STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE PROPOSED AMENDMENTS TO STANDARDS FOR INTERSTATE AND INTRASTRATE WATERS, 20.6.4 NMAC	)	WQCC No. 14-05(R)

AMIGOS BRAVOS' CLOSING ARGUMENT

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I. INTRODUCTION

Amigos Bravos hereby submits its closing arguments. Attached, separately, is Amigos Bravos' proposed statement of reasons. Distilled to its essence, Amigos Bravos respectfully recommends that the Water Quality Control Commission ("Commission"):

- Reject the New Mexico Environment Department's ("Department's) proposal for temporary standards or, in the alternative, improve the proposal in accord with Amigos Bravos' recommendations and the Department's own oral and written testimony.
- Direct the New Mexico Environment Department to: (1) assess the protectiveness of New Mexico's hardness-based aluminum criteria, 20.6.4.900 NMAC, relative to New Mexico mollusks, gastropods, and other species that may be vulnerable to aluminum toxicity within eight months of this Commission's final decision for this Triennial Review; and, separately, (2) assess the protectiveness of New Mexico's hardness-based aluminum criteria, 20.6.4.900 NMAC, within eight months of EPA's publication of revised nationally-recommended aluminum criteria pursuant to Section 304(a) of the CWA. In each instance, we request that the Commission direct the Department to summarize their assessment in a written report to the Commission and that the Department, before each report is finalized, vet it through a public review period of at least 60 days.
- Reject Freeport-McMoran Chino Mine's proposal for site-specific copper criteria in the Mimbres Basin because it failed to comply with requirements pertaining to public involvement.

In addition, Amigos Bravos appreciates the cooperation between the parties to productively resolve some of our differences during the Triennial Review. This cooperation has focused the points of disagreement for resolution and, in addition, resulted in agreements resolving some of these differences. On the basis of this cooperation, Amigos Bravos has withdrawn its objection and proposed changes to the Department's proposal for 20.6.4.16(c) NMAC. Similarly, pursuant to a stipulation submitted to the Commission on October 9, 2015 filed jointly with the Department, Los Alamos National Laboratories, and the U.S. Department of Energy, Amigos Bravos has withdrawn its proposed changes to 20.6.4.128 NMAC.

As implied by the second bullet, above, Amigos Bravos, with this closing argument, also hereby withdraws its proposed changes to New Mexico's aluminum criteria, 20.6.4.900 NMAC.

II. THE COMMISSION SHOULD REJECT THE DEPARTMENT'S PROPOSAL FOR TEMPORARY STANDARDS OR, ALTERNATIVELY, REMEDY THE PROPOSAL'S DEFICIENCIES IN ACCORD WITH AMIGOS BRAVOS' RECOMMENDATIONS AND THE DEPARTMENT'S OWN TESTIMONY

A. The Commission Should Reject the Department's Proposal for Temporary Standards

The Commission should reject the Department's Proposal. As Amigos Bravos has argued, the Department has not demonstrated a need for temporary standards. *See* Amigos Bravos, Direct Testimony of Rachel Conn at 6-8; Rebuttal Testimony of Rachel Conn at 9-10; Tran., p. 783, line 16 thru p. 784 line 11.

Amigos Bravos nonetheless recognizes that the Commission may determine that temporary standards could provide flexibility to the regulated community while ensuring that water quality standards are ultimately achieved. While this may be the case, it does not obviate the need for a well-designed tool that provides assurances that these objectives are met and clarity to the Commission, regulated community, and interested public about how temporary standards are approved and used. Unfortunately, the Department's temporary standards proposal is not well designed. The text of the temporary standard proposal—i.e., the words that we will all act in reliance upon—is confusing, vague, and disconnected from the Department's explanation, in its written and oral testimony, regarding how temporary standards would work in practice.

First, the Department explained in oral testimony that a temporary standard would be justified, in the words of the Department's Acting Surface Water Quality Bureau Chief, Shelly Lemon, as "the last consideration"—i.e., only if other tools, in particular compliance schedules built into Clean Water Act discharge permits, were deemed inadequate. *See* Transcript, p. 124, lines 19-25 thru p. 125, lines 1-3. It is therefore strange that the Department was unable to point to any provision in the temporary standards proposal or existing standards that reflect this

commitment. *See* Transcript, p. 125, lines 4-25 through p. 126, lines 1-6. This is problematic, because temporary standards should, as the Department itself has represented, only be used, if at all, where a discharger requires additional time, beyond the life of an existing permit (and thus beyond the life of a compliance schedule built into that permit), to achieve the original standard.

Second, the Department's temporary standards proposal does not adequately address how a temporary standard would apply to multiple dischargers. As a result, the Department has failed to provide assurances that a temporary standard would achieve the original standard in waters with multiple dischargers or, for that matter, how a temporary standard, if approved, would apply to other discharges. In large part, this concern is premised on the Department's emphasis on the submission of a "work plan" by the proponent of a temporary standard in the Department's proposed text. *See* 20.6.4.10.F(5) NMAC (proposed) (providing for work plan).

A work plan is, notably, a sensible requirement that Amigos Bravos supports. The work plan provides the basis for the Commission's approval of a temporary standard and explains the timeline and actions that the proponent of the temporary standard will take to achieve the original standard. *Id.* The timeline and actions, as well as additional conditions that the Commission may choose to impose, are then incorporated into the proponent's discharge permit, assuming the Commission approves the temporary standard. However, as became clear in oral testimony, only the proponent of the temporary standard must submit a work plan. *See* Tran., p. 132, lines 23-25 through p. 133 line 1. Other existing, new, or increased discharges into the water body subject to an approved temporary standard would not have to submit a work plan. *Id.*

While the Department contends that these discharges would nonetheless still have to comply with the temporary standard, the lack of a work plan governing these discharges is problematic. By the very structure of the Department's proposed text, the ability of a discharge

to ultimately achieve the original standard is expressly based on the work plan itself. 20.6.4.10.F(5) NMAC (proposed). If the work plan does not account for all discharges within the water body that would be entitled to seek coverage under the temporary standard, neither the Commission nor the public can be assured that the temporary standard is a reasonable exercise of the Commission's authority.

Relatedly, the Department contends that discharges in compliance with permit limits and standards would not be able to weaken those limits through use of a temporary standard. As Ms. Lemon explained in her oral testimony:

> If the permittee is currently meeting their effluent limitations, we, during the state certification process, would encourage the same limits. We wouldn't want them to be able to increase or have less stringent limits if they are currently able to meet them.

TR at 203, lines 20-24. This is also a sensible notion that Amigos Bravos supports, but it begs the question: if a temporary standard should not apply to a discharger already meeting effluent limits, why does the text of the Department's proposal not state this explicitly? The Department's testimony holds no force or effect of law; it is the text of the temporary standards provision that holds the force and effect of law. Burying this intent in testimony does not give rise to an enforceable, sensible constraint on the use of a temporary standard and risks confusion, inconsistent and inequitable implementation, and water quality degradation.

The Department, in its oral testimony, further suggests that it would reach out to "other dischargers to determine if they should be involved in this temporary standard process…" TR at 203, lines 15-17. This intent is fine and good but it is not reflected in the text of of the Department's proposal. Moreover, there is no requirement, period, in the text of the Department's proposal providing that other dischargers must in fact participate in the development of a work plan to inform the Commission's consideration of a temporary standard.

The Department does say that a temporary standard "doesn't automatically give a discharger the ability to have that temporary standard in their permit." Transcript, p. 204 at lines 4-5. This is true, but beside the point: these dischargers, according to the Department, would not have to complete a work plan. Instead, the discharger would only, as the Department vaguely contends, participate in "several different processes that would occur along the way." Transcript, p. 204, lines 3-7. Later, the Department suggests that it would use its Clean Water Act 401 certification authority to make sure that dischargers conform to the temporary standard. But this, in effect, shifts the burden from the discharger to the Department to identify how the temporary standard should be adhered to in order to achieve the original standard. Given the pivotal role of the work plan, it makes far more sense to simply constrain application of the temporary standard to only those discharges that are accounted for in a work plan submitted to the Commission, as Amigos Bravos recommends in Section III.B.3, below.

Third, the Department, in its written testimony, explained that a temporary standard would be constrained to "the minimum time necessary." *See* NMED, Exh. 13, Direct Testimony of Kristine Pintado at 21. This constraint, however, is entirely and perplexingly absent from the text of the Department's proposal. It is the actual text of the standards that this Commission, EPA, the regulated community, and the public will rely on—*not* a statement from a single witness buried in a voluminous record. Moreover, even if someone in the future was somehow aware of the Department's representation that a temporary standard should be constrained to the "minimum time necessary," that representation—if not contained in the text of the standards, is not enforceable as it has no force or effect of law. It is thus troubling that the Department cannot square its testimony with its actual proposal and has obstinately refused to change the text of its proposal to do so. *See* Tran., p. 132, lines 23-25 (the Department's Kristine Pintado, answering

"No" in response to a question asking whether the Department would accept language limiting temporary standards to the "minimum time necessary). A law—or, here, standard—"must provide fair and adequate warning to a person of ordinary intelligence of the conduct which is prohibited [or required]." *State v. Ramos*, 116 N.M. 13, 127, 860 P.2s 765, 769 (Ct. PP. `993). The Department's proposal fails to do this.

The Department contends, when confronted with this disconnect, that "EPA advised [the Department] to consider the flexibility of not incorporating a *definite* time frame." Tran., p. 134 at lines 14-15 (emphasis added). This contention rings hollow for a simple reason: the phrase "minimum time necessary" is *not* a "*definite* time frame." A *definite* time frame is, e.g., "three years." The phrase "minimum time necessary," rather than being "*definite*," provides the flexibility—and thus workability—for the Commission to tailor a temporary standard to the particular facts and circumstances of a case while also providing assurances that progress will in fact be made to achieve the original standard as quickly as is feasible. And it is for this reason that Amigos Bravos has recommended in Section III.B.2 below that this constraint be included in the text of the temporary standards provision, if it is adopted.

These deficiencies—and, fundamentally, the disconnect between how the Department represents temporary standards will operate in practice and the text of the language the Department proposes for inclusion in the standards—brings to mind U.S. Supreme Court Justice Antonin Scalia's admonition, in his concurrence and dissent in *Decker v. Northwest Environmental Defense Center*, that "[i]t is time for us to presume (to coin a phrase) that an agency says in a rule what it means, and means in a rule what it says there." 133 S.Ct. 1326, 1344 (2013). Or, to paraphrase, it is appropriate for us to expect that the Department says in proposed standards what it means, and means in its proposed standards what it says there. Given

the absence of that clarity, the Department's temporary standards proposal should be rejected.

B. The Commission Should Remedy The Proposal's Deficiencies In Accord With Amigos Bravos' Recommendations And The Department's Own Testimony

If the Commission does not reject the Department's temporary standards proposal, Amigos Bravos recommends that the Commission remedy the proposal's deficiencies in accord with the recommendations detailed below. To the degree the Commission believes these recommendations require further review, it should remand the proposal back to the Department for further action and public review, taking no action to either approve or reject the temporary standards proposal at this time.

1. In Subsection F(1)(b), The Commission Should Clarify That Temporary Standards Must Conform To New Mexico's Antidegradation Protections

The relationship between the Department's temporary standards proposal and New Mexico's antidegradation protections is confusing and should be clarified. The text of the Department's proposal provides that the temporary standard "limits the further degradation of water quality to the minimum necessary." *See* 20.6.5.10.F(1)(b) NMAC (proposed). But the standard of antidegradation protection varies, depending on whether the water is classified as a Tier I, II, or III water. *See* 20.6.4.8.A(1)-(3) NMAC (providing distinct antidegradation protections depending on whether the water is a Tier I (subparagraph (1)), Tier II (subparagraph (2)), or Tier III (subparagraph (3)) water). In some instances, "no degradation" is mandated, not simply degradation that is limited to the "minimum necessary," as the temporary standards proposal may be read to imply. 20.6.4.8.A(3) NMAC.

The Department's proposal thus invites confusion and should be modified to clearly convey that the temporary standard provision does not alter antidegradation protections. This is a

simple, sensible clarification that reflects the Department's own representations, as shown in the following exchange between Amigos Bravos' attorney and the Department's Kristine Pintado.

> MR. SCHLENKER-GOODRICH: So the temporary standard…doesn't alter New Mexico's anti-degradation policy and implementation plan?
>
> MS. PINTADO: No.

Tran., p. 141, lines 19-22. Amigos Bravos therefore offers the following recommended change, proposed in its October 12, 2015 filing[1], to 20.6.4.10.F(1)(b) NMAC (proposed):

> (b) the proposed temporary standard represents the highest degree of protection feasible in the short term, complies with antidegradation protections in 20.6.4.8 NMAC ~~limits the further degradation of water quality to the minimum necessary~~….

The Department contends that this language is "superfluous because [a temporary standard] would already be subject to antidegradation review." Transcript, p. 928 line 25 through p. 929, line 2. The Department misses the point. As explained above, the text of the Department's proposal provides that the temporary standard "limits the further degradation of water quality to the minimum necessary." *See* 20.6.5.10.F(1)(b) NMAC (proposed). This protective standard is different than the protective standards contained in the antidegradation provision of 20.6.4.8.A(1)-(3) NMAC, which differ depending on whether the water is a Tier I (subparagraph (1)), Tier II (subparagraph (2)), or Tier III (subparagraph (3)) water. Put differently, the plain text of the Department's proposal could be construed as imposing a distinct antidegradation standard for waters subject to a temporary standard, notwithstanding the Department's intent as conveyed in its testimony.

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[1] This recommendation is also an outgrowth of Amigos Bravos' concerns that temporary standards would weaken water quality protections, including through the potential for new or increased discharges targeting impaired waters subject to the temporary standard. *See*, *e.g.*, Amigos Bravos, Direct Testimony of Rachel Conn at 6-8.

2. In Subsection F(1)(b), The Commission Should Provide That Temporary Standards Are Limited To The Minimum Time Necessary To Achieve The Original Standard

The Department, in its written testimony, explained that a temporary standard would be constrained to "the minimum time necessary." *See* NMED, Exh. 13, Direct Testimony of Kristine Pintado, Dept. Exh. 13 at 21-89. Amigos Bravos supports this limit. The text of the Department's proposal does not, however, limit a temporary standard to "the minimum time necessary."

To remedy this deficiency, Amigos Bravos recommends that the Commission make the following change (which also includes Amigos Bravos' recommendation regarding antidegradation, discussed above, to ensure readability) to the Department's proposal in 20.6.4.10.F(1)(b) NMAC (proposed):

> (b) the proposed temporary standard represents the highest degree of protection feasible in the short term, complies with antidegradation protections in 20.6.4.8 NMAC ~~limits the further degradation of water quality to the minimum necessary~~, is limited to the minimum time necessary to achieve the original standard and for no longer than ten years, and adoption will not cause the further impairment or loss of an existing use;

See Tran., p. 141, lines 19-22.[2]

The Department offers no rationale opposition to the inclusion of language limiting the duration of a temporary standard to "the minimum time necessary." The Department only weakly contends that EPA advised the Department "to consider the flexibility of not incorporating a *definite* time frame." Tran., p. 134 at lines 14-15 (emphasis added). The phrase "minimum time necessary" is, as noted, *not* a "*definite* time frame" but, rather, an inherently flexible time frame that allows the Commission to tailor the duration of a temporary standard to the particular facts

[2] Amigos Bravos withdraws its October 12, 2015 proposal recommending that the temporary standard "ensures reasonable and expeditious progress to achieve the original standard."

and circumstances of a case while providing assurances that progress will in fact be made to achieve the original standard as quickly as is feasible. Given that it is a phrase used by the Department itself to explain how long a temporary standard would last, the Commission should make this simple, straightforward change to the temporary standards proposal.

During the hearing, the Department stated that inclusion of a clear time constraint was unnecessary because the Commission would review approved temporary standards during each Triennial Review. *See*, *e.g.*, Transcript, p. 924, lines 1-3. Commissioner Hutchinson made a similar suggestion. Transcript, p. 844, lines 4-8. However, there is a fundamental distinction between an affirmative requirement that the duration of a temporary standard be limited to the "minimum time necessary" and the requirement that an approved temporary standard—whose duration was set during the approval process for that temporary standard—be reviewed in each successive Triennial Review. Fundamentally, it is reasonable to impose a requirement limiting the duration of a temporary standard to "the minimum time necessary" which can then be reflected in the work plan submitted by the proponent of the temporary standard for this Commission's approval. The Department's proposed review requirement does *not* limit the duration of a temporary standard; it simply provides that a temporary standard, regardless of the duration, must be reviewed every three years.

Finally, Amigos Bravos' recommended changes to 20.6.4.8.F(1)(b) NMAC (proposed), noted above, include a ten-year limit on the application of a temporary standard. This recommendation, if incorporated, would prevent a temporary standard from becoming, in effect, a permanent revision of the original standard without the required completion of a Use Attainability Analysis. While EPA's final rule governing temporary standards does not mandate a specific time limit, Amigos Bravos believes that a ten-year limit is reasonable, at least as the

Commission, Department, regulated community, and the public work build expertise regarding how temporary standards will operate in practice here in New Mexico. Alternatively, the Commission should provide that a temporary standard should last no longer than ten years except in exceptional, defined circumstances.

3. In Subsection F(2), The Commission Should Limit Application Of Temporary Standards To Discharges Subject To A Work Plan

The Department's temporary standards proposal hinges on the submission a work plan to the Commission by the proponent of the temporary standard. See 20.6.4.10.F(5) NMAC (proposed). Given that waters may have multiple discharges, Amigos Bravos recommends that the Commission limit application of a temporary standard to those dischargers that are subject to a Commission-approved work plan. This would be done by making the following change to 20.6.4.10.F(2) NMAC (proposed) recommended in Amigos Bravos' October 12, 2015 filing:

> (2) A temporary standard shall apply to specific pollutant(s), ~~and~~ to specific water body segment(s), and to the specific discharges subject to the work plan prepared pursuant to Subparagraph 20.6.4.10.F(5) NMAC and approved by the commission. The adoption of a temporary standard does not exempt dischargers from complying with all other applicable water quality standards or control technologies.

The text of the Department's proposal requires that only the proponent of the temporary standard must submit a work plan. *See* Tran., p. 132, lines 23-25 through p. 133 line 1. Other existing, new, or increased discharges within the water quality segment subject to an approved temporary standard would not, pursuant to the Department's proposed text, have to submit a work plan to the Commission for approval. *Id.*

This is problematic because, pursuant to the very structure of the Department's temporary standards proposal, whether or not achievement of the original standard is feasible is expressly based on the work plan itself. *See* 20.6.4.10.F(5). As the Department's witness, Kristine Pintado,

explained in her direct testimony, "the petition for a temporary WQS will, of necessity, contain a work pan with controls or other limitations tightening over time, which shows progress towards achieving the original criterion." Direct Testimony of Kristine Pintado, Dept. Exh. 13 at 9-89. As Ms. Pintado further explained, "a temporary [standard] should also identify interim milestones…to ensure reasonable progress is made toward meeting the original [water quality standard] (EPA Water Quality Standards Handbook, Second Ed., 1994)." *Id.* at 10-89. In her rebuttal testimony, Ms. Pintado further underscored the importance of the work plan:

> A successful Temporary Standard petition would contain controls with limitations tightening over time and ultimately achieving the original [water quality standard]…the proposed Temporary Standard would proactively lay the groundwork for decreasing pollutant concentrations and potentially prevent future impairment.

Rebuttal Testimony of Kristine Pintado, Dept. Rebuttal Exh. 7 at p. 5-18.

It is true that a discharger must seek permission to apply a temporary standard to its operations through a permit application, renewal, or modification. *See* Tran., p. 204 at lines 4-5. And it is also true that the Department retains its Clean Water Act 401 certification authority to make sure that dischargers do in fact conform to the temporary standard. *See* Tran., p. 280 at lines 15-25. But this shifts the burden from the discharger to the Department to identify how the temporary standard should be adhered to in order to achieve the original standard. Requiring all dischargers (1) to collaborate with the proponent of the temporary standard through development of a single work plan or (2) to submit a work plan of their own to the Commission for review and approval is a reasonable, common sense improvement to the Department's proposal, providing assurances that the original standard can, in fact, be achieved and sharing the burden of applying for a temporary standard amongst all discharges to a water body.

The Department also contends "if an applicant were to submit a work plan with its

petition to the Department and did not identify all the discharges in that water body…the Department [would] have a duty to identify those to the Commission." Transcript, p. 930, lines 3-8. If that is the case, then that "duty" should be expressed in the text of the temporary standard provision itself. Based on a review of the Department's proposal and EPA's rules pertaining to water quality variances, 40 C.F.R. 131.14, Amigos Bravos is unaware of any enforceable "duty" requiring the Department to in fact identify all the discharges in a water body. That the Department intends to identify all the dischargers in a particular water body proposed for a temporary standard is welcome, but the intent to something is distinct from duty to do something. In addition, the Department may not be the petitioner for a temporary standard—a discharger may be the petitioner for a temporary standard. In this context, the Department's intent is meaningless; the petitioner is only required to do what is required by the plain text of the standards.

4. In Subsection F(2), The Commission Should Prohibit The Application Of Temporary Standards To Impaired Waters

Amigos Bravos recommends the following addition to 20.6.4.10.F(2) NMAC (proposed):

> (2) A temporary standard shall apply to specific pollutant(s), and to specific water body segment(s). A temporary standard shall not apply to specific pollutant(s) for which a water body segment is impaired. The adoption of a temporary standard does not exempt dischargers from complying with all other applicable water quality standards or control technologies.

This recommendation is an outgrowth of Amigos Bravos' direct testimony, where Amigos Bravos expressed serious concern that the Department's temporary standards proposal was "squarely and problematically aimed at already impaired waters" and, at the least, could "exacerbate[e] impairment and mak[e] attainment of water quality standards and protection of existing uses even more difficult." Amigos Bravos, Direct Testimony of Rachel Conn at 7. Amigos Bravos' recommendation would remedy this concern. As

Amigos Bravos explained in its rebuttal testimony, "if the Commission moves forward with adopting a temporary standard provision, that provision should expressly prohibit the use of temporary standards where those standards would allow or otherwise justify new, increased, or continued discharges into impaired waters." Amigos Bravos, Rebuttal Testimony of Rachel Conn at 10-11.

5. In Subsection F(5), The Commission Should Clarify And Strengthen The Work Plan Requirements That Form The Basis Of A Temporary Standard

The submission of a work plan is the heart of the Department's temporary standards proposal. Amigos Bravos recommends the following additions to the text of 20.6.4.10.F(5) NMAC (proposed), which sets forth the required composition of the work plan:

> (5) As a condition of a petition for a temporary standard, in addition to meeting the requirements in this Subsection, the petitioner shall prepare a work plan in accordance with Paragraph (4), and submit the work plan to the department and the public for review and comment. The work plan to support a temporary standard shall identify the factor(s) listed in 40 CFR 131.10(g) or Subparagraph 20.6.4.10.F(1)(a) NMAC affecting attainment of the standard that will be analyzed and the timeline for proposed actions to be taken to achieve the uses attainable over the term of the temporary standard, including baseline water quality, and any investigations, projects, facility modifications, monitoring, or other measures necessary to achieve compliance with the original standard. The work plan shall identify and account for each individual discharge within the specific surface water body segment(s) of the state to which the temporary standard would apply, including by identifying specific actions applicable to each discharge or, where discharges share particular characteristics or technical and economic scenarios, each group of discharges. The work plan shall include provisions for review of progress in accordance with Paragraph (8), public notice and consultation with appropriate state, tribal, local and federal agencies. Once prepared, the work plan shall be submitted to the commission for review and approval and be made available to the public.

Amigos Bravos' recommended changes would, first, clearly provide that the public may participate in the preparation of a work plan. This is an outgrowth of the Department's own intent to involve the public—intent, problematically, that is not reflected in the text of the

temporary standards proposal—as explained in the following exchange between Amigos Bravos' counsel and the Department's Kristine Pintado:

> MS. PINTADO: The water quality management plan requires, for rule-making process, that we include public participation. We would expect to see a draft notice put out for discussion and comment, yes.
>
> MR. SCHLENKER-GOODRICH: So, for example, for Subsection F(5), the work plan that's submitted to the Department for review and comment, that would also be available to the public for review and comment?
>
> MS. PINTADO: Yes.
>
> MR. SCHLENKER-GOODRICH: But to be clear, Subsection F(5) doesn't include that as an explicit requirement?
>
> MS. PINTADO: No.

Tran., p. 138 lines 2-14. The Department's suggestion that the public, to understand its public involvement rights, must cross reference the temporary standards provision with the water quality management plan ("WQMP") is problematic for the obvious reason that the public likely has no idea that the WQMP exists, let alone explains the public's rights to participate in the development of a temporary standard. Moreover, the WQMP itself provides that, "Public participation requirements in programs administered under the CWA are specified in 40 CFR 25.4." WQMP at XIV-1.[3] Thus, for a member of the public to understand their rights, they would have to know to cross reference the water quality standards with not only the WQMP, but with 40 C.F.R. § 25.4 (if they even know what "CFR" means). The situation is only more confusing by reference to the Department's rebuttal testimony, where the Department, in explaining how the public would be involved in the development of a temporary standard, referenced neither the WQMP or 40 C.F.R. § 25.4 but, rather, a different provision, 20.1.3 NMAC. Transcript, p. 926,

[3] The WQMP can be found here: https://www.env.nm.gov/swqb/documents/swqbdocs/WQMP-CPP/WQMP-CPP-May2011.pdf.

lines 4-7. The confusion regarding the public's rights to be involved is, fundamentally, unnecessary as it can be clearly explained in the text of the temporary standards provision itself.

Second, these recommended changes would also address a major point of disagreement—how a temporary standard accounts for and applies to other discharges—by requiring that the work plan identify and account for all discharges within a water body for which a temporary standard is proposed. The recommended change accounts for the Department's intent to apply any approved temporary standard to all dischargers of specific pollutants to a specific water quality segment and the Department's self-professed "duty" to do so. Transcript, p. 930, lines 3-8.

The proposed language also reflects EPA guidance for variances that apply to multiple dischargers. *See* Amigos Bravos, Supplemental Exhibit K, *Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers*, EPA Publication No. EPA-820-F-13-012 (March 2013).[4] This guidance document underscores the importance of evaluating multiple dischargers to determine whether a temporary standard (or, in EPA's parlance, a "variance") is appropriate and how that standard should be structured, including for similarly positioned groups of dischargers. For example, the guidance document notes that "[i]n developing an analysis to justify the need for a multiple discharger variance, states and tribes should … ensure that any overall demonstration is conducted in a manner that accounts for as much individual permittee information as possible." *Id.* at 5.

Finally, these recommended changes would also clearly provide that the work plan must be submitted to the Commission and be made available to the public. These latter elements reflect the discussion regarding public involvement above. Relative to Commission oversight, they should also be unobjectionable given that they are an outgrowth of the Department's own

[4] Notably, the Department referenced this guidance document in its original June 25, 2014 petition, specifically in its basis for change for the temporary standard proposal on page 7.

intent, as shown in following exchange between Amigos Bravos' counsel and the Department's Kristine Pintado:

> MR. SCHLENKER-GOODRICH: -- will the Commission specifically approve the work plan?
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> MS. PINTADO: The Commission will approve the work plan with the petition for the temporary standard, yes.
>
> MR. SCHLENKER-GOODRICH: So to be clear, they would be approving not just the temporary standard but the specific work plan submitted to justify that temporary standard?
>
> MS. PINTADO: Correct.

Tran., p. 136, lines 4-13.

6. In Subsection F(6), The Commission Should Clarify That It May Condition Approval Of The Work Plan Submitted With The Temporary Standard

Amigos Bravos recommends the following additionto subsection 20.6.4.10.F(6) NMAC (proposed):

> (6) The commission may condition the approval of a temporary standard and associated work plan by requiring additional monitoring, relevant analyses, the completion of specified projects, submittal of information, or any other actions.

This recommended change would explicitly provide that the Commission may condition its approval of not only the temporary standard, but the underlying work plan. This change preserves the Commission's authority to ensure that the work plan can in fact achieve the original standard and that any commitments made in the work plan are enforceable. This change is an outgrowth of the Department's own representation that the Commission would approve the work plan. *See* Tran., p. 136, lines 4-13.

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7. In Subsection F(7), The Commission Should Clearly Provide For Public Involvement In The Development And Approval Of A Temporary Standard

Amigos Bravos recommends the following changes to subsection 20.6.4.10.F(7) NMAC (proposed):

> (7) Temporary standards and work plans prepared to support temporary standards may be approved, adopted, and implemented after a thirty-day public review and comment period before a petition is submitted to the commission for approval and adoption, a public hearing before the commission ~~appropriate public participation~~, commission approval and adoption pursuant to this Subsection for all state purposes, and EPA Clean Water Act Section 303(c) approval for any federal action.

This recommended change is an outgrowth of the Department's own language, effectively replacing the Department's nebulous commitment to "appropriate public participation" with clearly-defined commitments to involve the public. It is also a product of Amigos Bravos' pre-filed written testimony, where Amigos Bravos called for an explicit public hearing requirement. Amigos Bravos, Rebuttal Testimony of Rachel Conn, p. 13 (see, specifically, Section F, providing that "NMED's Temporary Standards Proposal, If Adopted, Should Include A Public Hearing Requirement"). As noted above in Amigos Bravos' recommendations for subsection F(5), the current text forces a member of the public to cross reference multiple documents, which is confusing, lacks transparency, and is unduly burdensome.

8. The Commission Should Provide In Subsection F(8) That The Progress Report Underlying The Commission's Review Of A Temporary Standard Must Be Submitted In Advance Of The Deadline To Submit Proposed Changes For Each Triennial Review

Amigos Bravos recommends the following changes to subsection 20.6.4.10.F(8) NMAC (proposed):

> (8) All temporary standards are subject to a required review during each

succeeding review of water quality standards conducted in accordance with Subsection A of 20.6.4.10 NMAC. The petitioner shall provide a written report to the commission documenting the progress of proposed actions ninety days prior to the deadline to submit proposed changes to the water quality standards in each succeeding triennial review conducted pursuant to section 303(c) of the Clean Water Act and NMSA 1978 74-6-6.B, ~~pursuant to a reporting schedule stipulated in the approved temporary standard.~~ The purpose of the review is to determine progress consistent with the original conditions of the petition for the duration of the temporary standard. If the petitioner cannot demonstrate that sufficient progress has not been made the commission may revoke approval of the temporary standard or provide additional conditions to the approval of the temporary standard.

These recommended changes allow other parties to propose changes (or not) to the temporary standards on the basis of the written progress report. Further, these proposed changes alleviate the risk of inconsistent reporting requirements inherent to the Department's proposal, which, at present, vaguely provides that the report will be submitted in accord with a reporting schedule stipulated in the temporary standard itself.

9. In Section H, The Commission Should Limit Application Of Temporary Standards to Discharges Existing At the Time The Temporary Standard Was Approved

Amigos Bravos recommends the following additions to subsection 20.6.4.12.H NMAC (proposed):

H. It is a policy of the commission to allow a temporary standard approved and adopted pursuant to Subsection F of 20.6.4.10 NMAC to be included in the applicable NPDES permit for discharges for discharges existing at the time the temporary standard was approved and adopted and subject to a commission approved work plan as enforceable limits and conditions. The temporary standard and schedule of actions may be included at the earliest practicable time, and shall specify milestone dates so as to measure progress towards meeting the original standard. A temporary standard shall not be applied to Clean Water Act permits for new or increased discharges, and any new or increased discharges must comply with the original standard. Further, a temporary standard shall not be applied to a discharge that is already meeting effluent limitations and other required conditions of either a Clean Water Act section 402 or section 404 permit.

33 [20.6.4.12 NMAC - Rp 20 NMAC 6.1.1104, 10-12-00; A, 10-11-02; Rn, 20.6.4.11 NMAC, 05-23-34 05; A, 05-23-05; A, 12-01-10; A, XX-XX-XX]

These changes would limit the application of a temporary standard to those discharges existing at the time a temporary standard is proposed and adopted (and, per other proposed changes, identified and accounted for in a work plan). These recommendations would ensure that a temporary standard would not incentivize—by allowing weaker effluent limitations that would otherwise be required to conform to the original standard—new or increased dischargers targeting waters with temporary standards. This also ensures that progress is made towards achievement of the original standard, given that any new or increased discharges would not be encompassed by the work plan provided for in F(5) or accounted for in any of the assumptions underlying the original need for the temporary standard conveyed to the Commission. Indeed, it is reasonable to conclude that any new or increased discharges, if not identified and accounted for in a work plan, would undermine that work plan by changing the timing, location, and magnitude of discharges in the water quality segment subject to the temporary standard. These recommendations are an outgrowth of Amigos Bravos' testimony recommending that temporary standards not be applied to discharges in impaired waters or to new or increased discharges. *See* Amigos Bravos, Direct Testimony of Rachel Conn at 6-8; Amigos Bravos, Rebuttal Testimony of Rachel Conn at 10-12.

The Department notably "disagrees" with the notion that new or increased discharges could occur in water bodies subject to a temporary standard. Department, Rebuttal Exhibit 7 at 5-18 thru 6-18. As the Department explained, "a Temporary Standard must reduce pollutant loads over time and further must demonstrate continued progress toward achieving the original [water quality standard]." *Id.* at 6-18. The Department's statement is true, but misleading, as the temporary standard, by definition, would allow discharges of pollution that, at least in the early phases of the temporary standard's application, would be higher than allowed under the original

standard—discharges that were presumably prohibited before the temporary standard was approved. Put differently, under a temporary standard, there would be an initial spike of previously prohibited pollution followed by a downward slope towards compliance with the original standard. The Department conceded this point at the hearing under cross-examination:

> MR. SCHLENKER-GOODRICH: Once a temporary standard is approved, this means that effluent limits in that permit would be crafted on the basis of the temporary standard, correct?
>
> MS. PINTADO: For the interim period, correct.
>
> MR. SCHLENKER-GOODRICH: Could this result in weaker effluent limits in a renewed 402 permit compared to the prior 402 permit?
>
> MS. PINTADO: Yes.
>
> MR. SCHLENKER-GOODRICH: Could weaker effluent limits in a renewed 402 permit result in increased concentrations of discharges into the receiving water?
>
> MS. PINTADO: For a limited period of time, it may.
>
> MR. SCHLENKER-GOODRICH: Over the lifetime of the temporary standard?
>
> MS. PINTADO: Over the lifetime of the temporary standard, we would expect to see that, first of all, the water quality is absolutely maintained, and what is achievable at that time is maintained, but the pollutant in question should be reducing over that period of the temporary standard.
>
> MR. SCHLENKER-GOODRICH: So there is sort of a downward slope towards compliance with the original standard?
>
> MS. PINTADO: Correct.
>
> MR. SCHLENKER-GOODRICH: But at the beginning of the slope, you could have increased concentrations because of the weaker effluent limits compared to the prior permit that existed in the absence of the temporary standard?
>
> MS. PINTADO: Compared to the prior permit, yes.

Transcript, p.138, line 25 thru p. 140, line 7; *see also* Transcript, p. 920, lines 21-24 (Department noting that temporary standards proposal would allow for new or increased discharges to a water

body). Moreover, the Department not only conceded the point, but demonstrated that the logic underlying its proposal is confusing and consistent. While stating "water quality is absolutely maintained," the Department also said that effluent limits designed in accord with the temporary standard would be weaker than effluent limits designed in accord with the original standard—i.e., there would be a spike in the level of permitted pollution into the water body subject to the temporary standard as compared to the level of permitted pollution if the water body was still subject to the original standard. Indeed, that is the very purpose of a temporary standard: to temporarily change the standards to allow for effluent discharges that would otherwise not be permitted under the original standard.

The recommended changes would also forbid application of a temporary standard to discharges that are in compliance with permit limits and standards predicated on the original standard. This recommendation is an outgrowth of the Department's intent, as explained Ms. Shelly Lemon's oral testimony:

> If the permittee is currently meeting their effluent limitations, we, during the state certification process, would encourage the same limits. We wouldn't want them to be able to increase or have less stringent limits if they are currently able to meet them.

Transcript, p. 203, lines 20-24. This intent should be—but is not currently—reflected in the text of the Department's temporary standards proposal.

10. The Commission Should Provide That Limits To The Use Of A Temporary Standard Apply To All Clean Water Act Permits

Amigos Bravos recommends the following changes to subsection 20.6.4.12.H NMAC (proposed):

> H. It is a policy of the commission to allow a temporary standard approved and adopted pursuant to Subsection F of 20.6.4.10 NMAC to be included in the applicable Clean Water Act permit for discharges as enforceable limits and conditions. The temporary standard and schedule of actions may be

included at the earliest practicable time, and shall specify milestone dates so as to measure progress towards meeting the original standard.
33 [20.6.4.12 NMAC - Rp 20 NMAC 6.1.1104, 10-12-00; A, 10-11-02; Rn, 20.6.4.11 NMAC, 05-23-34 05; A, 05-23-05; A, 12-01-10; A, XX-XX-XX]

The purpose of the subsection H is to ensure the enforceability of limits on the application of a temporary standard through inclusion of these limits in Clean Water Act permits. Amigos Bravos' recommended change would ensure that these limits are included in not only Clean Water Act section 402 National Pollution Discharge Emission System permits, but all CWA permits, including CWA section 404 Dredge and Fill permits. At the hearing, the Department stated that it supported this change. *See* Tran. p. 142, line 22 thru p. 143, line 24.

C. Amigos Bravos' Recommendations Pertaining To The Department's Temporary Standards Proposal Are A Logical Outgrowth Of These Proceedings And Properly Before This Commission For Consideration

Amigos Bravos' recommendations regarding the Department's temporary standards proposal are a logical outgrowth of these proceedings. Every single recommended change advanced by Amigos Bravos in Section III.B above—whether pertaining to (1) the relationship between the temporary standard and antidegradation protections; (2) the duration of a temporary standard; (3) the nature and function of the work plan; (4) the application of a temporary standard to impaired waters or to new or increased discharges; or (5) Commission and public involvement in the development of a temporary standard—is firmly rooted in the Department's proposal, the Department's supporting testimony, or Amigos Bravos' testimony, including Amigos Bravos' pre-filed written testimony. In addition to the references in Section III.B, above, Amigos Bravos documented the source of its recommended changes during the hearing. *See* Tran., p. 787, line 21 thru p. 791, line 22 (detailing basis, in pre-filed written testimony, for October 12, 2015 recommendations pertaining to the Department's temporary standards proposal).

In the federal rulemaking context, courts have long recognized that an agency may promulgate final rules that differ from proposed rules. "A contrary rule would lead to the absurdity that...the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *Intl. Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n. 51 (D.C. Cir. 1973). However, where final rules differ from proposed rules, they must be a "logical outgrowth" of the proposed rules. As explained by the U.S. Circuit Court of Appeals for the District of Columbia:

> While an agency may promulgate final rules that differ from the proposed rule, *Shell Oil Co. v. EPA*, 950 F.2d 741, 750 (D.C.Cir.1991) a final rule is a "logical outgrowth" of a proposed rule only if interested parties "'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period," *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C.Cir.2004) (citing *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C.Cir.2003)).

Intl. Union, United Mine Workers of America v. Mine Safety and Health Admin., 407 F.3d 1250, 1259-60 (D.C. Cir. 2005).[5] As demonstrated above, Amigos Bravos recommended changes are a logical outgrowth of these proceedings.

Importantly, the logical outgrowth rule operates primarily as a constraint on the administrative agency that promulgates the final rules—here, the Commission—and *not* the public. In general, the constraint on the public is less rigorous; Amigos Bravos, in providing comments and recommendations to a rule-making body, must simply "structure [its] participation so that it is meaningful, so that it alerts the agency to [Amigos Bravos'] position and contentions." *Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978). In some instances, the public need not even raise the issue to preserve its

[5] Given similarities between rulemaking procedures provided by the Federal Administrative Procedure Act and the state Water Quality Act, it is appropriate to reference federal precedent to explain the logical outgrowth rule, as the attorney general's office has itself opined. *See* N.M.A.G. Op. No. 87-59 (Sept. 28, 1987).

ability to challenge a final rule because deficiencies are "so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action," or, here, to recommend changes to remedy those deficiencies at any time before a final decision by the Commission is made. *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 765 (2004). Regardless, given that the Commission often makes changes to the standards based on the record presented to it based on not only pre-filed written testimony but oral testimony, a cramped application of the logical outgrowth rule to Amigos Bravos' recommendations would operate to constrain the ability of the other parties to proffer recommendations to the Commission in the course of the hearing and in closing arguments. It would also constrain the Commission itself, as it deliberates and promulgates final, revised water quality standards. In short, what is good for the goose (i.e., Amigos Bravos) is good for the gander (i.e., the Commission itself, as well as the other parties).

Much of the consternation proffered by the other parties, in particular the Department, pertains to the timeliness of Amigos Bravos' recommended changes to the temporary standards proposal presented in an October 12, 2015 filing—i.e., after the September 4, 2015 deadline for Notices of Intent to Submit Technical Testimony. Yet that deadline does not operate to cement the parties' positions in stone. After September 4, 2015, the parties were only prohibited from introducing entirely new proposals for changes to the standards—i.e., changes to the standards that were not a logical outgrowth of proposals or testimony submitted prior to September 4, 2015. Put differently, any new proposal—e.g., to change New Mexico's antidegradation policies or the definition of "waters of the state"—that were not a logical outgrowth of the parties' pre-filed proposals would be forbidden without additional public involvement.

The Commission has, notably, encouraged deliberation and collaboration between the parties that results in new recommendations proffered during the hearing process itself. These new recommendations can spark dialogue and create opportunities to find common ground, as was Amigos Bravos' intent with its October 12, 2015 recommended changes. For example, several parties came together during this Commission's 2010 proceedings in WQCC 10-01(R) to craft and proposed a "negotiated proposal" for the Commission's adoption that had not been presented in pre-filed testimony but was nonetheless a logical outgrowth of the parties' pre-filed proposals and testimony. And in this proceeding, after the September 4, 2015 deadline, the Department, Amigos Bravos, Los Alamos National Laboratory, and the U.S. Department of Energy worked together to reach a stipulation resolving issues regarding segment 128.

Counsel for the other parties echoed the historically dynamic process for promulgating standards before this Commission, including through recommendations advanced after the deadline for notices of intent to submit technical testimony. As counsel for Chevron, Lou Rose, who has practiced before this Commission for years, explained:

> [I]t's an iterative process, and historically the proposals have changed over time. And so [Amigos Bravos October 12, 2015 recommended changes to the temporary standards proposal]—this appears to be one part of that process. And I suspect that when you see the final proposed changes they may be somewhat different than the parties originally proposed, simply because it takes into account Commission questions and cross-examination.

Tran., p. 643 line 20 thru p. 644 line 1. Similarly, Counsel for the San Juan Water Commission, Jolene McCaleb, explained that

> that has been the practice in the past, that the parties could – and even the Department in the past has shown up on a particular day of hearing with a new draft of proposed language, with changes. The one distinction has been I do not recall in the past where that has been accompanied by a detailed statement of basis, which I think is a distinction. But I think it is very useful to have the opportunity to have a written document with the words on that document that the parties can then address verbally.

Tran., p. 653 line 18 thru p. 654, line 4.

Finally, no concern was expressed regarding the ability of the parties to amend or improve proposed changes to the water quality standards in closing arguments so long, presumably, that they are a logical outgrowth of pre-filed proposals. To restrict the parties' abilities to provide the Commission—and the other parties—with recommended changes in advance of closing arguments would elevate form over function and chill the ability of the parties to constructively recommend changes to either their or other parties' proposals and to thereby reach compromise as early as possible. That the Department, here, was largely not receptive to Amigos Bravos' proposals does not change that dynamic. Amigos Bravos, put simply, tried. Moreover, the Department itself proved able to address Amigos Bravos recommendations in the course of the hearing and, Amigos Bravos anticipates, in their closing arguments, demonstrating that they were not prejudiced by Amigos Bravos October 12, 2015 filing. *See* Transcript, p. 928, line 7 thru p. 936, line 3 (Department providing rebuttal testimony regarding Amigos Bravos October 12, 2015 recommendations).

Fundamentally, Amigos Bravos' recommendations are a logical outgrowth of the Department's temporary standards proposal, the written pre-filed testimony submitted by both the Department and Amigos Bravos, and the oral testimony presented to the Commission during the hearing. Accordingly, Amigos Bravos' recommendations are properly before this Commission for its consideration.

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III. THE COMMISSION SHOULD DIRECT THE DEPARTMENT TO ASSESS THE PROTECTIVENESS OF NEW MEXICO'S HARDNESS-BASED ALUMINUM CRITERIA

Amigos Bravos withdraws its proposed changes to 20.6.4.900 NMAC, specifically, its proposal to revert back to the CWA 304(a) nationally recommended criteria for aluminum of 87 ug/l (chronic) and 750ug/l (acute). Amigos Bravos also withdraws its recommendation to reject the Department's proposal to qualify that hardness-based criteria do not apply for CWA purposes for waters with a pH of 6.5 or less.

Amigos Bravos nonetheless asks this Commission to direct the New Mexico Environment Department to: (1) assess the protectiveness of New Mexico's hardness-based aluminum criteria, 20.6.4.900 NMAC, relative to New Mexico mollusks, gastropods, and other species that may be vulnerable to aluminum toxicity within eight months of this Commission's final decision for this Triennial Review; and, separately, (2) assess the protectiveness of New Mexico's hardness-based aluminum criteria, 20.6.4.900 NMAC, within eight months of EPA's publication of revised nationally-recommended aluminum criteria pursuant to Section 304(a) of the CWA. In each instance, we request that the Commission direct the Department to summarize their assessment in a written report to the Commission and that the Department, before each report is finalized, vet it through a public review period of at least 60 days.

Amigos Bravos makes this request given reasonable and serious concerns that the hardness-based criteria may not be sufficiently protective of New Mexico's waters, including those waters' aquatic species, in particular mollusks and gastropods. At the hearing, Amigos Bravos and Jon Klingel, a retired biologist and resident of New Mexico for about 38 years, presented public testimony regarding the presence of mollusks and gastropods that may be vulnerable to aluminum toxicity. As Jon Klingel explained:

> New Mexico has 23 species of extant mussels and one species presumed extirpated. Many of these species are currently in trouble, listed as New Mexico endangered or threatened, candidates for listing under the Endangered Species Act, and other status categories of concern.

Transcript, p. 540 line 21 thru p. 541 line 1. As Mr. Klingel further explained, after expressing serious concern that hardness-based aluminum criteria do not protect mollusks:

> But it gets worse. I contacted a biologist who specializes in mollusks and crustaceans, and I asked her if aquatic gastropods related to mussels were sensitive to this type of contamination or was it just mussels that were sensitive. H[er] answer, and I quote, "They are equally sensitive."

Transcript, p. 542 lines 19-25.

Concerns raised by EPA and the U.S. Fish and Wildlife Service regarding the protectiveness of hardness-based aluminum criteria to mollusks were at the heart of West Virginia's withdrawal of a proposal to adopt hardness-based aluminum criteria similar to New Mexico's. EPA, in a letter submitted to the West Virginia Department of Environmental Protection, stated that, "the U.S. Fish and Wildlife Service (USFWS)…provided [West Virginia] comments on July 19, 2013, expressing concerns regarding aluminum toxicity to mussel species, including federally listed endangered mussels, in West Virginia and citing two studies on impacts to mussels exposed to aluminum." *See* January 30, 2014 Letter from Evelyn S. MacKnight, EPA, to Scott G. Mandirola, West Virginia Dept. of Environmental Protection, attached as Exhibit 8 to Chevron Mining, Inc.'s Rebuttal Testimony of Dr. Robert Gensemer, p.1. As EPA explained, regarding the studies cited by USFWS:

> pH had a significant effect on accumulation of aluminum in the gills [of specific mussel species], while hardness in the water was of minor importance, supporting USFWS conclusions that hardness-based criteria alone (without additional consideration of pH) will not be protective of mussels
>
> …

> EPA believes that these studies provide a sufficient weight of evidence to indicate mussels may be more sensitive to aluminum exposure than other species in West Virginia's data set. West Virginia's proposed revisions to their existing aluminum criteria do not take into account potential impacts on mussels and a rationale for the exclusion of these potential effects has not been provided.
>
> ...
>
> Because of the concerns of mussel sensitivity to aluminum, EPA will be looking for additional data to refine our estimates of aluminum toxicity to mussels. In addition, aluminum experts with whom EPA has consulted have indicated that pH is also a critical factor that should be taken into account in developing an aluminum criteria equation.

Id. at 2.

As Chevon Mining's expert Dr. Gensemer noted, the scientific community's understanding of aluminum toxicity "is [relative to other metals] behind in terms of development of the science." Transcript, p. 713 line 25 thru p. 714, line 1. Moreover, Dr. Gensemer, who testified on behalf of Los Alamos National Security in support of the hardness-based aluminum criteria during the 2009 Triennial Review (*see* Chevron Mining, Direct Testimony of Dr. Robert Gensemer, p. 3), testified in this proceeding that he had "no...direct knowledge of what mussel species exist in New Mexico or their sensitivity to aluminum or anything else." Transcript, p. 715 lines 19-21. Dr. Gensemer, reflecting on the 2009 Triennial Review, also stated he did not "immediately recall that we had any acceptable studies for mussels or gastropods...that were available to us at the time." Transcript, page 716, lines 10-13.

EPA, importantly, is also in the midst of reviewing its nationally recommended CWA 304(a) aluminum criteria. This review process is assessing the use of a "biotic ligand model" that would incorporate a variety of water quality parameters, including dissolved carbon, pH, temperature and hardness" to set aluminum toxicity criteria. Transcript, p. 658, lines 21-23 (Dr.

Gundersen discussing EPA's CWA 304(a) process for aluminum and the biotic ligand model); *see also* Transcript, p. 712, line 19 thru p. 713, line 8 (Dr. Gensemer discussing same).

Fundamentally, there is reasonable and serious concern, given the evolving state of the science, that New Mexico's current hardness-based aluminum criteria may not protect aquatic species. This concern warrants a hard look at how these criteria do or do not protect mollusks, gastropods, and other species that may be vulnerable to aluminum toxicity. Similarly, there is reasonable and sufficient concern regarding the protectiveness of New Mexico's current hardness-based aluminum criteria to prompt an immediate assessment of EPA's nationally recommended CWA 304(a) aluminum criteria once they are published. Accordingly, while Amigos Bravos withdraws its aluminum proposals, Amigos Bravos requests that the Commission direct the Department to take a hard look at aluminum criteria as explained above.

IV. THE COMMISSION SHOULD REJECT FREEPORT-MCMORAN CHINO MINE'S PROPOSAL FOR SITE-SPECIFIC COPPER CRITERIA IN THE MIMBRES BASIN BECAUSE IT FAILED TO COMPLY WITH PUBLIC INVOLVEMENT PETITION REQUIREMENTS MANDATED BY 20.6.4.10.D(3)(c) NMAC

New Mexico's water quality standards provide that "any person may petition the commission to adopt site-specific criteria." 20.6.4.10.D(3) NMAC. However, "[a] petition for the adoption of site-specific criteria shall":

> (c) describe the methods used to notify and solicit input from potential stakeholders and from the general public in the affected area, *and* present and respond to the public input received;

20.6.4.10.D(3)(c) NMAC (emphasis). This provision, by its plain language, contains two distinct petition requirements pertaining to public involvement. First, the petition must describe methods to notify and solicit input from stakeholders. Second, the petition must specifically present and

respond to the public input received.

Chino Mines' petition satisfied the first, but not the second, requirement. *See* Transcript, p. 808, line 16 thru p. 809, line 22. This is confirmed by Chino Mines' own evidence. Chino Mines submitted several exhibits (*see* Chino Mines, Exhibits J-M) demonstrating that they satisfied the first requirement—i.e., how Chino Mines notified and solicited input from the public regarding its proposal. But these exhibits—and Chino Mines' own testimony—undermine Chino Mines' contention that they satisfied the second requirement: that Chino Mines affirmatively presented and responded, in its petition, to public input that it received, as it must. 20.6.4.10.D(3)(c) NMAC.

The only substantive content that Chino Mines provided in support of its petition indicating that Chino Mines actually presented and responded to public input was a series of eight questions identified in Chino Mines' Exhibit K. Yet Exhibit K only contains one-sentence summaries of Chino Mines' response to two of the questions. These one-sentence summaries responses have virtually no information value. For example, Exhibit K notes that someone asked, "What is the alternative criteria if you do not use site specific and why did you pick this criteria?" Exhibit K at 5. Exhibit K's one-sentence response only says that "Barry explained that there would be exceedances under the hardness criteria, but poor indicators of actual aquatic health." *Id.* But, as Chino Mines' witness explained, the public's questions prompted a "discussion and going back to various slides and maps presented as part of that presentation." Transcript, p. 362 lines 2-9. We have no idea, however, what that discussion consisted of beyond the one-line responses in Exhibit K.

For the questions that the public raised where Chino Mines, in Exhibit K, did not provide *any* response, the problem is only more acute. There is no documentation period, about Chino

Mines' response to these six questions, or the content of any discussion at these meetings, as evidenced by the following exchange during cross examination:

> MR. SCHLENKER-GOODRICH: Is there any documentation regarding the responses to the other six questions?
>
> MR. FULTON: Not to my knowledge.

Transcript, p. 362, lines 11-13. The problem only gets worse by reference to Chino Mines' Exhibits L and M. Exhibit L provides the minutes to a September 17, 2013 meeting. These minutes show that Chino Mines simply show that Chino Mines provided the community with a "summary and update as to the site-specific criteria study," Transcript, p. 363 lines 18-19, and do not "present and respond to the public input" that Chino Mines may have received. Moreover, there is no other documentation pertaining to the September 17, 2013 meeting, as Chino Mines' witness explained in the following exchange during cross examination:

> MR. SCHLENKER-GOODRICH: Is there any documentation regarding any of that discussion that may have taken place or Chino Mines' responses to that discussion or the questions that were raised [at the meeting identified in Exhibit L]?
>
> I guess, is there any documentation about that sort of back-and-forth dialogue that may have taken place at the time?
>
> MR. FULTON: So as I understand, the meeting minutes are the documentation to the topics discussed during those meetings.
>
> MR. SCHLENKER-GOODRICH: So if -- this is the documentation. There is nothing else that would perhaps -- if there was some sort of discussion regarding this update, it would be contained here?
>
> MR. FULTON: All of the documentation pertaining to the actual discussion of those community work group meetings, to my knowledge, would be represented in the meeting minutes.

Transcript p. 364, lines 7-24.

Exhibit M has the same basic structure and content as Exhibit L and, similarly, is the only

documentation for that meeting. Put simply, there is no evidence, in the record, beyond two short one-line responses to only two of eight questions raised at a single meeting regarding how Chino Mines' "present[ed] and respond[ed] to the public input received; 20.6.4.10.D(3)(c) NMAC. The fundamental problem with this deficiency is revealed by cross-examination of Chino Mines' witness:

> MR. SCHLENKER-GOODRICH: If the petition for site-specific criteria does not specifically identify the questions raised by the public and the -- and Chino Mines' responses to those questions, how can the Commission be ensured that the petition is, in fact, responsive to the public's concerns?
>
> MR. FULTON: I guess I would say that I'm not quite sure of the answer to that question.

Transcript, p. 372, lines 1-8.

Chino Mines, at the hearing, suggested that it would assert two lines of defense to cover up this deficiency.

First, Chino Mines' counsel suggested that the plain text of 20.6.4.10.D(3)(c) NMAC did not require Chino Mines to "present and respond to the public input received" and, instead, that Chino Mines simply had to explain how it provided notice to and held meetings with the public. Similarly, Chino Mines' counsel suggested that the text of 20.6.4.10.D(3)(c) NMAC was subject to different interpretations. These related arguments are refuted by the plain language of 20.6.4.10.D(3)(c) NMAC. And it is axiomatic that legal construction begins with the plain language of a particular provision. *See* Milner v. Dep't of Navy, 131 S. Ct. 1259, 1264 (2011) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.")

Second, Chino Mines' counsel suggested that Amigos Bravos had not presented

any evidence that any public input had been ignored or had not been responded to. Of course, Chino Mines' Exhibit M, which failed to provide responses to six of eight questions, undermines this argument. As a more fundamental matter, it is Chino Mines' burden to comply with 20.6.4.10.D(3)(c) NMAC. It is not Amigos Bravos' burden to demonstrate that Chino Mines' failure to "present and respond to the public input received" operated to limit or exclude public involvement. As Amigos Bravos' Rachel Conn testified:

> Chino has made it difficult for this Commission, Amigos Bravos and other parties, including the Department, to identify issues of potential concern to stakeholders and members of the public in the immediate vicinity of Chino Mines and the water bodies in question.
>
> Thus, adoption of Chino's proposed change, in addition to not on its face complying with 20.6.4.10D(3)(c) risks the exclusion of local voices and input and, as a consequence, the arbitrary and capricious adoption of its proposed change by this Commission.

Transcript, p. 809, line 22 thru p. 811 line 5.

Rules must be complied with. Since Chino Mines did not comply with 20.6.4.10.D(3)(c) NMAC, its proposal for site-specific copper criteria should be denied.

V. CONCLUSION

For the above-stated reasons, this Commission should adopt Amigos Bravos' recommendations pertaining to this Triennial Review.

Respectfully submitted this 15th day of January 2016.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading, including Amigos Bravos proposed Statement of Reasons, was served to the parties by email, and that the original and fifteen hard copies of this filing was served to the Commission via U.S. mail, on January 15, 2016 to:

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