

**BEFORE THE WATER QUALITY CONTROL COMMISSION
FOR THE STATE OF NEW MEXICO**



In the Matter of:

**PROPOSED
AMENDMENTS TO GROUND
AND SURFACE WATER
PROTECTION REGULATIONS,
20.6.2 NMAC**

No. WQCC 17-03(R)

**NEW MEXICO MINING ASSOCIATION'S WRITTEN
CLOSING ARGUMENT AND PROPOSED STATEMENT
OF REASONS FOR PROPOSED AMENDMENTS TO 20.6.2 NMAC**

The New Mexico Mining Association ("NMMA") hereby submits its Written Closing Argument and proposed partial Statement of Reasons for the Commission's consideration as it deliberates on this proceeding.

NMMA's WRITTEN CLOSING ARGUMENT

I. INTRODUCTION

NMMA greatly appreciates the time and consideration of the Commission and its Hearing Officer with regard to the proposed amendments to 20.6.2 NMAC. NMMA also appreciates the time and effort of the Department and the other parties in preparing and presenting evidence and arguments regarding the amendments, as well as resolving many issues over the course of this proceeding.

Although NMMA is generally supportive of the Department's proposed amendments to 20.6.2 NMAC, NMMA raised several concerns. NMMA's chief concerns relate to consistency in the consideration and adoption of ground water quality standards under 20.6.2.3103 NMAC

and certain changes to the abatement rules, particularly the proposed additional of a new abatement standard for “subsurface water contaminants” and the proposed repeal of the longstanding provision that allows the Department to grant technical infeasibility determinations under limited circumstances without the need for a variance hearing before the Commission.

NMMA also provided written testimony and cross examination relating to proposed amendments offered by other parties, including Amigos Bravos and the Gila Resources Information Project (AB/GRIP), William Olson, and Laun-Dry. Some of Mr. Olson’s proposed amendments to which NMMA objected were incorporated into the Department’s latest proposed amendments in Department Exhibit 36, and those mostly resolve the NMMA’s concerns with Mr. Olson’s original proposed changes. NMMA continues to object to the changes proposed by AB/GRIP and the change to 20.6.2.4103.D offered by Laun-Dry regarding removal of the “existing conditions” language.

II. NMMA’s PARTICIPATION IN THE HEARING PROCESS

NMMA has appeared in this proceeding through undersigned legal counsel and participated in this proceeding as follows (references to the pleading numbers on the online list posted on the Commission’s website):

1. Filed a Statement of Position and Proposed Amendments (Pleading 30)
2. Filed a Notice of Intent to Present Direct Testimony, including the written direct testimony of Michael Neumann and exhibits (Pleading 54).
3. Filed a Response to Amigos Bravos’ and Gila Resources Information Project’s (“AB/GRIP”) Motion to Dismiss in Part (Pleading 69).
4. Filed a Notice of Intent to Present Written Rebuttal Testimony, including the written rebuttal testimonies of Michael Neuman, Lynn Lande and Dr. Dan Stephens (Pleading 82).
5. Participated in all pre-hearing conferences held by the Hearing Officer.

6. Appeared through counsel at the public hearing on November 14-18, 2017, presented Mr. Neumann and Dr. Stephens to adopt and summarize their written testimonies, to answer questions on cross-examination, and to answer questions from the Commission, and conducted cross-examination of witnesses offered by the other parties on issues of importance to the NMMA. Mr. Neuman's and Dr. Stephen's written direct and rebuttal testimonies and exhibits, NMMA Exhibits A-E and G-I, were admitted into evidence. TR Vol. 2, p. 331, l. 17-18 and TR Vol. 4, p. 973, l.18. Dr. Stephens presented considerable testimony at the hearing beginning on TR Vol. 4, p. 973, l. 22 through p. 985, l. 8. Ms. Lande's written testimony was not admitted, as it related to the withdrawn topic of discharge permit amendments. References to pertinent cross-examination are referenced below.

III. NMMA's PROPOSED AMENDMENTS TO 20.6.2 IN DIRECT TESTIMONY

Through its direct written testimony, NMMA presented the following positions:

A. Variances—20.6.2.1210.E

NMMA proposed changes to the language offered by the Department on the five-year review of variances in new subsection 20.6.2.1210.E. In particular, as explained in Mr. Neumann's direct testimony, NMMA Exhibit A, pp. 4-6, NMMA sought to clarify that only changes in circumstances and newly-discovered facts that are "material to the variance" are to be considered in the review. The Department addressed this issue in Mr. Vollbrecht's written rebuttal testimony, Department Exhibit 30, p. 30, ll. 3-12. During the cross-examination of the Department's witness Mr. Vollbrecht, the Department agreed to add language to the Department's final proposed amendment for section 20.6.2.1210.E, as presented in Department Exhibit 36, the words "which are material to the variance" in one location and "which are material to the variance and its conditions" in another location. TR Vol. 1, p. 105, ll. 22-25 and p. 106, l. 13 to p. 107, l. 9. A revised version of this subsection, consistent with the Transcript, is presented in the proposed Statement of Reasons below.

B. Amendments to Ground Water Quality Standards for Chromium and Fluoride—20.6.2.3103.A

Through the direct written testimony of Mr. Neumann and exhibits, NMMA Exhibit A, pp. 6-7 and Exhibits C and D, NMMA proposed that the numerical ground water quality standards in 20.6.2.3103.A for chromium and fluoride be amended as follows:

- a. Chromium: A standard of 0.1 mg/l
- b. Fluoride: A standard of 4.0 mg/l

NMMA also provided rebuttal testimony relating to this proposal in NMMA Exhibit E, pp. 6-7. The following testimony is based on that testimony.

A central issue that the Commission should consider with regard to changes to these standards is having a consistent approach and policy to the adoption of ground water quality standards. The Department's Petition and testimony supports the approach for the Commission to adopt human health-based standards that are consistent with the current Maximum Contaminant Levels ("MCLs") adopted for public drinking water systems under the Safe Drinking Water Act. The Department, however, proposed to change certain standards to be consistent with current MCLs in the case where new MCLs have been adopted, or where standards have been changed to be more stringent than the current standards in 20.6.2.3103.A NMAC, but declined to propose changes for chromium and fluoride when the MCL's for those constituents are less stringent than the current standards in 20.6.2.3103.A NMAC.

Under the Safe Drinking Water Act, the U.S. Environmental Protection Agency ("EPA") adopts two criterion for certain water contaminants: Maximum Contaminant Level Goals ("MCLGs"), which are set at a level fully protective of public health, and MCLs, which also consider the feasibility of treatment by public water systems. For chromium, EPA has adopted an MCLG and an MCL at the same level, 0.1 mg/l. NMMA presented, in its Exhibit C, a copy of the

relevant parts of the Federal Register notice explaining EPA's basis for adoption of the MCLG and MCL for chromium. EPA also has adopted an MCLG and an MCL for fluoride at the same level: 4.0 mg/l, as shown in NMMA Exhibit D, a copy of the Federal Register notice adopting the MCLG and MCL for fluoride. These standards are found in the current version of 40 C.F.R. Part 141, which has been adopted in its entirety by the Environmental Improvement Board ("EIB") as the New Mexico drinking water standards. 20.7.10.100.A NMAC. Consequently, the MCL's for chromium at 0.1 mg/l and fluoride at 4.0 mg/l are the concentrations that must be met in New Mexico's public water supplies.

The information in NMMA Exhibits C and D illustrate the complex data, information, and analysis that EPA considers when it adopts MCLs. The process to set MCLs is very expensive, exhaustive, and resource intensive. A consistent Commission policy to set health-based standards in 20.6.2.3103.A consistent with MCLs leaves the Commission in the desirable spot of have a sound technical basis for standards without the Department or the Commission having to go through the type of information gathering and analysis that EPA goes through to set MCLs. Departures from such a policy leaves the door open for the Commission, as well as the Department, to have to go through a similar resource-intensive process to set or amend future standards. Indeed, that is exactly why the Department chose to rely upon MCLs for the other standards changes it proposes in this proceeding, rather than presenting detailed expert testimony and analysis on the potential health-effects of each constituent.

Picking and choosing which MCL's to adopt as ground water quality standards results in an unbalanced and inconsistent approach. The risks of such an approach are evidenced by the Commission's hearing to consider amending standard for uranium under 20.6.2.3103.A NMAC. In that proceeding, the Commission relied on the adoption of the MCL for uranium rather than

relying on detailed evidence on alternative standards presented by both the NMMA, which advocated for retaining the old standard, and by other parties who advocated for a standard more stringent than the MCL. See Mr. McQuillan's testimony at TR Vol. 2, pp. 369-371. A decision by the Commission to depart from a general practice of adopting standards consistent with MCLs will open the door to consideration of many other potential sources of information and data with regarding to future health-based ground water quality standards.

The Department provided rebuttal testimony in response to NMMA's proposal to change the standards for chromium and fluoride through the written rebuttal testimony of Mr. McQuillan. NMMA Exhibit 28, pp. 7-8. With regard to chromium, Mr. McQuillan referenced possible future changes to the MCLs for chromium under consideration by EPA. TR Vol. 2, pp. 371-372 and 401-402. The Department's testimony, however, provides few details about those potential changes, including when they might be formally proposed. The Safe Drinking Water Act requires an ongoing evaluation of all MCLs, and if the Department's rationale were accepted as a reason for departing from the MCL for chromium, that rationale would also apply to all of the other constituents. A far better policy would be to consistently stick with the MCLs, as discussed in Mr. Neumann's direct and rebuttal testimony.

For fluoride, Mr. McQuillan's testimony included a discussion of a dental condition resulting in discoloration of teeth. EPA, as shown in NMMA Exhibit D, considered the same condition as part of its consideration of the fluoride MCL, and concluded that this condition did not warrant the setting of a standard based on protection of human health. Instead, EPA adopted a "secondary," non-enforceable, non-health-based standard related to this condition. In this regard, the Department argues that the Commission should retain the current 1.6 mg/l standard for fluoride as the health-based standard, even though that is contrary to EPA's MCL, because it would be

confusing to have both a health-based standard in 20.6.2.3103.A NMAC and a non-health based standard for fluoride in 20.6.2.3103.B NMAC. Department Exhibit 5; TR Vol. 2 pp. 404-05. That is an arbitrary approach, not only because it would be arbitrary for the Commission to set a human health-based standard at a level and for a condition for when EPA has determined that a health-based standard is unwarranted, and because the current standard in 20.6.2.3103.A NMAC is not even consistent with EPA's secondary standard, but such a choice would be poor policy for the reasons discussed above. If the Department is concerned about a condition that is not a human health-based condition, and believes that a standard is appropriate, the Department should propose non-health based standard in 20.6.2.3103.B NMAC. As discussed with Mr. McQuillan during cross-examination (TR Vol. 2 pp. 405-06), the Commission's rules draw distinctions between human health-based standards and non-human-health-based standards, so there is a good reason to have separate and different standards in 20.6.2.3103.A and 20.6.2.3103.B NMAC for the same constituent. Neither the Department nor any other party, however, proposed a fluoride standard under 20.6.2.3103.B NMAC, so that is not up for consideration by the Commission.

For these reasons, NMMA urges the Commission to adopt the changes to the human health-based standards for chromium and fluoride consistent with the current MCLs, as proposed by NMMA. That will not only be technically and legally sound and avoid arbitrary standards, but also will provide a better policy basis for consistent actions by the Commission in the future. NMMA's proposed rule changes and reasons are set forth below.

C. Amendment to the Note in Subsection 20.6.2.3103.A Regarding Effective Date

The current regulations include a note at the end of section 20.6.2.3103 NMAC which addresses the effective date of new standards previously adopted by the Commission. In particular, NMMA recommended the use of the defined phrase "hazard to public health" rather than

“reasonably foreseeable future use.” NMMA Exhibit A, p. The presented testimony in agreement with the change in Mr. McQuillan’s written rebuttal testimony, Department Exhibit at pp. 8-9. NMMA presents proposed language for the Note, consistent with the Department’s agreement, in its proposed Statement of Reasons below.

IV. NMMA’s REBUTTAL TESTIMONY

Through its written rebuttal testimony, NMMA offered its positions and testimony on the following issues:

A. Variances—20.6.2.1210 NMAC

NMMA supported the Department’s proposed amendments to the variance provision, 20.6.2.1210 NMAC, with some clarifying changes to the Department’s proposed Subsection E, as discussed above. NMMA opposed all of the amendments to 20.6.2.1210 offered by Amigos Bravos and the Gila Resources Information Project (referred to as AB/GRIP) in their Statement of Position filed on July 27, 2017 and also opposed the amendment offered by Mr. Olson and addressed in his Direct Written Testimony. NMMA Exhibit E, pp. 3-5. NMMA also previously briefed the legal arguments in response to AB/GRIP’s arguments in Pleading 70, and incorporates those arguments herein by this reference.

B. Ground Water Quality Standards and Toxic Pollutants—20.6.2.3103 NMAC

NMMA provided rebuttal testimony addressing the Department’s reasons for not proposing changes to those standards to conform to MCLs. NMMA Exhibit E, pp. 5-6. NMMA did not support the Municipal League proposal to rely upon the section 20.6.2.4103.C NMAC instead of the Note because this would limit the “grandfathering” effect of the Note to abatement standards only, and the Note as it currently exists and as proposed by the Department may also

apply to discharge permits. NMMA opposed the changes offered by AB/GRIP, and notes that AB/GRIP offered no direct testimony to support those amendments.

C. Fees

Neither the proposals on which NMMA commented nor NMMA's comments should be considered, as the changes relate to the withdrawn topic of "discharge permit amendments."

**D. Abatement—"Subsurface Water Contaminants" and Vapor Intrusion—
20.6.2.4103.A/B**

NMMA opposed the Department's proposal for a new abatement standard for subsurface water contaminants as 20.6.2.4103.B and the related change to 20.6.2.4105.B and provided technical testimony on that point through the written rebuttal and hearing testimony of Dr. Dan Stephens, NMMA Exhibit G and TR Vol. 4 pp. 973-985, and cross-examination of the Department's witnesses. TR Vol. 4 pp. 928-961. During this discussion, the Department indicated its desire to discuss alternative language for this proposal.

The Department's written testimony and hearing testimony emphasized that its most substantial concern relates to authority to require abatement to address vapor intrusion. NMMA is pleased to advise the Commission that the Department and NMMA reached agreement after the hearing on alternative language, particularly a new paragraph to existing 20.6.2.4103.A, that will address the vapor intrusion issue. The proposed language agreed upon between NMMA and the Department is included below, and NMMA anticipates that it also will be included in the Department's post-hearing proposal. In any event, NMMA proposes that the Commission adopt the new paragraph to 20.6.2.4103.A relating to vapor intrusion, and not adopt the Department's proposed 20.6.2.4103.B concerning "subsurface water contaminants."

E. Abatement—"Existing Conditions" language, 20.6.2.4103.B(2)

NMMA opposed Laun-Dry's proposed amendments to the existing language of section 20.6.2.4103.B(2) NMAC, which is the same as the renumbered Subsection C under the Department's proposal. NMMA Exhibit E, pp. 9-10. Regarding the changes to 20.6.2.4103 NMAC proposed by Laun-Dry, the "existing condition" language has always been a part of the standards of 20.6.2.3103 NMAC and relates to the conditions that existed prior to a discharge. If a constituent level exceeds one or more of the numerical standards of 20.6.2.3103 when a discharge commences, the "existing condition" or contaminant level is treated as the standard, such that the discharge must not cause an increase in the contaminant level beyond the "existing condition." It follows that the discharger should not be responsible for abatement of contamination that does not exceed the "existing condition." NMMA was able to conduct limited cross-examination of Laun-Dry's witness Mr. Snyder on this point due to time constraints (TR Vol. 3 pp. 800-801), but he appeared to acknowledge that the example about which he testified did not reflect the NMMA's concern. NMMA requests that the Commission not adopt this change and proposes reasons as set forth below.

F. Abatement—Technical Infeasibility Determinations by the Department

NMMA opposed the Department's proposal to delete the current 20.6.2.4103.E NMAC providing for technical infeasibility determinations by the Department as well as the related change to 20.6.2.4109 NMAC. NMMA Exhibit E, pp. 8-9. NMMA witness noted that this provision has been a part of the Commission's rules for over 20 years since their adoption. The technical infeasibility determination on its face changes the applicable abatement standards. As Mr. Neumann testified, technical infeasibility determinations are a useful tool as a basis to conclude environmental cleanup projects under the abatement rules. When there is a statistically valid

showing that no further cleanup can be accomplished or only at exorbitant cost with minimal or insignificant improvement in water quality, this provision allows the Department to determine that further actions toward cleanup would be in vain and to suspend further abatement actions.

Mr. Neumann asked the Commission to consider that requiring a variance hearing on matters that currently can be handled through a technical infeasibility determination would consume additional resources of the Department, the Commission and responsible persons conducting abatement. As to public notice, the abatement plan itself is subject to public notice, comment, and the opportunity for a public hearing, as provided in 20.6.2.4108 NMAC, and questions regarding the effectiveness of the proposed abatement plan can be raised at that time.

The Department proposes to repeal this authority because it now believes that allowing the Department to grant a technical infeasibility determination without a hearing before the Commission is contrary to the Water Quality Act because such a determination is a “variance,” and a variance can be granted only by the Commission after a public hearing. NMED Exhibit 13, Kurt Vollbrecht’s direct written testimony, page 16. Dairies disagree that the existing technical infeasibility provision constitutes a variance. A “variance” is not defined in the Water Quality Act, and the Department has not yet presented any legal argument why it believes that a technical infeasibility determination as provided in 20.6.2.4103.E NMAC is a variance. In the 1994 public hearing regarding the original adoption of the abatement rule, the Department provided evidence in support of its position that technical infeasibility determinations are not “variances.” NMED has not provided new evidence to justify a change in position. In the 1994 hearing, Department witness Dennis McQuillan drew a distinction between a technical infeasibility determination and a variance. Mr. McQuillan stated about technical infeasibility that:

This has been a long-standing provision in our abatement agreements. It was developed and modified in the course of negotiation these agreement with the

responsible parties, and it has also been incorporated into the Underground Storage Tank Regulations. It is not a variance. It is approved by the Secretary. And there are a number of provisions in there. TR Vol. I, p. 113, ll. 15-22

Mr. McQuillan goes on to state “The variance provisions have always been out there for someone who was unable to demonstrate technical infeasibility, and the Commission has been briefed over the years on the abatement agreements containing technical infeasibility.” TR Vol. I, p. 114, ll. 7-

9. Mr. McQuillan further established the difference between a variance and a technical infeasibility by stating the different procedures for a variance and technical infeasibility.

Section 3-203.F is a technical infeasibility provision that is not a variance. It’s a long-standing procedure that the agency has given –has granted to responsible parties where they implement the abatement technology that’s been approved by the agency pursuant to their remediation proposal, and they get the contaminant concentration down within 200 percent of the standard, and the curve of concentration versus time is asymptomatic—that means it’s flattening out—and it’s—the projected reduction of concentrations over the remainder of a 20-year period would be less than 20 percent of the standard, and after they have a minimum of eight consecutive quarters, they can propose technical infeasibility under those conditions, and they would have to propose an alternate—not an alternate standards, but a –I can’t remember the actual term we use—but another standard that would be technically feasible.

Now, this is very different from the procedures set forth in 3-203.G, which is, in fact, the variance procedure where concentration does not have to be within 200 percent of the standard. The responsible person could come and petition the Commission under this provision for approval of an alternative abatement standard, where three demonstrations would have to be met that are specified in the regulations. A public hearing would result, and the new thing about this alternative abatement standard is that the responsible person has the option of utilizing a transport, fate and risk assessment in order to justify the Commission approval of these alternative standards.

TR Vol. 2, p. 208, l. 20 to p. 210, l. 2. Mr. McQuillan’s testimony highlights another major difference between a variance requiring a public hearing and a technical infeasibility determination. The Commission, in 20.6.2.4103.E NMAC, authorizes the Department to make a technical infeasibility determination only if specific and objective technical criteria are met. In particular, this provision may be used only if the abatement has achieved a contaminant level that

is no more than 200% of the standard. Also, the Department must determine, based on sufficient data and a specific statistical test, that further reductions in the concentration levels are not feasible. Thus, the Department's discretion is narrowly and objectively defined.

The Department also does not address in its testimony how repeal of 20.6.2.4103.E NMAC would affect prior technical infeasibility determinations made by the Department. It is possible that past determinations would no longer be valid, and the Commission would now have to reconsider each of those past determinations in variance hearings. Neither the Department nor any other party has presented testimony raising any concerns regarding the use of the technical infeasibility determination process in the past. Indeed, in the hearing regarding the original adoption of 20.6.2.4103.E NMAC, the Department described this as an established and successful process. Repeal of 20.6.2.4103.E would create undue and unwarranted uncertainty regarding the validity of past determinations and could result in the need for the Commission to hold variance hearings on numerous past and future technical infeasibility determinations, which is not a good use of the Commission's time or the parties' resources.

G. Abatement—AB/GRIP Criteria for Alternative Abatement Standards, 20.6.2.4103.F

NMMA opposed the AB/GRIP proposed changes to 20.6.2.4103.F NMAC (criteria for alternative abatements standards), and asks the Commission not to consider those changes due to the lack of any supporting testimony. NMMA Exhibit E.

H. Abatement—Financial Assurance—20.6.2.4104.C NMAC

NMMA also opposes the Department amendment of 20.6.2.4104.C NMAC to allow the Department to require financial assurance from responsible parties who do not and have not held a discharge permit. NMMA Exhibit E, pp. 10-11. The Department's testimony on this point, provided in Ms. Hunter's direct testimony, did not identify any statutory authority to require

financial assurance under those circumstances. NMMA's witness testified that requiring financial assurance from some responsible parties could result in a financial burden that they cannot meet. Also, the Commission has not adopted any specific rules regarding financial assurance, so the means to comply with such a requirement are unclear. Reasons not to adopt that proposal are set forth below.

I. Abatement—Other Changes Proposed by AB/GRIP and William Olson

NMMA rebutted Mr. Olson's proposal regarding changes to 20.6.2.4103 and .4108 relating to public notice. NMMA Exhibit E, pp. 10-11. NMMA understands that the Department incorporated some of Mr. Olson's suggested changes in its proposal, and NMMA does not object to the Department's changes as proposed in Department Exhibit 36 regarding those points. NMMA expects that the Department will provide reasons for those changes.

NMMA's PARTIAL PROPOSED STATEMENT OF REASONS

A. Variances

Section 20.6.2.1210.E

The Commission should adopt this subsection in the following form, incorporating the language presented in Department Exhibit 36, with the highlighted language reflecting additional language agreed to at TR Vol. 1, p. 105, ll. 22-25 and p. 106, l. 13 to p. 107, l. 9:

E. For a variance granted for a period in excess of five years, the petition shall provide to the department for review a variance compliance report at five year intervals to demonstrate that the conditions of the variance are being met, including notification of any changed circumstances or newly-discovered facts **which are material to the variance**. At such time as the department determines the report is administratively complete, the department shall post the report on its website, and mail or e-mail notice of its availability to those persons on a general and facility-specific list maintained by the department who have requested notice of discharge permit applications, and any person who participated in the variance process. If such conditions are not being met, or there is evidence indicating changed circumstances or newly-discovered facts or conditions **which are material to the variance or its conditions** that were unknown

at the time the variance was initially granted, any person, including the department, may request a hearing before the commission to revoke, modify, or otherwise reconsider the variance within 90 days of the issuance of notice of availability of the report.

NMMA offers the following reasons for the additional highlighted language: “NMMA offered and the Department agreed to language that limits the consideration of changed circumstances and newly-discovered facts to those material to the variance, as addressed in the written direct testimony of Mr. Neumann.”

B. Standards of 20.6.2.3103.A

The Commission should adopt amendments to 20.6.2.3103.A that include the changes to the health-based standards for chromium and fluoride

A. Human Health Standards-

(4)	Chromium (Cr).....	0.05 <u>0.01</u> mg/l
(6)	Fluoride (F).....	1.6 <u>4.0</u> mg/l

Reasons: “The Commission adopts the changes to the human health standards for chromium and fluoride as proposed by the New Mexico Mining Association so that the human health standards in 20.6.2.3103.A for those constituents are consistent with EPA Maximum Contaminant Levels established under the Safe Drinking Water Act for protection of human health.”

C. Note to 20.6.2.3103

The Commission should adopt the changes to the Note to 20.6.2.3103 regarding the effective date of changes to the standards of 20.6.2.3103 in the following form:

[Note: For purposes of application of the amended numeric standard to past and current water discharges)as of 9-26-04), the new standard will not become effective until June 1, 2007. For purposes of application of the amended numeric

standards for arsenic, cadmium, lead, combined radium-226 & radium 228, benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, methylene chloride, EDB, 1,1,2-trichloroethane and benzo-a-pyrene, to past and current water discharges (as of July 1, 2017), the new standards will not become effective until July 1, 2020. With regard to sites for which the secretary has approved an abatement completion report as of the effective date of this rule pursuant to 20.6.2.4112 NMAC, the amended numeric standards for arsenic, cadmium, lead, combined radium-226 & radium 228, benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, methylene chloride, EDB, 1,1,2-trichloroethane and benzo-a-pyrene shall not apply unless the secretary notifies the responsible person that the site is a source of these contaminants in ground water that pose a hazard to public health.]

Regarding the changes proposed by the NMMA, reasons can be expressed as follows: “The New Mexico Mining Association proposed, and the Department agreed, to language for the Note to 20.6.2.3103 that allows for the Department, in relation to an abatement completion report approved as of the effective date of the rule, to require compliance with the new and amended standards adopted under this rule if the secretary determines and notifies the responsible person that the contaminants pose a hazard to public health.”

D. Abatement of Vapor Intrusion

The Commission should adopt the following change to section 20.6.2.4103.A, and should not adopt the Department’s proposed new subsection B to 20.6.2.4103 as presented in the Department’s pre-hearing rule language, Department Exhibit B:

A. The vadose zone shall be abated as follows:

- (1) Water contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B and C below, through leaching, percolation or as the water table elevation fluctuates; and
- (2) Any constituent listed in 20.6.2.3103 NMAC or any toxic pollutant in the vadose zone shall be abated so that it is not capable of endangering human health due to inhalation of vapors that may accumulate in structures, utility infrastructure, or construction excavations.

Reasons: “The Department proposed a new abatement standard for “subsurface water contaminants” as a new subsection B of 20.6.2.4103 NMAC. The New Mexico Mining Association opposed this new standard for the reasons given in the written rebuttal testimony and

hearing testimony of Dr. Dan Stephens. During the hearing, the Department emphasized the need for authority to require abatement of water contaminants to address the accumulation of vapors that may be capable of endangering human health. Following the hearing, the Department and the Mining Association reached agreement that the Department would withdraw its proposed standard for abatement of “subsurface water contaminants” and instead propose a new paragraph (2) to 20.6.2.4103.A to address vapor intrusion. The Commission adopts the change to 20.6.2.4103.A to add a new paragraph (2) as proposed by the Department and the Mining Association.”

E. Retaining “Existing Conditions” Language in Abatement Standards

The Department should not adopt Laun-Dry’s proposal to amend section 20.6.2.4103.B NMAC so that the “existing condition” language present in 20.6.2.3103 NMAC should not be considered as an abatement standard. The proposed reasons are: “The Commission declines to adopt Laun-Dry’s proposal to amend section 20.6.2.4103.B regarding the “existing condition” as referenced in 20.6.2.3103 NMAC for the reasons stated in Mr. Neumann’s written rebuttal testimony on behalf of the New Mexico Mining Association.”

F. Retaining Technical Infeasibility Determinations by the Department

NMMA proposes the following reasons for the Commission not to adopt the Department’s proposed amendment to strike and repeal 20.6.2.4103.E NMAC: “The Commission does not adopt the Department’s proposal to repeal 20.6.2.4103.E NMAC regarding technical infeasibility demonstrations made by the Department. Sufficient reasons have not been given to overturn the Commission’s determination, when it adopted the technical infeasibility determination provision, that such determinations are not “variances” as that term is used in the Water Quality Act. Technical infeasibility determinations made by the Department under

20.6.2.4103.E are limited by specific objective criteria, so the Department's discretion is narrow. Adequate public notice and opportunity for participation regarding technical infeasibility determinations can be provided under 20.6.2.4108 NMAC. Also the Department has not addressed how repeal of this provision would affect previous technical infeasibility determinations granted by the Department, and repeal could result in undue uncertainty regarding their effect and the potential need for the Commission to hear many additional variance cases on both past and future technical infeasibility determinations."

G. Abatement Financial Assurance

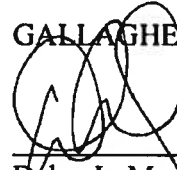
The Commission should not adopt the Department's proposed amendment of 20.6.2.4104.C to require financial assurance for abatement by parties who do not hold discharge permits. The reasons, as expressed in Mr. Neumann's rebuttal testimony, are the lack of statutory authority to impose financial assurance for abatement, the lack of any rules regarding financial assurance requirements, and the undue burdens such a requirement would impose.

CONCLUSION

For the reasons articulated herein, NMMA respectfully request that the Commission order changes to 20.6.2 NMAC keeping with NMMA's comments and proposed changes, including those proposed by the Department and supported by NMMA with additional language changes on these issues.

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.



Dalva L. Moellenberg, Esq.

Katelyn Hart, Esq.

1239 Paseo de Peralta

Santa Fe, NM 87501

(505) 982-9523

(505) 983-8160

DLM@gknet.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response to Motion to Stay all Filing Deadlines and hearings was served on February 16, 2018, via electronic mail to the following:

Ms. Pam Castañeda,
Administrator
Water Quality Control
Commission
Room N-2168, Runnels
Building
1190 St. Francis Dr.
Santa Fe, New Mexico 87505
Pam.castaneda@state.nm.us

Pete Domenici
Lorraine Hollingsworth
Domenici Law Firm, P.C.
320 Gold Ave. SW, Suite 1000
Albuquerque, NM 87102
pdomenici@domenicilaw.com
lhollingsworth@domenicilaw.com

William C. Olson
14 Cosmic Way
Lamy, NM 87540
billjeanie.olson@gmail.com

New Mexico Environment
Department
Office of General Counsel
John Verheul
Lara Katz
P.O. Box 5469
Santa Fe, New Mexico 87502
John.verhaul@state.nm.us
Lara.katz@state.nm.us

Louis W. Rose
Kari Olsen
P.O. Box 2307
Santa Fe, NM 87504
lrise@montand.com
kolson@montand.com

John Grubestic
Office of the Attorney General
Post Office Drawer 1508
Santa Fe, NM 87504-1508
jgrubestic@nmag.gov

New Mexico Environmental
Law Center
Jaimie Park
Douglas Meiklejohn
Johnathan Block
Eric Jantz
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
jpark@nmelc.org
dmeiklejohn@nmelc.org

Michael L. Casillo
AFLOA/JACE
1500 West Perimeter Rd. Ste.
1500
Joint Base Andrews, MD 20762
michael.l.casillo2.civ@mail.mil

Michael Bowen
Executive Director
1470 St. Francis Drive
Santa Fe, NM 87505
nmma@comcast.net

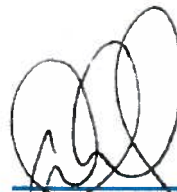
Rachel Conn
Projects Director
Amigos Bravos
P.O. Box 238
Taos, NM 87571
rconn@amigosbravos.org

William Brancard
Cheryl Bada
Energy, Minerals & Natural
Resources Department
1220 South St. Francis Drive
Santa Fe, NM 87505
bill.brancard@state.nm.us
cheryl.bada@state.nm.us

Russell Church, President
NMML EQA Subsection
NM Municipal League
P.O. Box 846
Santa Fe, NM 87504
rchurch@redriver.org

Stuart R. Butzier
Christina C. Sheehan
American Magnesium, LLC
Rio Grande Resources
Corporation
New Mexico Copper
Corporation
P.O. Box 2168
Albuquerque, NM 87103-2168
Stuart.butzier@modrall.com
Christina.sheehan@modrall.com

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

A handwritten signature in black ink, appearing to be 'Dalva L. Moellenberg', written over a horizontal blue line.

Dalva L. Moellenberg, Esq.