

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



**IN THE MATTER OF PROPOSED)
AMENDMENTS TO GROUND)
AND SURFACE WATER)
PROTECTION REGULATIONS,)
20.6.2 NMAC)**

No. WQCC 17-03(R)

NOTICE OF ERRATA AND CORRECTED PROPOSED CHANGES

Amigos Bravos and Gila Resources Information Project (“GRIP”) hereby submit this Notice of Errata to our Proposed Changes to the New Mexico Environment Department’s (“NMED”) Proposed Amendments to 20.6.2 NMAC and a corrected Statement of Position on NMED’s Petition to Amend 20.6.2 NMAC With Statement of Reasons and Proposed Changes, attached as Exhibit A.

On pages 42-43 of our Statement of Position on NMED’s Petition to Amend 20.6.2 NMAC With Statement of Reasons and Proposed Changes, we erroneously referenced the NMED secretary. We have replaced “secretary” with “commission”. We also deleted our proposed subsection H and incorporated that language into subsection B on page 42.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Errata And Corrected Proposed Changes was served on August 8, 2017 via electronic mail to the following:

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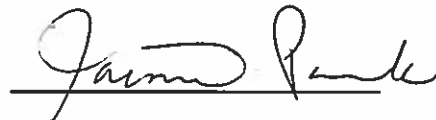
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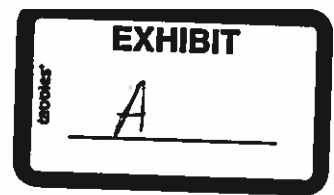
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**STATE OF NEW MEXICO
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**IN THE MATTER OF PROPOSED)
AMENDMENTS TO GROUND)
AND SURFACE WATER)
PROTECTION REGULATIONS,)
20.6.2 NMAC)**

No. WQCC 17-03(R)

**STATEMENT OF POSITION ON THE NEW MEXICO ENVIRONMENT
DEPARTMENT'S PETITION TO AMEND THE GROUND AND SURFACE
WATER PROTECTION REGULATIONS (20.6.2 NMAC) WITH
STATEMENT OF REASONS AND CORRECTED PROPOSED CHANGES**

Pursuant to 20.1.6.1000.B NMAC and the Revised Procedural Order issued on June 2, 2017, Amigos Bravos and the Gila Resources Information Project ("GRIP"), by and through undersigned counsel, hereby submit the following statement of position on the New Mexico Environment Department's Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC), along with corrected proposed amendments and a statement of reasons for the New Mexico Water Quality Control Commission's ("WQCC") consideration.

Amigos Bravos is a statewide water conservation organization guided by social justice principles. Amigos Bravos's mission is to protect and restore the waters of New Mexico. Amigos Bravos works locally, statewide, and nationally to ensure that the waters of New Mexico are protected by the best policy and regulations possible. New Mexico's ground and surface water protection regulations found at 20.6.2 NMAC are a critical component of Amigos Bravos's work to protect clean water and the communities that depend upon clean water in New Mexico.

The Gila Resources Information Project (GRIP) recognizes that human and environmental systems are inseparable and interdependent. GRIP works to protect and nurture human communities by safeguarding the natural resources that sustain us all and to safeguard natural resources by facilitating informed public participation in resource use decisions. Sound state water protection regulations are essential for realizing this work.

For clarity, language proposed to be deleted by NMED is indicated by ~~striketrough~~ (black in color copies). Language proposed to be deleted by Amigos Bravos and GRIP is indicated by ~~bold striketrough~~ (red in color copies). Proposed new language by Amigos Bravos and GRIP is indicated by **bold underlining** (blue in color copies). Amigos Bravos and GRIP reserve the right to amend its statement of position and to propose additional changes that are a logical outgrowth of NMED's Petition, along with additional arguments in support of positions taken on NMED's Petition at the November 14, 2017 public hearing.

I. 20.6.2.7 NMAC – NMED's Proposal to Add the Term "Discharge Permit Amendment"

Statement of Position:

NMED proposes to add a new term to 20.6.2.7 NMAC, that of "discharge permit amendment", which under NMED's proposed language appears to provide an unlimited ability to change previously public noticed and approved permit language. In doing so, NMED's proposed language would allow industry and NMED to circumvent public notice and participation requirements under the Water Quality Act ("WQA") and to make unlimited changes to major permit requirements. Amigos Bravos and GRIP oppose the addition of this term in its entirety for the following reasons.

Statement of Reasons for Changes to NMED's Proposed Amendment:

1. NMED's proposed term "discharge permit amendment" creates a new category of NMED actions called "amendments" not authorized under the Water Quality Act ("WQA"). The proposed term and definition both clearly violate the WQA because they exceed the authority of both the WQCC and NMED under the WQA. The WQA expressly authorizes NMED to perform the following actions: deny a permit, terminate a permit, modify a permit, or grant a permit subject to a condition. *See* NMSA 1978, § 74-6-5(M), (N). The WQA only authorizes the WQCC to promulgate procedures, by regulation, for the "issuance or modification of a permit" and for the "issuance of renewals of permits." NMSA 1978, § 74-6-5(F). The WQA does not permit the WQCC to adopt regulations providing procedures for NMED to "amend" a discharge permit. *Id.* Therefore, the proposed addition of "discharge permit amendment" to the current ground water and surface water protection regulations exceeds NMED's authority under the Act. If the WQCC were to adopt this proposed revision, it too would exceed its authority under the Act, violating NMSA 1978, § 74-6-4(C). NMED, in its Statement of Reasons provided with its May 1, 2017 Petition conceded that it has been engaging in an unlawful practice by approving "amendments" to discharge permits in effect. *See* NMED's "Statement of Reasons For Proposed Amendments to 20.6.2 NMAC", reason #3 (May 1, 2017). The WQCC must refrain from legitimizing NMED's unlawful practice with codification.
2. The inclusion of this new term would have the effect of eliminating the need to provide public notice, opportunity for public comment, and an opportunity for a public hearing for a permitting action that should be administered as a "discharge permit modification."

It is not clear whether NMED's proposed definition for "discharge permit amendment" would administer all changes to a permit's monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s), and sewerage system(s) requirements as amendments, as long as such changes would not result in a change in location of the discharge, increase in the discharge volume, or introduction of a new contaminant. Under NMED's proposed term and definition, it is conceivable that the public would never receive notice of *any* changes made to monitoring, reporting, sampling and analysis, closure plan, contain system(s), pollution control unit(s), and sewerage system(s) requirements under NMED's proposed amendment. This is because NMED's proposed "discharge permit amendment" would not require public notice, public comment, and an opportunity for a public hearing. Amigos Bravos and GRIP maintain that *any* changes to a permit's monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s), and sewerage system(s) requirements are properly administered as "discharge permit modifications", which require public notice, public comment, and an opportunity for a public hearing. Section 20.6.2.3108 NMAC.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendment:

Amigos Bravos and GRIP therefore propose to delete NMED's proposed addition of 20.6.2.7 NMAC in its entirety as follows:

~~{P.} (4) "discharge permit amendment" means a minor change to the requirements of a discharge permit that does not result in:~~

~~(a) a change in the location of a discharge that would affect groundwater beyond that impacted by the existing discharge location;~~

~~_____ (b) an increase in daily discharge volume of greater than ten percent of the daily discharge volume approved in the most recent discharge permit approval, renewal or modification for an individual discharge location, and where the sum of any volume increases via amendments during a permit term is greater than ten percent of the approved, renewed or modified discharge permit volume, or greater than 50,000 gallons/day, whichever is less;~~

~~_____ (c) an increase in an effluent limit set forth in the most recent discharge permit approval, renewal or modification for an individual discharge location, or~~

~~_____ (d) introduction of a new water contaminant~~

It is clear that neither NMED nor the WQCC has the authority to promulgate regulations for amendments to a discharge permit under the Water Quality Act. However, if the WQCC determines that the addition of this new term does not exceed either NMED's or the WQCC's authority under the WQA, then Amigos Bravos and GRIP propose, in the alternative, two options for alternative language for the term "discharge permit amendment" for the following reasons.

Statement of Reasons for "In the Alternative" Changes to NMED's Proposed Amendment:

1. Option 1 provides a definition that mirrors the decades long tested language used by the federal Environmental Protection Agency ("EPA") in that agency's definition of a minor modification of a permit. Under Option 1, "discharge permit amendments" are primarily administrative changes to an existing permit. Minor substantive changes to an existing permit are also permitted but restricted under Option 1. This alternative language derives from 40 C.F.R. 122.63, the National Pollutant Discharge Elimination System ("NPDES") permit regulations promulgated under the federal Clean Water Act.

2. NMED has failed to provide any rationale or scientific basis for proposing that an increase in daily discharge volume and an increase in the concentration of water contaminants discharged will no longer be considered a “discharge permit amendment” when greater than ten percent of the original, as opposed to one percent, three percent or five percent of the original. Ten percent of added pollution and/or flow could be very significant to down gradient communities and individuals that use ground water as their primary drinking water source, especially from a facility that discharges in large volumes. This is particularly concerning with respect to drinking water wells located down gradient from facilities that discharge contaminants that adversely impact the ability to use ground water for human consumption without additional and costly water treatment. The Water Quality Act expressly states that standards and regulations adopted by the WQCC be based on “credible scientific data.” NMSA 1978, § 74-6-4(D). Option 2 as proposed by Amigos Bravos and GRIP attempts to resolve these concerns by removing the increased discharge language from the definition.

Amigos Bravos’s & GRIP’s “In the Alternative” Changes to NMED’s Proposed Amendment:

Option 1 provides a definition that mirrors the decades long tested language used by the federal Environmental Protection Agency (“EPA”) in that agency’s definition of a minor modification of a permit as follows:

OPTION 1

[P-] (4) “discharge permit amendment” means a minor **change of a ground water discharge permit that only:**

(a) Corrects typographical errors;

(b) Requires more frequent monitoring or reporting by the permittee;

(c) Changes an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement;

(d) Allows for a change in ownership or operational control of a facility where the secretary determines that no other change in the permit is necessary and the requirements of 20.6.2.3111 NMAC have been met;

(e) Requires electronic reporting requirements (to replace paper reporting requirements);

(f) Changes the construction schedule for a discharger which is a new source. No such change shall affect a permittee's pre-discharge permit obligations; or

(g) Deletes a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.

~~change to the requirements of a discharge permit that does not result in:~~

~~_____ (a) a change in the location of a discharge that would affect groundwater beyond that impacted by the existing discharge location;~~

~~_____ (b) an increase in daily discharge volume of greater than ten percent of the daily discharge volume approved in the most recent discharge permit approval, renewal or modification for an individual discharge location, and where the sum of any volume increases via amendments during a permit term is greater than ten percent of the approved, renewed or modified discharge permit volume, or greater than 50,000 gallons/day, whichever is less;~~

~~_____ (c) an increase in an effluent limit set forth in the most recent discharge permit approval, renewal or modification for an individual discharge location; or~~

~~_____ (d) introduction of a new water contaminant~~

Option 2 proposes language developed by Amigos Bravos and GRIP that would limit the universe of permit amendments that could occur with limited public notice during the five-year lifespan of a ground water discharge permit as follows:

OPTION 2

[P:] (4) “discharge permit amendment” means a minor change to the requirements of a ground water discharge permit that does not result in:

(a) a change in the location of a discharge; ~~that would affect groundwater beyond that impacted by the existing discharge location;~~

(b) an increase in daily discharge volume; ~~greater than ten percent of the daily discharge volume approved in the most recent discharge permit approval, renewal or modification for an individual discharge location, and where the sum of any volume increases via amendments during a permit term is greater than ten percent of the approved, renewed or modified discharge permit volume, or greater than 50,000 gallons/day, whichever is less;~~

(c) an increase in an effluent limit set forth in the most recent discharge permit approval, renewal or modification for an individual discharge location; ~~or~~

(d) introduction of a new water contaminant;

(e) a change in monitoring locations, a reduction in monitoring frequency, or a removal of monitoring constituents;

(f) a reduction in reporting frequency or removal of a reporting requirement;

(g) a reduction or removal of procedures for detecting failure of the discharge system;

(h) a change to the closure plan;

(i) a reduction or removal of a Sampling and Analysis requirement; or

(j) a change to the containment system(s), pollution control unit(s), or sewerage system(s).

II. 20.6.2.3106 NMAC – NMED’s Proposal to Add “Discharge Permit Amendment” to Application for Discharge Permits, Renewals and Modifications Provisions

Statement of Position:

Amigos Bravos and GRIP oppose NMED’s proposed amendment to add “discharge permit amendment” to 20.6.2.3106 NMAC in its entirety for the following reasons.

Statement of Reasons for Changes to NMED’s Proposed Amendments:

1. NMED’s proposed term “discharge permit amendment” creates a new category of NMED actions called “amendments” not authorized under the Water Quality Act (“WQA”). The proposed term and definition both clearly violate the WQA because they exceed the authority of both the WQCC and NMED under the WQA. The WQA expressly authorizes NMED to perform the following actions: deny a permit, terminate a permit, modify a permit, or grant a permit subject to a condition. *See* NMSA 1978, § 74-6-5(M), (N). The WQA only authorizes the WQCC to promulgate procedures, by regulation, for the “issuance or modification of a permit” and for the “issuance of renewals of permits.” NMSA 1978, § 74-6-5(F). The WQA does not permit the WQCC to adopt regulations providing procedures for NMED to “amend” a discharge permit. *Id.* Therefore, the proposed addition of “discharge permit amendment” to the current ground water and surface water protection regulations exceeds NMED’s authority under the Act. If the WQCC were to adopt this proposed revision, it too would exceed its authority under the Act, violating NMSA 1978, § 74-6-4(C). NMED, in its Statement of Reasons provided with its May 1, 2017 Petition conceded that it has been engaging in an unlawful practice by approving “amendments” to discharge permits in effect. *See* NMED’s “Statement of Reasons For Proposed Amendments to 20.6.2 NMAC”, reason #3 (May 1,

2017). The WQCC must refrain from legitimizing NMED's unlawful practice with codification.

2. The inclusion of this new term would have the effect of eliminating the need to provide public notice, opportunity for public comment, and an opportunity for a public hearing for a permitting action that should be administered as a "discharge permit modification." It is not clear whether NMED's proposed definition for "discharge permit amendment" would administer *any* changes to a permit's monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s), and sewerage system(s) requirements as amendments, as long as such changes would not result in a change in location of the discharge, increase in the discharge volume, or introduction of a new contaminant. Under NMED's proposed term and definition, it is conceivable that the public would never receive notice of *any* changes made to monitoring, reporting, sampling and analysis, closure plan, contain system(s), pollution control unit(s), and sewerage system(s) requirements under NMED's proposed amendment. This is because NMED's proposed "discharge permit amendment" would not require public notice, public comment, and an opportunity for a public hearing. Amigos Bravos and GRIP maintain that *any* changes to a permit's monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s), and sewerage system(s) requirements are properly administered as "discharge permit modifications", which require public notice, public comment, and an opportunity for a public hearing. Section 20.6.2.3108 NMAC.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendment:

Amigos Bravos & GRIP therefore propose to delete NMED's proposed amendments in their entirety as follows:

20.6.2.3106 APPLICATION FOR DISCHARGE PERMITS ~~[AND]~~ RENEWALS;
AND MODIFICATIONS, ~~AND AMENDMENTS:~~

And:

~~H. — A permittee may submit a request for a discharge permit amendment to the department at any time during the term of an approved discharge permit.~~

In the alternative, if the WQCC determines that the term "discharge permit amendment" does not exceed the authority of either the NMED or the WQCC under the WQA, then Amigos Bravos and GRIP have proposed "in the alternative" changes to NMED's proposed amendment for the following reasons.

Statement of Reasons for "In the Alternative" Changes to NMED's Proposed Amendment:

1. NMED does not specify how many amendments may be granted during a permit term.

Though NMED appears to provide a cap for increases in discharge volume during the term of a discharge permit via amendment in the proposed definition for "discharge permit amendment", there is no cap for amendments made to other equally important permit requirements such as monitoring, reporting, sampling and analysis, and closure plan requirements. Alternative language proposed by Amigos Bravos and GRIP would resolve this concern by limiting the number of amendments that may be requested by the permittee and approved by NMED.

Amigos Bravos's & GRIP's "In the Alternative" Changes to NMED's Proposed Amendment:

In the alternative, if the WQCC finds that adding the term "discharge permit amendment" to 20.6.2 NMAC does not exceed either the NMED's or the WQCC's authority under the WQA, Amigos Bravos and GRIP propose the following changes to NMED's proposed amendments:

H. A permittee may submit a request for a discharge permit amendment to the department ~~at any time during the term of an approved discharge permit.~~ once per year for each year of a discharge permit term.

III. 20.6.2.3109 NMAC – NMED's Proposal to Add "Discharge Permit Amendment" to the Secretary's Approval, Disapproval, Modification or Termination of Discharge Permits, and Requirements for Abatement Plans.

Statement of Position:

Amigos Bravos and GRIP oppose NMED's proposed amendment to add "discharge permit amendment" to 20.6.2.3109 NMAC in its entirety for the following reasons.

Statement of Reasons for Changes to NMED's Proposed Amendment:

1. NMED's proposed term "discharge permit amendment" creates a new category of NMED actions called "amendments" not authorized under the Water Quality Act ("WQA"). The proposed term and definition both clearly violate the WQA because they exceed the authority of both the WQCC and NMED under the WQA. The WQA expressly authorizes NMED to perform the following actions: deny a permit, terminate a permit, modify a permit, or grant a permit subject to a condition. *See* NMSA 1978, § 74-6-5(M), (N). The WQA only authorizes the WQCC to promulgate procedures, by regulation, for the "issuance or modification of a permit" and for the "issuance of renewals of permits." NMSA 1978, § 74-6-5(F). The WQA does not permit the WQCC to adopt regulations providing procedures for NMED to "amend" a discharge permit. *Id.*

Therefore, the proposed addition of “discharge permit amendment” to the current ground water and surface water protection regulations exceeds NMED’s authority under the Act. If the WQCC were to adopt this proposed revision, it too would exceed its authority under the Act, violating NMSA 1978, § 74-6-4(C). NMED, in its Statement of Reasons provided with its May 1, 2017 Petition conceded that it has been engaging in an unlawful practice by approving “amendments” to discharge permits in effect. *See* NMED’s “Statement of Reasons For Proposed Amendments to 20.6.2 NMAC”, reason #3 (May 1, 2017). The WQCC must refrain from legitimizing NMED’s unlawful practice with codification.

2. The inclusion of this new term would have the effect of eliminating the need to provide public notice, opportunity for public comment, and an opportunity for a public hearing for a permitting action that should be administered as a “discharge permit modification.” It is not clear whether NMED’s proposed definition for “discharge permit amendment” would administer all changes to a permit’s monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s), and sewerage system(s) requirements as amendments, as long as such changes would not result in a change in location of the discharge, increase in the discharge volume, or introduction of a new contaminant. Under NMED’s proposed term and definition, it is conceivable that the public would never receive notice of *any* changes made to monitoring, reporting, sampling and analysis, closure plan, contain system(s), pollution control unit(s), and sewerage system(s) requirements under NMED’s proposed amendment. This is because NMED’s proposed “discharge permit amendment” would not require public notice, public comment, and an opportunity for a public hearing. Amigos Bravos and GRIP

maintain that *any* changes to a permit's monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s), and sewerage system(s) requirements are properly administered as "discharge permit modifications", which require public notice, public comment, and an opportunity for a public hearing. Section 20.6.2.3108 NMAC.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendment:

Amigos Bravos and GRIP propose to delete NMED's proposed amendment in its entirety as follows:

20.6.2.3109 SECRETARY APPROVAL, DISAPPROVAL, MODIFICATION, ~~AMENDMENT~~ OR TERMINATION OF DISCHARGE PERMITS, AND REQUIREMENT FOR ABATEMENT PLANS:

A. The department shall evaluate the application for a discharge permit, modification or renewal based on information contained in the department's administrative record. The department may request from the discharger, either before or after the issuance of any public notice, additional information necessary for the evaluation of the application. The administrative record shall consist of the application, any additional information required by the department, any information submitted by the discharger or the general public, other information considered by the department, the proposed approval or disapproval of an application for a discharge permit, modification or renewal prepared pursuant to Subsection G of 20.6.2.3108 NMAC, and, if a public hearing is held, all of the documents filed with the hearing clerk, all exhibits offered into evidence at the hearing, the written transcript or tape recording of the hearing, any hearing officer report, and any post hearing submissions.

~~———— B. ——— A discharge permit amendment shall be administratively reviewed and evaluated by the department.~~

~~———— (1) ——— The department shall approve, approve with conditions, disapprove or request additional information necessary for a determination regarding a discharge permit amendment within 30 days of receipt of a request.~~

~~———— (2) ——— The department shall provide notice of all discharge permit amendment approvals or denials to those persons on the facility-specific list~~

~~maintained by the department who have requested notice of discharge permit applications.~~

In the alternative, if the WQCC finds that adding the term “discharge permit amendment” to 20.6.2 NMAC does not exceed either NMED’s or the WQCC’s authority under the WQA, Amigos Bravos and GRIP propose “in the alternative” changes to NMED’s proposed amendments for the following reasons.

Statement of Reasons for “In the Alternative” Changes to NMED’s Proposed Amendment:

1. NMED’s decision to either approve or deny a request for a discharge permit amendment must be based on information in the administrative record.
2. The severely limited notice of the department’s decision to either approve or deny a request for a discharge permit amendment to “those persons on the facility-specific list maintained by the department *who have requested notice of discharge permit applications*” is inappropriate for the following reasons. First, to limit notice of the department’s decision regarding a request for a discharge permit amendment defeats the purpose of having the decision subject to appeal pursuant to 20.6.2.3112 NMAC. If notice is not provided to the public in general and to persons who participated in the discharge permit hearing, no one will know of the opportunity to appeal the department’s decision to the WQCC. NMED’s proposed notice requirement is so limited that persons who are on a facility-specific list will not even receive notice unless they specifically request notice of discharge permit applications for that facility. In order to give full meaning and effect to 20.6.2.3112 NMAC, notice of the department’s approval or denial of a request for a discharge permit amendment must be as broad and inclusive as possible.

Amigos Bravos's & GRIP's "In the Alternative" Changes to NMED's Proposed Amendment:

20.6.2.3109 SECRETARY APPROVAL, DISAPPROVAL, MODIFICATION, AMENDMENT OR TERMINATION OF DISCHARGE PERMITS, AND REQUIREMENT FOR ABATEMENT PLANS:

A. The department shall evaluate the application for a discharge permit, modification ~~or~~ renewal or amendment based on information contained in the department's administrative record. The department may request from the discharger, either before or after the issuance of any public notice, additional information necessary for the evaluation of the application. The administrative record shall consist of the application, any additional information required by the department, any information submitted by the discharger or the general public, other information considered by the department, the proposed approval or disapproval of an application for a discharge permit, modification ~~or~~ renewal, or amendment prepared pursuant to Subsection G of 20.6.2.3108 NMAC, and, if a public hearing is held, all of the documents filed with the hearing clerk, all exhibits offered into evidence at the hearing, the written transcript or tape recording of the hearing, any hearing officer report, and any post hearing submissions.

B. A discharge permit amendment shall be administratively reviewed and evaluated by the department.

(1) The department shall approve, approve with conditions, disapprove or request additional information necessary for a determination regarding a discharge permit amendment within 30 days of receipt of a request.

(2) The department shall provide notice of all discharge permit amendment requests within 30 days of determining an application for a discharge permit request is administratively complete by posting a notice on its website and by mailing notice to any affected local, state, federal, tribal or pueblo governmental agency, political subdivisions, ditch associations and land grants, as identified by the department. The department shall also mail or email notice to those persons who participated in the discharge permit hearing and to those persons on an industry, facility, and permit specific list maintained by the department. The department shall provide notice of all discharge permit amendment approvals or denials ~~to those persons on the facility-specific list maintained by the department who have requested notice of discharge permit applications:~~ on its website and with public notice 2 (PN-2) issued by the department for discharge permit applications, and by mailing notice to any affected local, state, federal, tribal or pueblo governmental

agency, political subdivisions, ditch associations and land grants, as identified by the department. The department shall also mail or email notice to those persons who participated in the discharge permit hearing and to those persons on an industry, facility, and permit specific list maintained by the department.

(3) The permittee shall provide notice of all discharge permit amendment approvals to the general public in the locale of the approved discharge permit amendment in a form provided by the department by each of the methods listed below:

a. for each 640 contiguous acres or less of a discharge site, prominently posting a synopsis of the public notice at least 2 feet by 3 feet in size, in English and in Spanish, at a place conspicuous to the public, approved by the department, at or near the proposed facility for 30 days; one additional notice, in a form approved by and may be provided by the department, shall be posted at a place located off the discharge site, at a place conspicuous to the public and approved by the department; the department may require a second posting location for more than 640 contiguous acres or when the discharge site is not located on contiguous properties;

b. providing written notice of the approved discharge amendment by mail or electronic mail, to owners of record of all properties within a 1/3 mile distance from the boundary of the property where the discharge site is located; if there are no properties other than properties owned by the discharger within a 1/3 mile distance from the boundary of property where the discharge site is located, the applicant shall provide notice to owners of record of the next nearest adjacent properties not owned by the permittee;

c. providing notice by certified mail, return receipt requested, to the owner of the discharge site if the permittee is not the owner; and

d. publishing a synopsis of the notice in English and in Spanish, in a display ad at least three inches by four inches not in the classified or legal advertisements section, in a newspaper of general circulation in the location of the proposed discharge.

(4) The notice provided under Subsection B(3) of 20.6.2.3109 NMAC shall include:

a. the name and address of the permittee;

b. a brief description of the amendment approved, including the following:

- i. the location of any amended discharge, including a street address, if available, and sufficient information to locate the facility with respect to surrounding landmarks;
- ii. a brief description of the activities that produce the amended discharge that has been approved by the department;
- iii. a brief description of the expected quality and volume of the amended discharge approved by the department;
- iv. the depth to and total dissolved solids concentration of the ground water most likely to be affected by the amended discharge;
- v. the address and phone number within the department by which interested persons may obtain information and be placed on a facility-specific mailing list for future notices; and
- vi. a statement that the department's approval of the discharge permit amendment is subject to appeal to the New Mexico Water Quality Control Commission pursuant to 20.6.2.3112.A NMAC.

IV. 20.6.2.3112 NMAC – NMED's Proposal to Provide for Appeals of Discharge Permit Amendment Approvals

Statement of Position:

Amigos Bravos and GRIP oppose NMED's proposal to provide for appeals of discharge permit amendment approvals for the following reasons.

Statement of Reasons for Changes to NMED's Proposed Amendment:

1. NMED's proposed term "discharge permit amendment" creates a new category of NMED actions called "amendments" not authorized under the Water Quality Act ("WQA"). The proposed term and definition both clearly violate the WQA because they exceed the authority of both the WQCC and NMED under the WQA. The WQA expressly authorizes NMED to perform the following actions: deny a permit, terminate a permit, modify a permit, or grant a permit subject to a condition. *See NMSA 1978, § 74-*

6-5(M), (N). The WQA only authorizes the WQCC to promulgate procedures, by regulation, for the “issuance or modification of a permit” and for the “issuance of renewals of permits.” NMSA 1978, § 74-6-5(F). The WQA does not permit the WQCC to adopt regulations providing procedures for NMED to “amend” a discharge permit. *Id.* Therefore, the proposed addition of “discharge permit amendment” to the current ground water and surface water protection regulations exceeds NMED’s authority under the Act. If the WQCC were to adopt this proposed revision, it too would exceed its authority under the Act, violating NMSA 1978, § 74-6-4(C). NMED, in its Statement of Reasons provided with its May 1, 2017 Petition conceded that it has been engaging in an unlawful practice by approving “amendments” to discharge permits in effect. *See* NMED’s “Statement of Reasons For Proposed Amendments to 20.6.2 NMAC”, reason #3 (May 1, 2017). The WQCC must refrain from legitimizing NMED’s unlawful practice with codification.

2. The inclusion of this new term would have the effect of eliminating the need to provide public notice, opportunity for public comment, and an opportunity for a public hearing for a permitting action that should be administered as a “discharge permit modification.” It is not clear whether NMED’s proposed definition for “discharge permit amendment” would administer all changes to a permit’s monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s), and sewerage system(s) requirements as amendments, as long as such changes would not result in a change in location of the discharge, increase in the discharge volume, or introduction of a new contaminant. Under NMED’s proposed term and definition, it is conceivable that the public would never receive notice of *any* changes made to monitoring, reporting,

sampling and analysis, closure plan, contain system(s), pollution control unit(s), and sewerage system(s) requirements under NMED's proposed amendment. This is because NMED's proposed "discharge permit amendment" would not require public notice, public comment, and an opportunity for a public hearing. Amigos Bravos and GRIP maintain that *any* changes to a permit's monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s), and sewerage system(s) requirements are properly administered as "discharge permit modifications", which require public notice, public comment, and an opportunity for a public hearing. Section 20.6.2.3108 NMAC.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendment:

Amigos Bravos and GRIP propose to delete NMED's proposed amendment in its entirety as follows:

20.6.2.3112 APPEALS OF SECRETARY'S DECISIONS:

A. If the secretary approves, approves subject to conditions, or disapproves a proposed discharge plan, renewal or modification, or modifies, ~~amends~~ or terminates a discharge permit, appeal therefrom shall be in accordance with the provisions of Sections 74-6-5(N), (O) and (P), NMSA 1978. The filing of an appeal does not act as a stay of any provision of the Act, the regulations, or any permit issued pursuant to the Act, unless otherwise ordered by the secretary or the commission.

In the Alternative Statement of Position:

In the alternative, if the WQCC finds that adding the term "discharge permit amendment" to 20.6.2 NMAC does not exceed either NMED's or the WQCC's authority under the WQA, Amigos Bravos and GRIP support NMED's proposal to provide for appeals of discharge permit amendment approvals to the WQCC and do not propose any additional changes for the following reasons.

In the Alternative Statement of Reasons:

1. Under current regulations, the following Secretary decisions are subject to appeal:
approval, approval subject to conditions, or disapproval of a proposed discharge permit, renewal or modification; or modification or termination of an active discharge permit.
20.6.2.3112 NMAC. Termination of a discharge permit, like NMED's proposed new term "discharge permit amendment," is reviewed internally by the department – without public notice, public comment, or a public hearing. *See* Sections 20.6.2.3109.E(2), (3), and –(F) NMAC. However, termination decisions are subject to appeal to the WQCC, pursuant to Section 20.6.2.3112 NMAC. Therefore, Amigos Bravos and GRIP support NMED's proposed amendment to provide for appeal of discharge permit amendment approvals.

V. 20.6.2.7.P NMAC – NMED's Proposal to Amend Definition of "Discharge Permit Modification"

Statement of Position:

NMED proposes to amend the definition for "discharge permit modification" to incorporate NMED's proposed new term "discharge permit amendment". Amigos Bravos and GRIP oppose in part and support in part NMED's proposed amendments to 20.6.2.7.P NMAC for the following reasons. Amigos Bravos and GRIP support NMED's proposed amendment to remove "a significant increase in" from a change in the quantity of a discharge and NMED's proposed amendment to remove "significant" from a change in the quality of the discharge. Amigos Bravos and GRIP oppose NMED's proposed amendment to include "that does not qualify as a discharge permit amendment".

Statement of Reasons for Changes to NMED's Proposed Amendments:

1. Any increase in the quantity of a discharge clearly constitutes a major modification of a discharge permit, requiring public notice and public participation. Any change in the quality of a discharge clearly constitutes a major modification of a discharge permit, requiring public notice and public participation.
2. As previously discussed, the proposed agency action of "discharge permit amendment" is unlawful under the Water Quality Act.
3. The current definition of "discharge permit modification" does not cover changes made to other requirements of a discharge permit beyond modifications that result in changes to the location, quantity and quality of discharges and introduction of new contaminant(s). For example, changes to permit requirements such as monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s) and sewerage system(s) requirements are not included in the current regulatory definition. Hence, if a permittee or the department proposes to change any of these equally important permit requirements, the change does not qualify as a modification under the current regulatory definition, allowing NMED and the permittee to circumvent the WQA's public notice and participation requirements. Amigos Bravos and GRIP maintain that changes to a permit's monitoring, reporting, sampling and analysis, closure plan, containment system(s), pollution control unit(s), and sewerage system(s) requirements are properly administered as "discharge permit modifications", which require public notice, public comment, and an opportunity for a public hearing. Section 20.6.2.3108 NMAC.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendment:

Amigos Bravos and GRIP thus propose the following changes:

(5) "discharge permit modification" means a change to the requirements of a discharge permit that result from a change in the location of the discharge; ~~;~~ ~~[a significant increase in]~~ the quantity of the discharge, ~~or;~~ ~~a [significant]~~ change in the quality of the discharge; ~~that does not qualify as a discharge permit amendment;~~ a change in monitoring locations or a reduction in monitoring frequency or constituents; a reduction in reporting frequency or removal of a reporting requirement; a reduction or removal of procedures for detecting failure of the discharge system; a change to the containment system(s), pollution control unit(s), or sewerage system(s); a change to the closure plan; a reduction or removal of a sampling and analysis requirement, or as required by the secretary;

VI. 20.6.2.7.WW NMAC – NMED's Proposal to Amend Definition of "Toxic Pollutant"

Statement of Position:

NMED proposes to amend 20.6.2.7.WW NMAC to add several toxic pollutants to the current regulatory definition "to enable regulation of these dangerous constituents for the protection of human health" (NMED's "Statement of Reasons for Proposed Amendments to 20.6.2 NMAC"), yet has failed to provide its rationale or any scientific basis for its proposed amendments. Therefore, Amigos Bravos and GRIP are only able to provide a preliminary statement of position with proposed changes and statement of reasons. Amigos Bravos and GRIP reserve the right to amend their statement of position on NMED's proposed amendments to 20.6.2.7.WW NMAC and reserve the right to provide additional proposed changes and present additional arguments pertaining to NMED's proposed amendments either in rebuttal testimony to be filed on October 13, 2017 or at the November 14, 2017 public hearing.

Amigos Bravos and GRIP generally support the addition of several new toxic pollutants to the current regulatory definition for "toxic pollutant". However, Amigos Bravos and GRIP

propose to add several additional toxic pollutants to 20.6.7.WW NMAC for the following reasons.

Statement of Reasons for Change to NMED's Proposed Amendments:

1. NMED has not provided its rationale or the scientific basis for limiting the addition of new toxic pollutants to the current regulatory definition to NMED's proposed list.
2. Amigos Bravos and GRIP propose to add chlorobenzene, alachlor, asbestos, total trihalomethanes, 2,4-D, dalapon, 1,2-dibromo-3-chloropropane, di (2-ethylhexyl) phthalate, dioxin, methoxychlor, simazine, 2,4,5-TP (silvex), bromate, carbofuran, chlorite, di-(2-ethylhexyl) adipate, dinoseb, diquat, endothall, glyphosate, heptachlor epoxide, oxamyl, and picloram, which are presently being regulated by the U.S. Environmental Protection Agency ("EPA"), to New Mexico's current regulatory definition.
3. Amigos Bravos and GRIP propose to add gamma-BHC, chromium III, chromium VI, dibromochloromethane, 1,3-dichloropropene, lead acetate, lead subacetate, trichlorofluoromethane, 1,1,2-trichloro-1,2,2-trifluoroethane, which are presently being regulated by California, to New Mexico's current regulatory definition. California is at the forefront of promulgating of regulations more protective of ground water quality than federal standards.
4. NMED's process for determining necessary amendments to 20.6.2.7.WW NMAC was flawed. NMED should have engaged in a more deliberative, collaborative process for determining necessary amendments to 20.6.2.7.WW NMAC by establishing a working group involving industry, municipalities, environmental groups and other stakeholders.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendment:

Amigos Bravos and GRIP therefore propose to include additional toxic pollutants to NMED's proposed amendment as follows:

[WW.] (2) "toxic pollutant" means~~[-a water contaminant or combination of water contaminants in concentration(s) which, upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains, will unreasonably threaten to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; in order to be considered a toxic pollutant a contaminant must be one or a combination of the potential toxic pollutants listed below and be at a concentration shown by scientific information currently available to the public to have potential for causing one or more of the effects listed above;]~~ any water contaminant or combination of the water contaminants in the list below ~~[creating a lifetime risk of more than one cancer per 100,000 exposed persons is a toxic pollutant:~~

- ~~_____~~ (1) ~~acrolein~~
- ~~_____~~ (2) ~~acrylonitrile~~
- ~~_____~~ (3) ~~aldrin~~
- ~~_____~~ (4) ~~benzene~~
- ~~_____~~ (5) ~~benzidine~~
- ~~_____~~ (6) ~~carbon tetrachloride~~
- ~~_____~~ (7) ~~chlordane~~
- ~~_____~~ (8) ~~chlorinated benzenes~~
 - ~~_____~~ (a) ~~monochlorobenzene~~
 - ~~_____~~ (b) ~~hexachlorobenzene~~
 - ~~_____~~ (c) ~~pentachlorobenzene~~
- ~~_____~~ (9) ~~1,2,4,5 tetrachlorobenzene~~
- ~~_____~~ (10) ~~chlorinated ethanes~~
 - ~~_____~~ (a) ~~1,2 dichloroethane~~
 - ~~_____~~ (b) ~~hexachloroethane~~
 - ~~_____~~ (c) ~~1,1,2,2 tetrachloroethane~~
 - ~~_____~~ (d) ~~1,1,1 trichloroethane~~
 - ~~_____~~ (e) ~~1,1,2 trichloroethane~~
- ~~_____~~ (11) ~~chlorinated phenols~~
 - ~~_____~~ (a) ~~2,4 dichlorophenol~~
 - ~~_____~~ (b) ~~2,4,5 trichlorophenol~~
 - ~~_____~~ (c) ~~2,4,6 trichlorophenol~~
- ~~_____~~ (12) ~~chloroalkyl ethers~~
 - ~~_____~~ (a) ~~bis (2 chloroethyl) ether~~

	(b)	bis (2-chloroisopropyl) ether
	(c)	bis (chloromethyl) ether
(13)		chloroform
(14)		DDT
(15)		dichlorobenzene
(16)		dichlorobenzidine
(17)		1,1-dichloroethylene
(18)		dichloropropenes
(19)		dieldrin
(20)		diphenylhydrazine
(21)		endosulfan
(22)		endrin
(23)		ethylbenzene
(24)		halomethanes
	(a)	bromodichloromethane
	(b)	bromomethane
	(c)	chloromethane
	(d)	dichlorodifluoromethane
	(e)	dichloromethane
	(f)	tribromomethane
	(g)	trichlorofluoromethane
(25)		heptachlor
(26)		hexachlorobutadiene
(27)		hexachlorocyclohexane (HCH)
	(a)	alpha-HCH
	(b)	beta-HCH
	(c)	gamma-HCH
	(d)	technical HCH
(28)		hexachlorocyclopentadiene
(29)		high explosives (HE)
	(a)	2,4-dinitrotoluene (2,4-DNT)
	(b)	2,6-dinitrotoluene (2,6-DNT)
	(c)	octahydro-1,3,5,7-tetranitro-1,3,5,7-tetrazocine (HMX)
	(d)	hexahydro-1,3,5-trinitro-1,3,5-triazine (RDX)
	(e)	2,4,6-trinitrotoluene (TNT)
(30)		isophorone
(31)		methyl tertiary butyl ether
(32)		nitrobenzene
(33)		nitrophenols
	(a)	2,4-dinitro-o-cresol
	(b)	dinitrophenols
(34)		nitrosamines
	(a)	N-nitrosodiethylamine
	(b)	N-nitrosodimethylamine
	(c)	N-nitrosodibutylamine

- _____ (d) N-nitrosodiphenylamine
- _____ (e) N-nitrosopyrrolidine
- _____ (35) pentachlorophenol
- _____ (36) perchlorate
- _____ (37) phenol
- _____ (38) phthalate esters
 - _____ (a) dibutyl phthalate
 - _____ (b) di-2-ethylhexyl phthalate
 - _____ (c) diethyl phthalate
 - _____ (d) dimethyl phthalate
- _____ (39) polychlorinated biphenyls (PCB's)
- _____ (40) polynuclear aromatic hydrocarbons (PAH)
 - _____ (a) anthracene
 - _____ (b) 3,4-benzofluoranthene
 - _____ (c) benzo-(k)-fluoranthene
 - _____ (d) fluoranthene
 - _____ (e) fluorene
 - _____ (f) phenanthrene
 - _____ (g) pyrene
- _____ (41) tetrachloroethylene
- _____ (42) toluene
- _____ (43) toxaphene
- _____ (44) trichloroethylene
- _____ (45) vinyl chloride
- _____ (46) xylenes
 - _____ (a) o-xylene
 - _____ (b) m-xylene
 - _____ (c) p-xylene
- _____ (47) 1,1-dichloroethane
- _____ (48) ethylene dibromide (EDB)
- _____ (49) cis-1,2-dichloroethylene
- _____ (50) trans-1,2-dichloroethylene
- _____ (51) naphthalene
- _____ (52) 1-methylnaphthalene
- _____ (53) 2-methylnaphthalene
- _____ (54) benzo-a-pyrene]
- (a) acrolein
- (b) acrylonitrile
- (c) benzene and alkylbenzenes
 - (i) benzene
 - (ii) toluene (methylbenzene)
 - (iii) ethylbenzene
 - (iv) xylenes (dimethyl benzene isomers)
 - (A) o-xylene
 - (B) m-xylene

- (C) p-xylene
- (v) styrene (ethenylbenzene)
- (d) chlorinated benzenes
 - (i) monochlorobenzene
 - (ii) 1,2-dichlorobenzene (ortho-dichlorobenzene)
 - (iii) 1,4-dichlorobenzene (para-dichlorobenzene)
 - (iv) 1,2,4-trichlorobenzene
 - (v) 1,2,4,5-tetrachlorobenzene
 - (vi) pentachlorobenzene
 - (vii) hexachlorobenzene
- (e) chlorinated phenols
 - (i) 2,4-dichlorophenol
 - (ii) 2,4,5-trichlorophenol
 - (iii) 2,4,6-trichlorophenol
 - (iv) pentachlorophenol (PCP)
- (f) chloroalkyl ethers
 - (i) bis (2-chloroethyl) ether
 - (ii) bis (2-chloroisopropyl) ether
 - (iii) bis (chloromethyl) ether
- (g) 1,2-dichloropropane (propylene dichloride, PDC)
- (h) dichloropropenes
- (i) 1,4-dioxane
- (j) halogenated ethanes
 - (i) 1,2-dibromoethane (ethylene dibromide, EDB)
 - (ii) 1,1-dichloroethane (1,1-DCA)
 - (iii) 1,2-dichloroethane (ethylene dichloride, EDC)
 - (iv) 1,1,1-trichloroethane (TCA)
 - (v) 1,1,2-trichloroethane (1,1,2-TCA)
 - (vi) 1,1,2,2-tetrachloroethane
 - (vi) hexachloroethane
- (k) halogenated ethenes
 - (i) chloroethene (vinyl chloride)
 - (ii) 1,1-dichloroethene (1,1-DCE)
 - (iii) cis-1,2-dichloroethene (cis-1,2-DCE)
 - (iv) trans-1,2-dichloroethene (trans-1,2-DCE)
 - (v) trichloroethene (trichloroethylene, TCE)
 - (vi) tetrachloroethene (perchloroethylene, PCE)
- (l) halogenated methanes
 - (i) bromodichloromethane
 - (ii) bromomethane
 - (iii) chloromethane
 - (iv) dichlorodifluoromethane (fluorocarbon-12)
 - (v) dichloromethane (methylene chloride)
 - (vi) tribromomethane (bromoform)
 - (vii) trichloromethane (chloroform)

- (viii) tetrachloromethane (carbon tetrachloride)
- (ix) trichlorofluoromethane (fluorocarbon-11)
- (m) hexachlorobutadiene
- (n) isophorone
- (o) methyl tertiary-butyl ether (MTBE)
- (p) nitroaromatics and high explosives (HE)
 - (i) nitrobenzene
 - (ii) 2,4-dinitrotoluene (2,4-DNT)
 - (iii) 2,6-dinitrotoluene (2,6-DNT)
 - (iv) octahydro-1,3,5,7-tetranitro-1,3,5,7 tetrazocine (HMX)
 - (v) hexahydro-1,3,5-trinitro-1,3,5-triazine (RDX)
 - (vi) 2,4,6-trinitrotoluene (TNT)
 - (vii) 2,4-dinitro-o-cresol
 - (viii) dinitrophenols
- (q) nitrosamines
 - (i) N-nitrosodiethylamine
 - (ii) N-nitrosodimethylamine
 - (iii) N-nitrosodibutylamine
 - (iv) N-nitrosodiphenylamine
 - (v) N-nitrosopyrrolidine
- (r) perchlorate
- (s) perfluorinated chemicals (PFCs)
 - (i) perfluorohexane sulfonic acid (PFHxS)
 - (ii) perfluorooctane sulfonate (PFOS)
 - (iii) perfluorooctanoic acid (PFOA)
- (t) pesticides
 - (i) aldrin
 - (ii) atrazine
 - (iii) chlordane
 - (iv) DDT
 - (v) dieldrin
 - (vi) endosulfan
 - (vii) endrin
 - (viii) heptachlor
 - (ix) hexachlorocyclohexane (HCH, lindane)
 - (A) alpha-HCH
 - (B) beta-HCH
 - (C) gamma-HCH
 - (D) technical-HCH
 - (x) hexachlorocyclopentadiene
 - (xi) prometon
 - (xii) toxaphene
- (u) phenol
- (v) phthalate esters
 - (i) dibutyl phthalate

- (ii) di-2-ethylhexyl phthalate (DEHP)
- (iii) diethyl phthalate (DEP)
- (iv) dimethyl phthalate (DMP)
- (w) polycyclic compounds
 - (i) benzidine
 - (ii) dichlorobenzidine
 - (iii) diphenylhydrazine
 - (iii) polychlorinated biphenyls (PCBs)
- (x) polynuclear aromatic hydrocarbons (PAHs)
 - (i) anthracene
 - (ii) benzo(a)pyrene
 - (iii) 3,4-benzofluoranthene
 - (iv) benzo(k)fluoranthene
 - (v) fluoranthene
 - (vi) fluorene
 - (vii) naphthalene
 - (viii) 1-methylnaphthalene
 - (ix) 2-methylnaphthalene
 - (x) phenanthrene
 - (xi) pyrene
- (y) thiolane 1,1 dioxide (sulfolane)

(z) Gamma-BHC

(aa) Alachlor

(bb) Asbestos

(cc) Total Trihalomethanes

(dd) Chlorobenzene

(ee) Chromium III

(ff) Chromium VI

(gg) 2,4-D

(hh) Dalapon

(ii) Dibromochloromethane

(jj) 1,2-Dibromo-3-chloropropane

(kk) 1,3-Dichloropropene

(ll) Di(2-ethylhexyl)phthalate

(mm) Dioxin

(nn) Lead acetate

(oo) Lead subacetate

(pp) Methoxychlor

(qq) Simazine

(rr) 2,4,5-TP (silvex)

(ss) Bromate

(tt) Carbofuran

(uu) Chlorite

(vv) Di-(2-ethylhexyl) adipate

(ww) Dinoseb

(xx) Diquat
(yy) Endothall
(zz) Glyphosate
(aaa) Heptachlor epoxide
(bbb) Oxamyl
(ccc) Picloram
(ddd) Trichlorofluoromethane
(eee) 1,1,2-trichloro-1,2,2-trifluoroethane

VII. 20.6.2.3103.A NMAC – NMED’s Proposal to Amend Human Health Standards

Statement of Position:

NMED proposes to change numeric ground water standards for several toxic pollutants yet has failed to provide its rationale or any scientific basis for its proposed amendments. Therefore, Amigos Bravos and GRIP are only able to provide a preliminary statement of position with proposed changes and statement of reasons. Amigos Bravos and GRIP reserve the right to amend their statement of position on NMED’s proposed amendments to 20.6.2.3103.A NMAC and reserve the right to provide additional proposed changes and present additional arguments pertaining to NMED’s proposed amendments either in rebuttal testimony to be filed on October 13, 2017 or at the November 14, 2017 public hearing.

While Amigos Bravos and GRIP generally support updating and strengthening human health standards for toxic pollutants in ground water, NMED has not provided its rationale or the scientific basis for why it is not proposing that the WQCC adopt the most stringent standards for all toxic pollutants listed in 20.6.2.7.WW NMAC.

Additionally, though NMED has stated that it “proposes changes to the numeric standards to bring those standards in line with Maximum Contaminant Levels for each pollutant as specified by the U.S. Environmental Protection Agency (“EPA”) under the federal Clean

Water Act”, NMED has inconsistently applied this rationale to its proposed amendments. *See* NMED’s Petition to Amend 20.6.2 NMAC, Statement of Reasons, #7 (May 1, 2017).

Amigos Bravos and GRIP oppose NMED’s proposed amendments to weaken human health standards for any currently regulated toxic pollutant, such as for barium; toluene; 1,1-dichloroethylene (1,1-DCE); 1,1,1-trichloroethane (TCA); and vinyl chloride.

Amigos Bravos and GRIP support NMED’s proposed amendments to strengthen human health standards, such as for arsenic; cadmium; lead; radium-226 & radium-228; polychlorinated biphenyls (PCB’s); PCE; TCE; methylene chloride; EDB; 1,1,2-trichloroethane; and benzo-a-pyrene.

Amigos Bravos and GRIP oppose NMED’s proposed amendment to maintain, rather than strengthen, the current human health standards for the following toxic pollutants: cyanide; uranium; 1,1-dichloroethane; and 1,1,2,2-tetrachloroethane.

Amigos Bravos and GRIP support NMED’s proposal to maintain the current protective standards for the following toxic pollutants: chromium, fluoride, total mercury, nitrate, total xylenes and PAHs.

Amigos Bravos and GRIP also do not understand why the following new toxic pollutants NMED has proposed to be added to 20.6.2.7.WW NMAC are not listed under 20.6.2.3103.A NMAC along with a corresponding numeric standard when EPA and other state environmental agencies, such as California Environmental Protection Agency, have set Maximum Contaminant Levels for the following toxic pollutants: hexachlorobenzene (HCB), bromodichloromethane, chlordane, endrin, heptachlor, perchlorate, toxaphene, dichloromethane, hexachlorocyclopentadiene, hexachlorocyclohexane (Lindane).

Finally, Amigos Bravos and GRIP do not support NMED's proposal to maintain the one cancer per 100,000 exposed persons risk level contained in 20.6.2.3103.A(2) NMAC.

Statement of Reasons for Changes to NMED's Proposed Amendments:

1. The federal Clean Water Act and Safe Drinking Water Act, as well as the New Mexico Water Quality Act, do not preclude the WQCC from setting standards higher than federal standards. The federal standards merely serve as a floor for water quality standards – not a ceiling. The WQCC should adopt the most protective water quality standards to ensure that New Mexicans have access to safe drinking water. Amigos Bravos and GRIP have changed NMED's proposed amendments to include California's more stringent standards.
2. The WQA makes clear that the WQCC shall only adopt water quality standards for surface and ground waters of the state "based on credible scientific data." NMSA 1978, § 74-6-4(D). The WQCC's adoption of current standards for barium, toluene, 1,1,1-trichloroethane and vinyl chloride was based on "credible scientific data" presented at WQCC public hearings and the WQCC determined those standards were necessary for the protection of New Mexico's ground water and public health.
3. NMED has not been consistent with bringing "standards in line with the Maximum Contaminant Levels for each pollutant as specified by the U.S. Environmental Protection Agency ("EPA") under the federal Clean Water Act" in its proposed amendments to 20.6.2.3103.A NMAC.
4. NMED's use of one cancer per 100,000 exposed persons is not sufficiently protective of human health. EPA's *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (2000) recommends use of one cancer per 1,000,000 risk

level in setting water quality criteria and considers this cancer risk level appropriate for the general population. Additionally, both California and Washington utilize the EPA's one cancer per 1,000,000 risk level in setting water quality criteria. NMED has stated that the purpose of its proposed amendments to 20.6.2.3103.A NMAC is to bring New Mexico's standards in line with EPA standards. Updating New Mexico's cancer risk level to one cancer per 1,000,000 will accomplish NMED's purpose.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendments:

Amigos Bravos and GRIP, therefore, propose the following changes to NMED's proposed amendments as follows:

A. ~~Human Health Standards-Ground water shall meet the standards of Subsection A and B of this section unless otherwise provided. If more than one water contaminant affecting human health is present, the toxic pollutant criteria as set forth in the definition of toxic pollutant in Section 20.6.2.[1101]7T(2)NMAC for the combination of contaminants, or the Human Health Standard of Subsection A of Section 20.6.2.3103 NMAC for each contaminant shall apply, whichever is more stringent. Non-aqueous phase liquid shall not be present floating atop of or immersed within ground water, as can be reasonably measured.~~

(1)	Numerical Standards	
(a)	Antimony (Sb)	0.006 mg/l
(b)	Arsenic (As).....	[0.1]0.01 mg/l
(c)	Barium (Ba).....	[1.0]2 mg/l 1.0 mg/l
(d)	Beryllium (Be).....	0.004 mg/l
(e)	Cadmium (Cd).....	[0.01]0.005 mg/l
(f)	Chromium (Cr).....	0.05 mg/l
(g)	Cyanide (CN).....	0.2 mg/l 0.15 mg/l
(h)	Fluoride (F).....	1.6 mg/l
(i)	Lead (Pb).....	[0.05]0.015 mg/l
(j)	Total Mercury (Hg).....	0.002 mg/l
(k)	Nitrate (NO ₃ as N).....	10.0 mg/l
(l)	Nitrite (NO ₂ as N).....	1.0 mg/l
(m)	Selenium (Se).....	0.05 mg/l
(n)	Silver (Ag).....	0.05 mg/l
(o)	Thallium (Tl).....	0.002 mg/l
(p)	Uranium (U).....	0.03 mg/l 0.02 mg/l
(q)	Radioactivity: Combined Radium-226 & Radium-228.....	[30]5 pCi/l
(r)	Benzene.....	[0.01]0.005 mg/l 0.001 mg/l
(s)	Polychlorinated biphenyls (PCB's).....	[0.001]0.0005 mg/l
(t)	Toluene.....	[0.75]1 mg/l 0.15 mg/l
(u)	Carbon Tetrachloride.....	[0.01]0.005 mg/l 0.0005 mg/l

(v)	1,2-dichloroethane (EDC).....	[0.01]0.005 mg/l	0.0005 mg/l
(w)	1,1-dichloroethylene (1,1-DCE).....	[0.005]0.007 mg/l	0.005 mg/l
(x)	1,1,2,2-tetrachloroethylene (PCE).....	[0.02]0.005 mg/l	
(y)	1,1,2-trichloroethylene (TCE).....	[0.1]0.005 mg/l	
(z)	ethylbenzene.....	[0.75]0.7 mg/l	0.3 mg/l
(aa)	total xylenes.....		0.62 mg/l
(bb)	methylene chloride.....	[0.1]0.005 mg/l	
(cc)	chloroform.....		0.1 mg/l-0.08 mg/l
(dd)	1,1-dichloroethane.....	0.025 mg/l	0.0050 mg/l
(ee)	ethylene dibromide (EDB).....	[0.0001]0.00005 mg/l	
(ff)	1,1,1-trichloroethane (TCA).....	[0.06]0.2 mg/l	0.06 mg/l
(gg)	1,1,2-trichloroethane.....	[0.01]0.005 mg/l	
(hh)	1,1,2,2-tetrachloroethane.....		0.01 mg/l-0.0010 mg/l
(ii)	vinyl chloride.....	[0.001]0.002 mg/l	0.0005 mg/l
(jj)	PAHs: total naphthalene plus monomethylnaphthalenes.....		0.03 mg/l
(kk)	benzo-a-pyrene.....	[0.0007]0.0002 mg/l	
(ll)	cis-1,2-dichloroethene.....	0.07 mg/l	0.0060 mg/l
(mm)	trans-1,2-dichloroethene.....	0.1 mg/l	0.0100 mg/l
(nn)	1,2-dichloropropane (PDC).....		0.005 mg/l
(oo)	styrene.....		0.1 mg/l
(pp)	1,2-dichlorobenzene.....		0.6 mg/l
(qq)	1,4-dichlorobenzene.....	0.075 mg/l	0.0050 mg/l
(rr)	1,2,4-trichlorobenzene.....		0.07 mg/l
(ss)	pentachlorophenol.....		0.001 mg/l
(tt)	atrazine.....	0.003 mg/l	0.0010 mg/l
(uu)	gamma-BHC.....		0.0002 mg/l
(vv)	chlorobenzene.....		0.07 mg/l
(ww)	hexachlorobenzene.....		0.001 mg/l
(xx)	alachlor.....		0.002 mg/l
(yy)	asbestos.....		7 MFL
(zz)	bromodichloromethane.....		0.08 mg/l
(aaa)	total trihalomethanes.....		0.08 mg/l
(bbb)	chlordane.....		0.0001 mg/l
(ccc)	chlorobenzene.....		0.07 mg/l
(ddd)	chromium III.....		0.05 mg/l
(eee)	chromium VI.....		0.01 mg/l
(fff)	2,4-D.....		0.07 mg/l
(ggg)	dalapon.....		0.2 mg/l
(hhh)	dibromochloromethane.....		0.08 mg/l
(iii)	1,2-Dibromo-3-chloropropane.....		0.0002 mg/l
(jii)	Di(2-ethylhexyl)phthalate.....		0.004 mg/l
(kkk)	dioxin.....		0.00000003 mg/l
(lll)	endrin.....		0.002 mg/l
(mmm)	heptachlor.....		0.00001 mg/l
(nnn)	lead acetate.....		0.015 mg/l
(ooo)	lead subacetate.....		0.015 mg/l
(ppp)	methoxychlor.....		0.03 mg/l
(qqq)	perchlorate.....		0.006 mg/l
(rrr)	simazine.....		0.004 mg/l
(sss)	toxaphene.....		0.003 mg/l
(ttt)	2,4,5-TP (silvex).....		0.05 mg/l
(uuu)	bromate.....		0.01 mg/l
(vvv)	carbofuran.....		0.04 mg/l
(www)	chlorite.....		1.0 mg/l
(xxx)	dichloromethane.....		0.005 mg/l

(vvv) di-(2-ethylhexyl) adipate.....	0.4 mg/l
(zzz) dinoseb.....	0.007 mg/l
(aaaa) diquat.....	0.02 mg/l
(bbbb) endothall.....	0.1 mg/l
(cccc) glyphosate.....	0.7 mg/l
(dddd) heptachlor epoxide.....	0.0002 mg/l
(eeee) hexachlorocyclopentadiene.....	0.05 mg/l
(ffff) hexachlorocyclohexane (lindane).....	0.0002 mg/l
(gggg) oxamyl.....	0.2 mg/l
(hhhh) picloram.....	0.5 mg/l
(iiii) 1,3-Dichloropropene.....	0.0005 mg/l
(jjjj) Trichlorofluoromethane.....	0.15 mg/l
(kkkk) 1,1,2-trichloro-1,2,2-trifluoroethane.....	1.2 mg/l

(2) Standards for Toxic Pollutants. A concentration shown by scientific information currently available to the public to have potential for causing one or more of the following effects upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains: (1) unreasonably threatens to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; or (2) creates a lifetime risk of more than one cancer per ~~100,000~~ 1,000,000 exposed persons.

(3) Standards for Non-Aqueous Phase Liquids. Non-aqueous phase liquid shall not be present floating atop of or immersed within ground water, as can be reasonably measured.

B. Other Standards for Domestic Water Supply

(1) Chloride (Cl)	250.0 mg/l
(2) Copper (Cu)	1.0 mg/l
(3) Iron (Fe)	1.0 mg/l
(4) Manganese (Mn)	0.2 mg/l <u>0.05 mg/l</u>
[(6)] (5) Phenols.....	0.005 mg/l
[(7)] (6) Sulfate (SO ₄)	600.0 mg/l <u>250 mg/l</u>
[(8)] (7) Total Dissolved Solids (TDS)	1000.0 mg/l <u>500 mg/l</u>
[(9)] (8) Zinc (Zn)	10.0 mg/l <u>5 mg/l</u>
[(10)] (9)pH.....	between 6 and 9
(10) Methyl tertiary-butyl ether (MTBE).....	0.1 mg/l <u>0.013 mg/l</u>

C. Standards for Irrigation Use

(1) Aluminum (Al).....	5.0 mg/l <u>1.0 mg/l</u>
(2) Boron (B)	0.75 mg/l <u>0.7 mg/l</u>
(3) Cobalt (Co)	0.05 mg/l
(4) Molybdenum (Mo)	1.0 mg/l
(5) Nickel (Ni)	0.2 mg/l <u>0.1 mg/l</u>

VIII. 20.6.2.3103.A NMAC – NMED’s Proposal to Amend Applicability of Certain Human Health Standards

Statement of Position:

NMED proposes to delay application of its revised human health 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) until July 1, 2020. NMED also proposes to limit application of its revised human health 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 by not requiring sites for which the Secretary has approved an abatement completion report pursuant to 20.6.2.4112 NMAC to comply with the newly revised standards “unless the secretary notifies the responsible person that the site is a source of these contaminants in ground water at a place of withdrawal for present or reasonably foreseeable future use at concentrations in excess of the standards of this section”.

Amigos Bravos and GRIP oppose NMED’s proposed amendments in their entirety for the following reasons.

Statement of Reasons for Changes to NMED’s Proposed Amendments:

1. A revised human health standard for a toxic pollutant discharged to ground water should be applied immediately to all regulated entities.
2. A currently regulated entity should be required to demonstrate that it needs additional time to comply with more stringent standards. The appropriate place to provide a compliance schedule with newly revised human health standards is in a regulated

facility's permit, on a permit-by-permit basis. For example, under the federal Clean Water Act, compliance schedules for human health standards are not provided in the Act's implementing regulations, but rather in an NPDES permit.

3. NMED's proposed amendments do not adequately address the issue of grandfathering sites currently under abatement. Sites for which the secretary has approved an abatement completion report should be required to meet any newly revised standards. These sites should not be exempt from human health standards of any toxic pollutant provided under 20.6.2.3103.A NMAC, but rather should be required to demonstrate their need for additional time to come into compliance with newly revised and adopted standards.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendments:

Amigos Bravos and GRIP therefore propose to delete NMED's proposed amendments in their entirety as follows:

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

~~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 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 at a place of withdrawal for present or reasonably foreseeable future use at concentrations in excess of the standards of this section.]~~

IX. 20.6.2.1210 NMAC – NMED’s Proposal to Amend Requirements for Variance Petitions

Statement of Position:

NMED proposes to amend requirements for variance petitions. Amigos Bravos and GRIP oppose in part and support in part NMED’s proposed amendments. Amigos Bravos and GRIP oppose NMED’s proposed amendment to remove the current five-year limit for variances to allow polluters to contaminate ground water and surface water in perpetuity. Amigos Bravos and GRIP support NMED’s proposed amendments to require petitioners for variances to “state in detail how any water pollution above standards will be abated” and to “state the period of time for which the variance is desired including all reasons, data, reports and any other information demonstrating that such time period is justified and reasonable”.

Statement of Reasons for Changes to NMED’s Proposed Amendments:

1. The WQA states that, “The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution *within a reasonable period of time.*” NMSA 1978 (as amended by NMSA 1978, Section 74-6-17), Section 74-6-4(H) (emphasis added). The current five-year limit for variances complies with and implements this provision of the WQA. NMED’s intent behind its proposed amendment removing the current five-year limit for variances is to have variances issued for “the life of the facility”. See NMED “Hit List for Regulation Changes as discussed on 11/9/2015.” Variances issued for “the life of the facility” would therefore violate §74-6-4(H).
2. The WQA also provides that a variance “may not be extended or renewed unless a new petition is filed and *a public hearing is held.*” *Id.* (emphasis added). Therefore, when a

facility submits a petition for an initial variance, renewal or extension of a variance, a public hearing *must* be held. NMED's proposed amendment to remove the five-year limit for variances and for NMED to conduct an administrative review every 5 years (of the term of the variance) is the functional equivalent of a variance renewal or extension, and therefore a public hearing must be held on any decisions to renew or extend a variance. This statutory requirement cannot be changed by regulatory amendment.

3. Under current regulations variances have a five-year limit, which parallels the WQA's five-year limit for permits. *See* Section 20.6.2.1210.D NMAC *and* NMSA 1978, § 74-6-5(I). The WQA does not authorize a variance to exceed the term of a permit. § 74-6-5(I).
4. The removal of the five-year limitation for variances would also authorize NMED to eliminate the mandatory holding of a public hearing on petitions for variances (whether new petitions, extension petitions, or renewal petitions) by issuing variances "for the life of the facility".
5. Providing a variance for the life of a facility will give industry incentive to petition the WQCC for variances at an unprecedented level. Neither the WQCC nor NMED currently has the resources to respond to the substantial increase in variance petitions that will most likely result from the removal of the five-year limitation for variances.
6. To approve variances for the life of a facility will undermine NMED's proposed amendment to strengthen human health standards of toxic pollutants discharged to ground water.
7. In the alternative, if the WQCC determines that removal of the five-year limit for variances is lawful under the WQA, Amigos Bravos and GRIP propose alternative

language for the WQCC's consideration. The proposed alternative language for 20.6.2.1210.E, -F, -G, and -H NMAC originates from the New Mexico Solid Waste Act regulations for variances. See 20.9.2.15.C, -D, -E, and -F NMAC. Proposed alternative language for 20.6.2.1210.I NMAC requires petitioners to appear before the WQCC as a condition precedent for the WQCC's consideration and approval of a variance petition.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendment:

Therefore, Amigos Bravos and GRIP propose the following changes to NMED's proposed amendments:

20.6.2.1210 VARIANCE PETITIONS:

A. Any person seeking a variance pursuant to NMSA 1978, Section 74-6-4(H)[G] shall do so by filing a written petition with the commission. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:

- (1) state the petitioner's name and address;
- (2) state the date of the petition;
- (3) describe the facility or activity for which the variance is sought;
- (4) state the address or description of the property upon which the facility is located;
- (5) describe the water body, ~~or~~ watercourse, or aquifer affected by the discharge for which the variance is sought;
- (6) identify the regulation of the commission from which the variance is sought;
- (7) state in detail the extent to which the petitioner wishes to vary from the regulation;
- (8) state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and

(9) ~~[state the period of time for which the variance is desired]~~state in detail how any water pollution above standards will be abated; and

(10) state the period of time for which the variance is desired including all reasons, data, reports and any other information demonstrating that such time period is justified and reasonable.

B. The variance petition shall be reviewed in accordance with the adjudicatory procedures of 20 NMAC 1.3 and shall be reviewed for compliance with existing federal regulations.

C. The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. ~~{The} If the petition is granted in whole or in part, or subject to conditions, the commission shall [not grant a]specify the length of time that variance [for a period of time in excess of five years.] shall be in place.~~ The commission shall not grant a variance for a period of time in excess of five years.

D. For variances associated with a discharge permit or abatement plan, the existence and nature of the variance shall be disclosed in all public notices applicable to the discharge permit or abatement plan.

E. ~~For variances granted for a period in excess of five years, the petitioner 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. If such conditions are not being met, or there is evidence indicating changed circumstances or newly discovered facts or conditions that were unknown at the time the variance was initially granted, any person may request a hearing before the commission to revoke, modify or otherwise reconsider the variance.~~ The commission shall deny the variance petition unless the petitioner establishes evidence that:

(1) application of the regulation would result in an arbitrary and unreasonable taking of the applicant's property or would impose an undue economic burden upon any lawful business, occupation or activity; and

(2) granting the variance will not result in any condition injurious to public health, safety or welfare or the environment.

F. No variance shall be granted until the commission has considered the relative interests of the applicant, other owners of property likely to be affected, and the general public.

G. Variance or renewal of a variance shall be granted for time periods and under conditions consistent with reasons for the variance but within the following limitations:

(1) if the variance is granted on the grounds that there are no practicable means known or available for the adequate prevention of degradation of the environment or the risk to the public health, safety or welfare, it shall continue only until the necessary means for the prevention of the degradation or risk become known and available;

(2) if the variance is granted on the grounds that it is justified to relieve or prevent hardship of a kind other than that provided for in Paragraph (1) of this subsection, it shall not be granted for more than one year.

~~—F. I.~~ An order of the commission is final and bars the petitioner from petitioning for the same variance without special permission from the commission. The commission may consider, ~~among other things~~, the development of new information and techniques to ~~be sufficient~~ provide significantly different justification for a second petition. If the petitioner, or his authorized representative, fails to appear at the public hearing on the variance petition, ~~the commission shall proceed with the hearing on the basis of the petition. the commission shall not proceed with the hearing and the petition shall be denied.~~ A variance may not be extended or renewed unless a new petition is filed and processed in accordance with the procedures established by this section.

X. 20.6.2.3114 NMAC – NMED’S Proposal to Amend Fees

Statement of Position:

NMED proposes to add “discharge permit amendments” to the fees that the Secretary may waive or reduce under 20.6.2.3114.E NMAC. Amigos Bravos and GRIP oppose this proposed amendment and therefore propose to delete NMED’s proposed amendment in its entirety for the following reasons.

Statement of Reasons for Changes to NMED's Proposed Amendment:

1. NMED's proposed term "discharge permit amendment" creates a new category of NMED actions called "amendments" not authorized under the Water Quality Act ("WQA"). The proposed term and definition both clearly violate the WQA because they exceed the authority of both the WQCC and NMED under the WQA. The WQA expressly authorizes NMED to perform the following actions: deny a permit, terminate a permit, modify a permit, or grant a permit subject to a condition. *See* NMSA 1978, § 74-6-5(M), (N). The WQA only authorizes the WQCC to promulgate procedures, by regulation, for the "issuance or modification of a permit" and for the "issuance of renewals of permits." NMSA 1978, § 74-6-5(F). The WQA does not permit the WQCC to adopt regulations providing procedures for NMED to "amend" a discharge permit. *Id.* Therefore, the proposed addition of "discharge permit amendment" to the current ground water and surface water protection regulations exceeds NMED's authority under the Act. If the WQCC were to adopt this proposed revision, it too would exceed its authority under the Act, violating NMSA 1978, § 74-6-4(C). NMED, in its Statement of Reasons provided with its May 1, 2017 Petition conceded that it has been engaging in an unlawful practice by approving "amendments" to discharge permits in effect. *See* NMED's "Statement of Reasons For Proposed Amendments to 20.6.2 NMAC", reason #3 (May 1, 2017). The WQCC must refrain from legitimizing NMED's unlawful practice with codification.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendment:

Amigos Bravos and GRIP therefore propose to delete NMED's proposed amendment in its entirety as follows:

E. The secretary may waive or reduce fees for discharge permit **amendments**, modifications or renewals which require little or no cost for investigation or issuance.

In the alternative, if the WQCC determines that the addition of “discharge permit amendment” to 20.6.3 NMAC does not exceed NMED’s authority or the WQCC’s authority under the WQA, then Amigos Bravos and GRIP provide the following reasons for their proposed “in the alternative” changes to NMED’s proposed amendment.

Statement of Reasons for “In the Alternative” Changes to NMED’s Proposed Amendment:

1. The term “discharge permit amendment” derives from 20.6.7 NMAC, the New Mexico “Copper Rule”. Section 20.6.7.9.C of the Copper Rule provides the following:

A permittee requesting a discharge permit amendment separate from a discharge permit renewal or modification shall remit with the request a discharge permit amendment fee of five hundred dollars (\$500). The permit amendment fee is not refundable and may not be applied toward future discharge permit applications or amendments.

Id. Fees assessed for discharge permit amendments should be consistent for all regulated entities. Copper Mines should not be the only regulated entities assessed a \$500 non-refundable fee for discharge permit amendment requests.

2. Only the WQCC has the authority to revise fees under the WQA, specifically NMSA 1978, Section 74-6-5(K).

Amigos Bravos’s & GRIP’s “In the Alternative” Changes to NMED’s Proposed Amendment:

In the alternative, if the WQCC determines that the addition of the term “discharge permit amendment” does not exceed NMED’s authority or the WQCC’s authority under the WQA, Amigos Bravos and GRIP propose the following changes to NMED’s amendment:

20.6.2.3114 FEES:

A. FEE AMOUNT AND SCHEDULE OF PAYMENT - Every facility submitting a discharge permit application for approval or renewal shall pay the permit fees specified in Table 1 of this section and shall pay a filing fee as specified in Table 2 of this section to the Water Quality Management Fund. Every facility submitting a request for temporary permission to discharge pursuant to Subsection B of Section 20.6.2.3106 NMAC, or financial assurance pursuant to Paragraph 11 of Subsection A of Section 20.6.2.3107 NMAC shall pay the fees specified in Table 2 of this section to the Water Quality Management Fund.

B. Facilities applying for discharge permits which are subsequently withdrawn or denied shall pay one-half of the permit fee at the time of denial or withdrawal.

C. Facilities requesting a discharge permit amendment shall remit with the request a discharge permit amendment fee of five hundred dollars (\$500). The permit amendment fee is not refundable and may not be applied toward future discharge permit applications or amendments.

~~C. D.~~ Every facility submitting an application for discharge permit modification will be assessed a filing fee plus one-half of the permit fee. Applications for both renewal and modification will pay the filing fee plus the permit fee

~~D. E.~~ If the secretary requires a discharge permit modification as a component of an enforcement action, the facility shall pay the applicable discharge permit modification fee. If the secretary requires a discharge permit modification outside the context of an enforcement action, the facility shall not be assessed a fee

~~E. F.~~ The secretary may waive or reduce fees for discharge permit modifications or renewals which require little or no cost for investigation or issuance.

~~F. G.~~ Facilities shall pay the filing fee at the time of discharge permit application. The filing fee is nonrefundable. The required permit fees may be paid in a single payment at the time of discharge permit approval or in equal installments over the term of the discharge permit. Installment payments shall be remitted yearly, with the first installment due on the date of discharge permit approval. Subsequent installment payments shall be remitted yearly thereafter. The discharge permit or discharge permit application review of any facility shall be suspended or terminated if the facility fails to submit an installment payment by its due date.

~~G. H.~~ Every three years beginning in 2004, the department shall review the fees for discharge permit amendments and fees specified in Table 1 and 2 of this section and shall provide a report to the commission. The ~~department~~commission shall revise the fees as necessary in accordance with NMSA 1978, Section 74-6-5(~~J~~)(K), ~~NMSA 1978.~~

XI. 20.6.2.4103.F NMAC – NMED’s Proposal to Amend Alternative Abatement Standards

Statement of Position:

Amigos Bravos and GRIP support NMED’s proposed amendments to 20.6.2.4103.A-E NMAC. Amigos Bravos and GRIP oppose NMED’s proposed amendments to 20.6.2.4103.F NMAC and propose several changes for the following reasons.

Statement of Reasons for Changes to NMED’s Proposed Amendments:

1. 20.6.2.3103.F NMAC contradicts 20.6.2.3103.F(1) NMAC for the following reason.

NMED is proposing to add the following language to 20.6.2.4103.F NMAC: “If a responsible person *abating* water pollution pursuant to an approved abatement plan is unable to fully meet the abatement standards set forth in Subsections A, B and C of this section the responsible person may propose alternative abatement standards.” (Emphasis added). This language implies that a responsible person is currently abating pollution pursuant to an approved Stage 2 abatement plan. This language clearly contradicts NMED’s proposed language for 20.6.2.3103.F(1): “*At any time during or after the submission of a Stage 2 abatement plan*, the responsible person may file a petition seeking approval of alternative abatement standard(s)...”. (Emphasis added). This language implies that a Stage 2 abatement plan has not yet been approved or implemented.

2. A responsible person should be required to implement Stage 2 abatement *before* being allowed to request an alternative abatement standard in order to make a clear showing that attaining abatement standard(s) is/are not feasible. To allow a polluter to bypass implementation of a Stage 2 abatement plan and request alternative abatement standards undermines the purpose of a Stage 2 abatement plan and 20.6.2.4103 NMAC, and renders meaningless human health standards for toxic pollutants being discharged to ground water.
3. Technical infeasibility should be demonstrated by a statistically valid extrapolation of the decrease of any water contaminant over the remainder of a twenty (20) year period with parametric statistics. Therefore, at a minimum, ten (10) data points should be provided to allow for substantially more sophisticated conclusions than could be provided with non-parametric statistics (or only eight (8) data points).

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendments:

Amigos Bravos and GRIP therefore propose the following changes to NMED's proposed amendments:

F. Alternative Abatement Standards: If a responsible person abating water pollution pursuant to an approved abatement plan is unable to fully meet the abatement standards set forth in Subsections A, B and C of this section the responsible person may propose alternative abatement standards.

(1) At any time after the implementation of an approved Stage 2 abatement plan, ~~At any time after the submission of a Stage 2 abatement plan,~~ a responsible person may file a petition with the commission seeking approval of an alternative abatement standard based on compliance with the standard set forth in Subsections A, B and C of this section is technically infeasible, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over the remainder of a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration at the time technical infeasibility is proposed. A statistically valid decrease cannot be demonstrated by fewer

than ten (10) consecutive sampling events. Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years, and at least one of the following criteria:

(a) compliance with the standard set forth in Subsections A, B and C of this section is not feasible by the maximum use of commercially ~~accepted~~ available abatement technology;

(b) compliance with the standard set forth in Subsections A, B and C of this section is not feasible by the maximum use of technology within the economic capability of the responsible person; or

(c) there is no reasonable relationship between the economic and social costs and benefits of attainment of the standard set forth in Subsections A, B and C of this section; ~~or.~~

~~(d) compliance with the standard set forth in Subsections A, B and C of this section is technically infeasible, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over the remainder of a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration at the time technical infeasibility is proposed. A statistically valid decrease cannot be demonstrated by fewer than eight (8) consecutive sampling events. Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years.~~

(2) A petition for alternative abatement standards shall specify, in addition to the information required by Subsection A of 20.6.2.1210 NMAC the following:

(a) the water contaminant for which the alternative abatement standard is proposed;

(b) the alternative abatement standard proposed;

(c) the three-dimensional body of water pollution for which approval is sought;

(d) a summary of all actions taken to abate water pollution to standards; and

(f) other information as deemed necessary, which may include a transport, fate and risk assessment in accordance with accepted methods.

(3) The commission may approve an alternative abatement standard if the petitioner demonstrates that:

(a) at least one of the criteria set forth in Paragraph 1 of Subsection F of this Section has been met;

(b) the proposed alternative abatement standard is technically achievable and cost-benefit justifiable; and

(c) compliance with the proposed alternative abatement standard will not create a present or future hazard to public health or undue damage to property.

(4) An alternative abatement standard shall only be granted after a public hearing, as required by NMSA 1978 (as amended by NMSA 1978, Section 74-6-17), Section 74-6-4(H) of the Water Quality Act.

(5) The commission shall review petitions for alternative abatement standards in accordance with the procedures for review of variance petitions provided in the commission's adjudicatory procedures, 20.1.3 NMAC.

XII. 20.6.2.4106.D NMAC – NMED's Proposal to Amend Stage 2 Abatement Plan Requirements

Statement of Position:

Amigos Bravos and GRIP oppose NMED's proposed amendments to 20.6.2.4106.D in their entirety for the following reasons.

Statement of Reasons for Changes to NMED's Proposed Amendments:

1. NMED has provided no rationale as to why regulated entities should be permitted to submit a Stage 2 abatement plan proposal at any time after approval by the Secretary of a final site investigation report prepared pursuant to Stage 1 of the abatement plan.
2. Removing the 120 day limit on when a regulated entity must submit a Stage 2 abatement plan proposal is a means to circumvent the requirement to obtain a variance.

Amigos Bravos's & GRIP's Changes to NMED's Proposed Amendments:

Amigos Bravos and GRIP therefore propose to delete NMED's proposed amendment as follows:

D. Stage 2 Abatement Plan: Any responsible person shall submit a Stage 2 abatement plan proposal to the secretary for approval within sixty (60) days~~[, or up to one hundred and twenty (120) days for good cause shown,]~~ for up to one hundred and twenty (120) days for good cause shown] after approval by the secretary of the final site investigation report prepared pursuant to Stage 1 of the abatement plan. ~~The secretary may grant approval for an extension of time to submit a State 2 abatement plan for good cause shown.~~

XIII. Conclusion.

For the foregoing reasons, Amigos Bravos and GRIP request that the WQCC adopt Amigos Bravos's and GRIP's proposed changes to NMED's Petition to Amend 20.6.2 NMAC.

Dated: August 8, 2017

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Statement of Position With Statement of Reasons and Corrected Proposed Changes was served on August 8, 2017 via electronic mail to the following:

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