

## 2013 Triennial Review Public Discussion Draft Comments and Surface Water Quality Bureau ("SWQB") Responses

The summary of comments received on the Public Discussion Draft and SWQB responses, which are arranged by New Mexico Administrative Code ("NMAC") Section and commenter, is presented below. All comments received have been posted to the SWQB website and can be viewed at: <http://www.nmenv.state.nm.us/swqb/Standards/TR2013/PublicCommentCompilation-2013TR.pdf>

The comment period for the Public Discussion Draft was April 1 – May 30, 2014 (with 30-day extension granted on April 28, 2014). Comments were received from 13 entities including municipalities, water districts, industries/trade groups, conservation groups. SWQB also received 52 public comments in a form letter in which the same, or very similar, comments were stated. Comments received timely during the comment period are attached. Comment received after the extended deadline is not included.

**Table 1. Commenters and Acronyms**

<b>Commenter</b>	<b>ACRONYM</b>
<b>U.S. Environmental Protection Agency, Region 6</b>	<b>EPA</b>
<b>Buckman Direct Diversion Project</b>	<b>BDDP</b>
<b>Freeport-McMoRan Copper and Gold</b>	<b>FMCG</b>
<b>New Mexico Mining Association</b>	<b>NMMA</b>
<b>San Juan Water Commission</b>	<b>SJWC</b>
<b>Trout Unlimited-Truchas Chapter</b>	<b>TUTC</b>
<b>Amigos Bravos</b>	<b>AMBR</b>
<b>Elephant Butte Irrigation District</b>	<b>EBID</b>
<b>Los Alamos National Laboratory Environmental Protection Division</b>	<b>LANL</b>
<b>New Mexico Municipal League Environmental Quality Association</b>	<b>NMMLEQA</b>
<b>Trout Unlimited-Gila/Rio Grande Chapter</b>	<b>TUGR</b>
<b>Amigos Bravos Constituency Letter</b>	<b>ABCL</b>

### Other Acronyms/Abbreviations:

<b>ACR:</b>	Acute-to-Chronic Ratio
<b>AU:</b>	Assessment Unit
<b>BLM:</b>	biotic ligand model
<b>BMP:</b>	Best Management Practice
<b>CFR:</b>	Code of Federal Regulations
<b>CPP:</b>	Continuing Planning Process
<b>CWA:</b>	Clean Water Act
<b>DWB:</b>	Drinking Water Bureau
<b>EPA:</b>	United States Environmental Protection Agency
<b>ESA:</b>	Endangered Species Act
<b>GLI:</b>	Great Lakes Initiative
<b>HP:</b>	Hydrology Protocol

**MCL:** maximum contaminant level  
**MPN:** Most Probable Number  
**NOI:** Notice of Intent  
**NPDES:** National Pollutant Discharge Elimination System  
**NMAC:** New Mexico Administrative Code  
**NMED:** New Mexico Environment Department  
**NMSA:** New Mexico Statutes Annotated  
**PGP:** Pesticide General Permit  
**PPCP:** Pharmaceuticals and Personal Care Product  
**SDWA:** Safe Drinking Water Act  
**SWPPP:** Stormwater Pollution Prevention Plan  
**SWQB:** Surface Water Quality Bureau  
**TMDL:** Total Maximum Daily Load  
**TN:** Total Nitrogen  
**TP:** Total Phosphorous  
**UAA:** Use Attainability Analysis  
**USFWS:** United States Fish and Wildlife Service  
**USGS:** United States Geological Survey  
**WQBEL:** Water Quality Based Effluent Limits  
**WQCC:** Water Quality Control Commission  
**WQMP:** Water Quality Management Plan  
**WQS:** Water Quality Standards

### **Comments and Responses**

Comments on SWQB's proposals are presented in order as they would occur in the NMAC and are followed by SWQB responses (in blue text). Comments on other issues not proposed are also addressed below. All comment letters received timely are available online at:

<http://www.nmenv.state.nm.us/swqb/Standards/TR2013/PublicCommentCompilation-2013TR.pdf>

### **§20.6.4.7 NMAC DEFINITIONS**

**Comment 1 (EPA):** The United States Environmental Protection Agency ("EPA") Region 6 notes that definitions may or may not be considered to be a water quality standard depending on how a particular definition supports or is integral to the understanding of application of a provision or criterion.

**Response:** The SWQB recognizes that EPA will review each revision and determine whether it constitutes new or revised water quality standard ("WQS"). The EPA has the authority and duty to approve or disapprove water quality standards under the Clean Water Act ("CWA") Section 303(c)(3).

#### §20.6.4.10(F) NMAC TEMPORARY CRITERIA

**Comment 2 (SJWC):** The temporary criteria provision is well intentioned, but not necessary because the petitioner must first demonstrate the use is not attainable, which impedes the usefulness of the provision.

**Response:** Several commenters noted, and the EPA has clarified in its comments, that while the justification for a temporary criteria or standard must be based on one of the 40 Code of Federal Regulations (“CFR”) §131.10(g) factors, it is not necessary to conduct a use attainability analysis (“UAA”) in the case of a temporary standard because the underlying uses and criteria will not be changed. This requirement has been removed from the proposal.

**Comment 3 (SJWC):** The provision does not allow for modification of a designated use like EPA’s guidance. It is not beneficial to point or nonpoint source dischargers. SWQB should consider variance proposals submitted in past Triennial Reviews instead of a temporary criteria provision.

**Response:** The water quality standards in Subsections C and D of 20.6.4.15 New Mexico Administrative Code (“NMAC”) already allow for modification of designated uses when the use is not attainable. The standards also allow for modification of criteria in consideration of site specific conditions and natural background in Subsections D and E of 20.6.4.10 NMAC. While proposals submitted in past rulemakings for WQS variances and temporary standards make an attempt to allow for interim standards, they do not reflect the EPA’s most current guidance and requirements. The temporary standard provision proposed in this Triennial Review was developed in close consultation with the EPA and incorporates suggestions from multiple stakeholders. WQS variance procedures and temporary standards provisions from other states were also considered in the development of this proposal. The EPA has approved the use of temporary standards in Colorado and Montana as preferable to the alternative of permanently downgrading uses and adopting elevated levels of pollutants.

**Comment 4 (AMBR):** The provision does not serve to maintain and restore water quality under the CWA (U.S.C. §1251(a)). Why is this provision necessary if NMED has compliance schedules and site specific criteria/ Use Attainability Analysis (“UAA”) provisions already in the WQS?

**Response:** Rather than downgrading uses and/or criteria as allowed under the state and federal water quality standards (e.g., 20.6.4.15 NMAC), other states<sup>1</sup> have established procedures in their water quality standards for adopting temporary standards for certain pollutants, in certain water bodies, with specific expiration dates. In this way, the state maintains designated uses and underlying criteria while recognizing that certain water quality conditions for certain pollutants are not achievable in the short-term, but are expected to be achievable over a specified duration.

The state also has an allowance for the EPA’s use of compliance schedules in the National Pollutant Discharge Elimination System (“NPDES”) permit, pursuant to Subsection G of 20.6.4.12 NMAC. This may be allowed by the EPA as the state permitting authority for certain situations, generally to meet the technology-based effluent limits required under Sections 301 or 306 of the CWA. The

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<sup>1</sup> For example, see Montana Code Annotated 2009, 75-5-312.

federal permit regulations under 40 §CFR 122.47 require compliance as soon as possible, but allow attainment of compliance in "...less than three years before commencement of the relevant discharge." However, there are cases such as when a new or more stringent criterion is applied in a permit and the WQS is not attainable within a three or five year timeframe. Therefore, a compliance schedule alone is not appropriate. For example, there are some pollutants for which the removal technology is not known or proven, does not provide adequate treatment to meet the WQS in the short term, or the available treatment options result in "substantial and widespread economic and social impact" as described under 40 CFR §131.10(g)(6). Even so, for these cases the situation is expected to change as technology advances or is proven. A temporary WQS can be applied that leads to improved water quality over the specified duration, and full attainment of designated uses due to advances in treatment technologies and control practices that further the objectives of the CWA. Currently, the state does have a WQS variance provision as allowed for under 40 CFR §131.13 to support a temporary standard.

**Comment 5 (AMBR):** Why use a water body or pollutant approach, instead of a discharger approach? Multiple dischargers will also get the temporary standards - those that do not need it will get a "free pass" without applying for or demonstrating the need for a variance. A discharger approach requires other dischargers on the water body to demonstrate their need before getting the variance (i.e., would not get it automatically by being on the same waterbody as the petitioner).

**Response:** The draft proposal and the EPA requires that the justification for a temporary standard must be demonstrated by the petitioner under one or more of the applicable factors in 40 CFR 131.10(g)(1). The appropriate factor, or factors, which apply will be case specific to the petitioner. A demonstration is required for each petitioner even though the temporary standard applies to a specific water body.

**Comment 6 (AMBR):** Why should temporary standards only apply to impaired waters if it will increase releases of pollutants that caused the impairments; impaired streams should be getting less pollution. Provision requires that the temporary standard will not contribute to the impairment of the existing use(s).

**Response:** While the limitation to impaired waters ensures well documented problems are addressed, such an approach may limit opportunities for restoration and remediation not clearly tied to a facility or pollutant, or where problems are not yet identified in the state's Section 303(d) / Section 305(b) Integrated Report. Several commenters noted limiting the provision to impaired waters was not warranted. In response, this limitation is removed and the change reflected in the petition proposal. The EPA has also stated their support to remove this limitation.

**Comment 7 (AMBR):** AMBR appreciates that the provision (20.6.4.10.F (3) NMAC) specifies impairment is based on the original criteria.

**Response:** The SWQB thanks the commenter for the support. The temporary standard provision requires that the underlying and original criteria be retained for CWA Sections 305(b)/ 303(d) assessments and listings.

**Comment 8 (AMBR):** It is not clear if new dischargers will be allowed as a result of relaxed criteria; this cannot be allowed for new permits or dischargers. The CWA mandates no new dischargers can have a variance provision. Interim requirements do not replace uses and criteria; CWA implementation of listing for 303(d) must be based on original standards.

**Response:** New dischargers are subject to CWA restrictions and a temporary standard may not apply to a new discharger. This determination would be made by the EPA as the permitting authority. In the proposed temporary standard provision, the underlying uses and criteria are not replaced or permanently relaxed, and CWA Sections 305(b)/303(d) assessments and listings are based on the original standards.

**Comment 9 (AMBR):** The provision is a shield to polluters from CWA lawsuits and takes away the public's ability under the CWA to have citizen lawsuits. Lawsuits are sometimes the only way to make progress. The NMED should maintain all possible avenues under the CWA to meet water quality goals.

**Response:** The provision allows a temporary standard to be adopted into the water quality standards by the Water Quality Control Commission ("WQCC") as part of a public hearing process. It must be approved by EPA before implementation for CWA purposes, and implemented in accordance with requirements stipulated in the approval of the temporary standard (e.g., schedule of actions toward achieving compliance with the original standards). If incorporated by EPA into a NPDES permit, the temporary standard with all stipulated requirements are applicable and enforceable under the CWA. The provision does not protect a facility that has violated state and federal CWA regulations and does not prevent citizen lawsuits. In fact, *Water Legacy, et al. v. EPA (2013)* is an example of a recent lawsuit filed on citizens' behalf to oppose a 10-year variance to Minnesota's water quality standards. The remanded its approval of the variance on July 28, 2014.

**Comment 10 (AMBR):** The proposal is too broad and far-reaching; it should be limited to only nutrients.

**Response:** The flexibility should be available within a temporary standards provision in terms of which pollutant-specific issues are addressed, in order to be tailored to site-specific conditions. The EPA is also supportive of a more flexible approach. Please also see the comments in EPA's letter of April 8, 2014.

**Comment 11 (AMBR):** 20.6.4.10.F. (1) NMAC – Temporary criteria should not be allowed for a designated use that is also an existing use.

**Response:** The temporary standard must protect designated and existing uses; the underlying uses and criteria are not subject to change. In the case where a designated use is also an existing use, the goals remain in place in order to restore and maintain the use.

**Comment 12 (AMBR):** To be consistent with EPA's latest proposed WQS revisions, language is recommended requiring the state identify and document best management practices ("BMPs") for nonpoint sources related to the pollutant(s) and location(s) that will be implemented waterbody-wide to attain the uses and criteria, that the measures have been implemented and that the temporary

criterion represents the highest degree of protection feasible in the short term. Also, require that these BMPs should be publicly available (nature and extent), and are enforceable. Failure to implement BMPs should result in penalties.

**Response:** The Subparagraph (1)(c) of the provision requires that for point sources, “existing or proposed discharge control technologies will comply with applicable technology-based limitations and feasible technological controls and other management alternatives, such as a pollution prevention program...” Current EPA guidance interprets that this language can also include BMPs under the petitioner’s control such as storm water management and stormwater pollution prevention plans (“SWPPPs”), as required by the permitting authority (i.e., the EPA). Permit limitations and requirements, including BMPs and SWPPPs, are subject to public review, compliance reporting and inspections. Violations that occur are required to be reported and these reports are publicly available. Any necessary enforcement actions would be taken to apply corrective measures or penalties. A new Subsection H is also added to 20.6.4.12 NMAC to require that an approved temporary standard applied by EPA in a permit must be included, with all stipulations, as enforceable permit limitations and conditions.

**Comment 13 (AMBR):** 20.6.4.F (2) - Provision should be used on a “case-by-case” basis; replace “or” with “and” so provision is used in a targeted capacity and not to downgrade standards on a regional or statewide basis.

**Response:** The draft proposal and the EPA requires that the justification for a variance or temporary standard for a given water body be demonstrated by the petitioner under one or more of the applicable factors in 40 CFR 131.10(g)(l). Thus, it is anticipated that the appropriate factor(s) to apply will be specific to each petitioner. The language has also been revised to replace “or” with “and”. However, where the problems in a water body or watershed are significant and widespread, and involve both point and nonpoint sources of pollution, the SWQB recognizes that a more comprehensive plan that considers all sources of a pollutant (e.g. nutrients) may be needed to comply with the underlying standards.

**Comment 14 (AMBR):** 20.6.4.10.F (4) – The inclusion of guidelines by which proposals or renewals can be judged is supported. Expand 20.4.10.F (4)(c) to submit a plan and timetable for achieving compliance with specific conditions that become prerequisites to be met before a petitioner is eligible for a temporary criteria renewal. Progress on achieving water-body wide measures to decrease nonpoint source pollution should be one of the renewal conditions.

**Response:** In response to several comments received on the Public Discussion Draft, the temporary standard provision in Subparagraph (1)(a) and Paragraphs (4), (5) and (6) outline the required components for a supporting work plan to be submitted along with a temporary standard petition. This includes a timetable for specific actions for achieving compliance, the 40 CFR 131.10(g) factor(s) to be analyzed affecting attainment of the original standard, actions to achieve compliance with attainable uses over the term of the temporary standard, and any investigations, projects, facility modifications, monitoring or other measures necessary to achieve compliance with the original standard. Paragraph (9) is expanded to include review during succeeding Triennial Reviews to determine progress consistent with the original conditions of the petition, and to allow the WQCC to revoke a temporary standard if progress is not sufficient. Paragraph (10) allows a petition to extend a

temporary standard if the following factors are met: 1) it is demonstrated (to the SWQB) that the factors precluding attainment of the original standard still apply; 2) the petitioner is meeting conditions required for approval of the temporary standard; and 3) reasonable progress towards meeting the underlying standard is achieved.

**Comment 15 (AMBR):** 20.6.4.10.F(8) - Include language, “unless renewed, a temporary criterion shall expire no later than the effective date of the next triennial review required by Subsection A of 20.6.4.10.F or 5 years, whichever occurs first.” Include a process by which an individual variance may be appealed and reference WQCC review procedures.

**Response:** The revised proposal requires a review of the temporary standard during subsequent Triennial Reviews and provides for revocation by the WQCC in Paragraph (9). To allow for short and long term situations, as justified and demonstrated as necessary by the petitioner, Paragraph (11) specifies expiration of the temporary standard as approved by the WQCC and EPA. Upon expiration, the underlying standard is applicable. However, water quality standards adopted by the WQCC may be amended or repealed in accordance with New Mexico Statutes Annotate (“NMSA”) 1978, §74-6-6, and the State Rules Act (NMSA § 12-8-25). It is not necessary, nor required, to adopt such a reference into the water quality standards.

**Comment 16 (NMMLEQA):** The commenter sees the benefit of a mechanism to request and grant a variance from a water quality criterion for a defined length of time; however the proposal is onerous and limited to a set of potential petitioners. A mechanism for a variance, rather than for a temporary criteria, should be added. Consider language proposed in the 2003 Triennial Review process.

**Response:** The temporary standard requirements are closely aligned with the EPA’s most recent guidance for water quality standards variances. One key distinction of a temporary standard is that the underlying uses or criteria will not change. Therefore, a UAA is not necessary and has been removed from the proposal, which streamlines the process. Also, the limitation that the water body be listed as impaired has been removed so that there are opportunities for restoration and remediation not clearly tied to a facility or pollutant. Under the revised proposal, there is opportunity to address problems not yet identified in the state’s Integrated Report. While proposals submitted in past rulemakings for WQS variances and temporary standards make an attempt to allow for interim standards, they do not reflect the EPA’s most current guidance and requirements.

**Comment 17 (NMMLEQA):** Delete the UAA requirement; 20.6.4.10.F.3 states the temporary criterion is not a change in a designated use. If the use is not supported and the segment is listed as impaired in the 305(b)/303(d) report, no further documentation should be needed to request a temporary criterion.

**Response:** The UAA requirement is not necessary in the case of a temporary standard in which the underlying uses and criteria remain in place. Therefore, the UAA requirement has been removed from the proposal (see also response to Comment 2).

**Comment 18 (NMMLEQA):** Recommend adding the underlined to the language in 20.6.4.10.F.1 (b): “...the proposed temporary criterion represents the highest degree of protection feasible in the short term and adoption will not cause further loss or impairment of an existing use.”

**Response:** The language in Subparagraph (1)(b) of the proposal is changed to, “...limits the further degradation of water quality to the minimum necessary to achieve the original standard by the expiration date of the temporary standard, and adoption will not cause the loss or impairment of an existing use;...” This is meant to emphasize that the petitioner must maintain water quality to the extent feasible but recognizes that degradation may be necessary in the short term in order to implement longer-term restoration goals. The petitioner must demonstrate that exceeding the current water quality standard is necessary, but this will be minimized and existing uses will be maintained.

**Comment 19 (NMMLEQA):** Add a reference where “...applicable technology-based limitations and feasible technological controls...” are defined or listed in 20.6.4.10.F.1 (c).

**Response:** The applicable technology-based limitations and feasible controls are based on the permitting authority’s guidance, policies and regulations as applied to each permit application, and are case specific. Such a list is too extensive to reference. While it may not be appropriate to define these terms in the WQS, they should be described in the petition as part of the required demonstration. To aid stakeholders in the preparation of required components for a temporary standard petition, it is anticipated that additional technical support may be developed by the SWQB, which could be incorporated into the *Statewide Water Quality Management Plan and Continuing Planning Process* (“WQMP/CPP”)<sup>2</sup>. As part of the WQMP/CPP, such technical support must be approved by the WQCC and the EPA before it could be implemented as part of a work plan for a temporary standard.

**Comment 20 (NMMLEQA):** Language in 20.6.4.10.F (8) should allow the temporary criterion to be continued unless discontinued by the WQCC after review (e.g., during the Triennial Review). Expiration of a temporary criterion after three years is a risk for permittees because the temporary criterion could expire within the effective period of an NPDES permit.

**Response:** The revised proposal requires a review of the temporary standard during subsequent Triennial Reviews and provides for revocation by the WQCC in Paragraph (9). In order to allow for short- and long-term situations as justified and demonstrated as necessary by the petitioner, Paragraph (11) specifies that expiration of the temporary standard is as approved by the WQCC and EPA. Upon expiration, the underlying standard is applicable.

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<sup>2</sup> The *Statewide Water Quality Management Plan and Continuing Planning Process* (WQMP/CPP) provides a concise summary of the water quality management system in New Mexico and the roles of the major participants in that system. It fulfills the requirements of Sections 208 and 303 of the federal Clean Water Act and Section 74-6-4.B of the New Mexico Water Quality Act, that the State maintain a comprehensive water quality management program and develop a continuing planning process to keep the program updated. See also the requirements in the federal regulations within 40 CFR 130.



**Comment 21 (FMMR):** In general, FMMR supports the temporary criteria provision with the included comments and suggested changes.

**Response:** SWQB appreciates the support.

**Comment 22 (FMMR):** 20.6.4.10.F (1) – It is unnecessary to restrict to waters listed as impaired under the 305(b)/303(d) Integrated Report.

**Response:** See response to Comment 6.

**Comment 23 (FMMR):** The SWQB should review EPA's proposed WQS regulations amendments (78 FR 54517, Sept. 2013) to serve as guidance. In particular, EPA's proposed rule does not require a UAA; but recognizes a demonstration that the attainment of the associated use and criteria is not feasible due to factors in 40 CFR 131.10(g). The requirements in 20.6.4.10(F)(4) do not exactly track EPA's proposed rule language, but do not wait for EPA to finalize its rule before proposing this provision during the Triennial Review.

**Response:** The temporary standard requirements are closely aligned with the EPA's most recent guidance for variances and temporary water quality standards. Since the underlying uses or criteria will not change under this provision, the EPA has clarified that a UAA is not necessary in the case of a temporary standard. The UAA requirement has been removed from the proposal. However, as pointed out by the commenter, the EPA requires the justification for a WQS variance or a temporary standard be demonstrated under one or more of the applicable factors in 40 CFR 131.10(g).

**Comment 24 (FMMR):** Consider *Colorado's Interim Guidance for Implementation of Discharger Specific Variance Provisions* (approved October 7, 2013) as a source of information about specific and reasoned analyses regarding implementation of a similar provision in Colorado.

**Response:** Temporary standards and variance provisions and procedures from other states were considered in the development of the proposal, including Colorado, Montana and Oregon. Other states' regulations and procedures are useful but the development of the water quality standards is necessarily guided by New Mexico's authorizations under the Water Quality Act and the EPA's federal regulations and guidance.

**Comment 25 (FMMR):** The difference between adoption of a temporary standard and a change in the designated use based on a UAA should be clarified. For example, the temporary criteria provision in application may apply only to a small portion of the surface water.

**Response:** The UAA requirement is removed from the temporary standard proposal to clarify that the underlying uses and criteria must remain in place. A UAA is a proposal to remove or downgrade a designated use permanently.

**Comment 26 (FMMR):** It may not be possible to develop a plan and timetable for achieving

compliance with the original conditions when the basis for temporary criteria is outside the control of a discharger (e.g., due to natural background conditions). A petition could be denied even though the petitioner demonstrates that all reasonable actions will be taken.

**Response:** If the reason for not attaining the original standard is due to natural conditions, such as described in 40 CFR 131.10(g)(1), the appropriate regulatory approach may be a site specific criterion or UAA process (20.6.4.10 NMAC and 20.6.4.15 NMAC, respectively). If the temporary standard is the appropriate approach, the required plan and timetable should account for uncertainty to the extent feasible. For example, the plan may include monitoring of a nearby reference site to show that unanticipated changes (e.g., fires, flooding, drought, etc.) causing an exceedance of the original standard is due to uncontrollable natural conditions (i.e., same impacts are across both sites), and therefore outside the petitioner's control. In such a case, a temporary standard may be extended if the requirements in 20.6.4.10.F (10) NMAC are met.

**Comment 27 (BDDP):** State the authority and purpose for promulgating the proposed rules in the "Basis for Change." NMED quotes EPA guidance (EPA-820-F-13-012) but not a New Mexico statute.

**Response:** The requirements for amendments to the WQS as part of a Triennial Review and authority for promulgating proposed rules are stated in the WQS in 20.6.4.3 NMAC, and also on page 1 of the Public Discussion Draft. This authority for promulgating the water quality standards is applicable to all changes, thus it is not considered necessary to restate the authority in the "basis for change" sections for each proposal. The EPA's published guidance documents referenced in the discussion draft do not impose legally binding requirements on the EPA, states, tribes or the regulated community, nor do they confer legal rights or impose legal obligations upon any member of the public.<sup>3</sup> However, the EPA's guidance (EPA-820-F-13-012) provides direction for States in reviewing, revising and implementing water quality standards.

**Comment 28 (BDDP):** The provision should align with EPA goals to "streamline the adoption and approval of water quality standards ("WQS") variances" by the states, which is a "time limited designated use and criterion (i.e. interim requirements) that is targeted to a specific pollutant(s), source(s), and/or waterbody segment(s) that reflects the highest attainable condition during the specified time period." The SWQB should state whether any state-specific goals were accomplished as part of the proposed rulemaking.

**Response:** The purpose of the temporary standard provision is to establish procedures that allow temporary standards to be proposed, adopted and implemented. Developing interim goals within a regulatory framework provides a clear pathway to promote active restoration, maintain progressive improvement and ensure accountability. The temporary standard provision was developed by the SWQB in close consultation with the EPA and revised to incorporate suggestions from several stakeholders and commenters including Amigos Bravos, Freeport MacMoRan, NM Mining Association, NM Municipal League and the San Juan Water Commission. Temporary standards and variance provisions and procedures from other states were also considered.

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<sup>3</sup> It should be noted that the CWA provisions and the EPA regulations described in EPA guidance documents contain legally binding requirements.

**Comment 29 (BDDP):** The justification for not using the term “variance” is incorrect. The NMSA and NMAC do not define “variance”; and do not imply that a “variance” is a permit-specific exclusion from regulation. If New Mexico’s intent is different than EPA’s intent for allowing “variances”, NMED needs to describe the intent to the regulated community.

**Response:** The provision allows for a temporary WQS to be proposed, adopted and implemented. It aligns with the EPA’s latest guidance for WQS variances, or temporary WQS, in the EPA’s Water Quality Standards Handbook (Second Edition, 1994). The EPA has also reiterated guidance on temporary WQS in the 1998 Advanced Notice of Proposed Rulemaking (“ANPRM”) (63 FR No. 129, July 7, 1998) and in more recently proposed changes to the federal water quality standards regulations (78 FR No. 171, September 4, 2013). The legal basis for granting a temporary WQS is that the state has fulfilled the same regulatory requirement for removing a designated use under one or more of the 40 CFR §131.10(g) factors (the complete legal history is found in Section 5.3 of EPA’s Water Quality Standards Handbook, 1994). As proposed, it does not provide for a “variance” from pollution abatement as described in other rules used to implement the Water Quality Act, such as Subsection G of Section 74-6-4 NMSA 1978 (Variance Petitions), as described in the adjudicatory procedures in 20.1.3.2 NMAC (e.g., alternate abatement standards pursuant to Subsection F of 20.6.2.4103 NMAC) or in 20.6.2.1210 NMAC.

**Comment 30 (BDDP):** The expression “not feasible in the short term” is vague and should be clarified or defined in the proposed rule and the criteria/standard for judging this should also be specified. EPA guidance applicable to effluent guidelines for point sources (proposed FR 19434, April 1, 2013) is available; some states have requirements for feasibility tests when applying for temporary criteria (i.e., Colorado). If feasibility tests are the determining factor, does NMED intend to develop guidance on feasibility tests as part of this rulemaking?

**Response:** As a general concept short-term would be considered one permit term (5-years) such that the issue could be addressed through other existing mechanisms such as a compliance schedule. However, where flexibility can be allowed, the language in the provision is not meant to be overly prescriptive. Therefore the temporary standard period is meant to be as short as possible, but the duration is specified in the temporary standard, and as approved by the WQCC and the EPA.

The EPA’s effluent guidelines are applicable to point sources and should not generally be cited in the WQS. However, the EPA has indicated that effluent guidelines may be considered as a basis for a temporary WQS if the petitioner presents appropriate justification, and demonstrates how achieving such levels will make progress towards improving water quality and attaining the original water quality standard. The required work plan and petition must outline how this will be achieved within the requested time frame.

To aid stakeholders in the preparation of required components for a temporary standard petition, it is anticipated that technical support may be developed by the SWQB, which could be incorporated into the WQMP/CPP<sup>4</sup>. As part of the WQMP/CPP, such technical support must be approved by the

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<sup>4</sup> The *Statewide Water Quality Management Plan and Continuing Planning Process (WQMP/CPP)* provides a concise summary of the water quality management system in New Mexico and the roles of the major participants in that system. It fulfills the requirements of Sections 208 and 303 of the federal Clean Water Act and Section 74-6-4.B of the New Mexico Water Quality Act, that the State maintain a comprehensive water

WQCC and the EPA before it could be implemented as part of a work plan for a temporary standard.

**Comment 31 (BDDP):** As the designated use does not change, and a segment is on the 303(d) list, a UAA should not be required. EPA guidance does not require a UAA. Replace the language, "...by means of a use attainability analysis completed pursuant to 20.6.4.15 NMAC..." with: "...by means of monitoring, process knowledge and relevant analyses of the applicant's discharge in conjunction with evaluation of the receiving water." (20.6.4.10.F(1)(a)NMAC).

**Response:** Since the underlying uses or criteria will not change under this provision, the EPA has clarified that a UAA is not necessary for the development of a temporary standard. The UAA requirement has been removed from the proposal, and the requirements are more clearly described in the provision.

**Comment 32 (BDDP):** The proposed rule 20.6.4.10.F(1)(b) NMAC is inconsistent because "...the proposed temporary criterion represents the highest degree of protection feasible in the short term and adoption will not cause loss or impairment of an existing use." A water body on the 303(d) list already does not support the designated use(s). If this subparagraph is adopted as proposed, no Assessment Units ("AUs") that are on the 303(d) list would be eligible for the temporary criterion even though petitions can only be made for AUs on the 303(d) list. The following revision to this subparagraph is recommended: "the proposed temporary criterion represents the highest attainable condition that is both feasible to attain in the short term and is closest to the protection afforded by the original criterion, and its adoption will not impair further existing use(s) of the receiving water."

**Response:** The SWQB recognizes that in addition to consideration of EPA's guidance for temporary or restoration WQS, a comprehensive plan is needed towards compliance with the underlying standards. A TMDL, which considers all sources of a pollutant, is one driving mechanism towards attaining the water quality standards. However, this approach may limit opportunities for restoration and remediation not clearly tied to a facility or pollutant. It may also limit the state in addressing problems not yet identified in the state's Integrated Report. Therefore, this limitation is removed from the proposal. However, participants in a TMDL may petition the WQCC for a temporary standard if the requirements in the proposal are met.

Also, the language in Subparagraph (1)(b) of the proposal is changed to: "...the proposed temporary standard represents the highest degree of protection feasible in the short term, limits the further degradation of water quality to the minimum necessary to achieve the original standard by the expiration date of the temporary standard, and adoption will not cause the loss or impairment of an existing use;..."

The proposed temporary standard is developed to be as close as feasibly possible to the original water quality standard. Any further degradation is limited to the minimum necessary to implement improvements toward achieving the original water quality standard for the time period specified in the temporary standard. However, existing uses must be maintained. The EPA supports this approach as consistent with CWA goals.

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quality management program and develop a continuing planning process to keep the program updated. See also the requirements in the federal regulations within 40 CFR 130.

**Comment 33 (BDDP):** Include definitions of “short term” and “feasible” in terms of technological, economical, and environmental feasibility.

**Response:** A definition for “short term” is not proposed for the rule as the length of period for the temporary standard is as justified by the petitioner, and as approved by the WQCC and the EPA (see also response to comment 30). The term “feasible” is not defined in the water quality standards, but is synonymous with the term “practicable”, which is defined in Subsection P, Subparagraph (4) of 20.6.4.7 NMAC. The applicable technological, economic and environmental terms would be case-specific and adopting such definitions could limit flexibility. However, definitions and other supporting documentation to help with implementation of the temporary standard provision are being considered for inclusion in the WQMP/CPP (see responses to Comments 19 and 30). The SWQB anticipates the most likely scenario for a temporary standard would be an economic evaluation based on the 40 CFR 131.10(g)(6) factor which could rely on portions of the EPA’s *Interim Economic Guidance for Water Quality Standards* (EPA 1995)<sup>5</sup> to determine whether a specific pollution control measure results in substantial and widespread economic and/or social impacts. This guidance is not an exhaustive description of all appropriate economic analyses; additional evaluations may be proposed for the analysis.

**Comment 34 (BDDP):** The proposal is a 7-step variance process that is burdensome, costly, and time consuming only to expire “no later than the effective date of the next triennial review” (20.6.4.10(F)(8) NMAC) and implies that NMED’s intent is to discourage variance applications for Temporary Criteria). The process would impose an unreasonable burden to business; such rules pose an economic burden on the regulated community and administrative burden on the WQCC.

**Response:** The temporary standard provision is proposed to establish a process allowable under the CWA and state and federal regulations (40 CFR 131.13) towards achieving compliance with water quality standards under certain circumstances. As mentioned in responses to previous comments the provision will not require the completion of a UAA as the underlying WQS will not be changed. The interim duration, though reviewed during subsequent Triennial Reviews, is not limited to a defined time frame but is as justified by the petitioner and as approved by the WQCC and the EPA. The SWQB recognizes meeting the requirements in the provision may be a challenge. However, the requirements are those necessary to ensure compliance with the existing regulatory framework, maintain progressive improvement and ensure accountability.

**Comment 35 (BDDP):** The rule should allow the option of petitioning the WQCC without regard for the Department’s position. The decision to grant a variance lies with the WQCC. Would a petition rejected by NMED constitute a rejection by the WQCC? Do the rules grant powers to NMED to act on behalf of the Commission, and, therefore subject to appeal in court pursuant to NMSA 1978, §74-6-7? Clarify the authority of each entity for variance applications, NMED and WQCC, and revise the proposed rules accordingly.

**Response:** The requirement is for the SWQB’s review and comment prior to submitting a petition to the WQCC is consistent with requirements for other processes adopted in the water quality standards

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<sup>5</sup> <http://water.epa.gov/scitech/swguidance/standards/economics/>

(e.g., UAAs, piscicide application). The provision does not grant the SWQB new authority to approve the adoption of a water quality standard or to act on behalf of the WQCC, and clarification of authority is not necessary. This requirement allows the SWQB to provide helpful technical comments on the temporary standard and the plan to meet the water quality standards and improve water quality.

A petition for a temporary water quality standard should adhere to the requirements as approved and adopted by the WQCC. However, water quality standards adopted by the WQCC may be amended or repealed in accordance with NMSA 1978, §74-6-6, and the State Rules Act.

#### **§20.6.4.16 NMAC: PLANNED USE OF A PISCICIDE**

**Comment 36 (SJWC):** NPDES Pesticide General Permit (“PGP”) holders should have relief from duplicative federal and state permit requirements. The WQCC should not retain authority if federal NPDES permit is revoked and should require an NPDES permit rather than contradict federal law. Clarify in the provision that WQCC approval for piscicide use can occur only if EPA’s NPDES PGP is revoked.

**Response:** The provision is clear in that the requirements remain in place and the WQCC retains approval authority when the “reasonable use” of a piscicide is not covered by the EPA’s NPDES PGP or individual permit thus this provision removes the current duplication. This could occur if the EPA’s NPDES PGP is revoked, or not reissued.

**Comment 37 (AMBR):** Amigos Bravos opposes eliminating the requirement for a public hearing or public participation for piscicide petitions. The WQCC should have authority to require additional information if necessary where a NPDES permit for piscicide application is required.

**Response:** When covered under the NPDES PGP, a public hearing is not required. Whether the application of a piscicide is covered by the NPDES PGP or not, the provision requires the public notification requirements in Subsection C (1) – (4) of 20.6.4.16 NMAC, which includes publication of notices in local media (e.g., the newspaper of circulation in the affected area). The EPA PGP effective October 31, 2011 was subject to extensive public review and comment during its development. Notices of intent (“NOIs”) for coverage under the EPA’s PGP may be reviewed by any interested parties at any time. The EPA may delay authorization prior to a discharge being covered under the permit if the Agency determines, based on information provided by other interested parties, that further review of eligibility under the PGP is warranted.

**Comment 38 (EBID):** In Subsections 20.6.4.16.C, D and E NMAC: The requirement for a public hearing should not be eliminated where the action is not covered by an NPDES permit. Proposed language should make clear that notice shall be provided to those entities under subparagraphs 20.6.4.16.C (1-4) NMAC and a hearing held for all actions not covered by an NPDES permit.

**Response:** Subsections C, D and E of 20.6.4.16 NMAC would give the WQCC the discretion of whether to hold a public hearing to review a petition, or to review the piscicide application during a WQCC meeting, which is open to the public and interested stakeholders to attend and provide comment. Regardless of permit coverage, in accordance with the added Subsection F of 20.6.4.16

NMAC, the applicator is held to the written public notice requirements in Subsection C, and to implement post-treatment monitoring in the application area required in Subsection E. These are requirements not covered in the EPA's NPDES PGP and are therefore required under 20.6.4.16 NMAC.

**Comment 39 (NMMLEQA):** Proposed changes are supported as they are consistent with the EPA's NPDES PGP. However, NMMLEQA questions when the state procedure is legal to use in light of the new NPDES PGP.

**Response:** The SWQB appreciates the support. The NPDES PGP contains requirements that are comparable to those in the existing provision. However, there are requirements in the state provision not covered in the NPDES PGP, which are addressed in the proposal, such as post treatment assessment monitoring in Subparagraph (9) in Subsection A of 20.6.4.16 and the written notification requirements in Subparagraphs (1) – (4), Subsection C of 20.6.4.16 NMAC. These are included in the addition of Subsection F. An applicant must therefore adhere to both federal and state requirements.

**Comment 40 (TUGR):** The proposed changes to 20.6.4.16 NMAC are strongly supported (reasoning provided in letter). The TUGR Chapter is based in Las Cruces, NM, and has 155 members; the group strongly supports watershed conservation projects in New Mexico, and the restoration of native fish species. Representatives have attended WQCC public hearings and meetings to support using piscicides to restore native Rio Grande cutthroat and Gila trout to watersheds where they once existed.

**Response:** The SWQB appreciates the comment and support.

**Comment 41 (TUTC):** The proposed changes to 20.6.4.16 NMAC are strongly supported (reasoning provided in letter). The scientific literature (and members' field experience) indicates that sustainable populations of Rio Grande cutthroat and Gila trout can only exist in streams, or stream segments free of non-native trout. The use of piscicides is the only effective method for removal of non-native trout so that native trout can be restored.

**Response:** The SWQB appreciates the comment and support.

#### **20.6.4.97 NMAC: EPHEMERAL WATERS**

**Comment 42 (SJWC):** A UAA should not be required before an unclassified stream segment can be classified as ephemeral; the water quality standards should be amended to replace the designated uses for all unclassified waters with wildlife habitat, secondary contact and limited aquatic life. The UAA or hydrology protocol ("HP") requirement for non-perennial water places an unreasonable, unnecessary economic burden on the state and its citizens. The rebuttable presumption that primary contact and marginal warm water aquatic life are attainable uses adopted in 2009 should be scrapped. Costs incurred by NMED to classify the 18 non-perennial stream segments (in the Discussion Draft) as ephemeral should be considered.

**Response:** The CWA Section 101(a)(2) and Section 20.6.4.6 NMAC declares that wherever attainable, water quality shall provide for the protection and propagation of fish, shellfish and wildlife



and for recreation in and on the water. Together with the federal regulation under 40 Code of Federal Regulation (CFR), Part 131.10(j), these regulations effectively establish the “rebuttable presumption” that designated CWA Section 101(a)(2) uses are attainable unless demonstrated otherwise under 20.6.4.15 NMAC and 40 CFR 131.10 (g). During the 2005 Triennial Review, the WQCC believed that the limited aquatic life and secondary contact uses were appropriate for ephemeral waters and satisfied CWA goals. However, in the Record of Decision on the 2005 amendments, EPA stated that those uses do not “serve the purposes of the Act” as defined in CWA Sections 101(a)(2) and 303(c), and the State must submit a UAA.

If the State has evidence or determines the 101(a)(2) goal(s) may not be attainable, UAAs must be conducted to remove a designated use or to assign a lesser use (40 CFR 131.10 and 20.6.4.15 NMAC). A UAA may be conducted for a specific water body, or for category of water bodies, such as for ephemeral waters. The HP was developed as a categorical approach allowed by the EPA for application on a local, regional or watershed basis to distinguish between ephemeral, intermittent and perennial streams. The HP process required amendments to the state’s water quality standards during the 2009 Triennial Review revisions, and subsequent approvals by the WQCC and EPA. These efforts now provide a scientifically defensible and cost effective process to apply to UAAs and other site evaluations. The HP process can be used to efficiently apply the appropriate criteria, avoiding inappropriate impairment listings on the CWA 303(d)/305(b) List of Assessed Waters and undue requirements on dischargers.

**Comment 43 (SJWC):** The Hydrology Protocol and similar documents (e.g., Hydrology Protocol, Assessment Protocol, Nutrient Criteria, Above Ground Use of Domestic Reclaimed Wastewater, etc.) in the New Mexico Water Quality Management Plan are good guidance but not be elevated to an enforceable regulation via their citation in the water quality standards, in Total Maximum Daily Loads, NPDES permits, or in groundwater discharge permits. All guidance, protocol and criteria documents should be subject to the WQCC rulemaking process if used as *de facto* water quality standards, TMDLs, or permit limitations that will be enforced by the WQCC or EPA. Circumvention of the rulemaking process violates due process rights; references to guidance documents, protocols and criteria in the New Mexico Water Quality Management Plan do not meet the public hearing requirements of the Water Quality Act regarding the adoption of regulations and standards.

**Response:** The SWQB, acting under authority delegated by the WQCC, implements the water quality standards by describing specific methods and procedures in the WQMP/CPP. As discussed in Comment 42, the HP is the technical support document developed by the SWQB for use in accordance with 20.6.4.15.C NMAC to distinguish between ephemeral, intermittent and perennial streams/rivers in New Mexico. If the HP is applied to a water body and data results indicate it is ephemeral, the water body may be recommended for adoption under 20.6.4.97 NMAC. The HP provides a scientifically defensible, efficient and cost effective process to apply to UAAs and other site evaluations. The HP process can be used to apply the appropriate criteria, avoiding inappropriate impairment listings in CWA 303(d)/305(b) assessments and undue requirements on dischargers. The HP document completed two rounds of public comment and was approved as an appendix to the State’s WQMP by the WQCC on May 10, 2011, and by the EPA on December 23, 2011.

The state’s WQMP is required in accordance with the CWA Sections 208 and 303(e) and the federal regulations (40 CFR 130.6). It is used for managing the State’s water quality program to implement



the CPP as required by the CWA Section 303(e)(3)(A)-(H) (see 40 CFR 130.5). In New Mexico, the CPP and WQMP are combined into one document (CPP/WQMP) providing a concise summary of the state's water quality management system and the roles of the major participants in that system. The CPP/WQMP also fulfills the requirements of Section 74-6-4.B of the New Mexico Water Quality Act. The CPP/WQMP is intended to work in conjunction with other applicable laws and program elements. For example, the water quality standards are used to assess the State's surface waters as required by the CWA Section 305(b) and to identify the pollutant load reductions necessary in a TMDL in accordance with the CWA Section 303(d). Program elements described in the CPP/WQMP also have very specific and detailed public participation requirements prior to approval by the WQCC, and the EPA.<sup>6</sup> However, it is not a federal or state requirement that States' CPPs and WQMPs be adopted into State rule.

**Comment 44 (SJWC):** WQCC's adoption of the "rebuttable presumption"/ CWA §101(a)(2) uses approach and the corresponding UAA/Hydrology Protocol requirement means certain NPDES discharges previously made into "ephemeral" waters are being made into "perennial" waters based solely on the discharge. Permit conditions become more stringent to meet upgraded designated uses (i.e., primary contact) and increases economic burdens on the discharger. The Department should consider Arizona's approach to unclassified waters and effluent dependent waters (examples are provided).

**Response:** During the 2009 Triennial Review, the EPA commented that default uses that do not change when stream flow is augmented by a discharge are contrary to the assumptions in the CWA and requirements in the water quality standards. The EPA also stated "that although the uses associated with 20.6.4.97 or 20.6.4.98 NMAC may apply, the associated uses and criteria may not be adequate when flow is augmented by a discharge. Although more protective uses may not be attainable throughout the entire length of an ephemeral or intermittent segment, augmented flow may enable a portion of those receiving waters to support a broader range of uses than outlined in 20.6.4.97 or 20.6.4.98 NMAC. The 40 CFR 131.10(g)(2) anticipates that, where a discharge to a low flow waterbody is sufficient to establish or sustain an aquatic life use, that use is to be protected." As stated in testimony from the 2009 Triennial Review hearings, the SWQB agrees that if a discharge changes the hydrology of a stream from ephemeral to perennial and thereby supports a "higher" aquatic life use, then that existing use must be protected for as long as the discharge continues.<sup>7</sup>

In accordance with Subsection C of 20.6.4.15 NMAC, the SWQB and the WQCC allow for the application of the HP to a stream to determine whether it is naturally ephemeral and can be assigned the appropriate designated uses under 20.6.4.97 NMAC. Most ephemeral UAAs are expected to be straightforward and not very costly to conduct. For straightforward cases, the application of the HP in accordance with Subsection C of 20.6.4.15 NMAC allows for appropriate criteria to be applied without unnecessary delay, avoids inappropriate impairment listings in the CWA 303(d)/305(b) assessments and the imposition of undue economic requirements on dischargers.

**Comment 45 (NMMLEQA):** The Hydrology Protocol should distinguish between water created by discharges into an otherwise ephemeral water course and natural streams as effluent dependent waters. There should not be the expectation that effluent streams can support the primary contact and

<sup>6</sup> See the WQMP/CPP Table XIV-1. Public Participation Requirements.

<sup>7</sup> See Exhibit 19, NMED Testimony, 2009 Triennial Review.

chronic aquatic life designated uses that natural streams do. A designated use for “Effluent Dependent Water” should be adopted. Examples from Arizona’s water quality standards are provided for development of similar standards in New Mexico.

**Response:** Please see the response to Comment 45.

**Comment 46 (AMBR):** The intention of both the national Clean Water Act and the NM Water Quality Act is to protect water quality for all existing uses of a stream, regardless of the stream’s hydrologic characteristics. The UAAs associated with these listings do not satisfy the rigors of a scientifically-based (UAA as required in Clean Water Act regulations at 40 C.F.R. § 131.10(g), (j) and (k). A list of example questions for the UAA process is provided in the comments.

**Response:** A UAA must assess the attainment of a use based on factors in 40 CFR 131.10(g), but those factors vary by situation. For example, an evaluation of the best water quality attained in the water body may not be relevant for determining whether an ephemeral stream will support fish populations. An evaluation of water quality may not be necessary to determine a recreational use when the water body is being used for recreational activities. If an assessment reveals that the physical habitat is the limiting factor precluding a use, a chemical evaluation would not be required. Instead of requiring the use of specific methodologies and dictating the contents of a UAA, the water quality standards require that methods must be scientifically defensible, and provides examples of such methods (Subsection B of 20.6.4.15 NMAC). This added flexibility allows UAAs to be better targeted without compromising quality. Also, these procedures and definitions are consistent with 40 C.F.R. § 131.10(g), (j) and (k), in EPA’s Water Quality Standard Handbook (Chapter 2.9) and EPA’s 1983 Technical Support Manual.

Additionally, UAAs conducted by the SWQB incorporate the HP and EPA Economic Guidance for Water Quality Standards into the analysis. The HP and associated cover sheets are a component part of a UAA, and are not necessarily the entirety of a UAA. The HP is used to distinguish between ephemeral, intermittent and perennial streams in New Mexico and generate documentation of the uses supported by those waters as a result of the flow regime. The ability to make such determinations is essential to assuring that the appropriate water quality standards are applied to a waterbody. The HP completed two rounds of public comment and was approved as an appendix to the State’s WQMP by the WQCC on May 10, 2011, and by the EPA on December 23, 2011. The application of the WQCC and EPA approved HP represents the type of analyses EPA believes sufficient for the State to determine attainable uses.

Resources for conducting UAAs are all included or referenced through a dynamic link on the SWQB’s UAA website.<sup>8</sup>

#### **20.6.4.101-503 NMAC: CLASSIFIED WATERS**

**Comment 47 (SJWC):** Wholesale upgrades from the secondary contact recreation designated use to primary contact recreation for numerous classified stream segments throughout New Mexico

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<sup>8</sup> <http://www.nmenv.state.nm.us/swqb/UAA/>

without any supporting evidence is overreaching, places a burden on dischargers to upgrade wastewater treatment for bacteria or to legally rebut the presumption that primary contact recreation is attainable. Designated uses of secondary contact recreation meet the CWA § 101(a)(2) goals (*i.e.*, recreation in and on the water).

**Response:** The EPA in past approval of triennial reviews has stated that secondary contact does not meet the CWA Section 101(a)(2) uses and that UAAs are required to support the designation of these uses. The SWQB has reviewed the record for these water bodies and found no UAAs were conducted to support the secondary contact recreation uses and criteria assigned. Further, the SWQB's review of these waters finds that recreation in and on the water is probable for many of these waters as an existing use.

**Comment 48 (EPA):** Based in the draft proposal, related to Region 6's recommendation in §20.6.4.15 NMAC, NMED is considering removal of the term "unclassified" for those waters which have been characterized as ephemeral and adding the term "surface" to be consistent with the term "surface water(s) of the state" defined in Subsection S of 20.6.4.7 NMAC. This proposal would be a welcome addition to the Region 6's earlier recommendations and reiterated in §20.4.6.15 NMAC above.

**Response:** The SWQB appreciates the comment and support.

**Comment 49 (EBID):** Sections 20.6.4.98(A), 99(A), 102(A) and 103(A) should the "and" be an "or" to make one or more of the uses acceptable, or should it be an "and" to require each use be met? In other words, should it read as it does, or as follows: "warmwater aquatic life, livestock watering, wildlife habitat, or primary contact."? Section 20.6.4.101(A): EBID believes "secondary contact" designation for this area of the Rio Grande is more appropriate.

**Response:** The use of "and" is correct; water quality criteria for each of the designated uses must be supported. For Section 20.6.4.101 NMAC the appropriate designated contact recreation use is primary contact recreation; to apply a secondary contact recreation use designation requires a UAA be conducted in accordance with the state and federal water quality standards rules (20.6.4.15 NMAC and 40 CFR 131.10, respectively).

**Comment 50 (LANS):** LANS is currently evaluating proposed changes to possible areas of interest including reclassification of certain Los Alamos National Laboratory streams from Section 20.6.4.98 intermittent to Section 20.6.4.97 ephemeral, pursuant to Section 20.6.4.15 NMAC, and expansion of the ability to use the biotic ligand model ("BLM"). In the event it decides to pursue any changes, LANS will arrange a meeting with appropriate SWQB representatives to discuss its proposals prior to submitting a petition

**Response:** No response is necessary.

#### **20.6.4.100, 102, 103, 110, 116 AND 124 NMAC: RIO GRANDE BASIN**

**Comment 51 (EPA):** EPA Region 6 supports the amendments to these segments in the Rio Grande Basin. These include proposed amendments consistent with the EPA recommendations for

recreational contact and CWA 101(a) goals. In some instances, revising the designation from secondary to primary contact for compatibility with downstream waters is consistent with 140 CFR 131.10(b). Region 6 supports the proposed amendments replacing the word “below” with the hydrologic term “downstream of” in these segment descriptions.

**Response:** SWQB appreciates the comment and support for changing the word “below” to “downstream of” in the appropriate segment descriptions.

#### **20.6.4.204, 206, 207, 213 AND 219 NMAC: PECOS RIVER BASIN**

**Comment 52 (EPA):** EPA Region 6 supports the proposed amendments to these segments in the Pecos River Basin, as noted for the Rio Grande segments above.

**Response:** SWQB appreciates the comment and support.

#### **20.6.4.305, 308 AND 317 NMAC: CANADIAN RIVER BASIN**

**Comment 53 (EPA):** EPA Region 6 supports the proposed amendments to these segments. (See EPA comment for Rio Grande segments above).

**Response:** The SWQB appreciates the comment and support.

#### **§ 20.6.4.404 NMAC: SAN JUAN RIVER BASIN**

**Comment 54 (EPA):** The editorial changes to the segment descriptions, adding the word “river” and referring to the correct jurisdiction boundary for Southern Ute Indian Tribe are appropriate. NMED has developed a draft UAA, Aquatic Life Uses for the Animus River in New Mexico to support the proposed designated amendments outlines for these segments. NMED is expected to submit a final draft to Region 6 for technical approval. Preliminary review suggests that the use and related temperature criteria may be appropriate. Region 6 will notify NMED of its decision on technical approvability.

**Response:** The SWQB appreciates the comment and the support. The SWQB will work with EPA on any necessary revisions to the UAA.

**Comment 55 (SJWC):** This classified stream segment, at page 22 of the Discussion Draft, includes a proposed refinement in designated use from marginal warmwater to coolwater based on a November 2013 Public Discussion Draft *UAA Aquatic Life Uses for the Animas River in New Mexico*. SJWC supports this proposal.

**Response:** The SWQB appreciates the comment and the support.

#### **§20.6.4.502 and 503 NMAC GILA RIVER BASIN**

**Comment 56 (EPA):** As noted for segments discussed previously, Region 6 supports replacing the word “below” with the hydrologic term “downstream of” in these segment descriptions. The

proposed correction to the segment description for 20.6.4.503 NMAC to accurately reflect where site-specific conductivity criteria should apply is reasonable. The analysis of the conductivity in this segment should be submitted in support of this amendment if adopted by the Commission.

**Response:** The SWQB appreciates the comment and support. The analysis of conductivity for the segment description and use designation will be part of the documentation supporting revisions proposed to the WQCC. If adopted by the WQCC, this will be submitted to the EPA for CWA Section 303(c) approval.

#### **§20.6.4.803, 804 and 807 CLOSED BASINS**

**Comment 57 (EPA):** Once a draft UAA supporting the proposed amendments to the aquatic life designated use and criteria for segments 20.6.4.803 and 804 NMAC and the addition of a new segment, 20.6.4.807 NMAC is developed, Region 6 anticipates that NMED will present it for public comments. The EPA Region 6 anticipates receiving a UAA and supporting documentation either for technical approval prior to these amendments, or as supporting documentation as part of the triennial submission for final CWA Section 303 (c) approvals.

**Response:** The SWQB appreciates the comment and support. The draft UAA was noticed for public review and comment April 1 - May 30, 2014 (60 days). The SWQB received no comments and the UAA was submitted to the EPA for technical approval on July 21, 2014. Once technical approval is received from the EPA and after adoption by the WQCC, the UAA recommendations will be included as supporting documentation for the Triennial Review or as a separate submission to the EPA for CWA Section 303(c) approval.

#### **§20.6.4.900 D. and E.: PRIMARY AND SECONDARY CONTACT**

**Comment 58 (EPA):** The proposal to update the standards and previously approved testing methodology for sampling, analyzing and reporting bacteria levels in ambient water is consistent with current EPA recommendations.

**Response:** The SWQB appreciates the comment and support.

**Comment 59 (AMBR):** The reclassification from secondary to primary contact proposed for specific waters is supported.

**Response:** The SWQB appreciates the comment and support.

**Comment 60 (AMBR):** Revisit CWA 101(a)(2) use attainment of waters included in sections 20.6.4.124, 20.6.4.126 and 20.6.4.128 NMAC, which do not have 101(a)(2) uses. It has been over three years since 101(a)(2) uses were removed from these segments.

**Response:** Water body segments in which uses less than those consistent with the CWA 101(a) uses have been adopted are subject to 40 CFR 131.20, which requires they “shall be re-examined every three years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its

standards accordingly". This requirement does not obligate the State to perform a new UAA or generate new data from these segments every three years. However, the State must determine if there is available new information that indicates that the uses specified in section 101(a)(2) of the Act are attainable. The SWQB regularly evaluates available water quality and other information to assess designated uses. In the case of the three segments in Sections 20.6.4.124, 20.6.4.126 and 20.6.4.128 NMAC, the SWQB does not have data or information indicating the attainability of the designated uses requires a change.

**Comment 61 (NMMLEQA):** The use of most probable number ("MPN") for reporting *E. coli* results is supported.

**Response:** The SWQB appreciates the comment and support.

#### **§20.6.4.900 I. (1) ACUTE AND (2) CHRONIC AQUATIC LIFE CRITERIA FOR METALS**

**Comment 62 (EPA):** The current proposed language for both Subparagraphs 20.6.4.900 I (1) and (2) NMAC states that the hardness-based equation for total recoverable aluminum as applicable only where pH is equal to or greater than 6.5 in the receiving stream after mixing, but also appears to say (in the table in 20.6.4.900 NMAC) that when pH is less than 6.5 in the receiving stream after mixing, that the 750 µg/L acute and the 87 µg/L chronic standard applies. This approach would not resolve EPA's disapproval in situations where the 87 µg/L chronic standard applies. In those instances, the more stringent of either the 87 µg/L chronic total recoverable aluminum criteria or the criterion resulting from the chronic hardness-dependent equation should be applied.

**Response:** Following the 2009 Triennial Review, the EPA approved the hardness-based chronic and acute equations for aluminum only for those waters of the State where pH is equal to or greater than 6.5, but disapproved the equations in waters where the pH is less than 6.5. In order to resolve the disapproval for the 2013 Triennial Review, the Public Discussion Draft included language to clarify implementation of the EPA's recommendations on applicability of the aluminum criteria where the ambient stream pH is less than 6.5. The SWQB also proposed retaining the original CWA Section 304(a) criteria in the table in 20.6.4.900 NMAC for both acute and chronic aluminum criteria for the low pH waters. As stated in Comment 62, the EPA did not agree this approach would resolve the disapproval. The approach suggested by the EPA to resolve the disapproval appears to apply the criteria for aluminum in a different way than recommended in the EPA's 304(a) criteria document, and also deviates from use of the acute criteria of 750 ug/L (as dissolved) previously adopted by the State and approved by the EPA. The SWQB finds the EPA's further recommendation is not well justified and ambiguous about what criteria should apply in low pH waters. Therefore, the proposal in the Public Discussion Draft will be changed to reflect that for federal actions in waters with a pH less than 6.5, the EPA will implement the aluminum criteria for CWA purposes.

**Comment 63 (AMBR):** There is no provision in the nationally recommended standard for aluminum for pH conditions 6.5 or less as requested by the EPA's Region 6; the criteria for analysis is for total recoverable, not dissolved. There was no scientific rationale stated for such a standard to be implemented even though there have been many studies published regarding the effects of aluminum

on aquatic life under acidic conditions.

**Response:** Please see the response to Comment 62.

**Comment 64 (AMBR):** The commenter objects to the hardness-based standard for aluminum pH 6.5 to 9.0 previously approved by the WQCC and the EPA, Region 6 and requests use of national recommendations until there is sufficient data to develop hardness based criteria for western waters. There is no consideration of aluminum speciation with respect to pH.

**Response:** Please see the response to Comment 62.

**Comment 65 (AMBR):** The chronic standards were derived from an acute-to-chronic ratio (“ACR”).

**Response:** The ACR is defined by the EPA as the ratio of the acute toxicity of an effluent or a toxin to its chronic toxicity. It is an accepted method described in the EPA’s guidance for use when there is adequate species data available that measures acute effects, but little or no reliable species data available that measures the chronic effects of particular chemicals or pollutants. See also the response to Comment 62.

**Comment 66 (AMBR):** The U.S. Fish and Wildlife Service (“USFWS”) should review the proposal, but commenter is not aware of such an analysis.

**Response:** The commenter did not specify but may be referring to the requirements under Section 7 of the Endangered Species Act (“ESA”). Those requirements apply solely to federal agencies, and the EPA is responsible for fulfilling any applicable requirements of Section 7 in its administration of the CWA. While States and Tribes may choose to function as “non-federal representatives” for purposes of informal consultation pursuant to 50 C.F.R. § 402.18, the responsibility for compliance with ESA Section 7 remains with the EPA. In this case, the SWQB has received no comments from the USFWS on the water quality standards or the Public Discussion Draft in the current Triennial Review. However, as part of CWA Section 303 (c) oversight review and approval of the WQCC-adopted water quality standards, the EPA determines whether consultation with the USFWS is necessary, and will conduct the appropriate evaluations accordingly.

**Comment 67 (AMBR):** Colorado’s chronic hardness-based formula for aluminum results in a value one third of that allowed in New Mexico and the pH range begins at 7.0. Oregon has a narrative standard for aluminum; previous standards for aluminum were disallowed by the EPA Region 10.

**Response:** The hardness-based formula for aluminum and the pH range for applicability may depend upon the state adopting such a formula. The EPA has responsibility under the CWA Section 303(c) to approve or disapprove water quality standards adopted by states and there may be regional issues addressed by the state and the EPA. For New Mexico, the EPA Region 6 has approved the hardness-based formula for aluminum as applicable at pH of 6.5 and above.

**Comment 68 (AMBR):** The current hardness-based standard does not address important pH effects where the pH is greater than 7.5, a condition prevalent in many New Mexico streams. Hardness

protects against, but does not eliminate, lethality at low concentrations of dissolved aluminum over long periods. According to one study, a mortality of 50% is projected at a little more than 3 months (109d) at 100 mg/l CaCO<sub>3</sub>, 0.16mg/l dissolved aluminum and pH of 8.6.

**Response:** Most of the EPA's recommended criteria, including those based on water hardness relationships, are derived from studies conducted within optimal ranges for the survival of most aquatic organisms, which fall between pH 6.5-9. In New Mexico, typical pH values in surface waters that are largely unaffected by anthropogenic disturbance vary from pH of 7.5 to 8.7 (NMED/SWQB Assessment Protocol ("AP"), 2013, Table 2, Appendix F). The EPA has approved the hardness-based equations for aluminum for only those waters of the State where pH is equal to or greater than 6.5 as applicable statewide. See also the response to Comment 62.

**Comment 69 (NMMA):** Limiting the application of the hardness-based aluminum criteria to waters with a pH greater than or equal to 6.5, and reverting to the previous EPA recommendations for aluminum criteria ( 87 µg/L for chronic and 750 µg/L for acute) where pH is less than 6.5, is not scientifically justified. The EPA's current aluminum criteria (EPA 1988) recommendations were developed using data conducted at pH from 6.5 to 8.17 and not at low pH; it is not appropriate to apply the EPA 1988 aluminum criteria outside the pH range of 6.5 to 9.0. It is inappropriate to apply outdated fixed values (EPA 1988) when scientifically advanced and relevant hardness-based criteria are available.

**Response:** Please see the response to Comments 62 and 68.

**Comment 70 (NMMLEQA):** The commenter supports the proposed addition of the hardness-based equation for total recoverable aluminum where pH is equal to or greater than 6.5 in the receiving stream after mixing.

**Response:** The SWQB appreciates the comment and support; please also see the response to Comment 62.

#### **COMMENTS ON OTHER ISSUES NOT IN THE TRIENNIAL PROPOSALS:**

**Comment 71 (AMBR):** Assign a conductivity criterion (400 microsiemens/cm) to the lower segment of the Rio Pueblo de Taos (from the Rio Grande del Rancho down to the confluence with the Rio Grande). Sampling conducted by Amigos Bravos and Sentinels Rios de Taos (data submitted periodically to NMED) show effluent conductivity from the wastewater treatment plant is consistently above 700 microsiemens/cm. Add a phosphate criterion (0.1mg/L) to the Rio Pueblo de Taos watershed to control nutrient loading and the associated impairment; lower segments of the Rio Pueblo de Taos and many tributaries are listed as impaired for Nutrient/Eutrophication Biological Indicators

**Response:** States are required to adopt water quality criteria, based on sound scientific rationale, and that contain sufficient parameters or constituents to protect the designated use<sup>9</sup>. Before assigning a

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<sup>9</sup> See 40 CFR Section 131.11(a)(1).



segment-specific criterion for specific conductivity or phosphate, the attainable designated and existing aquatic life uses and the necessary criteria to support the uses should be considered. The commenter did not provide sufficient data or information to support the requested change. Also, the narrative nutrient criterion (Subsection F of 20.6.4.13 NMAC) applies to this water. The SWQB currently assesses water bodies in the Rio Pueblo de Taos watershed (ecoregion 22f) for the total phosphorus ("TP") ecoregional threshold of 0.02 mg/L in addition to .

### **Pharmaceuticals and Personal Care Products**

**Comment 72 (AMBR):** The commenter supports development of new water quality standards for Pharmaceuticals and Personal Care Products ("PPCPs") and chemicals such as sulfamethoxazole, loxacin, caffeine, DEET, TDCPP and tris (2-chlorethyl) phosphate, all of which have been detected in New Mexico's waters. The NMED should test for chemicals including but not limited to: chemotherapy drugs; hormones; antidepressants; anti-epileptics; antibiotics; pain relievers; blood pressure diuretics; and plasticizers. A list of chemicals could be derived from demographics of most commonly used PPCPs, especially for hormones and plasticizers (such as bisphenol-A). A resource to help identify pollutants of concern and to assist in developing water quality standards is the United States Geological Survey ("USGS") Health Based Screening Levels Database.

**Response:** Recent concerns regarding PPCPs have made clear the need for further investigation into the potential adverse effects of these chemicals on human health and the environment. While most of these chemicals are not currently included in routine monitoring, they may be candidates for future regulation depending on their potential health or ecological effects. Many of the chemicals that make up PPCPs are not necessarily new and have been present in the environment, including in New Mexico's waters, but with advances in technology they are far more detectable. The lack of understanding about their particular health effects and the fact that PPCPs are comprised of thousands of chemical substances makes criteria development difficult. Resources such as identified by the commenter may be helpful in identifying and prioritizing pollutants of concern. The EPA is also investigating PPCPs and developing strategies to help protect the health of both the environment and the public.<sup>10</sup> Among the myriad issues to be considered in the need and approach for development of criteria for PPCPs, primary focus may be on those chemicals that demonstrate a reasonable potential to adversely affect human health.

### **Biocriteria and Numeric Nutrient Criteria**

**Comment 73 (AMBR):** The narrative biocriteria adopted in the last Triennial Review is a very good start, but both narrative and numeric biocriteria are essential. The Department should move quickly to develop and finalize nutrient criteria for New Mexico.

**Response:** The SWQB continues to development of biocriteria assessment approaches. Such work is the next step toward developing numeric biocriteria.

### **Climate Change**

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<sup>10</sup> According to the EPA, to date scientists have found no evidence of adverse human health effects from PPCPs in the environment. See EPA Website, <http://www.epa.gov/ppcp/faq.html>

**Comment 74 (AMBR):** The NMED is urged to consider future, long reaching effects of climate change on water quality; science on climate change is becoming dire and the impacts of climate change on water resources must be addressed. Climate change will result in changed precipitation patterns, a likely decrease in water supply and add pressure to over-allocated water resources in the state.

See, e.g., Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: *Climate Change Impacts in the United States: The Third National Climate Assessment*. U.S. Global Change Research Program

(available at: <http://nca2014.globalchange.gov/>).

**Response:** The SWQB acknowledges the potential impacts of climate change on New Mexico's water resources. While the comment focuses on changes in water supply, changes in water supply may potentially impact water quality. The current WQS provide the necessary level of protection for existing and attainable uses and this will remain even if the potential impacts of climate change are realized. However, it is not currently possible to determine what portion, if any, of a pollutant concentration in a water body is or will be the result of climate change.

### Limited Aquatic Life Use

**Comment 75 (AMBR):** The limited aquatic life designated use is ambiguous, confusing and could be abused to lower standards; readers must flip back and forth between the segment and the back of the standards. For example, for Sulphur Creek (§20.6.4.124 NMAC) it would be simpler to note under paragraph B(3) that, except for subsections I and J of 20.6.4.900, the chronic aquatic life criteria do not apply. The commenter suggests segment specific uses to allow for more fine-tuned standards (e.g., notes in the segment where only certain uses, criteria or constituents apply, or not). If the limited aquatic life use is maintained, the definition should match the Department's current hydrology protocol in which ephemeral waters are assigned the limited aquatic life use, and intermittent waters are assigned the marginal warmwater aquatic life use (see 20.6.4.97 and 20.6.4.98). Change the limited aquatic life use definition to remove "or intermittent" (in Subsection L, subparagraph (2) of 20.6.4.7 NMAC).

**Response:** Designating a waterbody with the limited aquatic life use is subject to the requirements in 40 CFR Part 131 and 20.6.4.15 NMAC, and requires that a UAA be conducted, which is the scientific analysis of the factors affecting the attainment of aquatic life use(s). It is also the process through which appropriate designated uses and criteria may be assigned. Therefore, the UAA process removes ambiguity related to non-attainable and incorrectly assigned uses for a particular waterbody (or type of waterbody), as determined through the analysis. The limited aquatic life designated use does not mean that aquatic species are not present or supported. In fact, as defined in Subsection L of 20.6.4.5 NMAC, the use "includes surface waters that support aquatic species selectively adapted to take advantage of naturally occurring rapid environmental changes, ephemeral or intermittent water, high turbidity, fluctuating temperature, low dissolved oxygen or unique chemical characteristics." The results of a UAA documenting the presence of aquatic invertebrates (e.g., shellfish or insects) and/or amphibians, but finds support of fish populations is not existing or attainable, allows for the support and protection of the appropriate aquatic life use.

## Mixing Zones

**Comment 76 (AMBR):** The mixing zones standards should be eliminated or revisited. The NMED should ensure that New Mexico's mixing zone criteria are at least in line with EPA regulations. EPA regulations allow mixing zones where: (1) the integrity of the water body as a whole is not impaired; (2) they prevent the death of organisms passing through the mixing zone; and (3) they do not cause significant health risks. The water quality standards do not meet these limitations on mixing zones, and should be revisited.

**Response:** The commenter did not provide examples of where the water quality standards provision for mixing zones is inconsistent with the EPA's mixing zone guidance and policies, nor were any examples of noncompliance provided. Mixing zone provisions in the water quality standards (Subsections D and E of 20.6.4.11 NMAC) have been adopted by the WQCC and approved by EPA. They are based on, and consistent with, federal regulations, EPA policies and the guidance provided in "*Technical Support Document for Water Quality-Based Toxics Control*" (EPA, March, 1991). It should be noted that the current provision contains requirements that are more stringent than allowed by EPA guidance. For example, a mixing zone for acute aquatic life, or zone of initial dilution, is prohibited (EPA 1991 TSD; Subsection E, Subparagraph (2) of 20.6.4.11 NMAC). In accordance with Subsection E, Subparagraph (2) of 20.6.4.11, to protect designated aquatic life uses the acute criteria are met at the point of discharge, before entering state waters. Also, the development of mixing zones in lakes and reservoirs is prohibited in the water quality standards provision (Subsection E, Subparagraph (1) of 20.6.4.11 NMAC), even though allowed for in EPA's guidance.

## Perchlorate Standard

**Comment 77 (AMBR):** Adopt a perchlorate standard of 1 ug/L for domestic water supply; develop criteria for irrigation, wildlife habitat and livestock watering. Perchlorate contamination has been detected in both ground and surface water in the past ten years. The USGS collected one sample in spring of 1999 at Lost River, Holloman Air Force Base with a level of 16,000 ug/L perchlorate. One sample from shallow alluvial groundwater in Los Alamos reported a level of 180 ug/L perchlorate (1995), and one ground monitoring well at Fort Wingate, reported a level of 2,860 ug/L perchlorate. Although there is currently no federal drinking water standard for perchlorate, the EPA has considered a reference dose of 1ug/L in drinking water. New evidence indicates Americans are consuming large quantities of perchlorate in vegetables or other sources and the level of perchlorate safe for drinking water should be lowered. Vegetables irrigated with perchlorate contaminated water concentrates the contaminant by many factors. For example lettuce concentrates perchlorate by an average factor of 65 at levels found in water of 10 to 130 ppb.

**Response:** The EPA is evaluating the available science on health effects of perchlorate exposure and has committed to using peer reviewed science and data to develop a drinking water recommendation. Consideration of a perchlorate criterion in the New Mexico water quality standards would follow the publication of the proposed recommendation (i.e., federal rule proposal) and be evaluated by the SWQB in collaboration with the New Mexico Drinking Water Bureau ("DWB").

## Public Water Supply and Fish Culture Use

**Comment 78 (AMBR):** Adopt specific criteria (i.e., bacteria, pH, and temperature) for the public water supply use and fish culture uses. Language under Subsection A of 20.6.4.900 NMAC states: “Water quality adequate for these uses is ensured by the general criteria and numeric criteria for bacterial quality, pH and temperature,” yet there are no use specific criteria assigned. What would happen in a situation where there is a public water supply use, or a fish culture use for that matter, where a UAA has been conducted to remove 101(a) uses and thus their associated bacterial, pH and temperature criteria? Many contaminants listed in Subsection J of 20.6.4.900 NMAC are not removed with conventional treatment practices; criteria should be adopted to protect for the public water supply use, taking into account the effectiveness of standard treatment technology.

**Response:** The SWQB recognizes the concerns raised by the commenter. The public water supply and fish culture uses currently have no numeric criteria specifically assigned to them. However, they are linked to water quality standards protections under the antidegradation provisions, the general criteria (e.g., narratives) and numeric criteria for bacteria, temperature and pH assigned to the water body segment in which they occur. The narrative criteria also prohibit toxic pollutants (Subsection F of 20.6.4.13 NMAC) and protect for organoleptic qualities, which can affect the flavor of fish, and the odor and taste of water (Subparagraphs D (1)-(2) of 20.6.4.13 NMAC). Additionally, in accordance with Subsection F of 20.6.4.11 NMAC, the numeric and general criteria protections assigned to other designated uses are applicable to the segment.

The public water supply use defined in 20.6.4.7 NMAC applies to public water systems (as defined in 20.7.10 NMAC) required to be regulated under the federal Safe Drinking Water Act (“SDWA”) and New Mexico’s Drinking Water Regulations (20.6.10 NMAC) (N.M. Stat. Ann. § 74-1-12 and § 74-1-13; 20.7.10 NMAC). The New Mexico Drinking Water Bureau (“DWB”) has primacy for the federal SDWA, which means it has the authority to implement and enforce the SDWA regulations for public water systems. The state of New Mexico has also passed state drinking water rules under the Environmental Improvement Act (NMSA 74) that incorporate the federal regulations and have additional requirements not covered by SDWA.

Nonetheless, in some cases it may be necessary to consider adopting water quality criteria in the standards for these uses as a preventative approach on a segment specific basis, to further protect human health or to reduce public water supply treatment costs. The challenge is to develop criteria based on the best available scientific information, EPA guidance, applicable legal authorities, coordination with the appropriate state and federal agencies necessary to support adoption.

## Delisting

**Comment 79 (EBID):** This document (Triennial Review Public Discussion Draft) could, and in EBID's opinion should, include procedures for deleting impaired streams in areas where compliance has been consistently attained. EBID is also interested in working with NMED to determine delisting procedures for streams designated as "impaired" but which have been rehabilitated to a point where they may be considered for delisting. EBID further recommends delisting the reach of the Lower Rio Grande from Caballo to Leasburg Dam for *E. coli*.

**Response:** The Integrated List and Report identifies whether or not a particular surface water of the state is currently meeting its designated uses or is impaired. This list is developed based on the water quality standards through application of the State's Assessment Protocols (AP).<sup>11</sup> Delisting procedures follow the same procedures as listing and all determinations are based on the last 5 years of data collected for a waterbody<sup>12</sup>. The State's AP is updated every odd year (i.e. 2015) and there is a public involvement component to that process. The commenter did not submit any data or reasoning to support delisting the reach of the lower Rio Grande from Caballo to Leasburg Dam for *E. coli*. Further, the most current 2014-2016 Integrated List and Report (approved by the WQCC on September 9, 2014) listed the lower AU (Leasburg Dam to one mile below Percha Dam) as impaired for *E. coli*. The upper AU (Percha Dam to Caballo Reservoir) was not listed as impaired for *E. coli*. Both AUs were assessed based on data collected in 2011-2012.

## Application of Aquatic Life Standards in Ponds or Impoundments Adjacent to Ephemeral Streams

**Comment 80 (NMMA):** Livestock ponds and impoundments located on or adjacent to ephemeral streams should be subject to the same aquatic life standards as ephemeral streams, which are designated limited aquatic life (acute criteria only). Because there are no fish in ephemeral drainages, there is no potential for migration of fish to the livestock ponds and impoundments. Limited aquatic life standards would therefore be protective of the limited, opportunistic aquatic life expected to be in both ephemeral drainages, and any instream or adjacent ponds and impoundments.

**Response:** The appropriate process to determine the attainable uses and criteria for a category of waters such as suggested by the commenter is to perform a UAA process pursuant to 20.6.4.15 NMAC. The required regulatory mechanisms are in place to remove or change designated uses (e.g., primary and secondary contact) and associated criteria when appropriate.

In accordance with 20.6.4.15.A (1):

"The commission may remove a designated use specified in Section 101(a)(2) of the federal Clean Water Act or adopt subcategories of a Section 101(a)(2) use requiring less stringent criteria only if a use attainability analysis demonstrates that attaining the use is not feasible because of a factor listed in 40 CFR 131.10(g). Section 101(a)(2) uses, which refer to the protection and propagation of fish, shellfish and wildlife and recreation in and on the water,

<sup>11</sup> <http://www.nmenv.state.nm.us/swqb/protocols/2014/index.html>

are also specified in Subsection B of 20.6.4.6 NMAC.”

The commenter submitted no work plan, information or data to support such a broad, categorical exclusion for the types of waters mentioned (i.e., man-made ponds and livestock ponds). Such broad exclusions would potentially remove required CWA 101(a) uses from ponds or wetlands used for livestock watering or as wildlife habitat, and also from waters used for a variety of activities without conducting the necessary UAA demonstration that such uses are unattainable.

### **Modification of Wildlife Standard for Selenium**

**Comment 81 (NMMA):** The current selenium water quality standard for the protection of wildlife habitat is 5.0 µg/L (total recoverable), which is identical to and duplicative of the chronic aquatic life water quality standard. The standard is the original EPA derivation of the selenium standard based on the protection of the most sensitive aquatic life (fish). The wildlife standard should be based on aquatic-dependent wildlife that use water only for drinking or through incidental consumption during feeding. Different standards are appropriate for terrestrial wildlife, and could include a combination of water column- based standards to protect animals that may drink the water (e.g., the livestock watering standard of 50 µg/L could be considered) and bird egg-based standards to ensure protection of egg-laying terrestrial vertebrates that drink and feed from the water. Such an approach would allow NMED to apply appropriately protective wildlife standards based on the uses of a given waterbody (e.g., waters used for livestock watering may also be used by wildlife).

**Response:** Last summer, the SWQB began preliminary evaluations of the EPA’s Great Lakes Initiative (“GLI”) Methodology for its potential in updating the current wildlife habitat uses and criteria. The EPA’s Region 6 and the EPA’s Health and Ecological Criteria Division provided clarification on calculation procedures in current EPA guidance and examples of the GLI approach used in other states. While New Mexico’s current wildlife habitat criteria mirror the EPA’s chronic values for aquatic life protections, they were adopted considering that protecting lower trophic levels would protect higher trophic levels of aquatic life. The GLI methodology also focuses on chronic levels as most likely to impact the viability of a species. The SWQB’s evaluation identified significant data gaps that would need to be addressed in order to apply the GLI methodology in New Mexico. For example, the GLI method extrapolates data sets from laboratory tests and applies particular values from such tests to wildlife species. Enough laboratory tests that can be utilized for application of the GLI method would need to be identified for species in New Mexico. The SWQB will continue to evaluate the most defensible and protective approach for developing wildlife habitat criteria in New Mexico.

## **AMBR Form Letter Comments, SWQB Responses and List of Commenters**

**Comment 82 (AMBR):** This pollution-allowing proposal from the Department does nothing to protect or enhance the quality of our state's waters. The only thing this provision does is to allow polluters a way out of protective permit limits. The mandate of the Department is to protect our natural resources, not to facilitate industrial development and therefore it is requested that the Department drop this provision from their petition.

**Response:** The EPA supports the use of temporary standards in New Mexico as preferable to the alternative of permanently downgrading uses with elevated levels of pollutants. A temporary standard can be developed to address all sources of a pollutant on a water body, not just point sources. Such a plan implemented towards attaining the water quality standards is more beneficial, has the potential to address other issues before they cause impairments and positively works toward restoration of the standards. Please also see responses to Comments 2 - 35 in the section on Temporary Criteria above.

**Comment 83 (AMBR):** The lower segment of the Rio Pueblo de Taos (from the Rio Grande del Rancho down to the confluence with the Rio Grande) deserves the protections that are afforded other rivers and streams in Taos County and should have a conductivity standard of 400 microsiemens/cm to protect the designated use of coldwater aquatic life. To protect the applicable designated uses the entire Rio Pueblo de Taos watershed should have a phosphate criterion of 0.1mg/L (same criteria that applies to the Red River and the Rio Hondo).

**Response:** Please see response to Comment 71 in the segment-specific section above.

**Comment 84 (AMBR):** The Department's proposal to ensure that nine New Mexico rivers, which historically have not had standards that are protective for swimming, are now protected for swimming and other full body immersion recreation, is supported.

**Response:** The SWQB appreciates the comment and the support.

**Comment 85 (AMBR):** There is no scientific rationale stated for the Department's proposed change to the aluminum standard in low pH waters. It is requested that a scientific rationale be provided before any changes to numeric standards are adopted. Moreover, the current aluminum standard for waters within the normal pH range that was adopted in 2010 is flawed, not based on adequate scientific data, does not address important pH effects where the pH is >7.5, a condition prevalent in many New Mexico streams and should be revisited. The Department should revert to the pre-2010 aluminum standard, or at the very least, propose a hardness-based aluminum standard similar to Colorado's, which is two-thirds more protective than New Mexico's current hardness-based chronic criteria standard.

**Response:** The SWQB is not proposing to change the numeric aluminum criteria for low pH waters. The EPA has disapproved the hardness-based equations for aluminum adopted during the 2009 Triennial Revisions for waters below pH 6.5. The SWQB proposed text to clarify how the EPA will implement the aluminum criteria for these waters. Please also see responses to Comments 62-68 above.



**Signatories to AMBR constituency form letters (Comments 82-85) submitted under separate cover.**

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