a) goal" to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" when compared with the

[1] According to the list of admitted exhibits found on pages 440-441 of the Triennial Review hearing transcript, neither the Amigos Bravos Proposed Amendments and Statement of Basis nor Ms. Conn's written direct testimony was admitted as an exhibit during the hearing.

downgrade of a designated use. [*EPA Proposed Rule*, 78 Fed. Reg. at 54531-32 (Ex. SJWC-C-3); Nylander Direct at 12-13 (Ex. SJWC-C)]

24. SWQB's temporary standards proposal does not condone the discharge of increased concentrations of pollutants causing water quality impairment. A temporary standard will not allow increased pollutant concentrations because permitted point source discharges will be required to meet technology-based effluent requirements. [Nylander Rebuttal at 12 (Ex. SJWC-D)]

25. Amigos Bravos also asserts that temporary standards "would reward polluters that have been illegally discharging . . . ." [Amigos Bravos Proposed Amendments and Statement of Basis at 5; Conn Direct at 8] However, absent an unpermitted discharge, there is no "illegal[] discharging" in New Mexico because point source discharges must be permitted under the CWA Section 402 NPDES permit program and thus are legal discharges. EPA cannot issue a permit that does not comply with the Clean Water Act, and a permittee must comply with all permit conditions. [Pintado Rebuttal at 8-18 (Ex. SWQB-Rebuttal-7); Nylander Direct at 13 (Ex. SJWC-C); Nylander Rebuttal at 12 (Ex. SJWC-D); 40 C.F.R. §§ 122.4, 122.41(a) (2015)] Further, any temporary standard adopted by the WQCC must ultimately be approved by EPA. [Pintado Direct at 23-89 (Ex. SWQB-13); 40 C.F.R. §§ 131.14 (preamble), 131.14(a)(3)]

B. <u>The WQCC Should Adopt a Broader Temporary Standards Provision that More Closely Comports with EPA Guidance, and Temporary Standards Should Apply Not Only to Criteria, But Also to Designated Uses and Permittees, as Authorized by EPA</u>.

SJWC urges the WQCC to adopt SWQB's temporary standards proposal, with the modifications described below that more closely comport with EPA guidance.

1. SWQB has limited its temporary standards proposal to criteria only; it does not apply to designated uses, even though EPA authorizes temporary designated uses:

> A [temporary standard] is a time-limited *use* and *criterion* for a specified pollutant(s), permittee(s), and/or water body or waterbody segment(s) that reflect the highest attainable condition during the specified time period.

[*EPA Proposed Rule*, 78 Fed. Reg. at 54532 (Ex. SJWC-C-3) (emphasis added); EPA *Discharger-Specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers*, Pub. No. EPA-820-F-13-012 (March 2013) (at 2) (Ex. SJWC-C-2); EPA *Water Quality Standards Handbook*, § 5.3 (Ex. SJWC-D-1); *EPA Final Rule*, 80 Fed. Reg. at 51035, 51047; 40 C.F.R. § 131.3(o) (2014); Pintado Direct at 8-89 to 9-89, 16-89 to 17-89 (Ex. SWQB-13); Nylander Rebuttal at 2 (Ex. SJWC-D); Tr. at 99:14-18, 100:16-101:5, 101:14-19 (Pintado), 419:20-420:2, 420:9-13 (Nylander)]

2. EPA's recently adopted water quality standards regulations in 40 C.F.R. Sections 131.3(o) and 131.14 authorize use of temporary standards, and EPA prefers adoption of temporary standards to permanent downgrades of designated uses based on UAAs. [Tr. at 44:4-7, 44:23-45:3, 97:25-98:3 (Pintado); *EPA Final Rule*, 80 Fed. Reg. at 51035, 51047]

3. If a criterion cannot be met in a water body, then the designated use is not fully protected and may be deemed non-attainable. Thus, if a temporary standard applies to a criterion, it also should apply to the designated use associated with the criterion. [Nylander Rebuttal at 4-5 (Ex. SJWC-D); Tr. at 420:17-421:14 (Nylander)]

4. According to EPA, the underlying designated use and criterion continue to represent the long-term goal for a water body and remain in effect for Section 303(d) listing and TMDL development, even if both a time-limited designated use and a time-limited criteria are adopted. [Nylander Rebuttal at 2-3 (Ex. SJWC-D); EPA *Water Quality Standards Handbook*, § 5.3 (Ex. SJWC-D-1)]

5. EPA recommended using the term "temporary standard" instead of the term "temporary criteria" to give New Mexico the flexibility to have either a temporary use or a temporary criteria, and SWQB has changed its proposed term from "temporary criteria" to "temporary standard." [SWQB Petition at 8 (Ex. SWQB-2); Tr. at 102:5-14 (Pintado)]

6. SWQB does not oppose adopting a definition of a temporary standard that mimic's EPA's definition of a temporary standard (called a "water quality standards variance" in EPA regulations). [Tr. at 101:23-102:14 (Pintado)] EPA's recently adopted definition is:

> A *water quality standards variance* (WQS variance) is a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance.

[*EPA Final Rule*, 80 Fed. Reg. at 51047 (emphasis in original); 40 C.F.R. § 131.3(o) (2015)]

7. EPA's water quality standards variance rule also applies specifically to permittees, allowing the benefits of a temporary standard to apply to a group of permittees. For that reason, SJWC proposes modifying SWQB's proposal to allow a temporary standard to apply to permittees, in addition to designated uses, pollutants and specific water body segments. [Nylander Rebuttal at 7 (Ex. SJWC-D); 40 C.F.R. § 131.14(a) (2015); *EPA Final Rule*, 80 Fed. Reg. at 51036; Tr. at 420:14-15; 421:15-422:21 (Nylander)]

8. SWQB has not directly objected to SJWC's proposal to reference permittees in the temporary standards at 20.6.4.10(F)(2) and (F)(4)(a).

9. It would be most useful to New Mexico to adopt the whole temporary standards tool authorized by EPA's recent final rule on water quality standards variances, which would allow a temporary designated use and also would allow a temporary standard applicable to a permittee. [Tr. at 446:7-24 (Nylander)] Adoption of the modifications proposed by SJWC,

which incorporate the broader tool authorized by EPA, will benefit a broader group. [Tr. at 447:24-449:25 (Nylander)]

10. Based on the evidence, the WQCC finds it is appropriate to adopt the full temporary standards tool authorized by EPA. Temporary standards shall apply to designated uses as well as criteria, and it also shall apply to permittees. Subsections 20.6.4.10(F)(2), (3) and (4) of SWQB's temporary standards proposal, as found in the Second Revised Petition (Sep. 4, 2015), shall be modified as follows, as recommended by SJWC:

> **F. Temporary Standards.**
>
> (2) A temporary standard shall apply to specific designated use(s), pollutant(s), or permittee(s), and to specific water body segment(s). The adoption of a temporary standard does not exempt dischargers from complying with all other applicable water quality standards or control technologies.
>
> (3) ~~Designated uses shall not be modified on a temporary basis.~~ Designated use attainment as reported in the CWA Section 305(b)/303(d) Integrated Report shall be based on the original standard and not on a temporary standard.
>
> (4) A petition for a temporary standard shall:
>
> (a) identify the currently applicable standard(s), the proposed temporary standard for the specific pollutant(s), the permittee(s), and the specific surface water body segment(s) of the state to which the temporary standard would apply;
>
> . . . .

[Nylander Rebuttal at 7 (Ex. SJWC-D)]

11. EPA guidance states that a temporary standard provides a water quality-based effluent limit ("WQBEL") in an NPDES permit for the term of the temporary standard. [Nylander Rebuttal at 8; EPA *Water Quality Standards Handbook*, § 5.3 (Ex. SJWC-D-1)] The

following modification of SWQB's proposal for Section 20.6.4.12(H) NMAC, as proposed by SJWC, is therefore appropriate:

> H. It is a policy of the commission to allow a temporary standard approved and adopted pursuant to Subsection F of 20.6.4.10 NMAC to be used in development of water quality-based effluent limitations (WQBELs), and the WQBELs and any relevant temporary standards conditions be included in the applicable NPDES permit(s) as enforceable limits and conditions. The temporary standard and any schedule of actions may be included at the earliest practicable time, and shall specify milestone dates so as to measure progress towards meeting the original standard.

[Nylander Rebuttal at 9 (Ex. SJWC-D]

12. SWQB has not proposed a definition for "temporary standard." It is appropriate to adopt EPA's final definition of "water quality standards variances," modified to replace the term "variance" with the term "temporary standard":

> "Temporary standard" means "a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the temporary standard."

[40 C.F.R. § 131.3(o) (2015); Nylander Rebuttal at 9 (Ex. SJWC-D); *EPA Final Rule*, 80 Fed. Reg. at 51047, 51048; EPA *Discharger-Specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers*, Pub. No. EPA-820-F-13-012 (March 2013) (at 2) (Ex. SJWC-C-2)]

13. SJWC has withdrawn its proposal to replace the term "temporary standard" with the term "variance." [Tr. at 423:2-19, 445:20-446:6 (Nylander)]

14. SJWC has withdrawn its objection to the use of the term "work plan" and the requirement of UAA-type documentation because, under EPA's recent water quality standards rule, "[t]he level of rigor required for a water quality standards variance is no different than for a

designated use change." [*EPA Final Rule*, 80 Fed. Reg. at 51041; Tr. at 423:20-424:9, 426:13-427:11, 445:23-446:6, 450:1-451:4 (Nylander)]

C. In the Alternative, SJWC Supports Adoption of SWQB's Narrower Temporary Standards Proposal Over Rejection of SWQB's Proposal.

It is SJWC's position that New Mexico has a great need for a tool to obtain temporary relief from a water quality standard. Although SJWC prefers adoption of the entire variance or temporary standard tool authorized by EPA, adoption of SWQB's narrower proposal is better than rejection of the concept entirely. SJWC therefore urges the WQCC to, at a minimum, adopt SWQB's temporary standards proposal. [Tr. at 446:7-447:23, 527:1-12, 527:24-528:21 (Nylander)]

Section 20.6.4.97 NMAC (SWQB's Ephemeral Waters Proposal)

SWQB proposes adding 29 stream segments to the list of ephemeral waters set out in 20.6.4.97(C) NMAC based on UAA reports prepared pursuant to 20.6.4.15(C) NMAC and SWQB's Hydrology Protocol for the Determination of Uses Supported by Ephemeral, Intermittent, and Perennial Waters ("Hydrology Protocol"). [SWQB Petition at 12-15 (Ex. SWQB-2)] If approved, these waters would be the first to be expressly designated as ephemeral in 20.6.4.97(C) NMAC out of tens of thousands of miles of ephemeral watercourses in New Mexico. [Nylander Direct at 14 (Ex. SJWC-C); Nylander Rebuttal at 12-13 (Ex. SJWC-D)] Once designated an ephemeral water, a surface water is assigned the designated uses of livestock watering, wildlife habitat, limited aquatic life, and secondary contact recreation. Currently, undesignated ephemeral waters, not yet the subject of a Use Attainability Analysis ("UAA"), are intermittent waters under 20.6.4.98 NMAC and are assigned the more stringent designated uses of primary contact and marginal warmwater aquatic life. [Kougioulis Direct at 7-14 (Ex. SWQB-39); Nylander Direct at 14 (Ex. SJWC-C)]

SJWC supports designation of the waters identified in SWQB's Petition (Ex. SWQB-2) as ephemeral waters. [Nylander Direct at 14 (Ex. SJWC-C); Nylander Rebuttal at 13 (Ex. SJWC-D); Tr. at 453:4-14 (Nylander)] Taken together, the written direct testimony of Jodey Kougioulis (Ex. SWQB-39 at 5-14 to 14-14), Deborah Sarabia (Ex. SWQB-46 at 2-13, 4-13 to 5-13, 10-13, 12-13), and Kristine Pintado (Ex. SWQB-13 at 37-89 to 47-89), the oral technical testimony of Mr. Kougioulis and Ms. Pintado at the Triennial Review hearing, and the UAA documentation introduced as evidence at the Triennial Review hearing (Exs. SWQB-31-36, 41-45, 48-49, 51-53), present significant credible scientific data supporting the ephemeral waters designations, as required by the New Mexico Water Quality Act, NMSA 1978, Section 74-6-4(D). The following reasons, in addition to those to be presented in the post-hearing briefing filed by SWQB and Freeport McMoRan Chino Mines Company, support the ephemeral waters designations proposed by SWQB.

1. Mr. Kougioulis presented the conclusions of two UAAs conducted in accordance with the Hydrology Protocol, the first covering 20 non-perennial stream segments associated with 13 NPDES permitted facilities, and the second covering four ephemeral waters located in the Pecos River basin, the Tularosa Valley closed basin, and the Mimbres River closed basin.[2] [Kougioulis Direct at 8-14 to 14-14 (Ex. SWQB-39); Sarabia Direct at 1-13 to 2-13, 4-13 to 5-13, 10-13, 12-13 (Ex. SWQB-46); Tr. at 56:4-16 (Kougioulis); Exs. SWQB-41-45, 48-49, 51-53]

2. The Hydrology Protocol provides a method of identifying the most protective and attainable uses for a particular water body based on naturally existing hydrology. [Kougioulis Direct at 3-14 to 4-14 (Ex. SWQB-39); Tr. at 57:12-14, 59:13-25 (Kougioulis)]

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[2] Mr. Kougioulis adopted the portion of the written technical testimony of Debbie Sarabia addressing the four ephemeral waters in the Pecos River basin, the Tularosa Valley closed basin, and the Mimbres River closed basin. [Tr. at 55:14-21 (Kougioulis)]

3. The two UAAs covering the 24 stream segments addressed by Mr. Kougioulis "concluded that the proposed stream segments listed in each HP UAA are naturally ephemeral and that the highest attainable uses are that of secondary human contact and limited aquatic life." [Kougioulis Direct at 10-14, 13-14 to 14-14 (Ex. SWQB-39); Sarabia Direct at 4-13 to 5-13, 12-13 (Ex. SWQB 46); Tr. at 60:1-5 (Kougioulis)]

4. EPA Region 6 has issued technical approval for both UAAs, "conclud[ing] that the uses and criteria associated with ephemeral waters in New Mexico can apply to these stream segments listed in the HP UAAs for all regulatory purposes." [Tr. at 62:2-7, 264:8-13 (Kougioulis); Exs. SWQB-45, 53]

5. Ms. Pintado presented the conclusions of a UAA conducted by Freeport-McMoRan Chino Mines Company ("Chino"), in accordance with the Hydrology Protocol, covering five streams in the Mimbres closed basin. [Pintado Direct at 38-89 to 47-89 (Ex. SWQB-13); Tr. at 51:7-24 (Pintado)]

6. SWQB and the Groundwater Quality Bureau worked with Chino and EPA to finalize the UAA report. [Pintado Direct at 41-89, 45-89 to 46-89 (Ex. SWQB-13); Tr. at 52:23-53:2 (Pintado)]

7. The Hydrology Protocol results and final UAA report demonstrate these streams are naturally ephemeral and the designated uses and criteria applicable to 20.6.4.97 NMAC are appropriate. [Pintado Direct at 40-89, 43-89 to 44-89, 46-89 to 47-89 (Ex. SWQB-13); Tr. at 51:21-24, 52:19-22 (Pintado); Exs. SWQB-31-36]

8. EPA's technical approval of the UAA is pending. [Tr. at 53:1-2 (Pintado)]

9. Based on the evidence, the WQCC finds it is appropriate to adopt SWQB's proposal for 20.6.4.97(C) NMAC and to classify all 29 stream segments as ephemeral waters.

Sections 20.6.4.103-308 NMAC (SWQB's Proposal to Upgrade the Recreation Designated Use of Nine Stream Segments from Secondary Contact to Primary Contact)

A. SJWC Opposes SWQB's Proposal to Upgrade the Recreation Designated Use of Nine Stream Segments from Secondary Contact to Primary Contact for Failure to Provide Credible Scientific or Other Information Supporting the Proposal, and SJWC Requests that the WQCC Reject the Proposal .

SWQB proposes to upgrade the recreation designated use for nine stream segments (Sections 20.6.4.103, 20.6.4.116, 20.6.4.124, 20.6.4.204, 20.6.4.206, 20.6.4.207, 20.6.4.213, 20.6.4.219, and 20.6.4.308 NMAC) from secondary contact to primary contact. SJWC opposes the proposed change in designated use because SWQB has failed to provide any legal or evidentiary support for its proposal. Contrary to SWQB's assertion, no UAA is required to maintain the previously designated secondary contact use for these stream segments. In addition, SWQB has failed to provide credible scientific or other information supporting the proposed change in designated use. The following reasons support a WQCC decision to reject SWQB's proposal.

1. SWQB has proposed upgrading the recreation designated uses of nine stream segments from secondary contact to primary contact. [SWQB Petition at 17-22 (SWQB Ex. 2); Pintado Direct at 77-89 to 82-89 (Ex. SWQB 13); Nylander Direct at 21-22 (Ex. SJWC-C)]

2. SWQB presented expert technical testimony that EPA has adopted a "rebuttable presumption" that the "fishable/swimmable" designated uses specified in Section 101(a)(2) of the Clean Water Act "are attainable in all waters unless a [UAA] demonstrates otherwise." [Tr. at 30:9-13 (Lemon)] EPA does not consider the secondary contact designated use to be a fishable/swimmable use. [Hogan Direct at 10-13, ¶ 2 (Ex. SWQB-1); Tr. at 30:19-21 (Lemon)]

3. Current federal regulations at 40 C.F.R. Section 131.10(j) require a UAA demonstrating that fishable/swimmable uses are not existing or attainable before a water body's

designated use can be *downgraded* from primary contact to secondary contact, or before the secondary contact designated use can be *assigned* in the first instance. [Hogan Direct[3] at 10-13, ¶ 3 (Ex. SWQB-1); Tr. at 30:22-31:1, 32:1-5 (Lemon)]

4. The WQCC assigned the secondary contact designated use to these nine stream segments between 1988 and the last Triennial Review. [Tr. at 73:19-24, 74:6-11, 92:21-93:4 (Lemon)]

5. EPA did not object to the secondary contact designated uses at the time they were assigned by the WQCC. [Tr. at 74:13-17 (Lemon), 469:7-9 (Nylander)]

6. EPA did not require a UAA proving primary contact was not an attainable use at the time the secondary contact designated use was adopted by the WQCC for these nine stream segments, and SWQB has not found any UAAs supporting the secondary contact designated use for these nine stream segments. [Hogan Rebuttal at 11-22 (Ex. SWQB-Rebuttal-1); Pintado Direct at 77-89 (Ex. SWQB-13); Tr. at 33:22-24, 74:18-22 (Lemon)]

7. EPA is not requesting or demanding that the recreation designated use for these nine segments be upgraded from secondary contact to primary contact. [Tr. at 75:7-12 (Lemon), 469:23-470:7 (Nylander)]

8. Under the State's surface water quality standards, "primary contact means any recreational or other water use in which there is prolonged and intimate human contact with the water, such as swimming and water skiing, involving considerable risk of ingesting water in quantities sufficient to pose a significant health hazard." [20.6.4.7(P)(5) NMAC; Tr. 76:5-19 (Lemon)]

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[3] Shelley Lemon adopted Dr. Hogan's written testimony during the Triennial Review hearing. [Tr. at 26:5-7 (Lemon)]

9. Under the State's surface water quality standards, "secondary contact means any recreational or other water use in which human contact with the water may occur and in which the probability of ingesting appreciable quantities of water is minimal, such as fishing, wading, commercial and recreational boating and any limited seasonal contact." [20.6.4.7(S)(1) NMAC] This definition does not require a "zero" likelihood of ingesting water. [Tr. at 535:5-17 (Nylander)]

10. A water body that does not include the fishable/swimmable uses specified in Section 101(a)(2) of the Clean Water Act "shall be re-examined every three years to determine if any *new information* has become available. If such *new information* indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly." [40 C.F.R. § 131.20(a) (Ex. SJWC-D-3) (emphasis added); Hogan Direct at 10-13, ¶ 2 (Ex. SWQB-1); Pintado Direct at 77-89 (Ex. SWQB-13) (emphasis added); Nylander Direct at 22 (Ex. SJWC-C); Nylander Rebuttal at 25 (Ex. SJWC-D); Tr. at 33:5-10 (Lemon), 92:2-8 (Pintado), 470:8-13, 20-23, 501:1-7, 581:22-582:19 (Nylander)]

11. In its Petition and in pre-filed written direct testimony, SWQB provided only "boilerplate" rationale for the proposed designated use upgrade for these nine stream segments, stating it has (1) "*no evidence* that [the primary contact use] is *not* attainable" and (2) the primary contact use "*may be* existing" and (3) primary contact use "is *likely* attainable." [SWQB Petition at 17-22 (Ex. SWQB-2) (emphasis added); Pintado Direct at 79-89 to 82-89 (Ex. SWQB-13); Nylander Direct at 22 (Ex. SJWC-C); Tr. at 78:21-80:4 (Pintado)] At that time, SWQB did "not offer any data, documentation, or evidence that primary contact *is* occurring and *is* attainable." [Nylander Direct at 22 (Ex. SJWC-C) (emphasis in original)] Nor did SWQB provide any segment-specific information. [Nylander Direct at 23 (Ex. SJWC-C)]

12. SWQB contends that: (1) "no evidence a use is not attainable" is equivalent to "evidence that a use is attainable"; (2) the fact that primary contact "may be existing is the same as evidence that [the primary contact] use is existing"; and (3) the fact that a "primary contact use is likely attainable" is "the same as evidence that the use is attainable." [Tr. at 80:5-19 (Pintado)]

13. In response to SJWC's objection that SWQB provided no evidence of primary contact use, SWQB prepared and submitted its Rebuttal Exhibit 2, which it contends provides new information showing that primary contact recreation is an existing or attainable use in these nine stream segments. [Hogan Rebuttal at 10-22 to 12-22 (Ex. SWQB-Rebuttal-1); Tr. at 75:13-25, 76:1-4, 20-25, 81:2-82:9 (Lemon); 91:24-92:12 (Lemon, Pintado), 945:8-946:1 (Lemon)] SWQB's written rebuttal testimony and oral testimony at the Triennial Review hearing supporting its proposal relies on an undated summary memo prepared by Bryan Dail for rebuttal purposes. [Ex. SWQB-Rebuttal-2; Tr. at 81:23-83:8 (Dail, Lemon, Pintado), 92:2-12 (Pintado, Lemon)] That memo also makes the qualified statement: "primary contact recreation . . . *may be* an existing use for water bodies in most of [the nine segments proposed to be upgraded to primary contact] and is *likely* an attainable use." [Ex. SWQB-Rebuttal-2 at 3 (emphasis added)]

14. SWQB also contends that where boating occurs, "primary contact recreation() is almost always an existing use and is almost certainly an attainable use." [Ex. SWQB-Rebuttal-2 at 3; Tr. at 34:21-24 (Lemon)] However, by definition, boating is a secondary contact use under the New Mexico surface water quality standards. [20.6.4.7(S)(1) NMAC]

15. SWQB further contends that a UAA is required to retain the *existing* secondary contact designated use for these nine water body segments. [Pintado Direct at 77-89 (Ex. SWQB-13); Tr: at 91:15-92:20 (Lemon), 153:8-13 (Pintado), 943:13-944:2 (Lemon)] However,

SWQB's supporting technical testimony referring to applicable federal regulations shows that "federal regulations, at 40 C.F.R. 131.10(j), . . . require that *before adopting* a designated use that does not support the fishable/swimmable goals, a UAA must be completed to demonstrate that these uses are not existing nor attainable." [Tr. at 30:22-31:1, 974:14-16 (Lemon) (emphasis added)] SJWC provided expert technical testimony that neither the Code of Federal Regulations nor the new EPA Final Rule requires a UAA to maintain a previously designated secondary contact use—a UAA is required only to downgrade from a primary contact designated use to a secondary contact designated use or to designate a secondary contact use. [Nylander Rebuttal at 24, 31 (Ex. SJWC-D); Tr. at 470:24-471:3, 500:7-13, 510:23-511:5, 558:4-12, 580:23-581:7, 581:8-21, 583:1-22, 584:3-12 (Nylander)]

16. The New Mexico Water Quality Act, Section 74-6-4(D), provides that surface water quality standards must be "based on credible scientific data and other evidence appropriate under the Water Quality Act."

17. As set forth below with respect to each individual stream segment, SWQB has not provided any "credible scientific data" or "other evidence appropriate under the Water Quality Act" supporting its proposal to upgrade these nine segments from the secondary contact designated use to the primary contact designated use. Rather, SWQB's proposal relies on vague, non-substantial, anecdotal evidence and SWQB has provided "scant" evidence supporting the upgrade to the primary contact designated use. [Nylander Rebuttal at 24-30 (Ex. SJWC-D); Tr. at 467:12-468:4, 511:6-15, 513:3-5, 10-16, 525:16-526:5, 558:13-24, 559:7-560:4, 581:22-582:24 (Nylander)]

18. As set forth below with respect to each individual stream segment, SWQB has not provided the "new" information required by 40 C.F.R. Section 131.20 to support its proposal to

upgrade these nine stream segments from the secondary contact designated use to the primary contact designated use. [Nylander Rebuttal at 30 (Ex. SJWC-D)]

19. SWQB also relies on the "latest EPA guidance for recreational contact" to support its proposal to upgrade these nine water body segments to the primary contact designated use. [Pintado Direct at 77-89 (Ex. SWQB-13); SWQB Ex. 37; Tr. at 93:5-11 (Pintado)] That EPA guidance states:

> EPA has released its 2012 recreational water quality criteria recommendations for protecting human health in all coastal and non-coastal waters *designated for primary contact recreation use*.
>
> . . . .
>
> *The new criteria are designed to protect primary contact recreation*, including swimming, bathing, surfing, water skiing, tubing, water play by children, and similar water contact activities where a high degree of contact with the water, immersion and ingestion are likely.

[SWQB Ex. 37 (first page) (emphasis added)] Nothing in EPA's guidance states secondary contact waters must be upgraded to primary contact waters. [Tr. at 93:12-94-6 (Pintado)]

20. EPA's guidance does not apply to waters currently designated as secondary contact waters and does not support SWQB's proposal. [Nylander Direct at 23-24 (Ex. SJWC-C); Nylander Rebuttal at 25, 30 (Ex. SJWC-D)]

21. Four NPDES-permitted municipally or publicly owned treatment plants are located in a stream segment SWQB proposes to upgrade from the secondary contact to the primary contact designated use: Truth or Consequences wastewater treatment plant, Abiquiu wastewater treatment plant, Artesia wastewater treatment plant, and Fort Sumner wastewater treatment plant. [Tr. at 156:17-157:2 (Lemon)] These dischargers will be required to comply

with primary contact criteria even if the stream segment fails to meet primary contact criteria for other reasons, such as spring inflow. [Tr. at 1002:8-1005:1 (Lemon)]

22. If the WQCC upgrades the recreation designated use for these nine segments to primary contact, and in the future it is determined that the appropriate designated use is secondary contact, it will be necessary to do a UAA to prove the then-existing primary contact designated use is neither existing nor attainable. Such UAA's have significant time and expense costs. [Nylander Direct at 25 (Ex. SJWC-C); Tr. at 511:21-25] The WQCC should not risk incurring such future costs where, as here, the WQCC does not have any credible evidence before it supporting SWQB's proposal.

23. Upgrading the designated use for these nine stream segments from secondary contact to primary contact will place an economic burden on both the SWQB and those discharging into these stream segments. "Conceivably, the change in designated use will force dischargers either to upgrade wastewater treatment for bacteria or to technically and legally rebut the presumption that primary contact recreation is attainable with the costly performance of a UAA." [Nylander Direct at 23 (Ex. SJWC-C)]

24. Considering all of the evidence, the WQCC rejects SWQB's proposal to change the designated recreation use for these nine stream segments from secondary contact to primary contact.

25. <u>Section 20.6.4.103 NMAC (Rio Grande from headwaters of Caballo Reservoir upstream to Elephant Butte Dam; perennial reaches of tributaries in Sierra and Socorro Counties)</u>:

a. The secondary contact use for this stream segment has been in place for decades and repeatedly has been approved by EPA. [Nylander Rebuttal at 25 (Ex. SJWC-D)]

b. SWQB contends that "[t]his portion of the Rio Grande *is accessible for swimming* and bodily contact can occur with a risk of ingesting water" even though swimming in this area is "at your own risk." [SWQB Petition at 17 (Ex. SWQB-2); Pintado Direct at 78-89 (Ex. SWQB-13); Hogan Rebuttal at 12-22 (Ex. SWQB-Rebuttal-1)]

c. SWQB contends that, if a water body is accessible, it must be assumed that swimming is an existing use. [Tr. at 81:2-5 (Pintado)] Further, SWQB contends swimming should be a protected use even if the area is not open to the public and swimming is illegal because of dam releases. [Tr. at 980:15-981:18 (Dail)]

d. Accessibility of a water body does not mean primary contact recreation is an existing use. [Nylander Rebuttal at 25 (Ex. SJWC-D)]

e. The secondary contact designated use should continue where swimming or other primary contact recreation is at the public's own risk because such activities should not be condoned or encouraged. [Nylander Rebuttal at 25 (Ex. SJWC-D)]

f. At hearing, SWQB contended that Bureau staff have witnessed swimming or boating in this water body segment. [Tr. at 81:10-22 (Lemon), 83:15-18 (Dail)] All such evidence is provided in SWQB's Rebuttal Exhibit 2. [Tr. at 81:23-82:9 (Pintado and Lemon)]

g. SWQB Rebuttal Ex. 2 (at 3) refers only to a website describing public pools accessible for swimming "at your own risk." Evidence of SWQB personnel observations is not provided in Rebuttal Ex. 2 and has not been provided elsewhere during this Triennial Review hearing. [Tr. at 83:9-84:1 (Dail)]

h. SWQB has not provided any new information showing that primary contact recreation is an existing or attainable use in this stream segment, as required by 40 C.F.R. Section 131.20(a) (Ex. SJWC-D-3) [Nylander Rebuttal at 25 (Ex. SJWC-D)].

i. SWQB has not provided credible scientific or other evidence supporting its petition to change the recreation use for this stream segment from secondary contact to primary contact, as required by Section 74-6-4(D) of the New Mexico Water Quality Act.

26. Section 20.6.4.116 NMAC (Rio Chama from mouth on the Rio Grande upstream to Abiquiu Reservoir; perennial reaches of several tributaries):

a. SWQB contends in its Petition that "[t]his segment includes Rio Ojo Caliente," but SWQB does not assert that primary contact recreational use is occurring. [SWQB Petition at 18 (Ex. SWQB-2)]

b. Ms. Pintado's written direct testimony simply states that "[t]he SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use . . . ." [Pintado Direct at 79-89 (Ex. SWQB-13)] This statement does not provide substantive evidence of primary contact use. [Nylander Rebuttal at 26 (Ex. SJWC-D)]

c. All evidence concerning primary contact use in this stream segment is provided in Table 1 of SWQB's Rebuttal Exhibit 2 at 3-4. That Exhibit notes (at 4 & n.3) that a hot spring is located in the segment, rafting and float trips have been observed by Bureau staff, and a BLM website indicates it offers rafting "on lower and upper segments of the Rio Chama." However, SWQB has provided no documentary evidence of staff observations or identified who made the observations, where the

observations were made or when the observations were made. [Hogan Rebuttal at 12-22 & n.3 (Ex. SWQB-Rebuttal-1); Tr. at 84:2-85:16 (Dail and Lemon)]

d. By definition, boating is a secondary contact use under the New Mexico surface water quality standards. 20.6.4.7(S)(1) NMAC.

e. SWQB has not provided any new information showing that primary contact recreation is an existing or attainable use in this stream segment, as required by 40 C.F.R. Section 131.20(a) (Ex. SJWC-D-3). [Nylander Rebuttal at 26 (Ex. SJWC-D)]

f. SWQB has not provided credible scientific or other evidence supporting its petition to change the recreation use for this stream segment from secondary contact to primary contact, as required by Section 74-6-4(D) of the New Mexico Water Quality Act.

27. Section 20.6.4.124 NMAC (Rio Grande Basin; perennial reaches of Sulphur Creek from confluence with Redondo Creek upstream to its headwaters):

a. SWQB contends in the statement of basis for its Petition that "information from surveys indicates that primary contact use may be existing and is likely attainable." [SWQB Petition at 19 (Ex. SWQB-2)] However, Ms. Pintado's written direct testimony removed all reference to surveys and just stated that "[t]he SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use . . . ." [Pintado Direct at 79-89 (Ex. SWQB-13)] This statement does not provide substantive evidence of primary contact use. [Nylander Rebuttal at 26-27 (Ex. SJWC-D)]

b. All evidence concerning primary contact in this stream segment is provided in Table 1 of SWQB's Rebuttal Exhibit 2 at 4, which refers vaguely to "privately owned hot springs." Those hot springs are not currently in use, and SWQB

has not provided any historical documents or other evidence showing previous primary contact use. [Tr. at 85:17-86: 5 (Lemon, Dail, Pintado)] As noted by Dr. Hogan in his written rebuttal testimony, this segment is only "nominally accessible to park scientists and guided tours," and SWQB has only "anecdotal" evidence of previous primary contact hot springs use (based solely on the names of the hot springs). [Hogan Rebuttal at 12-22 to 13-22 (Ex. SWQB-Rebuttal-1)]

c. In 2005, the WQCC designated this stream segment as secondary contact even though the hot springs may have been used post-1975. [Ex. SWQB-Rebuttal-2, Table 1 at 4; Tr. at 85:20-86:11 (Dail, Pintado, Kougioulis)]

d. SWQB has not provided any new information showing that primary contact recreation is an existing or attainable use in this stream segment, as required by 40 C.F.R. Section 131.20(a) (Ex. SJWC-D-3). [Nylander Rebuttal at 26-27 (Ex. SJWC-D)]

e. SWQB has not provided credible scientific or other evidence supporting its petition to change the recreation use for this stream segment from secondary contact to primary contact, as required by Section 74-6-4(D) of the New Mexico Water Quality Act.

28. Section 20.6.4.204 NMAC (Pecos River from headwaters of Avalon Reservoir upstream to Brantley Dam):

a. Neither SWQB's statement of basis for its Petition nor testimony presented by SWQB provides any evidence of primary contact in this segment. [SWQB Petition at 19 (Ex. SWQB-2)]

b. Ms. Pintado's written direct testimony states only that "[t]he SWQB has no evidence that this use is not attainable and information indicates that primary contact

use may be an existing use . . . ." [Pintado Direct at 80-89 (Ex. SWQB-13)] This statement does not provide substantive evidence of primary contact use. [Nylander Rebuttal at 27 (Ex. SJWC-D)]

c. In his written rebuttal testimony, Dr. Hogan asserts that "[e]vidence of primary contact recreation has been observed by SWQB staff," but he does not identify the type of primary contact or provide any additional information. [Hogan Rebuttal at 13-22 (Ex. SWQB-Rebuttal-1)]

d. Nor has SWQB provided any documentary evidence of staff observations or identified who made the observations, where the observations were made or when the observations were made.

e. SWQB's Rebuttal Ex. 2 states that the New Mexico Department of Game & Fish noted swimming in this segment in June 2014. [Ex. SWQB-Rebuttal-2 at 4 & n.5] However, SWQB has provided no documentary or other evidence of such use or identified who provided that information.

f. SWQB has not provided any new information showing that primary contact recreation is an existing or attainable use in this stream segment, as required by 40 C.F.R. Section 131.20(a) (Ex. SJWC-D-3). [Nylander Rebuttal at 27 (Ex. SJWC-D)]

g. SWQB has not provided credible scientific or other evidence supporting its petition to change the recreation use for this stream segment from secondary contact to primary contact, as required by Section 74-6-4(D) of the New Mexico Water Quality Act.

29. Section 20.6.4.206 NMAC (Pecos River upstream of Brantley Reservoir to Salt Creek and several tributaries):

a. Neither SWQB's statement of basis for its Petition nor testimony presented by SWQB provides any evidence of primary contact in this segment. [SWQB Petition at 20 (Ex. SWQB-2)]

b. Ms. Pintado's written direct testimony states only that "[t]he SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use . . . ." [Pintado Direct at 80-89 (Ex. SWQB-13)] This statement does not provide substantive evidence of primary contact use. [Nylander Rebuttal at 27-28 (Ex. SJWC-D)]

c. SWQB Rebuttal Ex. 2 (at 5) states only that Brantley Reservoir downstream of this segment has primary contact use—it makes no reference to any evidence of primary contact use in this segment. [Ex. SWQB-Rebutal-2; Tr. at 86:12-87:24 (Dail, Lemon)]

d. In his written rebuttal testimony, Dr. Hogan contends "[e]vidence of primary contact recreation has been observed by SWQB staff," but he does not identify the type of primary contact or provide any additional information. Nor does SWQB Rebuttal Ex. 2 provide such information. [Ex. SWQB-Rebuttal-2 at 5; Hogan Rebuttal at 13-22 (Ex. SWQB-Rebuttal-1).

e. SWQB has not provided any evidence that primary contact occurs or is attainable in this stream segment, which is upstream of Brantley Reservoir. [Tr. at 86:19-23 (Dail)]

f. SWQB has not provided any new information showing that primary contact recreation is an existing or attainable use in this stream segment, as required by

40 C.F.R. Section 131.20(a) (Ex. SJWC-D-3). [Nylander Rebuttal at 27-28 (Ex. SJWC-D)]

g. SWQB has not provided credible scientific or other evidence supporting its petition to change the recreation use for this stream segment from secondary contact to primary contact, as required by Section 74-6-4(D) of the New Mexico Water Quality Act.

30. Section 20.6.4.207 NMAC (Pecos River from Salt Creek upstream to Sumner Dam):

a. In its statement of basis for its Petition, SWQB states that, during a 2013 survey conducted by unidentified SWQB staff, "it was observed this segment *likely* has an existing use of primary contact. While access is difficult in very remote locations, it can be accomplished." [SWQB Petition at 20-21 (Ex. SWQB-2) (emphasis added)]

b. SWQB has neither produced the survey to which it has referred nor provided any evidence about the preparation of the survey. In fact, in her direct written testimony, Ms. Pintado removed all reference to the survey and just stated that "[t]he SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use . . . ." [Pintado Direct at 80-89 to 81-89 (Ex. SWQB-13)] This statement does not provide substantive evidence of primary contact use. [Nylander Rebuttal at 28 (Ex. SJWC-D)] Nor does SWQB Rebuttal Ex. 2 (at 5) provide any evidence concerning the type of "[p]rimary contact use observed by SWQB staff," where such use occurred, or when it occurred.

c. Dr. Hogan has noted that the main stem of the Pecos River covers 100 miles, including the Salt Creek Wilderness used by hikers and backpackers. "While some of this area is very remote, contact recreation is *possible*." [Hogan Rebuttal at 13-

22 (Ex. SWQB-Rebuttal-1) (emphasis added)] Dr. Hogan also stated in his written rebuttal testimony that there are daytime recreational-use sites on both sides of the river and fishing activities are common. [Hogan Rebuttal at 13-22 (Ex. SWQB-Rebuttal-1)] Fishing is a secondary contact designated use. [20.6.4.7(S)(1) NMAC]

d. SWQB has not provided any new information showing that primary contact recreation is an existing or attainable use in this stream segment, as required by 40 C.F.R. Section 131.20(a) (Ex. SJWC-D-3). [Nylander Rebuttal at 28 (Ex. SJWC-D)]

e. SWQB has not provided credible scientific or other evidence supporting its petition to change the recreation use for this stream segment from secondary contact to primary contact, as required by Section 74-6-4(D) of the New Mexico Water Quality Act.

31. Section 20.6.4.213 NMAC (McAllister Lake):

a. SWQB has provided evidence that McAllister Lake is a state park and national wildlife refuge open for boating, fishing and camping. [SWQB Petition at 21 (Ex. SWQB-2); Pintado Direct at 81-89 (Ex. SWQB-13); Hogan Rebuttal at 13-22 (Ex. SWQB-Rebuttal-1); Ex. SWQB-Rebuttal-2 at 5; Tr. at 87:25-88:11 (Lemon)]

b. SWQB has provided no evidence of swimming at McAllister Lake but assumes that primary contact recreation is the appropriate designated use because water-based recreation such as wading and boating "indicate[s] a significant *potential* for primary contact, either on purpose or by accident" and "it is a *possibility* that somebody could be immersed in the water, either accidentally or on purpose, if there is boating occurring on the lake." [Hogan Rebuttal at 13-22 (Ex. SWQB-Rebuttal-1); Tr. at 88:5-11, 89:10-19 (Lemon) (emphasis added)]

c. An algal bloom caused a fish kill that has limited fishing in the lake since 2007. It therefore is likely that any swimming (of which SWQB has provided no evidence) similarly has been limited. [Ex. SWQB-Rebuttal-2 at 5 & n.6; Tr. at 89:1-9 (Lemon)]

d. The boating, fishing and camping activities cited by SWQB are, by definition, secondary contact activities. [20.6.4.7(S)(1) NMAC; Tr. at 88:12-25, 89:10-23 (Lemon)]

e. In her written direct testimony, Ms. Pintado stated that "[t]he SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use . . . ." [Pintado Direct at 81-89 (Ex. SWQB-13)] This statement does not provide substantive evidence of primary contact use. [Nylander Rebuttal at 28 (Ex. SJWC-D)]

f. SJWC's technical expert has fished this lake and has never observed anyone swimming in it. The lake has plant growth, such as cattails, around its banks and edges. [Tr. at 471:8-21 (Nylander)]

g. SWQB has not provided any new information showing that primary contact recreation is an existing or attainable use in this stream segment, as required by 40 C.F.R. Section 131.20(a) (Ex. SJWC-D-3). [Nylander Rebuttal at 28-29 (Ex. SJWC-D)]

h. SWQB has not provided credible scientific or other evidence supporting its petition to change the recreation use for this stream segment from secondary contact to primary contact, as required by Section 74-6-4(D) of the New Mexico Water Quality Act.

32. Section 20.6.4.219 NMAC (Avalon Reservoir):

a. SWQB presented evidence that Avalon Reservoir is a state park, and its website describes paddle craft, kayaking and scuba game fishing. [Pintado Direct at 81-89 (Ex. SWQB-13); Hogan Rebuttal at 13-22 (Ex. SWQB-Rebuttal-1); Ex. SWQB-Rebuttal-2 at 5-6 & n.7]

b. SWQB assumes that primary contact recreation is the appropriate designated use for this segment because water-based recreation such as wading and boating "indicate[s] a significant *potential* for primary contact, either on purpose or by accident" and contends that "[t]hese activities involve considerable risk of ingesting the water." [Hogan Rebuttal at 13-22 (Ex. SWQB-Rebuttal-1) (emphasis added); Pintado Direct at 81-89 to 82-89 (Ex. SWQB-13)]

c. In her written direct testimony, Ms. Pintado stated that "[t]he SWQB has no evidence that this use is not attainable . . . ." [Pintado Direct at 81-89 (Ex. SWQB-13)] This statement does not provide substantive evidence of primary contact use. [Nylander Rebuttal at 29 (Ex. SJWC-D)]

d. Boating and fishing are, by definition, secondary contact activities. [20.6.4.7(S)(1) NMAC]

e. SWQB has not provided any new information showing that primary contact recreation is an existing or attainable use in this stream segment, as required by 40 C.F.R. Section 131.20(a) (Ex. SJWC-D-3). [Nylander Rebuttal at 29 (Ex. SJWC-D)]

f. SWQB has not provided credible scientific or other evidence supporting its petition to change the recreation use for this stream segment from secondary contact

to primary contact, as required by Section 74-6-4(D) of the New Mexico Water Quality Act.

33. Section 20.6.4.308 NMAC (Charette Lakes):

a. SWQB has provided evidence that Charette Lake is a state park providing *access* for wading, fishing, paddle craft and primitive camping. [Pintado Direct at 82-89 (Ex. SWQB-13); Hogan Rebuttal at 13-22 (Ex. SWQB-Rebuttal-1); Ex. SWQB-Rebutal-2 at 6]

b. SWQB assumes that primary contact recreation is the appropriate designated use for this segment because water-based recreation such as wading and boating "indicate[s] a significant *potential* for primary contact, either on purpose or by accident." [Hogan Rebuttal at 13-22 (Ex. SWQB-Rebuttal-1)]

c. Wading and boating are, by definition, secondary contact activities. [20.6.4.7(S)(1) NMAC]

d. In her written direct testimony, Ms. Pintado states that this state park has *access* for swimming, but she does not provide any evidence that swimming is allowed or occurs. [Pintado Direct at 82-89 (Ex. SWQB-13)] In fact, SWQB Rebuttal Ex. 2 states that the upper lake is shallow and only accessible for wading. This exhibit also intimates that swimming is not allowed in the lower lake, which is "deeper." [Ex. SWQB-Rebuttal-2 at 6]

e. In her written direct testimony, Ms. Pintado stated that "the SWQB has no evidence that this use is not attainable." [Pintado Direct at 82-89 (Ex. SWQB-13)] This statement does not provide substantive evidence of primary contact use. [Nylander Rebuttal at 29 (Ex. SJWC-D)]

f. SJWC's technical expert has fished this lake. It is a "weedy" lake used for fishing but not necessarily swimming. [Tr. at 471:22-472:1 (Nylander)]

g. SWQB has not provided any new information showing that primary contact recreation is an existing or attainable use in this stream segment, as required by 40 C.F.R. Section 131.20(a) (Ex. SJWC-D-3). [Nylander Rebuttal at 29-30 (Ex. SJWC-D)]

h. SWQB has not provided credible scientific or other evidence supporting its petition to change the recreation use for this stream segment from secondary contact to primary contact, as required by Section 74-6-4(D) of the New Mexico Water Quality Act.

B. In the Alternative, SJWC Proposes that the WQCC Retain the Secondary Contact Designated Use, But Upgrade the Bacteria Criteria for the Nine Stream Segments.

In the event the WQCC determines that the nine stream segments must be upgraded to the primary contact designated use because of the absence of a UAA supporting the pre-existing secondary contact designated use, or because SWQB has provided sufficient credible evidence of primary contact, SJWC urges the WQCC to retain the secondary contact designated use but upgrade the bacteria criteria for the nine stream segments. The following reasons support adoption of SJWC's alternative proposal.

1. SWQB's intent to meet the fishable/swimmable goals of the Clean Water Act for these nine stream segments may be accomplished by retaining the secondary contact designated use and assigning the bacterial criteria associated with the primary contact use, as authorized by EPA. [EPA *Water Quality Standards Handbook*, § 2.1.3 at 2-3 ("Option 2") (2015) (Ex. SJWC-D-1); Tr. at 468:5-24, 501:21-504:18, 532:7-533:12, 560:20-561:14, 588:19-589:20 (Nylander)]

2. In its December 29, 2006, Record of Decision for the 2005 Triennial Review, EPA stated that the State may designate the secondary contact use if it establishes bacteria criteria protective of the primary contact designated use:

> The secondary contact designation [for segment 20.6.4.129 NMAC] is supported by revised bacteriological criteria sufficient to support primary contact recreation based on a light frequency of use. EPA recognizes that primary contact recreation may not be attainable or appropriate in all waters and that States may designate secondary contact recreation, but set bacteriological criteria sufficient to support primary contact based on frequency of use as New Mexico has done here.

[Ex. SWQB-Rebuttal-4 at 66; Tr. at 589:10-20 (Nylander)]

3. Retaining the secondary contact designated use for these nine stream segments obviates the costs associated with potential future UAAs. If a stream segment does not meet the bacteria criteria, it will be placed on the Section 303(d) impaired waters list. No UAA will be required. [Tr. at 533:13-534:10, 560:10-561: 14, 567:16-568:14, 569:17-570:5 (Nylander)]

4. The WQCC retains the secondary contact designated use for 20.6.4.103, 20.6.4.116, 20.6.4.124, 20.6.4.204, 20.6.4.206, 20.6.4.207, 20.6.4.213, 20.6.4.219, and 20.6.4.308 NMAC. The primary contact bacterial limits set forth in 20.6.4.900(D) NMAC are assigned to these stream segments. [20.6.4.900(D) NMAC; Tr. 532:20-533:12 (Nylander)]

SJWC Urges the WQCC to Form a Working Group to Investigate a Means of Avoiding the Unwarranted Adverse Impacts of EPA's Recently Adopted Rebuttable Presumption that All Waters, Including Ephemeral Streams, Are Fishable/Swimmable Unless a UAA Proves Otherwise

A. Introduction.

At least two of SWQB's key proposals during this Triennial Review stem from EPA's recently adopted rebuttable presumption that all waters (including tens of thousands of miles of dry arroyos in New Mexico) must be considered to be fishable/swimmable, and thus assigned the

most protective designated uses, unless a UAA proves otherwise. [Tr. at 30:9-13 (Lemon)] For example, as discussed above in pages 21-40, SWQB seeks to upgrade the recreation designated use of nine stream segments from secondary contact to primary contact because no UAA has been performed to prove that the secondary contact use is appropriate. [SWQB Petition at 17-22 (SWQB Ex. 2); Pintado Direct at 77-89 to 82-89 (Ex. SWQB 13); Nylander Direct at 21-22 (Ex. SJWC-C)] Currently, EPA does not consider the secondary contact designated use to be a fishable/swimmable use, although it approved the original secondary contact designations for these stream segments. [Hogan Direct at 10-13, ¶ 2 (Ex. SWQB-1); Tr. at 30:19-21, 74:13-17, 107:3-13, 940:19-24 (Lemon), 469:7-9 (Nylander)] Upgrading the recreation designated use for these nine stream segments will require four NPDES-permitted water treatment plants to comply with primary contact water quality criteria, potentially requiring expensive technology upgrades. [Nylander Direct at 23 (Ex. SJWC-C); Tr. at 156:17-157:2, 1002:8-1005:1 (Dail, Lemon)] Further, should it be determined in the future that the appropriate designated use on any one of these segments really is secondary contact, it will be necessary to conduct a UAA in order to downgrade to secondary contact. Such UAA's have significant time and expense costs. [Nylander Direct at 18-19, 23, 25 (Ex. SJWC-C); Nylander Rebuttal at 21-23 (Ex. SJWC-D); Pintado Direct at 39-89 to 47-89 (Ex. SWQB-13); Hogan Rebuttal at 7-22 (Ex. SWQB-Rebuttal-1); Tr. at 458:13-461:12, 511:21-25, 561:19-567:10, 585:9-586:3 (Nylander)]

In addition, as discussed above in pages 18-20, SWQB seeks to classify 29 stream segments as ephemeral based on UAAs performed since the last Triennial Review. [SWQB Petition at 12-15 (Ex. SWQB-2)] If approved, these waters would be the first New Mexico waters to be expressly designated as ephemeral in 20.6.4.97(C) NMAC. [Nylander Direct at 14 (Ex. SJWC-C); Nylander Rebuttal at 12-13 (Ex. SJWC-D); Tr. at 454:14-455:6 (Nylander)]

Once designated as an ephemeral water, a surface water is assigned the designated uses of livestock watering, wildlife habitat, limited aquatic life, and secondary contact recreation. Undesignated ephemeral waters that have not been the subject of a UAA are intermittent waters under 20.6.4.98 NMAC and are assigned the more stringent designated uses of primary contact and marginal warmwater aquatic life. [Kougioulis Direct at 7-14 (Ex. SWQB-39); Nylander Direct at 14 (Ex. SJWC-C); Tr. at 454:14-455:2, 455:15-456:7 (Nylander)]

The UAAs required to support these and potential future ephemeral stream designations come with significant monetary and time costs for the State. [Tr. at 458:13-460:11, 561:19-567:10, 585:9-586:3 (Nylander)] For example, it is estimated that the 2012 UAA performed by SWQB and its contractor, Daniel B. Stephens & Associates, for 20 of SWQB's proposed ephemeral stream designations cost in excess of $100,000 given the considerable SWQB staff time expended and the payment of $25,000 in contractor expenses. [Nylander Direct at 18-19 (Ex. SJWC-C); Nylander Rebuttal at 22-23 (Ex. SJWC-D); Hogan Rebuttal at 7-22 (Ex. SWQB-Rebuttal-1); Tr. at 460:12-24 (Nylander)] Ms. Pintado's written testimony describes the significant transactional costs for both Chino Mines and SWQB over a period of four years associated with the UAA supporting the designation of five Chino Mine stream segments as ephemeral, including preparation and review of a work plan, conducting the Hydrology Protocol, preparing draft reports, field reconnaissance, responding to public comments, and responding to EPA concerns. [Pintado Direct at 39-89 to 47-89 (Ex. SWQB-13); Nylander Rebuttal at 21-22 (Ex. SJWC-D)] The monetary cost of the UAA is estimated to be between $150,000 and $200,000. [Nylander Rebuttal at 21-22 (Ex. SJWC-D); Tr. at 460:25-461:12 (Nylander)]

The cost of conducting all of the UAAs that will be required for future ephemeral stream designations on thousands of miles of arroyos statewide is immeasurable. As stated by Mr.

Nylander, it is "absurd" to incur such costs "solely to demonstrate that ephemeral waters cannot sustain primary contact and marginal warm water aquatic life uses and criteria." [Nylander Rebuttal at 23 (Ex. SJWC-D)] Those costs will extend to federal and state land resource agencies when they undertake land management activities, and also to private landowners. [Tr. at 524:24-525:5, 536:6-539:5 (Nylander)]

B. History of EPA's Rebuttable Presumption and Its Application in New Mexico.

Section 101(a) of the Clean Water Act adopted by the United States Congress in 1972 (Pub. L. 92-500) states:

> The *objective* of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this *objective* it is hereby declared that, consistent with the provisions of this chapter—
>
> (1) it is the national *goal* that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) it is the national *goal* that *wherever attainable*, an *interim goal* of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
>
> (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited . . . .

33 U.S.C. § 1251(a). [Ex. SJWC-D-2 (emphasis added)] Over the last 43 years, these objectives, goals and policy statements have been interpreted and re-interpreted by EPA, and the scope of federal jurisdiction under the Clean Water Act gradually has expanded. [Nylander Rebuttal at 15-16 (Ex. SJWC-D)] Over the years, the WQCC has adopted various designated uses to address the Section 101(a)(2) fishable/swimmable interim goals, including subdividing recreational use into primary contact and secondary contact and changing fishery subcategories into several types of aquatic life uses. "EPA approved these many versions" of the New Mexico

surface water quality standards and "historically approved the designated uses of secondary contact and limited aquatic life as meeting the requirements of the [Clean Water Act]." [Nylander Rebuttal at 16-17 (Ex. SJWC-D); Tr. at 469:7-9 (Nylander)]

Nevertheless, according to SWQB, "EPA [now] considers Secondary Contact and Limited Aquatic Life as not meeting the uses specified in Section 101(a)(2) of the [Clean Water Act]" because Section 101(a)(2), "[t]ogether with federal regulation under 40 C.F.R. § 131.10(j) . . . effectively establish the '*rebuttable presumption*' that designated CWA Section 101(a)(2) uses are attainable unless demonstrated otherwise [by a UAA]." [Hogan Direct at 10-13 (Ex. SWQB-1); Pintado Direct at 39-89 (Ex. SWQB-13) (emphasis added); Hogan Rebuttal at 3-22, 6-22 (Ex. SWQB-Rebuttal-1); Tr. at 30:9-31:25, 107:3-13, 252:6-16 (Lemon), 454:14-455:2 (Nylander)] SWQB's assumption is based on a November 16, 2006, *draft* Record of Decision from EPA Region 6 following the 2005 Triennial Review stating that EPA regulations "establish[] a rebuttable presumption that fishable/swimmable uses are attainable and therefore should apply to a water body unless it can be demonstrated that such uses are not attainable . . . [through] a UAA . . . ." [Hogan Rebuttal at 4-22 & n.1, 5-22, 6-22, 11-22 (Ex. SWQB-Rebuttal-1); Tr. at 108:12-110:16 (Lemon)] SWQB did not challenge EPA's new rebuttable presumption position; instead, SWQB developed the Hydrology Protocol for conducting UAAs. [Tr. at 111:4-112:24 (Lemon), 461:13-462:15 (Nylander)]

During the 2009 Triennial Review, based on EPA's rebuttable presumption position set out in the 2006 draft Record of Decision, SWQB proposed (and the WQCC ultimately adopted), amendments to the State's surface water quality standards that (1) upgraded the recreation designated use for all unclassified non-perennial waters in New Mexico from secondary contact to primary contact and (2) upgraded the aquatic life designated use for those waters from limited

aquatic life to marginal warmwater aquatic life. [Nylander Direct at 14-15 (Ex. SJWC-C); Nylander Rebuttal at 13, 18 (Ex. SJWC-D); Hogan Rebuttal at 4-22 to 6-22 & n.1 (Ex. SWQB-Rebuttal-1)] SWQB proposed adoption of the rebuttable presumption even though it agrees New Mexico's ephemeral streams are not fishable. [Tr. at 959:22-961:1 (Lemon)] In fact, SWQB has concerns about purported federal authority over ephemeral waters under the Clean Water Act, and during the 2005 Triennial Review, SWQB itself "argued that the limited aquatic life and secondary contact uses proposed for ephemeral waters under Section 20.6.4.97 NMAC were consistent with § 101(a)(2) uses." [Hogan Rebuttal at 4-22, 8-22 (Ex. SWQB-Rebuttal-1); Tr. at 110:23-111:14 (Lemon)]

Put simply, during the 2009 Triennial Review, the WQCC redefined ephemeral and intermittent waters based on the rebuttable presumption that all non-perennial unclassified waters of the state are intermittent, thereby requiring a UAA to designate a water as ephemeral under 20.6.4.97(C) NMAC. [Nylander Direct at 15 (Ex. SJWC-C); Nylander Rebuttal at 13-14, 18-19 (Ex. SJWC-D); Kougioulis Direct at 3-14, 7-14 (Ex. SWQB-39); Tr. at 455:15-457:10 (Nylander)] In particular, the WQCC adopted 20.6.4.11(H) NMAC:

> **H. Unclassified Waters of the State**: Unclassified waters of the state are those surface waters of the state not identified in 20.6.4.101 through 20.6.4.899 NMAC. An unclassified surface water of the state is *presumed* to support the uses specified in Section 101(a)(2) of the federal Clean Water Act. As such, it is subject to 20.6.4.98 NMAC if non-perennial or subject to 20.6.4.99 NMAC if perennial. The commission may include an ephemeral unclassified surface water of the state under 20.6.4.97 NMAC *only if a use attainability analysis demonstrates* pursuant to 20.6.4.15 NMAC that *attainment of CWA §101(a)(2) uses is not feasible.*

[Kougioulis Direct at 3-14 (Ex. SWQB-39) (emphasis added)] Clearly, this regulation adopts EPA's rebuttable presumption, even though Section 101(a) of the Clean Water Act contains no hint of a rebuttable presumption and prior to 2009 "the designated uses of secondary contact

recreation and limited aquatic life for ephemeral waters complied with the § 101(a)(2) interim goals, as documented by EPA approval." [Nylander Rebuttal at 20-21 (Ex. SJWC-D); Ex. SJWC-D-2]

C. Pushing Back Against EPA Over-Reach.

SJWC has not petitioned to remove the rebuttable presumption for unclassified waters adopted by the WQCC in 2009 because it is unlikely that the designated uses for all undesignated ephemeral waters in New Mexico can be downgraded without UAAs given EPA's current policy. [Hogan Rebuttal at 6-22 (Ex. SWQB-Rebuttal-1)] However, there must be a reasonable solution to this problem, and SJWC encourages the WQCC, in conjunction with SWQB, to approach EPA and New Mexico's congressional delegation and identify a method to allow unclassified waters to be considered ephemeral unless proved to be intermittent or perennial. EPA may be receptive to such an approach given the current uncertainty of federal jurisdiction over ephemeral waters.

On April 21, 2014, EPA and the Army Corps of Engineers published a proposed rule defining "Waters of the United States" under the Clean Water Act and expanding federal jurisdiction to include ephemeral waters as "tributaries" of navigable or interstate waters. *See* Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22188 (Apr. 21, 2014) (the "Proposed WOTUS Rule"). In response to the Proposed WOTUS Rule, numerous states, industries, municipal entities, property owners and trade associations submitted comments challenging EPA's jurisdiction over ephemeral waters. One example of such comments is the November 14, 2014, submission of the Federal Water Quality Coalition ("FWQC"). [Ex. SJWC-C-4] "The FWQC is a group of industrial companies, municipal entities, property owners, and trade associations that are directly affected, or which

have members that are directly affected, by regulatory and policy decisions made pursuant to the [Clean Water Act]," including the American Chemistry Council, American Iron and Steel Institute, American Petroleum Institute, Association of Idaho Cities, General Electric Company, Mid America Crop Life Association, and Western Coalition of Arid States. [Nylander Direct at 16 (Ex. SJWC-C)] The FWQC's comments "make a strong case for excluding ephemeral waters from federal jurisdiction under the [Clean Water Act]." [Nylander Direct at 17 (Ex. SJWC-C); Ex. SJWC-C-4 at 2] For example, the FWQC points out that neither Kansas nor Missouri nor Tennessee water quality standards apply to ephemeral waters. [Nylander Direct at 17 (Ex. SJWC-C); Ex. SJWC-C-4 at 7-8]

EPA and the Army Corps of Engineers promulgated the final WOTUS Rule on June 29, 2015. [80 Fed. Reg. 37054] Under the final rule, ephemeral streams are jurisdictional waters of the United States. Since that time, several states, businesses, municipalities and other entities, including the New Mexico Environment Department and the New Mexico State Engineer, have filed lawsuits challenging the WOTUS Rule and its asserted scope of federal jurisdiction. In fact, New Mexico is one of about 31 states challenging the new WOTUS rule in court. *See North Dakota v. EPA*, 2015 WL 5060744 (D. N.D. 2015); *In re EPA*, 803 F.3d 804 (6th Cir. 2015). [Tr. at 464:13-465:23 (Nylander), 959:16-21 (Lemon)] The Sixth Circuit has entered a nationwide stay of the WOTUS Rule, holding that the EPA/Army Corps of Engineers' "rulemaking process by which the [jurisdictional] distance limitations were adopted is facially suspect." *In re EPA*, 803 F.3d at 807. The North Dakota federal district court entered a preliminary injunction against implementation of the WOTUS rule in 13 states, including New Mexico, on the ground that New Mexico and other states are "likely to succeed on the merits" of their claim that the rule exceeds the congressional grant of jurisdiction under the Clean Water

Act by authorizing federal regulation of "tributaries" having no effect on the chemical, physical or biological integrity of any navigable-in-fact water. *North Dakota*, 2015 WL 5060744 at *4-*5. As EPA is learning, it has gone too far with its regulations over ephemeral waters, and its rebuttable presumption similarly imposes unreasonable standards on New Mexico's ephemeral streams.

D. Call to Action.

Given the obvious over-reach of EPA's recently adopted rebuttable presumption and its associated costs, SJWC urges the WQCC to form a working group to approach EPA and New Mexico's congressional delegation and to investigate a method to better protect New Mexico's waters without automatically imposing the most stringent designated uses on dry arroyos and other ephemeral waters. [Nylander Direct at 15-16 (Ex. SJWC-C); Tr. at 462:16-463:22, 466:11-467:3, 512:4-14 (Nylander)] Neither the State and its agencies, nor New Mexico businesses and private citizens, should be burdened with the performance of UAAs to prove an ephemeral stream is not fishable/swimmable. Even SWQB agrees that the State's waters should not be over-protected. [Hogan Rebuttal at 6-22 (Ex. SWQB-Rebuttal-1)]

Upon inquiry by counsel for SWQB at the Triennial Review hearing, Mr. Nylander stated that he is willing to serve on such a working group. [Tr. at 514:3-9 (Nylander)] SJWC anticipates that many stakeholders will support and participate in the initiative it has proposed, and it requests that the WQCC implement SJWC's recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of San Juan Water Commission's Closing Legal Arguments and Proposed Statement of Reasons was served on the following persons by regular mail and e-mail this 15th day of January, 2016:

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