



**Northwest**  
1216 Lincoln Street  
Eugene, Oregon 97401  
(541) 485-2471

**Rocky Mountains**  
103 Reeder's Alley  
Helena, Montana 59601  
(406) 443-3501

**Southwest**  
208 Paseo del Pueblo Sur #602  
Taos, New Mexico 87571  
(575) 751-0351

**Defending the West** [www.westernlaw.org](http://www.westernlaw.org)

## Western Environmental Law Center

September 30, 2014

Pam Castaneda, Boards & Commissions Administrator  
New Mexico Environment Department1  
1190 S. St. Francis Drive, S2102  
P.O. Box 5469  
Santa Fe, New Mexico USA 87505  
E-mail: [Pam.Castaneda@state.nm.us](mailto:Pam.Castaneda@state.nm.us)



**Re: WQCC 14-05(R)**

Dear Ms. Castaneda:

Please find enclosed the original and fifteen (15) copies of Amigos Bravos' Proposed Amendments and Statement of Basis in WQCC 14-05(R). A PDF copy of the original was also sent to you via email on September 30, 2014. Please let me know if you have any questions.

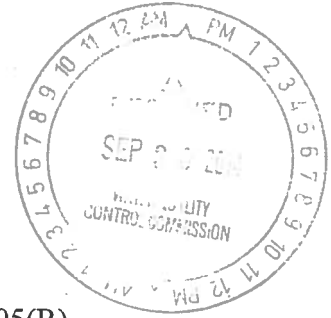
Sincerely,

Erik Schlenker-Goodrich  
575.613.4197  
[eriksg@westernlaw.org](mailto:eriksg@westernlaw.org)

**Counsel for Amigos Bravos**

enclosure

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



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

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**AMIGOS BRAVOS' PROPOSED AMENDMENTS AND STATEMENT OF BASIS**

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Amigos Bravos, by and through undersigned counsel, hereby submits the following proposed changes, with statement of basis, to the current *State of New Mexico Standards For Interstate and Intrastate Surface Waters* (20.6.4 NMAC). Amigos Bravos also provides certain proposed changes to the latest proposal advanced by the New Mexico Environment Department (“NMED”) to inform NMED’s Amended Proposed Changes and Statement of Basis for the Changes, currently due October 20, 2014.

Amigos Bravos is a statewide river conservation organization guided by social justice principles. Amigos Bravos’ mission is to protect and restore the waters of New Mexico. Amigos Bravos’ works to ensure that New Mexico’s rivers provide a reliable source of clean water to the communities and farmers that depend on them, as well as a safe place to swim, fish, boat, and otherwise recreate. Amigos Bravos works locally, statewide, and nationally to ensure that the waters of New Mexico are protected by the best policy and regulations possible. In this capacity, Amigos Bravos works to make sure that New Mexico’s water quality standards support the diverse ecological, including human, uses of our state’s water resources.

Materials to be deleted (including from language proposed by NMED or others) are indicated by **~~bold strikethrough~~** (red in color copies) and proposed new language is indicated by **bold underlining** (blue in color copies).

**I. 20.6.4.10.F & 20.6.4.10.H – NMED’S PROPOSAL FOR TEMPORARY STANDARD AND PROPOSAL FOR ALLOWING TEMPORARY STANDARDS IN DEVELOPING NPDES PERMITS**

NMED, in its June 25<sup>th</sup>, 2014 petition, proposes to add a new section that would allow parties to petition the Water Quality Control Commission to adopt temporary standards. Amigos Bravos opposes NMED’s proposal in its entirety and thus proposes to delete the NMED’s proposed addition of 20.6.4.10.F and 20.6.4.10.H NMAC as follows:

~~20.6.4.10.F Temporary Standards.~~

~~(1) — Any person may petition the commission to adopt a temporary standard applicable to all or part of a surface water of the state as provided for in this section. The commission may adopt a proposed temporary standard if the petitioner demonstrates that:~~

~~(a) — attainment of the associated designated use may not be feasible in the short term due to one or more of the factors listed in 40 CFR 131.10.g as demonstrated by the petition and supporting work plan requirements in paragraphs (4), (5) and (6) below.~~

~~(b) — 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 further impairment or loss of an existing use;~~

~~(c) — 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; and~~

~~(d) — for restoration activities, nonpoint source or other control technologies shall limit downstream impacts, and if applicable, existing or proposed discharge control technologies shall be in place consistent with subparagraph (c)~~

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

~~(3) — Designated uses shall not be modified on a temporary basis. Designated use attainment as reported in the CWA Section 305(b)/303(d) Integrated Report shall be based on the original standard and not on a temporary standard.~~

~~(4) — A petition for a temporary standard shall:~~

~~(a) — identify the currently applicable standard(s), the proposed temporary standard and the surface water(s) of the state to which the temporary standard would apply.~~

~~(b) — demonstrate that the proposed temporary standard meets the requirements in this Subsection.~~

~~(c) — present a work plan and timetable for achieving compliance with the original standard.~~

~~(d) — include any other information necessary to support the petition.~~

~~(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 supporting work plan in accordance with subparagraph (6) to conduct the analysis required in this Subsection, and submit the work plan to the department for review and comment. Upon revision of the work plan based on input from the department, the petitioner shall conduct the analyses in accordance with the work plan. The department or the petitioner may petition the commission to adopt a temporary standard if the conclusions of the analysis support such action.~~

~~(6) — The work plan to support a temporary standard petition shall identify the factor(s) listed in 40 CFR131.10(g) affecting attainment of the standard that will be analyzed and the timeline for specific 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 include provisions for review of progress in accordance with subparagraph (9), public notice and consultation with appropriate state and federal agencies.~~

~~(7) — The commission may condition the approval of a temporary standard by requiring additional monitoring, relevant analyses, the completion of specified projects, submittal of information, or any other actions.~~

~~(8) Temporary standards may be implemented only after 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.~~

~~(9) — 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 purpose of the review is to determine progress consistent with the original conditions of the petition for the duration of the temporary standard. If 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.~~

~~(10) — The commission may consider a petition to extend a temporary standard. The effective period of a temporary standard shall be extended only if demonstrated to the department that the factors precluding attainment of the underlying standard still apply, that the petitioner is meeting the conditions required for approval of the temporary standard, and that reasonable progress towards meeting the underlying standard is being achieved.~~

~~(11) — A temporary standard shall expire no later than the date specified in the approval of the temporary standard. Upon expiration of a temporary standard, the original standard becomes applicable.~~

~~(12) — Temporary standards shall be identified in 20.6.4.97-899 NMAC~~

~~20.6.4.10.H. — It shall be 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 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.~~

***Basis for Changes to NMED's Proposal:***

NMED's proposal for temporary criteria at proposed 20.6.4.10.F and 20.6.4.10.H NMAC undermines the protection of water quality in New Mexico, in particular the ability of clean water to support ecological systems and human activities that rely on clean water, such as agriculture. Specifically, NMED's proposal allows polluters to petition the Water Quality Control Commission ("WQCC") to weaken standards for receiving waters that are already impaired and not meeting water quality standards. These weakened standards, if approved, would be in place for 3-5 years with the potential for renewal after the initial 3-5 years. During the time that these weakened standards, if approved, are in place, they would be incorporated into National Pollution Discharge Emission System ("NPDES") permits. This would result in increased discharges of pollution into already impaired waters. We oppose NMED's proposal for the following four primary reasons.

First, there is no need for this provision. Amigos Bravos is unaware of any New Mexico facility denied a Clean Water Act ("CWA") NPDES permit to discharge because it could not meet effluent limits. Moreover, the CWA already provides a mechanism to address situations where a permitting facility truly cannot meet standards: compliance schedules. Compliance schedules can be included in a facility's permit to allow the permittee time to come into compliance with effluent limits over time. For example, in the case of Los Alamos National Laboratory, a facility with hundreds of discharges and complex problems of legacy pollution, EPA designed a compliance schedule that gave the facility time to come into compliance, while still maintaining water quality standards of the receiving waters. To the degree that the proposal is concerned with a water's natural background, the standards already include a provision for site-specific criteria equal to the concentration of natural background, *see* NMAC 20.6.4.10(D), thus providing a mechanism to ensure that natural background is taken into account.

Second, CWA regulations and case law prohibit discharge permits for new or increased discharges where the imposition of conditions in the permit cannot ensure compliance with water quality standards. 40 C.F.R. § 122.4; *see also Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1012 (9th Cir. 2007) (holding that, even with remediation, the CWA forbids issuance of a NPDES discharge permit where the discharge would contribute to violations of water quality standards), cert. denied, 129 S. Ct. 896 (2009). This provision cannot be circumvented through “temporary” or “interim” standards. EPA has, notably, counseled that “interim requirements do not replace the designated use and criteria for the water body as a whole, therefore, any implementation of CWA section 303(d) to list impaired waters must continue to be based on the designated uses and criteria for the waterbody rather than the interim requirements.” *Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers FAQs*, EPA Publication No. EPA-820-F-13-012 (March 2013); *see also Water Quality Standards; Clarifications*, 78 Fed. Reg. 54518 (September 4, 2013) (any implementation of CWA section 303(d) must continue to be based on the underlying designated uses and criteria for the water body rather than the interim requirements). As such, the Department cannot allow for new permits based on relaxed standards; rather, the Department must continue to seek to restore water quality to its designated uses and original criteria. Consistent with these interpretations, and the mandates of the CWA, any variance provision must disallow new or increased discharges.

Third, NMED’s proposal is squarely and problematically aimed at already impaired waters. NMED, in advancing this proposal, wrongly contends that adoption of temporary standards will not cause “further impairment or loss of an existing use.” See NMED proposed 20.6.4.10.F.1(b)). NMED’s position makes little sense. NMED’s proposal would allow temporary standards that are weaker than permanent standards, thus compromising any “existing use” reliant on those standards. In so doing, NMED’s proposal would condone the discharge of increased concentrations of parameters that are causing the impairment in the first place, thus exacerbating impairment and making attainment of water quality standards and protection of existing uses even more difficult, if not impossible. Put simply, where waters are impaired, more pollution means more, and sustained, impairment. We thus fail to see how the proposal, as a practical matter, could even be implemented.

Fourth, NMED’s proposal would reward polluters that have been illegally discharging and who have failed or been unable to obtain, as discussed above, a compliance schedule as part of their discharge permit. The only scenario where temporary standards may be relevant is where a standard is changed at the statewide level and a discharger in compliance with the previous standard needs time to come into compliance with the new standard. But again, a mechanism already exists to address this situation: compliance schedules.

On the foregoing basis, NMED’s proposal should be rejected.

## **II. 20.6.4.16.C – NMED’S PROPOSAL TO ELIMINATE THE PUBLIC HEARING REQUIREMENT FOR PISCICIDE APPLICATIONS**

NMED proposes to weaken public hearing requirements for piscicide applications where NPDES permits are not obtained by rendering public hearings optional. Amigos Bravos opposes this change and encourages the WQCC to retain the language in the current standards. The following proposed changes to NMED's proposal would do just that and reflect, word-for-word, the language in the current standards:

C. The commission shall review the petition and the department's recommendation and **shall** within 90 days of receipt of the department's recommendation ~~may~~ hold a public hearing in the locality affected by the proposed use in accordance with Adjudicatory Procedures. ...

...

E. After a public hearing ~~or commission meeting, if no hearing is held~~, the commission may grant the petition...

***Basis for Change to NMED's Proposal:***

NMED proposes in 20.6.4.16 NMAC to not require WQCC review of piscicide applications that obtain a NPDES permit. NMED further proposes to eliminate mandatory public hearings for those situations where piscicide applications do not need a NPDES permit and therefore are not subject to the public participation processes under the NPDES permitting process. While Amigos Bravos does not oppose NMED's proposal to provide for WQCC review where piscicide applications obtain an NPDES permit, Amigos Bravos opposes eliminating the mandatory public hearing requirement where piscicide application do not need an NPDES permit.

Piscicide applications are very controversial in many parts of the state. A full public process is necessary to make sure that people from the locality where the piscicide application is being proposed have the chance to participate in the application process and have their voices heard before the Commission through a public hearing. Notably, assuming that the Commission adopts NMED's proposal to eliminate a commission process for piscicide applications that obtain a NPDES permit, the administrative burden on the Commission will be reduced from the current situation. In sum, the WQCC should retain the public hearing requirement for piscicide applications that do require an NPDES permit.

**III. 20.6.4.128 – AMIGOS BRAVOS' PROPOSAL REGARDING LOS ALAMOS INTERMITTENT AND EPHEMERAL WATERS**

Amigos Bravos proposes the following changes to 20.6.4.128 NMAC:

20.6.4.128 RIO GRANDE BASIN - Ephemeral and intermittent portions of watercourses within lands managed by U.S. department of energy (DOE) within LANL, including but not limited to: Mortandad canyon, Cañada del Buey, Ancho canyon, Chaquehui canyon, Indio canyon, Fence canyon, Potrillo canyon and

portions of Cañon de Valle, Los Alamos canyon, Sandia canyon, Pajarito canyon and Water canyon not specifically identified in 20.6.4.126 NMAC. (Surface waters within lands scheduled for transfer from DOE to tribal, state or local authorities are specifically excluded.)

A. Designated Uses: livestock watering, wildlife habitat, ~~limited~~ marginal warmwater aquatic life and secondary contact.

***Basis for change:***

Intermittent waters on Los Alamos National Laboratory's ("LANL's") property are given weaker protections (those associated with the limited aquatic life use) than all other intermittent waters in New Mexico (which receive the marginal warmwater aquatic life use). Amigos Bravos opposes such unfair and preferential treatment and therefore proposes to ensure consistent application of water quality standards by including the "marginal warmwater aquatic life" use in 20.6.4.128 NMAC. This inclusion ensures that all waters covered by 20.6.4.128 NMAC are given "fishable/swimmable" protections (EPA does not consider 20.6.4.128 NMAC's current "limited aquatic life" use a fishable/swimmable protection).

In the event that LANL believes that the marginal warmwater aquatic life use is not attainable in some ephemeral waters under this segment, LANL should complete an adequate, properly timed UAA analysis to demonstrate that contention and a separate segment should be created for those waters. While LANL did prepare a UAA, the UAA is fatally flawed because, *inter alia*, it was drafted *after* 20.6.4.128 NMAC was changed during the 2004 triennial review. Put differently, the UAA was drafted to justify a decision that had already been made, not to ensure a reasoned and informed decision. Condoning such predetermined action constitutes a textbook example of arbitrary and capricious action. See, e.g., *Davis v. Mineta*, 302 F.3d 1104, 1112-14 (10<sup>th</sup> Cir. 2002) (forbidding predetermined decisions).

Moreover, the CWA mandates that all states—including New Mexico—review water-bodies that are not meeting the fishable/swimmable goals ("101(a)(2) uses"). CWA regulations provide that even if a water-body segment is, on the basis of a UAA, downgraded such that the protections afforded to that water body segment are less protective than those specified in section 101(a)(2) of the CWA, that water-body segment must be reexamined every three years to determine if any changes have occurred in the water body or new information has become available that would create conditions where 101(a)(2) uses are attainable. 40 C.F.R. § 131.20(a). Here, it has been more than 10 years since the waters subject to 20.6.4.128 NMAC have met fishable/swimmable uses and, therefore, CWA regulations mandate that it is past time to reassess the segment. Moreover, since the 2004 standard was adopted, New Mexico has adopted a hydrology protocol that provides clearer guidance on how to complete UAAs in ephemeral and intermittent streams. Amigos Bravos contends that, if this new protocol was used, the waters in these segments would clearly merit the protections of a marginal warmwater aquatic life use designation rather than a limited aquatic life use designation, in particular given distinctions in how the hydrology protocol, consistent with 128.6.4.98 NMAC, treats intermittent and ephemeral waters differently.



**IV. 20.6.4.900 – AMIGOS BRAVOS’ PROPOSAL REGARDING CRITERIA APPLICABLE TO EXISTING, DESIGNATED OR ATTAINABLE USES UNLESS OTHERWISE SPECIFIED IN 20.6.4.97 THROUGH 20.6.4.899 NMAC**

Amigos Bravos proposes the following changes to 20.6.4.900 NMAC:

Metal	m <sub>c</sub>	b <sub>c</sub>	Conversion factor (CF)
<b>Aluminum (Al)</b>	<b>1.3695</b>	<b>0.9161</b>	
Cadmium (Cd)	0.7647	-4.2180	1.101672-[(ln hardness)(0.041838)]
Chromium (Cr) III	0.8190	0.6848	0.860
Copper (Cu)	0.8545	-1.702	0.960
Lead (Pb)	1.273	-4.705	1.46203-[(ln hardness)(0.145712)]
Manganese (Mn)	0.3331	5.8743	
Nickel (Ni)	0.8460	0.0584	0.997
Zinc (Zn)	0.9094	0.6235	0.986

Pollutant	CAS Number	DWS	Irr/Irr Storage	LW	WH	Aquatic Life			Type
						Acute	Chronic	HH-OO	
Aluminum, dissolved	7429-90-5		5,000			750 e	87 e		
Aluminum, total recoverable	7429-90-5					a <sub>5</sub> e	a <sub>5</sub> e		

~~(e) The criteria are based on analysis of an unfiltered sample unless otherwise indicated. The acute and chronic aquatic life criteria for aluminum are based on analysis of total recoverable aluminum in a sample that is filtered to minimize mineral phases as specified by the department. For aluminum, where the pH is 6.5 or less in the receiving water after mixing, the acute and chronic dissolved criteria in the table will apply.~~

***Basis for Change:***

The current hardness-based criteria for aluminum pH 6.5 to 9.0, previously approved by the WQCC and EPA, is not protective of aquatic life. Accordingly, it should be replaced with the USEPA recommended dissolved Aluminum criteria of 87 ug/l and 750ug/l that New Mexico had in place prior to 2010, until such time that there is sufficient scientific data to develop a hardness based criteria that is appropriate in western waters.

At present, EPA has not recommended a hardness-based standard for aluminum, although Amigos Bravos supports the development of such a standard once adequate studies exist to do so. Such studies are important to investigate the relationships of hardness-based effects of aluminum regarding chronic (long term) conditions and that of pH variance effects under those conditions. Montana, Wyoming, and Utah use the current national standard. The only states that have adopted hardness-based standards for aluminum (Colorado and New Mexico) did so at the

request of mining companies who benefit from the standards, and these standards were based on a single, mining industry-study.

New Mexico's hardness-based standard fails to address important pH effects where the pH is >7.5, a condition prevalent in many New Mexico streams. Hardness protects against, but does not eliminate, lethality at low concentration dissolved Al. over long periods. According to a peer-reviewed study, a mortality of 50% would be projected at a little more than 3 mo.(109d): at 100 mg/l CaCO<sub>3</sub>, 0.16mg/l dissolved Al, pH=8.6.<sup>1</sup>

## V. RESERVATION OF RIGHTS

Amigos Bravos reserves the right to support, oppose, or request additional changes to: NMED's Petition to Amend Surface Water Quality Standards; NMED's Amended Proposed Changes and Statement of Basis for the Changes; and the proposals advanced by other parties or interests. Amigos Bravos will exercise this right, as necessary, through its notice of intent to present technical testimony, rebuttal technical, at hearing, and through public comment, whether written or oral.

Respectfully submitted this 30th day of September 2014.



Erik Schlenker-Goodrich  
Western Environmental Law Center  
208 Paseo del Pueblo Sur, #602  
Taos, NM 87571  
575.613.4197 (p)  
575.751.1775 (f)  
[eriksg@westernlaw.org](mailto:eriksg@westernlaw.org)

Kyle Tisdell  
Western Environmental Law Center  
208 Paseo del Pueblo Sur, #602  
Taos, NM 87571  
575.613.8050 (p)  
575.751.1775 (f)  
[tisdell@westernlaw.org](mailto:tisdell@westernlaw.org)

**Counsel for Amigos Bravos**

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<sup>1</sup> Gunderson, et.al.1994. pH, Hardness, and Humic Acid Influence Aluminum Toxicity to Rainbow Trout (Oncorhynchus mykiss) in Weakly Alkaline Waters. Can. J. Fish. Aquat. Sci. 51: 1345-1355

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was serviced by regular mail and, where an email address is specified, by email, on September 30, 2014 to:

**Pam Castaneda, Boards & Commissions Administrator**

New Mexico Environment Department1

1190 S. St. Francis Drive, S2102

P.O. Box 5469

Santa Fe, New Mexico USA 87505

E-mail: [Pam.Castaneda@state.nm.us](mailto:Pam.Castaneda@state.nm.us)

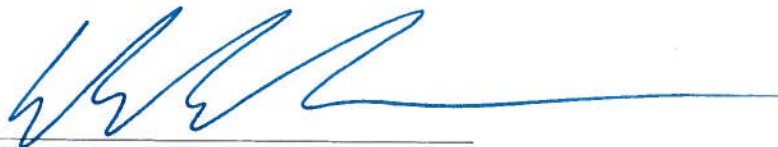
**Kevin J. Powers, Esq.**

Assistant General Counsel

New Mexico Environment Department

1190 St. Francis Drive

Santa Fe, New Mexico 87505



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Erik Schlenker-Goodrich

Western Environmental Law Center