DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE LEGAL OPERATIONS AGENCY

15 February 2018

HQ AFLOA/JACE
1500 W. Perimeter Road, Suite 1500
Joint Base Andrews, MD 20762

VIA FEDERAL EXPRESS
Ms. Pam Castaneda
Administrator for Boards and Commissions
Water Quality Control Commission
1190 St. Francis Dr.
Santa Fe, NM 87505

Re: WQCC 17-03(R): In the Matter of: Proposed Amendments to Ground and Surface Water Protection Regulations, 20.6.2 NMAC: DoD Pleadings.

Dear Ms. Castaneda:

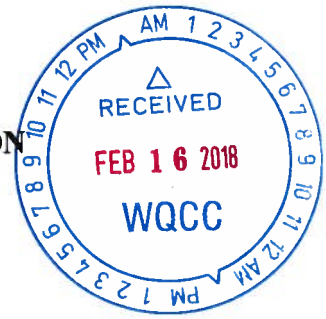
I have enclosed an original, two (2) hard copies and ten (10) electronic copies on compact discs (cds) of the following documents: (1) USAF/DoD Closing Argument, Partial Findings of Fact and Conclusions of Law; and (2) Certificate of Service. We would greatly appreciate it if these documents were added to the pleadings for the above referenced case. Thank you very much for your attention to this matter.

Sincerely,

Michael L. Casillo
Litigation Attorney

Encl.

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

WQCC 17-03(R)

UNITED STATES AIR FORCE, DEPARTMENT OF DEFENSE

CLOSING ARGUMENT, PARTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

1. The United States Air Force, Department of Defense (USAF/DoD) provided comments, proposed changes and testimony on two discrete issues in this rulemaking: "Exemptions (20.6.2.10 and 20.6.2.3105 NMAC)" and "Section 20.6.2.3103 NMAXC – Content of the Narrative Standard." Accordingly, the Partial Findings of Fact and Conclusions of Law are reserved to findings and conclusions on specific Rule proposals on these two issues. USAF/DoD's proposed language for specific provisions of the Rules changes are found in **Exhibit A**, attached hereto. USAF/DoD, however, draws content and testimony from other issues in the proceeding in its closing argument to further illustrate the efficacy of adopting USAF/DoD proposed changes to the Rules. USAF/DoD reserves all rights to counter any post-hearing submission by other parties.

PARTIAL FINDINGS OF FACTS ON SPECIFIC RULE PROPOSALS

Section 20.6.2.3103 NMAC – Content of the Narrative Standard

2. NMED petitioned the Commission to amend the definition of toxic pollutant under the Rules proposing to add several contaminants to the list of toxic pollutants and proposing to relocate the content of what is referred to as the "Narrative Standard" from 20.6.2.7.WW NMAC in the existing Rules to a new sub-section, proposed at 20.6.2.3103(A)(2) NMAC.

3. The Narrative Standard provides NMED with regulatory authority to control discharges onto or below the surface of the ground to protect groundwater with an existing concentration of 10,000 mg/l or less TDS where the discharges: contain a constituent identified as a toxic pollutant identified in (proposed) 20.6.2.7.T(2) NMAC that does not have a corresponding numeric human health standard in (proposed) 20.6.2.3103.A(1) NMAC; or

contain contaminants may be more toxic in combination then individually. *See* Exhibit NMED 5, p. 20, lns. 8-9 & 15-18. In both scenarios, when implemented NMED must set numeric standard(s). *See* Transcript Vol. II, pgs. 427, lns. 15- 19; 483 – 484 lns. 22- 1.

4. NMED stated that the move of the narrative standard provision is designed to provide, "regulatory clarity since the toxic pollutant definition is a narrative groundwater standard." *See* Exhibit NMED 5, p. 21, lns. 13-14.

5. USAF/DoD written testimony recommended changes to the Rules to identify, clarify and explain NMED's process and what scientific information NMED is to consider when implementing the Narrative Standard. *See* Exhibit USAF/DoD 2, p. 3, lns. 10-22. USAF/DoD explained that the broad scope of NMED's proposed language creates the possibility that a standard could be adopted based on scientific information that is incomplete or does not meet an acceptable standard of practice of within the scientific community. *See e.g.* Exhibit USAF/DoD 2, p. 3, lns. 4 – 6. NMED's Narrative Standard would allow a toxic pollutant standard to be based on any scientific information that is publically available, regardless of whether or not the scientific information is based on legitimate peer reviewed, and accepted scientific research. *See* Exhibit USAF/DoD 2 p. 2-3, lns. 22 - 1. USAF/DoD proposals seek to give consideration to the weight of scientific evidence through a systematic process as is standard practice in the scientific community. *See* Exhibit USAF/DoD 2, p. 3, lns. 16 – 22. USAF/DoD asserted that NMED's then proposed language does not require that the scientific information be peer reviewed, which is "a necessary element in the evaluation of scientific information used in the formulation of scientifically and legally defensible standards," and otherwise "falls well short of scientifically accepted validation methods." *See* Exhibit USAF/DoD 2, pgs. 6 -7, lns. 21 – 1. USAF/DoD's written testimony pointed to examples in several federal laws, processes and guidelines for

setting standards that explain exactly what the regulator is to consider in similar scenarios to ensure the quality, objectivity, and integrity of the scientific analysis that support regulatory decision making. *See* Exhibit USAF/DoD 2, pgs. 4-6, lns. 12 -20. Specifically, USAF/DoD proposed to change the language of the Narrative Standard to read as follows:

> Standards for Toxic Pollutants. A concentration upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains: (1) shown by human health risk assessments to warrant actions to reduce or prevent direct or indirect injury to human health, (2) creates a lifetime risk of more than one cancer per 100,000 exposed persons, or (3) produces harmful effects to the health of animals or plants which are commonly hatched, bred, cultivated, or protected for use by man for economic benefit. Appropriate sources of toxicological information for human health risk assessments, at a minimum, include the following elements: (1) based on the best science available, peer reviewed science and supporting studies conducted in accordance with sound and objective scientific practices, as well as data collected by accepted methods or best available methods, (2) available to the public, and (3) transparent about the methods and processes used to develop the values. Integrated Risk Informant System, the EPA's Provisional Peer Reviewed Toxic Values, Agency for Toxic Substances and Disease Registry Minimal Risk Levels and Human Effects Assessment Summary Tables are examples of acceptable sources for toxicological information for human health risk assessments.
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> *See* Exhibit USAF/DoD 2, pgs. 8-9, lns. 8 – 2.

6. Environmental Quality Association, Subsection, New Mexico Municipal League ("Municipal League") raised similar concerns as USAF/DoD, seeking that the process of adopting standards from scientific studies be codified for consistency and ensuring public participation. *See* Exhibit NMML-4 lns. 96 - 99. The Municipal League claimed that NMED's proposed move of the Narrative Standard would allow NMED to expand its authority beyond the list of toxic pollutants. *See* Exhibit NMML-4, lns. 94 - 96. Similar to USAF/DoD, the Municipal League asserted that "scientific information currently available to the public' needs to

be peer reviewed before translating to a regulatory standard outside the rulemaking process." *See* Pleading Log No. 55, Municipal League Notice of Intent to Present Technical Testimony and Exhibits, Exhibit NMML-1, NMML Comments on NMED Petition, at p. 1, lns. 35 – 44. The Municipal League also claimed that NMED's proposed changes to the Narrative Standard provision should only be adopted by the Commission if NMED's implementation powers were limited to the listed toxic pollutants. *See* Exhibit NMML-4, lns 99 -101.

7. NMED's written rebuttal testimony claims that the USAF/DoD proposed language is too prescriptive, inconsistent with the flexibility afforded by the Act and limits the toxicological information that could be relied upon when implementing the Narrative Standard. *See* Exhibit NMED 28, p. 3, lns. 13 – 18. NMED's written rebuttal testimony explained what types of data NMED might consider in implementing the Narrative Standard. *See* Exhibit NMED 28 p. 5, lns. 13 – 16. In response to USAF/DoD concerns, NMED proffered to substitute the term "scientific information" (in the existing Rules and proposed at 20.6.2.3103(A)(2)) with language derived from the Act: "credible scientific data and other evidence appropriate under the Water Quality Act" [74-6-4.D NMSA] *See* Exhibit NMED 28, p. 3, lns. 20 – 21; & p. 6, lns. 21 – 22; *see also* Transcript Vol. II, p. 366, lns. 8-14; p. 367 lns.. 2 - 9. At the hearing, Mr. McQuillan explained that NMED believed that this change "was very good public policy." *See* Transcript Vol. II, p. 10 – 11.

8. Los Alamos National Security, LLC (LANS) rebuttal testimony explained that they agree with USAF/DoD that the Rules would benefit from a more defined process under the Narrative Standard. *See* Pleading Log No. 80, Rebuttal Testimony of Robert S. Beers, LANS at p. 10, lns. 20 - 22. Mr. Olson's written rebuttal testimony stated that USAF/DoD's recommended language was reasonable, but claimed that the specific language proposed by

USAF/DoD was not consistent with the Act, recommended that that the Commission adopt only portions of USAF/DoD's initial recommended changes. *See* Exhibit WCO Rebuttal 1 at p. 4.

9. Municipal League rebuttal testimony concurred with USAF/DoD's position on the Narrative Standard, explaining that NMED proposed language is vague and does not specify NMED's methodology for setting standards under the Narrative Standard. *See* Exhibit NMML-RT-2, p. 1, 30 – 31; p. 4, lns. 2 – 7. The Municipal League explained that NMED's Narrative Standard provision, "provides NMED flexibility, but results in uncertainty for the regulated community," and this issue serves an example of "how NMED often regulates by guidance and not rule." *See* Exhibit NMML-RT-2, p. 1, 31 – 33. The Municipal League reiterated its agreement with USAF/DoD that "all transparency and peer review should be used in the formulation of groundwater standards." See Exhibit NMML-RT-2, p. 4, lns. 2 – 7.

10. USAF/DoD written sur-rebuttal testimony addressed and countered NMED and Mr. Olson's rebuttal testimony. Specifically, USAF/DoD claimed while derived from the Act, NMED and Mr. Olson's proposed changes are not defined or explained in the Act or the Rules (*See* Exhibit USAF/DoD 4, p. 7). As such, USAF/DoD explained that the NMED and Mr. Olson proposed changes do not address the lack of transparency, or clarity to the regulated community on the meanings of the terms NMED seeks to add as well as the unfettered discretion afforded to NMED in implementing the Narrative Standard. *See* Exhibit USAF/DoD 4, p. 7. USAF/DoD written sur-rebuttal testimony proposes to remedy these deficiencies by adopting Mr. Olson's proposed changes and adding a definition for "credible science" be added to the Rules (proposed for 20.6.2.7.C(8) NMAC), derived from the regulations for the federal Toxic Substances Control Act. *See* Exhibit USAF/DoD 4, pgs. 8 -9. Specifically, USAF/DoD offered the following definition for "credible science":

> means, science that is reliable and unbiased. Use of credible science involves the use of supporting studies conducted in accordance with sound and objective science practices, including, when available, peer reviewed science and supporting studies and data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data). Additionally, NMED will consider as applicable: (1) The extent to which the scientific information, technical procedures, measures, methods, protocols, methodologies, or models employed to generate the information are reasonable for and consistent with the intended use of the information; (2) The extent to which the information is relevant for NMED's use in making a decision about a toxic pollutant or combination of toxic pollutants; (3) The degree of clarity and completeness with which the data, assumptions, methods, quality assurance, and analyses employed to generate the information are documented; (4) The extent to which the variability and uncertainty in the information, or in the procedures, measures, methods, protocols, methodologies, or models, are evaluated and characterized; and (5) The extent of independent verification or peer review of the information or of the procedures, measures, methods, protocols, methodologies or models.
>
> *See* Exhibit USAF/DoD 4, pgs. 8 -9; *see also* Exhibit A.

USAF/DoD explained that these additional changes are aligned with its initial proposed changes – to ensure that NMED's narrative standard decisions are transparent and based on sound science *See* (Transcript Vol. II, p. 477 – 480 lns 23 – 4) and to allow for certainty, transparency, accountability and accuracy in NMED's implementation of the narrative standard. *See* Transcript Vol. II, p. 481 lns 2-4.

11. At the hearing, Mr. McQuillan explained that when NMED has implemented the Narrative Standard, it would look to whatever information is available, so long as it is credible scientific data. *See* Transcript Vol. II, p. 435, lns. 21 - 23. Mr. McQuillan explained that NMED opposes USAF/DoD's proposed changes to the Narrative Standard, claiming that the NMED's proposed change to the Narrative Standard, "credible scientific data and other evidence appropriate under the Water Quality Act" is "much clearer," and "a broader standard, and it includes a lot of good information that may not be considered the best available, but it's

important." *See* Transcript Vol. II, p. 387, lns. 13 – 17. Mr. McQuillan acknowledged, however, that the terms "credible science" or "other evidence appropriate under the Water Quality Act" are not defined or explained in relevant laws, regulations or guidance. *See* Transcript, Vol. II, p. 414, lns. 7 – 10; p. 423, lns. 20 – 23; p. 424, lns. 9 – 17). Mr. McQuillan also acknowledged that there is no statute, regulation or guidance indicating how NMED is to weigh evidence when implementing the Narrative Standard. *See* Transcript Vol. II, p. 428, lns. 1 – 4.

12. Mr. McQuillan acknowledged that his explanation of what NMED might consider in his written testimony was merely an illustration of the types of data, not a formalized process. *See* Transcript Vol. II, pgs. 412 – 414 , lns 23 - 4. As for specific components of USAF/DoD's proposed changes, Mr. McQuillan explained that NMED opposed the insertion of the term "best available" science, claiming that NMED did not want to have "[its] hands tied" in the type of information used. *See* Transcript Vol. II, p. 387, lns. 2 – 13. Mr. McQuillan explained that NMED would like to retain the discretion to decide what to use in administering the Narrative Standard (Transcript, Vol. II, p. 413 - 414, lns. 12 - 10 p. 423, lns. 4 - 10), which offers "simplicity and flexibility" to NMED that is "just perfect" in his opinion. *See* Transcript, Vol. II, pgs. 422, lns. 21 – 23. Mr. McQuillan claimed that NMED would never use "junk science," or use a standard set by another state that NMED determines to not be based on credible scientific data. *See* Transcript, Vol. II, p. 386, lns. 6 – 7; p. 388, lns. 11 – 17; p. 416, lns. 22 -24; p. 425 lns. 1 -21; *see also* Exhibit NMED 28 p. 3, lns. 7-10. Mr. McQuillan also claimed that was not aware of "any problems" or litigation from NMED's implementation of the Narrative Standard. *See* Transcript, Vol. II, p. 386, lns. 6 – 7; *see also* Exhibit NMED 28 p. 3, lns. 7-10.

13. Dr. Brock testified that the USAF/DoD's proposed changes to the Narrative Standard seek transparency in what NMED is to consider and how it makes decisions under the Narrative Standard, and specific considerations be included in the Rules concerning the scientific data used to make such decisions. USAF/DoD proposals focus on transparency and the use of sound and objective scientific practices. *See* Transcript Vol. II, p. 479, lns. 17 – 22. USAF/DoD believes that better transparency will assure that the Commission, the citizens of New Mexico and regulated parties have a more clear understanding of the basis" for NMED's decisions under the Narrative Standard. *See* Transcript Vol. II, p. 484, lns. 6-13.

14. Dr. Brock explained that USAF/DoD appreciates NMED's willingness to make changes to the Narrative Standard provision in response to USAF/DoD's concerns. *See* Transcript Vol. II, p. 47, lns. 10 – 11. But, NMED's proposed changes fall short because it fails to address USAF/DoD's fundamental concerns that NMED's decisions be transparent and based on sound science. *See* Transcript Vol. II, p. 479, lns. 10 – 16. USAF/DoD would be amendable to NMED proposed changes to the Narrative if a definition for "credible science" were added to the Rules (Transcript Vol. II, p. 479, lns. 17 – 21). Dr. Brock's written sur-rebuttal testimony offers a definition for this term derived from the regulations for the federal Toxic Substance Control Act. *See* Transcript Vol. II, p. 479 - 480, lns. 24 -4. Dr. Brock explained that USAF/DoD's written sur-rebuttal testimony seeks to provide "a more granular level of detail to illustrate to the Commission and [NMED] the kinds of information and facts that would be needed to satisfy" USAF/DoD's initially proposed changes to the Narrative Standard. See Transcript Vol. II, pl. 494 – 495, lns. 9 – 17.

15. Dr. Brock explained that USAF/DoD does not seek to impose federal laws and regulations (Transcript Vol. II, 480 – 481, lns. 5 – 22) or rigid rules that if not followed, NMED

is prevented from taking appropriate action. *See* Transcript Vol. II, p. 496 - 497, lns. 16 – 14. Dr. Brock explained that USAF/DoD understood that by definition, there is going to be a level of uncertainty of the available science for toxic pollutants that don't have corresponding numerical standard in the Rules, because "if the data were sufficient to set a numerical standard, [the Commission] would just set one." *See* Transcript Vol. II, p. 494, lns. 7 – 23. Dr. Brock also indicated that there may be situations where the scientific information is not sufficient for setting a numeric standard under the Narrative Standard, in which case, he suggested that NMED wait until the science has matured to a level that can be reliably used to set a goal, or establish a standard based on the information available to the Department. Dr. Brock explained that USAF/DoD's proposed changes seek transparency on what data should be considered when implementing the Narrative Standard - how the data is examined, to explain the rationale, and logic for why the standard is set at the level chosen by NMED. *See* Transcript Vol. II, pgs. 496 – 499, lns. 16 – 2. With regard to the scientific process, Dr. Brock stated that USAF/DoD seeks peer-reviewed science, explaining that it is "basic to the scientific method." *See* Transcript Vol. II, p. 478, lns. 8 – 9. Dr. Brock explained, however, that USAF/DoD does not suggest that information should be rejected if it is not peer-reviewed, just that such information be examined more closely. *See* Transcript Vol. II, pgs. 490 – 491, lns. 9 -12. As to the listed numeric criteria in USAF/DoD's proposed definition of "credible science," Dr. Brock explained that this is intended to identify what is considered as part of a flexible and adaptable process evaluation of the science by NMED, not to restrict NMED's ability to implement the Narrative Standard. *See* Transcript Vol. II, pgs. 496 – 500, lns. 3 – 4. Dr. Brock explained that the Commission may choose to implement different terms than proposed by USAF/DoD, but the Rules currently lack sufficient detail to meet needed scientific processes to ensure "thoroughness, systematic review,

transparency, accuracy and reliability of the data." *See* Transcript, Vol. II, pgs. 496 – 497, lns 2 – 14.

16. As to NMED's claims that no litigation has arisen as a result of its administering the Narrative Standard, USAF/DoD submitted evidence indicating that NMED proposes to add several controversial contaminants where the science is currently not sufficiently mature enough to establish a health-based standard. *See* Exhibit USAF/DoD 4, at pgs. 5, 10 – 11; *see also* Transcript Vol II, pgs. 482 - 483 lns. 24-16. Dr. Brock explained that federal regulators have faced multiple challenges after adopting scientifically unsupportable decisions. *See* Exhibit USAF/DoD 4, pgs. 5-6.

Exemptions (20.6.2.10 and 20.6.2.3105 NMAC

17. NMED proposed changes to 20.6.2.3105.A, L, M NMAC and proposed to add subsection N & O to 20.6.2.4105 NMAC.

18. With respect to 20.6.2.3105.A, NMED seeks to limit the exemption if treatment or blending is required to meet the standards. The Municipal League opposed NMED's changes to this subsection, claiming that NMED's additions would make it likely that "no scenarios would qualify for this exemption." *See* Pleading Log No. 55, Municipal League Notice of Intent to Present Technical Testimony and Exhibits, Exhibit NMML-1, NMML Comments on NMED Petition, at p. 3, lns. 151 – 152. The Municipal League also seeks to expand the exemption in subsection A to apply to Aquifer Storage and Recovery (ASR)) projects, so long as the (treated) source water chemistry is compatible with the ground water. The Municipal League asserts that treated water from ASR projects meets the regulatory requirements of the federal Safe Drinking Water Act should be exempt the discharge permit requirements because the treated water is safe to drink. *See* Exhibit NMMLRT-2 at pgs. 1 – 3, lns. 8 – 18. The Municipal League argued that

the discharge permit requirement is duplicative and provided examples of the costs, time and resource strain caused by requiring ASR projects obtain discharge permits. *See* Exhibit NMML-5, at pgs. 2-3. The Municipal League also claimed that ASR projects are an key tool to water resource management, especially in a state like New Mexico where water resources are scarce. *See* Exhibit NMML-5, at pgs. 2-3. The Municipal League claimed that instead of encouraging entities to engage in recharge efforts, NMED insistence on the need for discharge permit in such cases serves as a disincentive due to the costs, strain and additional regulatory requirements imposed on municipalities. *See* Pleading Log No. 55, Municipal League Notice of Intent to Present Technical Testimony and Exhibits, Exhibit NMML-1, NMML Comments on NMED Petition, at p. 4, lns. 207 - 208.

19. USAF/DoD and LANS noted that NMED proposed subsection O relates to statutory exceptions found in 74-6-12(B) & (G) of the Act, which apply to all the requirements under the Act and Rules and are not reserved to the discharge permit requirements. Both LANS and USAF/DoD claimed that the current Rules apply to the regulated community even if such entities are already subject to regulatory control and oversight pursuant to other statutory authorities, such as the Hazardous Waste Act (NMSA 1978 Sections 74-4-1 to -14), resulting in duplicative and reporting and permitting requirements. *See* USAF/DoD Exhibit 6 pgs 3 – 5, lns. 8 – 12.

20. As such, LANS and USAF/DoD requested changes to the Rules that provide express exceptions/limitation to the Rules (proposed for 20.6.2.10 NMAC), as well and revisions to discharge permit exemptions in 20.6.2.3105 NMAC. *See* Pleading Log No. 52, Notice of Intent to Present Technical Testimony, Direct Testimony of Robert S. Beers, LANS at pgs. 4 – 6, lns. 18 – 18; *see also* USAF/DoD Exhibit 6 p. 4, lns. 11 – 18; pgs. 5-6, lns. 20 – 22.

21. The Energy, Minerals and Natural Resources Department ("EMNRD") submitted written testimony supporting NMED's proposed changes to 20.6.2.3105.L, M & N NMAC. *See* EMNRD Exhibit 1, pgs. 1 – 3.

22. At the hearing, Rio Grande Resources Corp., American Magnesium, LLC and New Mexico Copper Corp. questioned NMED regarding the limits of the exemptions (20.6.2.3105.A NMAC) and why a discharge permit is required for treated effluent from NMED-approved water treatment systems. See Transcript Vol. III, pgs. 602 – 610, lns. 17 - 25. NMED stated that a discharge permit, and all of its accompanying requirements are required when treated effluent is used for irrigation purposes. *See* Transcript, Vol. III, p. 607, lns 12 – 22. NMED acknowledged that it is in NMED's best interest to encourage recycled water use. *See* Transcript Vol. III, p. 608, lns. 22-24. But, NMED's position was that a regulated entity would need to seek a discharge permit so NMED could monitor the discharge and ensure that the treated effluent meets the standards. *See* Transcript Vol. III, pgs. 607 – 609, lns. 5 - 1.

23. NMED agreed to include a limitations (as proposed by LANS and USAF/DoD) provision in the Rules, but NMED countered with a caveat proposed to added to 20.6.2.10.A NMAC that would limit the exception to the Rules, where the activity or condition is to "abate water pollution or control the disposal of septage and sludge." At the hearing, USAF/DoD questioned NMED on the language of NMED's proposed caveat, and why it opposed an exception that would apply where regulated entities are already subject to NMED oversight. Ms. Hunter admitted that NMED proposed caveat to 20.6.2.10.A NMAC contained language that was so broad (*See* Transcript Vol. III, p. 612, lns. 3 – 12) that it would ensure that a regulated entity engaged in water treatment to New Mexico water standards pursuant to a Hazardous Waste Act permit would not be exempt from the Rules. *See* Transcript Vol. III, p. 613, lns. 12 - 17. Mrs.

Hunter claimed that it opposed LANS and USAF/DoD's proposed language for 20.6.2.10 because such proposed changes did not track exactly the language of the act and that groundwater treatment systems may fail. *See* Transcript Vol. III p. 596, lns 17 – 20; p. 611, lns. 14 – 20. Mrs. Hunter and Mr. McQuillan also emphasized that if a regulated entity were subject to NMED regulatory oversight under a NMED-issued Hazardous Waste Act (NMSA 1978 Sections 74-4-1 to -14) permit, such permit would not cover the specific underground injection control requirements of Part V of the Rules. *See* Transcript Vol. III p. 616, lns 5 – 25.

24. USAF/DoD asked why NMED would insist on including its proposed caveat when the abatement plan requirements of the Rules contain exceptions to those requirements for regulated entities abating water pollution subject to the authority of environmental regulators. *See* Transcript, Vol. III, pgs. 619 - 622, lns. 6 – 4; *see also* 20.6.2.4105.A – B NMAC. NMED's justification was that the Rules (at 20.6.2.4105.B) allow NMED to "reopen" the abatement plan requirements if the NMED determines that the abatement standards and requirements (20.6.2.4103 NMAC) or that additional action is necessary to protect health, welfare, environment or property. *See* Transcript, Vol. III, pgs. 619 - 620, lns. 12 – 19; *see also* 20.6.2.4105.B NMAC. NMED acknowledged, however, that if the treated effluent was part of a Hazardous Waste Act corrective action cleanup subject to NMED oversight, and the treated effluent failed to meet the standards, NMED could take action under the Hazardous Waste Act permit. *See* Transcript, Vol. III, pgs. 621, lns. 4 – 11. NMED explained that it was its position that a regulated entity should need to submit a notice of intent to NMED to submit for NMED determination of whether the Rules apply. *See* Transcript Vol. III, p. 613, lns. 12 - 17.

25. USAF/DoD's believes NMED's proposed exception (20.6.2.10) is too limited, fails to provide transparency on when the Rules apply, fails to account for NMED's regulatory

controls under other environmental programs, allows NMED to have too much discretion, and would continue unnecessary and costly duplicative oversight and permitting requirements. *See* Transcript, Vol. III, pgs. 697 - 698, lns. 2 - 13. Specifically, Mr. Clark explained that NMED's caveat to proposed 20.6.2.10 NMAC, does not achieve USAF/DoD's intended purpose of seeking the exception/limitation to the Rules because "abatement of water pollution could include any groundwater cleanup project that is already covered under [the Hazardous Waste Act], the corrective action provisions." *See* Transcript, Vol. III, p. 697, lns. 2 - 13. Thus, regulated entities would still "have to deal with two layers of permitting and oversight for the same treatment system and exact same effluent." *See* Transcript, Vol. III, p. 697, lns. 14 - 18. USAF/DoD believes that the Rules should go beyond "reiterating the statute" and "provide more detail and consider the real life scenario where the rules need not apply because of the direct oversight in other environmental programs." *See* Transcript, Vol. III, pgs. 697 - 698, lns. 25 - 4. Mr. Clark proposed adding 20.6.2.3105.N to the Rules, providing a limited exception for land application discharges subject to NMED regulatory oversight. *See* Transcript, Vol. III, pgs. 696 - 700, lns. 7 - 7. Specifically, Mr. Clark proposed the following language: "N. Effluent or leachate discharges for land application or infiltration trenches regulated by the Hazardous Waste Bureau pursuant to a permit or a consent order under the Hazardous Waste Act, NMSA 1978 Sections 74-4-1 to -14." *See* Transcript, Vol. III, p. 698, lns. 15 - 21. Mr. Clark explained that his proposed 20.6.2.3105.N is limited so it would not apply to discharges that would otherwise be subject to Part V of the Rules. *See* Transcript, Vol. III, p. 699 - 700, lns. 18 - 7.

USAF/DOD CONCLUSIONS OF LAW ON SPECIFIC RULE PROPOSALS

Section 20.6.2.3103 NMAC – Content of the Narrative Standard

26. The Commission finds that the language for the Narrative Standard, proposed by NMED and Mr. Olson, while tracking the language of the Act, fails to provide needed clarity on how NMED is to set a numerical standard and otherwise implement the Narrative Standard.

27. Mrs. Hunter and Mr. McQuillan testified that they approach implementation of the narrative standard in a way similar to the process requested by USAF/DoD. Yet, NMED opposes requirements in the Rules, claiming it is too prescriptive and restrictive of NMED's flexibility. Dr. Brock's testimony, however, explained that USAF/DoD's language is not intended to be restrictive – it is offered to provide an example of how the process could be clarified and what data is to be considered when implementing the Narrative Standard - how the data is examined, to explain its rationale, and logic for why it selects an appropriate standard.

28. The Commission finds that the USAF/DoD's proposed addition of "credible science" only requires consideration of factors, not that all the factors bet met. This language provides clarity and transparency to the Commission, NMED, the citizens of New Mexico and the regulated community as to the process used by NMED implementing the Narrative Standard.

29. The Commission finds that the infrequent application of the Narrative Standard in the past as testified by NMED may not be an accurate prediction of NMED's future application of the Narrative Standard due to the Revised Petition's addition of several emerging contaminants to the definition of toxic pollutant at 20.6.2.7.T NMAC. With increased focus on emerging contaminants, the need for the use of best available science, full understanding of impacts and clear, transparent, consistent procedures is amplified.

30. The Commission finds that DoD/USAF's proposed language for the "Narrative Standard," namely its proposed changes to 20.6.2.7.T(8) and 20.6.2.3103(A)(2) strikes an appropriate balance between the need for flexibility by the regulator and the need for clarity and

certainty on behalf of the Commission and the regulated community how the Narrative Standard is to be implemented.

31. Relying on the testimonies of Dr. Brock, Mr. Olson, Mr. McQuillan and Mrs. Hunter, and based on the weight of the evidence, the Commission adopts USAF/DoD's proposed language for 20.6.2.7.T(8) and 20.6.2.3103(A)(2) proposed by USAF in the Proposed Final Rule. In implementing the Narrative Standard, NMED is to demonstrate their consideration of "credible science" under the Rules.

Exemptions (20.6.2.10 and 20.6.2.3105 NMAC)

32. The Commission finds that USAF/DoD's initially proposed language for the Exceptions/Limitations to the Rules, 20.6.2.10 provided too broad of an exception to the Rules. On the other hand, while tracking the language of the Act, NMED's proposed language for 20.6.2.10 NMAC is too narrow in that it does not account for a regulated entity's discharges pursuant to direction and approval of NMED pursuant to a permit or consent order under the Hazardous Waste Act, NMSA 1978 Sections 74-4-1 to -14.

33. At the hearing, NMED expressed reluctance to allow for an exception for discharge activities pursuant to a state or federal permit or consent order. In part, NMED explained further protections are needed for underground injection.

34. The Commission finds the USAF/DoD language for 20.6.2.3105.N proposed by Mr. Clark at the hearing and in writing as USAF/DoD Exhibit 8, strikes an appropriate balance between eliminating duplicative requirements and protecting the environment. The language of Mr. Clark's 20.6.2.3105.N provides a limited, specified exception from the discharge permit requirements under the Rules made under the direction and approval of NMED pursuant to a permit or consent order under the Hazardous Waste Act, NMSA 1978 Sections 74-4-1 to -14.

The Commission further finds that Part V of the Rules outline rules applicable for underground injection that are in addition to the general requirements found in Part I. Thus, the Rules provide adequate protection against unregulated underground injection because the exceptions contained in 20.6.2.3105 do not apply to activities covered by Part V of the Rules.

USAF/DOD CLOSING ARGUMENTS

As a member of the regulated community, USAF/DoD respects and appreciates the difficult and important role of NMED's as a state environmental regulator. USAF/DoD appreciates the opportunity to present its proposed changes to the Rules to NMED and the Commission. USAF/DoD takes the responsibility of adhering to environmental laws seriously and devotes significant resources to those tasks. USAF/DoD is committed to environmental compliance and will be affected by the proposed regulatory changes.

USAF/DoD proposes changes to the Rules on two main areas of concern: duplicative reporting and permitting requirements; and the basis for adopting a Narrative Standard. For both these issues, USAF/DoD seeks greater transparency, consistency and more certainty in the state regulator's process and decision-making. These concerns are not unique to USAF/DoD. Several parties in this rule making process emphasized the need for NMED to be transparent and provide more certainty and clarity in their rulemaking to allow the regulated community make realistic predictions regarding potential NMED actions. Unfortunately, however, NMED is mostly opposed to proposed changes to the Rules that would provide certainty and clarity on NMED's methods, considerations and process under the Rules.

As to the Narrative Standard, NMED opposes USAF/DoD proposals even though it claims that it follows a process similar to what USAF/DoD proposes. NMED asserts that it prefers its proposed language on the Narrative Standard because it affords the agency with

flexibility. Flexibility, when in practice, affords the agency unaccountability in its decision-making. USAF/DoD has advocated that the broad scope of NMED's proposed language creates the possibility that a standard could be adopted based on scientific information that is incomplete or does not meet an acceptable standard of practice of within the scientific community. *See e.g.* Exhibit USAF/DoD 2, p. 3, lns. 4 – 6. USAF/DoD proposals seek to give consideration to the weight of scientific evidence through a systematic process as is standard practice in the scientific community. *Id.*; lns. 16 – 22; Exhibit USAF/DoD p. 8. USAF/DoD seeks to improve the Narrative Standard by incorporating principles and standards from federal laws and regulations that address this very issue: science in decision-making. *See* Exhibit USAF/DoD 3, pgs. 4- 7; Exhibit USAF/DoD 4 at pgs. 3 – 11.

A clear reading of USAF/DoD proposed language supports Dr. Brock's assertions that it is not intended to impinge on NMED's discretion, it merely imposes the standard scientific guidance to make those decisions. The USAF/DoD proposals require that the science used when implementing the Narrative Standard be "reliable and unbiased" and that its decision be based on certain considerations. *See* Exhibit USAF/DoD 4, pgs. 8 -9; *see also* Exhibit A. The considerations component of USAF/DoD's proposed language contains several qualifications and caveats. Specifically, when discussing the types of supporting studies that may be used, USAF/DoD's proposed language states "peer-reviewed science" is to be used, "when available." *Id.* Also, data used needs to be "reliable," and may have been collected by "accepted methods" or "best available methods." *Id.* In addition, the numbered considerations listed in the definition for credible science, are to be considered, "as applicable." *Id.*

Under USAF/DoD's proposal, NMED's decision must be based on reliable and unbiased science, and follow a process that includes considering certain factors. USAF/DoD understands

that each site and scenario is different, and that NMED likely benefits from flexibility of action. But, USAF/DoD proposals do not restrict NMED's ability and discretion in making a decision. NMED asserts that it holds itself to a high standard when meeting the Act's requirement of "credible science." *See* Transcript Vol. II, pgs. 423 – 425, lns. 11 – 21. If NMED follows the processes it outlined in its testimony with respect to implementing the Narrative Standard, it should have no issues complying with the language proposed by USAF/DoD. Accordingly, USAF/DoD believes that its proposals concerning the Narrative Standard will not adversely impact NMED.

NMED's 'flexibility' position essentially ignores the impacts of such flexibility on the regulated community, who need regulations to be transparent, consistent and certain in their application. Regulated entities have no way of predicting NMED's decisions in its proposed continuation of a 'flexible,' case-by-case approach to implementing the Narrative Standard. Without certainty about NMED's decisions, regulated entities cannot plan for the costs, timing and other resources that may be required to meet the NMED standard. As agencies of the federal government operating with appropriated funds, USAF/DoD facilities in New Mexico are subject to detailed, complicated, and long-term requirements concerning planning, budgeting and execution of funding for environmental restoration activities. *See* Environmental Management, Air Force Instruction ("AFI") 32-7001; Defense Environmental Restoration Program ("DERP") Management, Department of Defense Manual ("DODM") 4715.20; The Environmental Restoration Program, AFI 32-7020. Uncertainty of how NMED implements the Rules directly conflicts with and is disruptive of the practical realities of the federal budgetary process because such a process involves long-term planning and a set amount of funds that are allocated long in advance of when they are spent. *See* AFPD 90-11; Strategic Planning System; AFPD 90-6, Air

Force Strategy, Planning, Programming, Budgeting and Execution (SPPBC) Process; DoDD 7045.14, The Planning, Programming, Budgeting and Execution (PPBE) Process. In addition, if NMED sets a Narrative Standard applicable to a DoD facility, a DoD program manager would need to certify under federal laws (*see e.g.* The Chief Financial Officers Act of 1990, Pub. L. 101-576, 104 Stat. 2838, codified as amended in scattered sections of 31 U.S.C.) that the Federal Government has a bona-fide need to comply with a numerical value for a toxic pollutant developed by New Mexico under the toxic pollutant narrative standard. The program manager would have to certify that the standard is not discriminatory against the Federal Government, was developed using a recognized process (such as a process similar to the EPA processed under CERCLA and TSCA), and that there is a demonstrated link between the Toxic Pollutant standard and a human health risk.

USAF/DoD also pointed out that in application, NMED's proposed language could lead to disparate and unreasonable standards or conversely to those that are not protective of human health and the environment because they are based on cursory scientific studies. *Id.*, lns. 7 – 9. In addition, standards based on limited, unverified and non-peer reviewed studies are often misleading and provided flawed information, which in turn misinforms the public, leads to incorrect decisions and can undermine the integrity of the regulator. *See* Exhibit USAF/DoD 2, p. 7 – 10 – 13. Decision not based on adequate science could also lead to unnecessary litigation, a resource drain on the regulator and the regulated entity. NMED claims that that it hasn't been subject to a legal challenge for its implementation of the Narrative Standard, perhaps encouraging the Commission to conclude that there is no harm to under the *status quo*. But, the past may not be a good indication of the future because NMED seeks to add several emerging

contaminants as listed Toxic Pollutants that, if detected, would cause NMED to administer the Narrative Standard. *See* Exhibit USAF/DoD 4 at pgs. 9 - 11.

NMED claims that if a member of the regulated community doesn't agree with a NMED's decision on the Narrative Standard, such decision may be appealed. *See e.g.* NMSA § 74-6-5 (N) – (S); 20.6.2.3112 NMAC. The problem with NMED's approach is that if the Commission adopts NMED's proposal on the Narrative Standard, the Commission will have no specified, objective, defined criteria to use in its evaluation of NMED's decision. "[C]redible scientific data and other evidence appropriate under the [Act]," is not a clearly defined standard and based on NMED's testimony, it is NMED's intent to have flexibility to establish a standard for on a case-by-case basis. With limited, unspecified criteria, the Commission and Courts will have difficulty in making a determination NMED's decision. The *Phelps Dodge* case concerned a dispute over permit conditions that New Mexico Court of Appeals found that the regulations provided unclear interpretive guidance. 140 N.M. 464, 470 – 471 (N.M. Ct. App. 2006). The *Phelps Dodge* Court explained the review standard, that courts afford agencies considerable discretion on their decisions implementing their regulations. *See Phelps Dodge Tyrone Inc. v. New Mexico Water Quality Control Comm'n*, 140 N.M. 464, 470 – 471 (N.M. Ct. App. 2006). With respect to certain permit conditions, however, the *Phelps Dodge* court, reversed and remanded the Commission's decision. *Id.* at 473. While the Court found that the Commission erred in its decision on the administrative appeal, the Court was sympathetic, stating "[u]nfortunately, the statute and existing regulations did not give the Commission adequate information about the decision it was obligated to make" and the Court provided references to cases and state and federal regulations that the Commission may find instructive in its reconsideration. *Id.* As this Commission likely well knows, subsequent proceedings of *Phelps*

Dodge case lasted many years. Wouldn't this Commission rather have clear Rules of application, than decide later if NMED adhered to the principles of an unspecified law and regulations? USAF/DoD believes that all persons and entities, including the Commission, are best served with clarity and certainty to what the agency is to consider and its methods for making a decision under the Narrative Standard.

USAF/DoD believes that the Commission's responsibilities in this proceeding include balancing the interests of the regulator, the citizens and those impacted[1] and make a decision in the best interest of the state. This may mean challenging or holding the state regulator to account, or requiring more transparency, or making changes to the Rules that allow for more certainty and clarity on how the Rules will be implemented. The Commission need not look beyond the transcript of this proceeding to see examples of why transparency and clear requirements are needed in NMED's decision-making process. Mr. McQuillan explained that with few exceptions, NMED's proposed numeric standards for 20.6.2.3103.A(1) NMAC seek to correlate with USEPA primary drinking water standards. *See* Exhibit NMED 5, p. 24, lns. 10 – 12. With respect to Fluoride[2], Mr. McQuillan explains that USEPA has two standards: a primary, enforceable standard that is protective of a human health issue, skeletal fluorosis; and a secondary, non-enforceable secondary standard protective against dental fluorosis. *See* Transcript Vol. II, p. 373, lns. 14 - 25; p. 403, lns. 14 - 17. NMED proposes to maintain a

[1] The spectrum of participating parties, and thus the factual information in the record of this proceeding only effectively represents what can be considered long-standing established entities and individuals who are in and remain committed to New Mexico. It stands to argue that NMED's opposition to transparency in its Rules and its preference for case-by-case decisions could well factor into a business decisions to start, operate or re-locate to another state with a more transparent and predictable regulatory construct and pattern of practice.

[2] USAF/DoD did not and does not oppose NMED's proposed standard for any toxic pollutant in this proceeding, including Fluoride. The arguments herein contained are used for illustrative and analogous purposes.

standard below to the USEPA secondary standard out of concerns for dental fluorosis. NMED's justification for straying from NMED's typical position of adhering to the federal primary drinking water standard for Fluoride is that it would be "very bad public policy" to no longer protect against dental fluorosis and NMED's expert didn't know how to administer two standards for the same constituent. *See* Transcript Vol. II, p. 374, lns. 14 - 17; p. 404, lns. 13 - 25. While preventing against the risk of dental fluorosis is a laudable goal, but NMED acknowledges that the secondary standard (which is higher than the NMED proposed standard) is non-enforceable and is protective against a condition, which NMED claims is "unsightly," "not decay," and not something USEPA considers a human health issue. *See* Transcript Vol. II, p. 374, lns. 1 - 14; p. 404, lns. 19 – 25. As for NMED's concerns about how to administer two standards for Fluoride, relevant federal regulations explain that when detected levels exceed secondary levels but are below primary levels - the appropriate action by community water systems is a relatively low administrative burden - provide special notice to persons served concerning the detected levels. *See* 40 C.F.R. § 141.208. NMED's position on Fluoride is somewhat concerning to members of the regulated community, like USAF/DoD, because it would appear that by extension, NMED could set a numeric standard under the Narrative Standard for an emerging contaminant without supporting science or at a level less than half of a standard that sound, accepted science considers protective of human health – and do so by supporting its position based on policy reasons.

After the hearing, on January 23, 2018, New Hampshire Department of Environmental Services, a state environmental regulator faced with similar responsibilities and limited resources, came to the same conclusion advocated by Dr. Brock in this proceeding - that at the present time, it is not appropriate to set standards for emerging contaminants (e.g. perfluorinated

chemicals (PFCs)). *See* Attachment 1 at p. 1.[3] Specifically, the New Hampshire environmental regulator found that standards need to be based on the "best peer-reviewed science available, full understanding of the impact and practicality, and the resources and time for needed analysis." The New Hampshire state regulator further believes it should not break from the accepted methodologies and processes used by other state environmental regulators and USEPA. As a result the New Hampshire state regulator has decided to delay establishing an MCL for emerging contaminants until adequate science is available to establish health based criteria.

As for the Exemptions issue, USAF/DoD calls for exemptions that are in accordance with the spirit of the Act, and make it clear that activities that are already subject to significant regulatory oversight by NMED should be exempt from certain components of the Rules. NMED opposes USAF/DoD (and other party) exemptions proposals, essentially claiming that it would limit their discretion to decide whether the Rules apply to any given scenario. NMED's approach appears to seek regulated entities seek its permission at every turn, rather than having clear language in the Rules explaining how and under what circumstances the Rules apply.

Unfortunately, not only does this approach cause unnecessary duplicative permitting and regulatory oversight, it ignores NMED's and federal regulator authority and powers. NMED opposes exemptions on the basis that water treatment systems could fail, as if NMED, federal regulators or the citizens of New Mexico have no recourse in the off chance of such failure and resulting contamination. If there is a failure of a water treatment system regulated pursuant to a

[3] As reflected in the date of Attachment 1, this document was not available before the Hearing in this proceeding. As such, it could not be presented as evidence at the hearing. USAF/DOD respectfully requests that the Hearing Officer allow this document be offered as USAF/DoD Exhibit 9 for consideration by the Commissioners. USAF/DoD understands and appreciates if the Hearing Officer would like to allow other parties the opportunity to object to including what is proposed as USAF/DoD Exhibit 9, and USAF/DoD is open to any written or oral process selected by the Hearing Officer to determine the admissibility of this proposed exhibit.

Hazardous Waste Act permit, NMED has direct regulatory recourse and can order corrective action, impose penalties or otherwise take appropriate action. Specifically, NMED may seek injunctive relief and has the power to assess civil penalties in the amount of $10,000 per day of noncompliance with permitting requirements. *See* Hazardous Waste Act, NMSA 1978, §§ 74-4-10, 74-4-12. NMED also has the overarching authority under the Hazardous Waste Act to take action in response to imminent and substantial endangerment to health or the environment. *See* Hazardous Waste Act, NMSA 1978, § 74-4-13. Citizens and state and federal regulators may have other recourse under the state and federal law. *See e.g.* 42 U.S.C. §§ 6972, 6973.

Similar to its positions on the Narrative Standard, NMED's position on exemptions fails to recognize legitimate concerns by the regulated community for clarity and transparency in NMED's decision-making process. Several parties submitted evidence and testimony that NMED's opposition to exemptions to the Rules adds to uncertainty, and serve as time and cost resource drains on the regulated community. The Municipal League explained the amount of funding needed to implement two Aquifer Storage and Recovery projects is due in large part to the regulatory framework implemented by the Office of the State Engineer and NMED. *See* Exhibit NMML-5 at 2. NMED's flexibility amounts to uncertainty, added costs and resources and additional, duplicative regulatory oversight to the regulated community, which serves as a disincentive to perform needed recycling and recharge projects. *See* Pleading Log No. 55, Municipal League Notice of Intent to Present Technical Testimony and Exhibits, Exhibit NMML-1, NMML Comments on NMED Petition, at p. 4, lns. 207 – 208; *see also* Transcript Vol. III, p. 779, lns. 16 – 19.

Moreover, other than assuaging some unsubstantiated fears, NMED has failed to demonstrate that duplicative permitting requirements actually is protective of the environment.

As an agency funded in part by taxpayers, it would seem that NMED would support provisions in regulations that reduce project costs without compromising public health and safety through the elimination of duplicative permitting requirements. The staff time used for writing duplicative permits does not add any level of environmental projection, it only adds costs and delays to cleanup projects. Instead, NMED acknowledged several times that it opposes exemptions in scenarios where the discharges into the environment meet New Mexico's requirements in the Rules and other environmental statutes. USAF/DoD believes, the Commission's responsibilities include balancing the interests of the regulator, the citizens and those impacted and make a determination in the best interests of the state. If viewed through this lens, we believe the Commission appropriately would favor transparency, clarity and certainty in NMED's decisions. USAF/DoD hopes that the Commission sees the need for improvement, certainty, and clarity to NMED's implementation of the Narrative Standard, and orders changes aligned with USAF/DoD's positions on these issues

CONCLUSION

For the reasons articulated herein, USAF/DoD respectfully requests that the Commission order changes to the Narrative Standard and Exemptions to the Rules in keeping with USAF/DoD's comments and proposed changes on these issues.

Respectfully submitted,

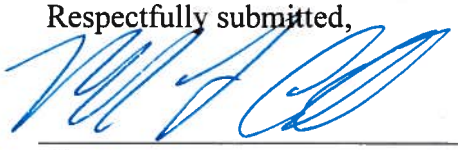

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Exhibit A:

SPECIFIC PROPOSED RULE CHANGES

Section 20.6.2.3103 NMAC – Content of the Narrative Standard

20.6.2.7 DEFINITIONS:

C. Definitions that begin with the letter "C"

....

(8) **"credible science"** means, science that is reliable and unbiased. Use of credible science involves the use of supporting studies conducted in accordance with sound and objective science practices, including, when available, peer reviewed science and supporting studies and data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data). Additionally, NMED will consider as applicable: (1) The extent to which the scientific information, technical procedures, measures, methods, protocols, methodologies, or models employed to generate the information are reasonable for and consistent with the intended use of the information; (2) The extent to which the information is relevant for NMED's use in making a decision about a toxic pollutant or combination of toxic pollutants; (3) The degree of clarity and completeness with which the data, assumptions, methods, quality assurance, and analyses employed to generate the information are documented; (4) The extent to which the variability and uncertainty in the information, or in the procedures, measures, methods, protocols, methodologies, or models, are evaluated and characterized; and (5) The extent of independent verification or peer review of the information or of the procedures, measures, methods, protocols, methodologies or models.

20.6.2.3103 STANDARDS FOR GROUND WATER OF 10,000 mg/l TDS Concentration or LESS: .....

....

A. Human Health Standards

....

(2) **Standards for Toxic Pollutants.** A toxic pollutant shall not be present at a concentration shown by credible scientific data and other evidence appropriate under the Water Quality Act, currently available to the public, to have the 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.

Exemptions (20.6.2.10 and 20.6.2.3105 NMAC)

20.6.2.10 LIMITATIONS:

20.6.2.10 LIMITATIONS: These regulations do not apply to the following:

A. Any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to - 14, the Ground Water Protection Act, NMSA 1978, Sections 74-6B-1 to -14, the Solid Waste Act, NMSA 1978, Sections 74-9-1 to -25 except to abate water pollution or to control the disposal or use of septage and sludge;

B. Any activity or condition subject to the authority of the oil conservation commission pursuant to the Oil and Gas Act, NMSA 1978, Section 70-2-12 and other laws conferring power on the oil conservation commission and the oil conservation division of the energy, minerals and natural resources department to prevent or abate water pollution.

[XX-XX-17; 20.6.2.10 NMAC]

20.6.2.3105 EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT: Sections 20.6.2.3104 and 20.6.2.3106 NMAC do not apply to the following:

A. Effluent or leachate which conforms to all the [~~listed numerical~~] standards in Subsections A, B and C of Section 20.6.2.3103 NMAC and has a total nitrogen concentration of 10 mg/l or less[~~, and does not contain any toxic pollutant~~]. If treatment or blending is required to achieve these standards this exemption does not apply. To determine conformance, samples may be taken by the agency before the effluent or leachate is discharged so that it may move directly or indirectly into ground water; provided that if the discharge is by seepage through non-natural or altered natural materials, the agency may take samples of the solution before or after seepage. If for any reason the agency does not have access to obtain the appropriate samples, this exemption shall not apply;

B. Effluent which is regulated pursuant to 20.7.3 NMAC, "Liquid Waste Disposal and Treatment" regulations;

C. Water used for irrigated agriculture, for watering of lawns, trees, gardens or shrubs, or for irrigation for a period not to exceed five years for the revegetation of any disturbed land area, unless that water is received directly from any sewerage system;

D. Discharges resulting from the transport or storage of water diverted, provided that the water diverted has not had added to it after the point of diversion any effluent received from a sewerage system, that the source of the water diverted was not mine workings, and that the secretary has not determined that a hazard to public health may result;

E. Effluent which is discharged to a watercourse which is naturally perennial; discharges to dry arroyos and ephemeral streams are not exempt from the discharge permit requirement, except as otherwise provided in this section;

F. Those constituents which are subject to effective and enforceable effluent limitations in a National Pollutant Discharge Elimination System (NPDES) permit, where discharge onto or below the surface of the ground so that water contaminants may move directly or indirectly into ground water occurs downstream from the outfall where NPDES effluent limitations are imposed, unless the secretary determines that a hazard to public health may result. For purposes of this subsection, monitoring requirements alone do not constitute effluent limitations;

G. Discharges resulting from flood control systems;

H. Leachate which results from the direct natural infiltration of precipitation through disturbed materials, unless the secretary determines that a hazard to public health may result;

I. Leachate which results entirely from the direct natural infiltration of precipitation through undisturbed materials;

J. Leachate from materials disposed of in accordance with the Solid Waste Management Regulations (20 NMAC 9.1) adopted by the New Mexico Environmental Improvement Board;

K. Natural ground water seeping or flowing into conventional mine workings which re-enters the ground by natural gravity flow prior to pumping or transporting out of the mine and without being used in any mining process; this exemption does not apply to solution mining;

L. Effluent or leachate discharges resulting from activities regulated by [~~a mining plan approved and~~]permit issued by the [~~New Mexico Coal~~]mining and minerals division of the energy, minerals and natural resources department pursuant to the Surface Mining [Commission]Act, NMSA 1978, Sections 69-25A-1 to -36, provided that this exemption shall not be construed as limiting the application of appropriate ground water protection requirements by the mining and minerals division and the New Mexico Coal Surface Mining Commission; ~~or~~

~~**M.** Effluent or leachate discharges which are regulated by the Oil Conservation Commission and the regulation of which by the Water Quality Control Commission would interfere with the exclusive authority granted under Section 70-2-12 NMSA 1978, or under other laws, to the Oil Conservation Commission~~]Discharges resulting from activities regulated by the energy consideration and management division of the energy, minerals and natural resources department under the authority of the Geothermal Resources Development Act, NMSA 1978, Sections 71-9-1 to -11 (2016); or

N. Effluent or leachate discharges for land application or infiltration trenches regulated by the Hazardous Waste Bureau pursuant to a permit or consent order under the Hazardous Waste Act, NMSA 1978 Sections 74-4-1 to -14.

[2-18-77, 6-26-80, 7-2-81, 12-24-87, 12-1-95; 20.6.2.3105 NMAC - Rn, 20 NMAC 6.2.III.3105, 1-15-01; A, 12-1-01; A, 8-1-14; A, XX/XX/17]

Attachment 1

The State of New Hampshire
Department of Environmental Services

Robert R. Scott, Commissioner

January 23, 2018

The Honorable Kevin Avard
Chair, Senate Energy and Natural Resources Committee
State House, Room 100
Concord, NH 03301

RE: SB 309-F, An Act relative to standards for perfluorinated chemicals in drinking water, ambient groundwater and surface water.

Dear Chair Avard and Members of the Committee:

Thank you for the opportunity to testify on SB 309-FN. Within 180 days of the bill's passage, the NH Department of Environmental Services (NHDES) would be required to:

1. Review the current Ambient Ground Water Standards (AGQSs) for perfluorooctanoic acid (PFOA), perfluoroctanesulfonic acid (PFOS)and, if warranted, initiate rulemaking to revise the AGQSs within 60 days;
2. Initiate rulemaking to establish new public drinking water standard (i.e. maximum contaminant levels or MCLs) for PFOA and PFOS;
3. Establish new surface water quality standards for PFOA and PFOS; and
4. Consider the appropriateness of all three standards annually.

NHDES appreciates the intent of this bill which is to protect public health and is supportive of related bills (HB 485 and HB 1101). However, we cannot support SB 309 because we do not believe it contains all of the components needed to establish these standards. Namely, the use of the best peer-reviewed science available to establish health based criteria, a full understanding of the impact and practicality of setting the standard, and the resources and time for needed analysis. SB 309 also fails to align the process for setting maximum contaminant limits for public drinking water systems with that of other states and the United States Environmental Protection Agency (USEPA). A further explanation for each type of standard follows:

Ambient Ground Water Quality Standards (AGQSs): This type of standard is generally used for contaminated site remediation and to set appropriate permit limits for groundwater discharges. In 2016, NHDES adopted a combined standard of 70 ppt for PFOA and PFOS based on a health advisory set by the USEPA. It did so after review of other states' standards. NHDES has continued to review any new science or analysis related to these chemicals. By summer of 2018, the Centers for Disease Control and Prevention (CDC) will release Toxicological Profiles that will establish Minimal Risk Levels for PFOA and PFOS, as well as PFNA and PFHxS, all of which have been found in New Hampshire's water. This will greatly

inform what the AGQS should be for all of these chemicals. NHDES believes that the review and possible revision of the current standard should wait for this research.

MCLs for Public Drinking Water Systems: MCLs are set for over 100 contaminants that may occur in public drinking water which can negatively affect health. These chemicals are then required to be periodically sampled for and treatment is required, if necessary, to achieve compliance with this standard. It is important to understand that, unlike AGQSs, where the costs are generally paid by people responsible for contamination, it is largely municipal government and rate payers that bear the cost burden of compliance with MCLs.

NHDES has been reluctant to set MCLs for PFAS chemicals to date as we do not believe it is appropriate to set such standards using different methodology than any other state or the USEPA. Our statute is silent on the considerations that should go into establishing an MCL which include occurrence data, ability to reliably detect the contaminant, ability to remove the chemical from drinking water, and costs to government entities and rate payers that will result from establishing the standard. This silence is due to the fact that NH, like most states, has historically relied on USEPA to establish MCLs which the state then adopts. In the case of PFOA and PFOS, NHDES believes that once the CDC Toxicological Profiles have been released, qualified staff would have enough information to make recommendations for well-balanced, health-based public drinking water standards for these compounds. We note that HB 485 and an amendment to HB1101 would provide NHDES with a toxicologist and a risk assessor, both of which are needed for NHDES to set and review health-based standards. In addition, HB 1101 would add language to NH's Safe Drinking Water Act so that MCLs are set in accordance with the balanced and scientifically based methodology used by all other states and USEPA. With such language in place, NHDES would be well positioned to determine and propose appropriate MCLs for PFOA and PFOS and future contaminants.

Surface Water Quality Standards: Surface water quality standards are used to set permit limits for all discharges to surface water and to make determinations on the health and need for restoration of New Hampshire's wetlands, lakes and rivers. Like MCLs, NHDES relies on EPA to create its standards and would need significant resources to do otherwise. This would be the first state based surface water quality standard and would need approval by USEPA. HB 1590 is another bill this session that also requires NHDES to set standards for PFAS chemicals. The NHDES letter of testimony on HB 1590 is attached which provides details in setting surface water standards. In general, significant research would be required to identify if the science and studies exist to set surface water standards and the consequences of this action would need to be fully examined.

In summary, while NHDES does not support SB 309, we are in support of two related bills: HB 485 and what we believe will be an amendment to HB 1101. These bills together accomplish the same goals for AGQSs and MCLs for PFOA and PFOS as SB 309. Specifically, NHDES will set and/or revise drinking water and ambient groundwater standards for PFOA and PFOS (and PFNA and PFHxS) by the end of 2018. This will allow the new CDC toxicological profiles to be

reviewed. Also, two new positions at NHDES would be established to perform analysis of the science and the NH Safe Drinking Water Act would be amended to specify the other important considerations that are needed to set MCLs using methodology consistent with other states and USEPA. Finally, while NHDES understands the desire for NH surface water standards for PFOA and PFOS, it will take significant resources and time to create the first NH-derived surface water standard.

Thank you again for the opportunity to comment on this proposed legislation. If you have questions or need additional information, please contact Sarah Pillsbury, Drinking Water and Groundwater Bureau Administrator (Sarah.Pillsbury@des.nh.gov or 271-1168).

Sincerely,

Robert R. Scott
Commissioner

cc: Senators Innis, Bradley, Avard, Fuller Clark, Gannon, Ward, Carson, Birdsell, Feltes, and Representatives Messmer, Marsh, Emerick, Bean, Murray

CERTIFICATE OF SERVICE

I hereby certify that on February 16 2018, a true and correct copy of the foregoing "Closing Argument, Partial Findings of Fact and Conclusions of Law were served via electronic mail to the following:

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