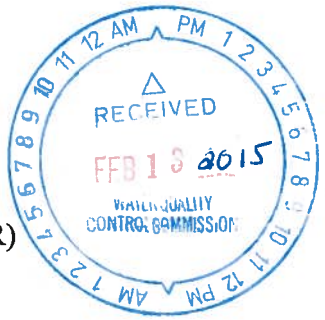
STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



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' REBUTTAL TESTIMOMY

Amigos Bravos, by and through undersigned counsel, hereby submits the rebuttal testimony of Rachel Conn and Dr. Deke Gunderson in accord with the Water Quality Control Commission's July 10, 2014 Scheduling Order.

Amigos Bravos continues to reserve the right to offer additional argument, testimony, and evidence in this proceeding as necessary and appropriate and in accord with the Commission's guidance and rules.

Respectfully submitted this 13th day of February 2015.

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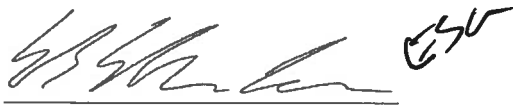


Erik Schlenker-Goodrich
Western Environmental Law Center

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)

REBUTTAL STATEMENT OF RACHEL CONN
SUBMITTED ON BEHALF OF AMIGOS BRAVOS

Estimated Time for Rebuttal Testimony: 60 minutes

I. QUALIFICATIONS

My qualifications were set forth in my direct pre-filed written testimony, provided December 12, 2014.

II. AMIGOS BRAVOS OPPOSES THE NEW MEXICO ENVIRONMENT DEPARTMENT'S PROPOSAL TO ELIMINATE HEARINGS FOR PISCICIDES APPLICATIONS WHERE SUCH APPLICATIONS HAVE NOT OBTAINED OR DO NOT REQUIRE NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMITS

The New Mexico Environment Department ("NMED") proposes to change 20.6.4.16 NMAC so that WQCC review of piscicide applications that obtain a National Pollution Discharge Elimination System ("NPDES") permit is not required. 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. As explained in our December 12th submission, Amigos Bravos does not oppose NMED's proposal to remove WQCC review where piscicide applications obtain an NPDES permit. However, Amigos Bravos does oppose eliminating the mandatory public hearing requirement where piscicide applications do not need or receive a NPDES permit.

NMED states in their December 12th NOI that all previous piscicide applications

A piscicide is, ultimately, *any* chemical that is poisonous to fish and is not limited to rotenone and antimycin. Thus, and putting aside the fact that agency approval and confidence in these two poisons has grown over the years, it must be remembered that this policy applies to *all* potential piscicides—not just the ones that have historically been used in New Mexico. The public has the right to a full and informed public process, including a public hearing, before *any* poisons are discharged into the New Mexico's rivers and streams and certainly with regard to poisons that, to date, have not been used into our rivers and streams.

Amigos Bravos has developed a Pesticide and Chemicals Policy that governs our approach to piscicide applications. *See* Amigos Bravos Exhibit E (attached). Amigos Bravos would like the standards to preserve the opportunity for Amigos Bravos—and its members and other members of the public—to determine if individual piscicide applications meet the requirements of this policy and, if not, to argue against such applications. A public hearing process is essential in making this determination.

NMED states that only 7 hearings have occurred (Pintado at 33-89). This averages to less than 1 hearing per year over the 10-year period that the requirement has been place. Given that NMED is proposing to already eliminate the need for hearings where piscicide applications obtain NPDES permits—a change that Amigos Bravos does not oppose—it is reasonable to conclude that the number of hearings will, going forward, be reduced. Requiring a public hearing for piscicide treatments that do not obtain NPDES permits is therefore more than reasonable and does not impose an undue burden on the WQCC or the proponents, typically agencies, of piscicide treatments.

III. CLEAN WATER ACT 101(a)(2) AQUATIC LIFE PROTECTIONS SHOULD APPLY TO SEGMENT 128

Los Alamos National Security, LLC and the United States Department of Energy ("LANS/DOE") oppose Amigos Bravos' proposal to apply Clean Water Act 101(a)(2) uses to stream segment 20.6.4.128 ("Segment 128"). That stream segment includes ephemeral and intermittent waters at Los Alamos National Laboratory ("LANL"). LANS/DOE does so on the basis of testimony submitted by Mr. Saladen in LANS/DOE's

new segment, Segment 128, as proposed by NMED and the University of California/LANL. As paragraph 243 provides:

> 243. The Commission adopts another new segment proposed by NMED and UC, for the same reasons as set out above in paragraphs 235-236. The proposed uses are appropriate as discussed above.

LANL Exhibit 4, ¶ 243.

Thus, in paragraph 237, the WQCC correctly explained that the presence of shellfish and macroinvertebrates is sufficient to warrant application of the CWA 101(a) coldwater aquatic life use to Segment 126, regardless of the presence of fish. However, in paragraph 243, the WQCC, in accepting NMED and UC's proposal to designate Segment 128, incorrectly failed to apply a CWA 101(a)(2) aquatic life use standard and, instead, only applied the lesser "limited aquatic life" standard. EPA, notably, has determined that the limited aquatic life is not protective enough to qualify as a Clean Water Act 101(a)(2) protection. *See* EPA Final ROD for the 2009 Triennial Review, April 12, 2009, page 29; and EPA Final ROD for the 2004 Triennial Review, December 29, 2011, page 36.

There is no explanation for this stark disconnect. In addition, the same basis (provided in paragraph 237) is used to justify two very different decisions, despite the fact that paragraph 237 clearly demonstrates why CWA 101(a)(2) uses should be applied to both Segment 126 *and* Segment 128. Put simply, there is no rational basis provided for applying the weaker, non-CWA 101(a)(2) "limited aquatic life" use to Segment 128.

Exacerbating the problem, the UAA prepared for Segment 128—*after* the WQCC decided to designate Segment 128 and not apply a CWA 101(a) aquatic life use standard (a textbook example of arbitrary *post hoc* decisionmaking)—concedes that macroinvertabrates are present in Segment 128 waters. Again, as the WQCC itself explained in paragraph 237 of its 2005 Statement of Reasons, as the WQCC further explains in its Hydrology Protocol, and as EPA has also determined—the presence of macroinvertebrates warrants application of the Clean Water Act 101(a)(2) aquatic life use protections. *See* New Mexico Hydrology Protocol at 33, 20.6.4.98 NMAC; EPA, Office of Water, Regulations and Standards, Questions and Answers on Antidegradation, Washington DC 20460, August 1985, page 3.

Despite New Mexico and EPA statements and policy that the CWA 101(a)(2)

the UAA, did not hold a public hearing for the UAA, and did not notify the public that the UAA was to be discussed and adopted at a WQCC hearing—despite the fact EPA regulations require a public hearing when uses are changed 40 C.F.R. 131.10(e). To turn around and wield the lack of transparency and public process as a sword to suggest that Amigos Bravos was willfully ignorant is unfair and unreasonable.

Second, LANS/DOE claims that nothing has changed since the previous Triennial Review that would call into question the Commission's Order and Statement of Basis for Amendment of Standard for Segment 128 (Saladen at 6). Of course, to accept that argument, LANS/DOE must first sweep the fatal deficiencies of the Segment 128 designation and the *post hoc* 2007 UAA under the rug and, in effect, suggest that it's perfectly appropriate for New Mexico to allow water quality standards grounded in a deficient basis to remain on the books. Regardless, LANS/DOE is, once again, wrong. The changes since the last Triennial Review are straightforward and compelling. New Mexico, since the last Triennial Review, developed, approved, and began implementing the New Mexico Hydrology Protocol ("Hydrology Protocol"). The Hydrology Protocol: (1) outlines a clear and straightforward process for distinguishing between ephemeral and intermittent streams; and (2) creates a framework for protecting intermittent streams with Clean Water Act 101(a)(2) protections (specifically "marginal warmwater aquatic life" use protections). Application of this protocol through a new UAA would help clarify this situation and, at the least, ensure that whatever protections are afforded to Segment 128 are properly grounded.

Third, LANS/DOE claim that the Segment 128 waters are monitored regularly (Saladen at 9). Of course, just because waters may be monitored does not justify the deficient designation of Segment 128 or the deficient 2007 UAA. Even if that were not the case, just because they are "monitored" does not mean that they are "monitored" in sufficient fashion to support LANS/DOE claim that Segment 128 does not require CWA 101(a)(2) protections. Nowhere does LANS/DOE present a list of aquatic species such as fish, aquatic invertebrates, and or shellfish found in these waters and whether the monitoring work for Segment 128 targets aquatic species or the conditions necessary to support those species. To credibly monitor the Segment 128 waters to determine if Clean Water Act 101(a)(2) uses are occurring, LANS/DOE must establish a monitoring

To date, Amigos Bravos is unaware of any evidence that NMED or LANS/DOE has taken a hard look to determine if these improvements in water quality represent a change in the highest attainable use in Segment 128 waters.

IV. NMED'S TEMPORARY STANDARD PROPOSAL IS UNNECESSARY AND SHOULD BE REJECTED OR, IF ADOPTED, SUBJECTED TO REASONABLE CONSTRAINTES TO PROTECT WATER QUALITY AND ENSURE PUBLIC INVOLVEMENT

NMED, in its December 12, 2014 NOI and supporting testimony from Ms. Kristine Pintado, 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, also in its entirety, the NMED's proposed addition of 20.6.4.10.F and 20.6.4.10.H NMAC. Amigos Bravos also proposes constraints on temporary standards to protect water quality and ensure public involvement.

A. Temporary Standards Are Unnecessary Because Flexibility To Achieve Water Quality Standards Is Already Afforded Through Compliance Schedules

Amigos Bravos' basis for opposing NMED's proposal is straightforward: NMED has yet to adequately explain why a temporary standard provision is even needed. The only example that NMED gives is that of implementing the general nutrient criteria (Pintado at 18-89). With this example, NMED contends that the state has no flexibility to allow time for dischargers to meet nutrient controls (Pintado at 18-89 and 19-89). This is not the case. Flexibility is already afforded through authorities providing for the inclusion of compliance schedules into NPDES permits, specifically 20.6.4.12.G NMAC:

> G. Compliance Schedules: It shall be the policy of the commission to allow on a case-by-case basis the inclusion of a schedule of compliance in a NPDES permit issued to an existing facility. Such schedule of compliance will be for the purpose of providing a permittee with adequate time to make treatment facility modifications necessary to comply with water quality based permit limitations determined to be necessary to implement new or revised water quality standards or wasteload allocation. Compliance schedules may be included in NPDES permits at the time of

increased, or continued discharges into impaired waters.

C. Temporary Standards, If Adopted, Should Not Be Allowed For New Or Increased Discharges

Under NMED's proposed language, a temporary standard, once adopted, would apply broadly to a specific waterbody and therefore would be applicable to both existing discharges and new discharges in that waterbody. Therefore the proposal, if adopted, would allow a new discharger (or dischargers, plural) to secure a temporary standard allowing it to discharge pollution that would cause or contribute to the impairment of the original existing use, which per NMED's proposal (*see* NMED's proposal for 20.6.4.10.F(3) NMAC) is the use that is applicable for 303(d) purposes.

NMED's proposal does include a boilerplate provision, required by Clean Water Act rules (40 C.F.R. § 122.44(d)), providing that adoption of a temporary standard "will not cause the further impairment or loss of an existing use" (proposed 20.6.4.10.F(1)(b) NMAC). Yet, as written, the mechanics of NMED's proposal provide no such assurances and, indeed, compel the opposite conclusion: that temporary standards could, even if unintentionally, "cause the further impairment or loss of an existing use." In effect, NMED's boilerplate language forbidding "the further impairment or loss of an existing use" is disconnected from how NMED's proposal for temporary standards would operate in practice.

To explain, it is impossible to determine at the time of adoption of a temporary standard whether or not the temporary standard will or will not cause the further impairment or loss of an existing use. This is because, as proposed by NMED, temporary standards would apply broadly to a waterbody without any limitations on the applicability of the temporary standard to new discharges. Therefore, a new discharger or dischargers could come along, after the temporary standard has been approved, and start discharging into the waterbody using effluent limits based on the temporary standard. This discharge could cause or contribute to a violation of the original standard, which in turn means that the temporary standard would enable discharges that cause or contribute to a violation of the original, permanent standard. In addition, a current discharger could increase its discharges by reference to the temporary standard which would also cause or contribute

would be in place, effectively rendering them—or at least risking that they will become—*de facto* permanent standards. Under the current provision, a "temporary" standard could last 15, 20, 30, 50, or 100 years. The only limitation is a vague and largely illusory reference to an "effective period" (proposed 20.6.4.10.F(10)). Lacking is any real limitation—such as contained in NMED's original proposal—on how long a temporary standard may be in place. Of note, EPA has identified temporary standards as "time-limited" and has proposed to limit all variances to 10 years or less. 78 Fed. Reg. No. 171 (September 4, 2013). If the WQCC adopts a temporary standard provision, it should ensure that the temporary standard provision is in fact temporary and build in safeguards to ensure that it is not abused by adopting NMED's original proposal to impose a 3-year time limit on temporary standards, with the ability to renew that temporary standard at each subsequent Triennial Review.

F. NMED's Temporary Standards Proposal, If Adopted, Should Include A Public Hearing Requirement

NMED states in their testimony that a temporary standard would be "subject to hearing and public comment" and that petition for a temporary standard "must satisfy the WQCC's public notice, hearing, and appellate procedures" (Pintado at 9-89 and 26-89). Yet NMED's proposal contains neither a public comment period nor a hearing requirement. The only reference to public participation is found at NMED's proposed 20.6.4.10.F(8) NMAC, where the following language is included: "Temporary standards may be implemented only after appropriate public participation, commission approval, and adoption pursuant to this Subsection." There is no description of what constitutes "appropriate public participation." EPA requires a public hearing on proposed changes to water quality standards and a public review of these changes prior to the hearing. 40 C.F.R. § 131.20(b)). In order to meet EPA regulatory requirements, the Commission must include a more rigorous public participation component prior to adoption of a temporary standard provision.

G. NMED's Temporary Standards Proposal, If Adopted, Should Place The Burden To Justify A Temporary Standard Squarely On The Proponent Of The Temporary Standard

to "shall."

H. NMED's Temporary Standards Proposal, If Adopted, Should Be Subjected To The Condition That Failure To Comply With NPDES Permit Conditions Would Result In Termination Of The Temporary Standard

NMED states that failure to comply with the conditions of a NPDES permit could result in termination of the temporary standard (Pintado at 25-89), yet nowhere in either 20.6.4.10.F or 20.6.4.10.H NMAC of NMED's proposal is this condition referenced. If the Commission adopts a temporary standard provision, explicit language that links the validity of a temporary standard to NPDES permit compliance should therefore be included.

I. SAN JUAN WATER COMMISSION'S POSITION REGARDING NMED'S TEMPORARY STANDARDS PROPOSAL IS UNPERSUASIVE

The San Juan Water Commission ("SJWC") in their December 12, 2014 NOI provided testimony in response to NMED's temporary standard proposal. SJWC expressed concern that the NMED proposal required "Use Attainability Analysis ("UAA") – like" requirements (Nylander at 2) and contrives a proposal that NMED adopt a variance procedure instead of a temporary standard procedure (Nylander at 6). SJWC is referring to the requirements that a petitioner for a temporary standard demonstrate that the attainment of the applicable designated use may not be feasible in the short term due to one or more of the factors listed in 40 C.F.R. § 131.109(g). Yet, as per EPA requirements, any variance procedure "must satisfy the same substantive and procedural requirements as a designated use removal. *See* 40 C.F.R. § 131.10(g); Section 5.3, EPA Water Quality Standards Handbook, Second Edition, 1994).[3]

[3] SJWC also ttempts to re-animate language provided during the 2004 triennial review regarding variances and provides new testimony to support that language. However, this language was not submitted by SJWC as proposed language by the September 30, 2014 deadline imposed by this Commission's July 10, 2014 Scheduling Order and is not a logical outgrowth of NMED's temporary standards proposal. Thus, the Commission should disregard this proposed language and supporting testimony.

presumably be lower on such segments compared segments that are not subject to temporary standards.

SJWC also contends that there is nothing in NMED's standards that awards polluters (Nylander at 13), NMED's proposal, at least indirectly does just that: it awards polluters that have been discharging at levels that are causing or contributing to a violation of water quality standards by giving them the option to secure a temporary, less stringent standard that could enable them to discharge at levels that, to date, have caused otherwise unacceptable impacts to the receiving water that do not satisfy the original, permanent water quality standards—including, as discussed above, waters that are *already* impaired.

V. PEABODY'S PROPOSAL TO WEAKEN WATER QUALITY PROTECTIONS FOR MAN-MADE PONDS AND WETLANDS SHOULD BE REJECTED

Peabody Energy ("Peabody"), in its December 12, 2014 submittal, proposes to amend language at 20.6.4.900(D) and (E) NMAC, which provides primary and secondary human contact standards. Peabody's submittal amends their September 30, 2014 submittal by proposing a three-tiered approach that weakens both primary and secondary human contact standards for manmade ponds and wetlands.

Amigos Bravos objects to Peabody's tiers 1, 2, and 3, proposed as 20.6.4.900.D(1), (2) and (3) and 20.6.4.900.E(1), (2), and (3), for six primary reasons.

First, Peabody's proposal for tiers 1 and 3 is duplicative of existing provisions. Specifically, regarding Peabody's proposal for 20.6.4.900.D(1) and 20.6.4.900.E(1) NMAC, if the waters are neither waters of the US nor waters of the state, then 20.6.4 NMAC, including 20.6.4.900, does not apply. Regarding Peabody's proposal for 20.6.4.900.D(3) and 20.6.4.900.E(3) NMAC, it is already the case that if a UAA is approved that shows that a Clean Water Act 101(a) human contact use is not attainable, then the associated use/criteria are not applicable. Accordingly, there is no need to qualify through a change to the standards; the proposed language is duplicative.

Second, Peabody's proposal for tier 2 and 3 is based on the idea that human contact standards are only appropriate for waters of the U.S., not surface waters of the

being then waters of the U.S. In this context, Peabody's proposal risks imposing an overbroad exemption for artificial ponds and man-made wetlands that, while not waters of the U.S., are nonetheless important to water quality in surface waters of the state.

Building on this point, Peabody provides little evidence regarding the practical implications of its proposal. Peabody does not identify how many artificial ponds and man-made wetlands across New Mexico would be impacted by its proposal, where those ponds and wetlands are located to gauge whether or not the exemption it seeks would or would not adversely impact broader water quality across a particular watershed or landscape, whether or not human contact is or is not reasonably foreseeable, etc. It is important to remember, in this context, that Peabody is seeking a *statewide* exemption for artificial ponds and man-made wetlands, not just an exemption for its own ponds and wetlands. Peabody's proposal is therefore not narrowly tailored and does not provide the evidence necessary to support a reasoned and informed finding by the WQCC that a change in New Mexico's *statewide* water quality standards is appropriate.

Third, Amigos Bravos further objects to Peabody's proposal for Tier 2 because the proposal is unclear and overbroad. Are the intended uses referred to in D(2) and E(2) those that are listed in the main paragraphs of Peabody's proposed D and E ("treatment, livestock watering, and/or wildlife habitat"), or does intended use refer to any intended use approved by a state governmental authority? Regardless of which of these two interpretations are intended, Amigos Bravos opposes Peabody's proposal. The proposal is inherently problematic from a water quality perspective because the WQCC is distinctively charged with the responsibility to protect water quality in accord with the Water Quality Act. Allowing *any* "state governmental authority" to have, in effect, *carte blanche* to identify and approve intended uses that trigger an exemption from human contact standards, whatever their underlying statutory mandates, missions, and motivations may be, opens the door to mischief and, if approved, compels the conclusion that the WQCC improperly abdicated its Water Quality Act responsibilities.

Even if this were not the case, Peabody (Cochran at 4) states that NMED, during the last triennial review, testified that livestock watering ponds in general do not pose a regulatory issue (Peabody Exhibit 4). Yet, when reading NMED's testimony it is clear that NMED did *not* say that livestock ponds should not be governed by CWA 101(a)

entity but, rather, by its own admission, "the world's largest private-sector coal company."[4]

Sixth, Peabody's inclusion of the word "treatment" in the list of uses that would be exempt from human contact standards in 20.6.4.900.D and 20.6.4.900.E NMAC is also either duplicative or, perhaps, indicative (whether intended or not) of a potential "Trojan horse." The definition of "surface water(s) of the state" at 20.6.4.7.S(5) NMAC already excludes "[w]aste treatment systems, including treatment ponds or lagoons designed and actively used to meet requirements of the Clean Water Act...." Assuming that Peabody's proposal is intended to actually change the standards, rather than merely insert duplicative language, this suggests that Peabody, through its proposal, seeks to somehow expand the definition of treatment ponds to include man-made ponds or artificial wetlands used for "treatment" facilities that are designed for a purpose other than "to meet requirements of the Clean Water Act." If so, then Amigos Bravos strongly objects. Before any exemption from water quality standards—in particular human contact standards—is provided, it should be absolutely clear what is, in fact, covered by the exemption. Peabody must clarify this point.

VI. San Juan Water Commission's Testimony On NMED's Ephemeral Waters Proposal Is Reflects A Policy Preference That Is Not Grounded In Either Law Or Fact

The San Juan Water Commission ("SJWC") provides testimony in their December 12th, 2014 NOI related to NMED's Ephemeral Waters Proposal for 20.6.4.97(C). In their testimony, SJWC suggests that EPA would be receptive to a proposal from NMED allowing New Mexico to return the pre-2009 protections for ephemeral streams (Nylander at 16), including livestock watering, wildlife habitat, secondary contact and limited aquatic life protections. SJWC, however, appears to forget or at least not realize that it was EPA that required the 2009 changes because EPA does not consider the pre-2009 protections—specifically the limited aquatic life use and the

[4] http://www.peabodyenergy.com/content/101/About-Us.

jurisdictional reach of the CWA. In accord with these decisions, CWA protections for some waters that historically had been well within the CWA's jurisdictional reach, such as waters that flow intermittently or are isolated, were rendered uncertain. In this confusion, many of our rivers and streams lost on-the-ground Clean Water Act protection. The proposed EPA rule attempts to clarify the CWA's jurisdictional reach in the wake of these Supreme Court decisions and, furthermore, to respond to calls from Congress for clarification. Specifically, EPA's proposed rule would clarify that some of the rivers, streams, and wetlands that fell through the cracks in the wake of the Supreme Court's decisions in fact still properly require CWA protection and are well within the scope of the CWA's jurisdiction, including as understood by the Supreme Court.

Contrary to the factually untrue fear mongering that SJWC perpetuates with its testimony, and even if this EPA's rule is finalized, *less* water would be protected today than was protected during the Reagan Administration. For example, even if this proposed rule were passed, many of waters in New Mexico that were protected under the Clean Water prior to 2001, such as waters in New Mexico's closed basins, as well as some playa lakes and prairie potholes, would not regain Clean Water Act protections. This creates a huge, adverse impact on water quality in New Mexico since closed basins constitute 20% of the state. *See* Amigos Bravos *et al.*'s Comments on the Proposed Rule, attached as Amigos Bravos Exhibit H. Countless organizations and individuals support the rule, including numerous organizations from New Mexico. *See* Amigos Bravos Exhibit H. The New Mexico Environment Department and former Governor Richardson have supported going further than a rulemaking by passing legislation that would restore pre-2001 protections to the nation's waters. *See* Amigos Bravos Exhibits I and J (Attached). Americans highly value clean water and want strong protections for our nation's rivers and streams. It is estimated that, of the approximately one million comments received by the EPA on the proposed rule, over 800,000 of them are in support of the rule.[6]

Furthermore, and contrary to the rhetoric about this rule, this rule would help farmers. The Rocky Mountain Farmers Union has come out in support of the rule[7] and

[6] http://switchboard.nrdc.org/blogs/jdevine/big_polluter_agenda_comes_for_.html
[7] http://www.rmfu.org/they-dont-speak-for-me-campaign-launches-2/

Adopted: October 30, 2004

AMIGOS BRAVOS
POLICY

Pesticides and Chemicals

The Mission of Amigos Bravos includes maintenance and restoration of clean unpolluted water and natural biological diversity. Situations arise which may create a conflict, for example, the use of piscicides (i.e., fish toxins) for restoration of native fish and the use of herbicides to control non-native problematic plants.

Generally, it is the policy of Amigos Bravos to oppose the use of pesticides and other chemicals that may contaminate the waters of New Mexico. Exceptions may be considered on a case-by-case basis.

When evaluating potential exceptions to the policy, the following items will be considered:

- Purpose of treatment: Is it necessary to restore or maintain native biological diversity, or natural ecosystem functions?
- Alternatives: Are there reasonable and practical alternatives? Cost alone, should not be the justification for using chemicals.
- All chemicals in a compound or product must be known.
- Has the product been thoroughly researched and approved by the EPA?
- Will any of the chemicals reach the surface or ground water?
- Are any of the chemicals persistent in the ecosystem?
- What are the toxic affects of the product and each chemical, such as direct mortality, carcinogen, endocrine disruption, cholinesterase inhibitor, behavioral or reproductive toxin, etc.?
- Is there a risk of synergism between chemicals?
- How long are the chemicals expected to remain in the system?
- How does each chemical break down and are the resulting chemicals toxic?
- What organisms will be affected? What non-target species will be affected and will they recover to natural population levels?
- Do any of the chemicals bioaccumulate?

EXHIBIT E (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

DITCH THE MYTH

LET'S GET SERIOUS ABOUT PROTECTING CLEAN WATER

This document addresses concerns and misconceptions about the proposal by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to protect clean water. The proposed rule clarifies protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources. The following facts emphasize that this proposed rule cuts through red tape to make normal farming practices easier while also ensuring that waters are clean for human health, communities, and the economy.
Learn more facts at **www.epa.gov/ditchthemyth**

MYTH: The rule would regulate all ditches, even those that only flow after rainfall.
TRUTH: The proposed rule actually reduces regulation of ditches because for the first time it would exclude ditches that are constructed through dry lands and don't have water year-round.

MYTH: A permit is needed for walking cows across a wet field or stream.
TRUTH: No. Normal farming and ranching activities don't need permits under the Clean Water Act, including moving cattle.

MYTH: Ponds on the farm will be regulated.
TRUTH: The proposed rule does not change the exemption for farm ponds that has been in place for decades. It would for the first time specifically exclude stock watering and irrigation ponds constructed in dry lands.

MYTH: Groundwater is regulated by the Clean Water Act.
TRUTH: The proposed rule specifically excludes groundwater.

MYTH: The federal government is going to regulate puddles and water on driveways and playgrounds.
TRUTH: Not remotely true. Such water is never jurisdictional.

MYTH: EPA is gaining power over farms and ranches.
TRUTH: No. All historical exclusions and exemptions for agriculture are preserved.

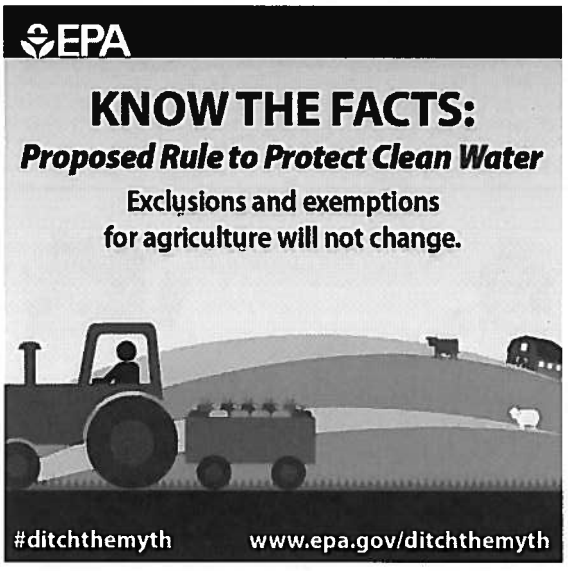
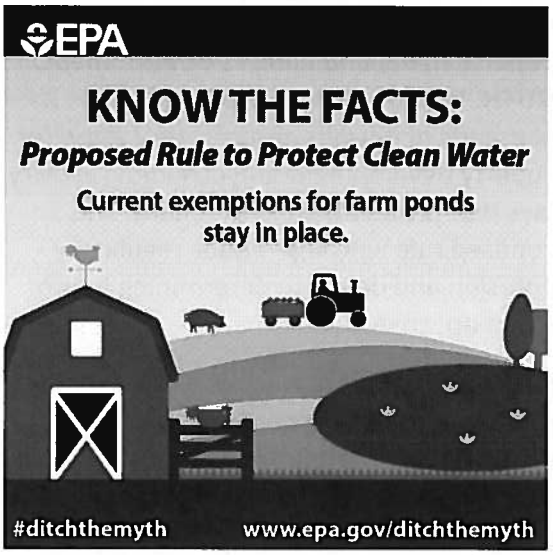


EXHIBIT F (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

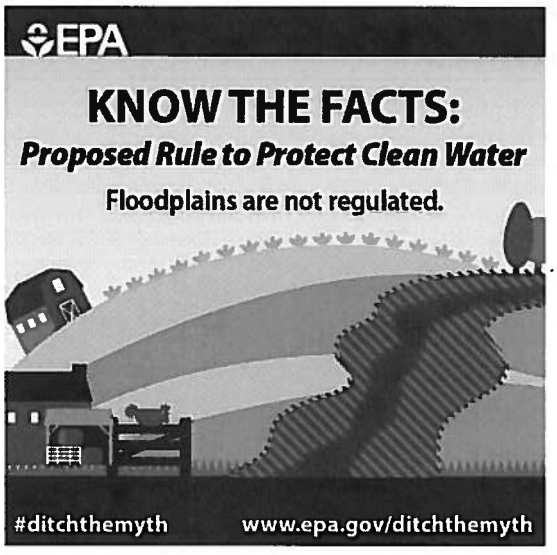
MYTH: This is a massive expansion of federal authority
TRUTH: The proposal does not protect any waters that have not historically been covered under the Clean Water Act. The proposed rule specifically reflects the more narrow reading of jurisdiction established by the Supreme Court and protects fewer waters than prior to the Supreme Court cases.



MYTH: This is increasing the number of regulated waters by including waters that do not flow year-round as waters of the U.S.
TRUTH: Streams that only flow seasonally or after rain have been protected by the Clean Water Act since it was enacted in 1972. More than 60 percent of streams nationwide do not flow year-round and contribute to the drinking water supply for 117 million Americans.

MYTH: Only actual navigable waters can be covered under the Clean Water Act.
TRUTH: Court decisions and the legislative history of the Clean Water Act make clear that waters do not need actual navigation to be covered, and these waters have been protected by the Clean Water Act since it was passed in 1972.

MYTH: The proposal sets no limits on federal jurisdiction.
TRUTH: The proposed rule does not protect any types of waters that have not historically been covered under the Clean Water Act and specifically reflects the Supreme Court's more narrow reading of jurisdiction, and includes several specific exclusions.



MYTH: This rule is coming before the science is available.
TRUTH: EPA's scientific assessment is based on more than 1,000 pieces of previously peer-reviewed and publicly available literature. The rule will not be finalized until the scientific assessment is finalized.

MYTH: This is about little streams in the middle of nowhere that don't matter.
TRUTH: Everyone lives downstream. This means that our communities, our cities, our businesses, our schools, and our farms are all impacted by the pollution and destruction that happens upstream.

EXHIBIT F (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

EPA's Acting Assistant Administrator for Water Claims	AFBF Response	NRDC Analysis of AFBF Arguments
There's been some confusion about EPA's proposed "Waters of the U.S." rule.	That's because the rule doesn't CLARIFY anything except that almost any low spot where rainwater collects could be regulated. The proposed rule defines "tributaries" and "adjacent" in ways that make it impossible for a typical farmer to know whether the specific ditches or low areas at his or her farm will be "waters of the U.S."—but the language is certainly broad enough to give agency field staff plenty of room to find that they are! (79 Fed. Reg. 22206, 22209)	There's not much to respond to here – it's mainly just rhetoric. But, it sounds a common theme in this document – the Farm Bureau repeatedly reads the proposed language in the broadest way possible, often to the point of absurdity, so as to come to the conclusion that the rule would regulate things that the agencies clearly don't have any intent to cover and have not – by any fair reading of the proposal – tried to cover. If the Farm Bureau, however, feels that the proposed definitions could be made clearer, it has the same right as the hundreds of thousands of people who have asked the agencies to finalize a strong rule – it can suggest improvements during the public comment period any time before October 20.
The rule keeps intact all CWA exemptions and exclusions for agriculture that farmers count on. But it does more for farmers by actually expanding those exemptions.	It has to! Congress provided those exemptions in the statute, and the agencies can't take them away by regulation. However… The categories of exemptions are still there, but because of the expansion of jurisdiction over more small, isolated wetlands and land features like ditches and ephemeral drains, fewer farmers will benefit from the exemptions. The exemptions for activities occurring in "waters of the U.S." have been interpreted by the agencies to be ridiculously narrow (e.g., you can plow and plant in a wetland, but only if you have been farming there since 1977, and only if you do not alter the hydrology of the wetland, and you cannot apply fertilizer or herbicide there without an NPDES permit). *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).	The rule would not be an "expansion" of traditional coverage dating back to the Reagan administration. It would restore coverage to a small percentage more waters than are being protected under policies in place today. But it's important to understand that those policies are more restrictive than required by the Supreme Court, especially given the new compilation of the science supporting broad protections. Most importantly, it will provide clear protections for waters that there should be no question about but are in limbo today. There is no 1977 limitation on this exemption, period. The case that the Farm Bureau cites ruled that the discharge in question would so fundamentally alter the watershed hydrology that it would require permitting under a section of the Act that limits the applicability of the exemptions. [*U.S. v. Cumberland Farms of Conn., Inc.*, 647 F.Supp 1166 (D. Mass. 1986) ("Cumberland's activities involve precisely what is prohibited: the wholesale modification of a major aquatic system having an adverse effect, both individually and cumulatively.")] The idea that exempted activities lose their exemption if they "alter the hydrology" of covered waters is overstated. Any alteration doesn't trigger permitting, but Congress – not the agencies – required discharges causing significant harm to be

	disease control.	includes "plowing" and "seeding" in that exemption, contrary to AFBF's suggestion. [Clean Water Act §404(f)(1)(A)] Other discharges have additional exemptions. In the event that a discrete discharge will in fact pollute a water body covered by the law, the discharge can still happen promptly. The Corps has developed several nationwide permits, including a permit for agricultural activities, allowing speedy action, and – by our count – pesticide discharges in 42 states are covered by a general permit for pesticide discharges from the state or EPA.
When Congress passed the CWA in 1972, it didn't just defend the mighty Mississippi or our Great Lakes; it also protected the smaller streams and wetlands…But two Supreme Court cases over the last 15 years confused things, making it unclear which waters are "in," and which are "out."	And yet, Congress chose to authorize federal regulatory power over "navigable waters," which the Supreme Court has said means EPA cannot regulate the entire "vast, interconnected system" of waters. The Supreme Court didn't "confuse things." It ruled that the agencies' pre-2001 regulation of all waters to the full extent of the U.S. commerce power – even based only on the use of waters by migratory birds – was illegal. EPA's proposed rule doesn't make it clear which features are "in" and which are "out," but it does provide a rationale for agency or citizen enforcers to claim that almost any ditch or low spot is "waters of the U.S." This creates confusion and risk—not clarity.	The Supreme Court has said three essential things about this issue: • "[T]he term 'navigable' as used in the Act is of limited import." [*U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)] • The Act does not protect a water body solely based on its function as habitat for migratory birds [*Solid Waste Agcy. of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001)] • At least those kinds of water bodies that collectively have a significant impact on the condition of downstream waters can be protected. [*Rapanos v. U.S.*, 547 U.S. 715 (2006)] By basing the scope of the clean water proposal on the science that shows the connectivity between different kinds of waters and ones downstream, the agencies are well within the Court's directions. Indeed, because the Court didn't strike down any piece of the agencies' regulations, NRDC has concerns that the proposal does not protect all of the water bodies that it could, particularly with respect to waters outside of the floodplain of covered waterways.
That confusion added red tape, time and expense to the permitting process under the Clean Water Act. The Army Corps of Engineers had to make case-by-case decisions about which waters were protected, and decisions in different parts of the country became inconsistent.	The Supreme Court rulings didn't complicate the permitting process. That was already a morass of red tape. They only made it more difficult for the Corps and EPA to assert jurisdiction over small, isolated waters and "waters" that are dry most of the time. The proposed rule will make it easier for the Corps and EPA to make "desktop determinations" that any wetlands across huge swaths of the countryside are categorically jurisdictional. (79 Fed. Reg. 22195,	Wrong. Even organizations that have urged a narrow scope of clean water protections agree that the case-by-case process that exists today is unworkable. For example, in 2009, a witness testifying in Congress on behalf of the Associated General Contractors of America said: "Proceeding on a case-by-case basis is unacceptable to AGC." We also see delays in effective implementation of the law regularly.

		didn't. [*Rapanos v. U.S.*] Activity on land – Note the trick here, which is echoed throughout the Farm Bureau's piece. They take recognized and scientifically-understood terms like "ephemeral stream" and "wetland" and call them "land." Don't be fooled – these features have long been understood to be protected by the law. The question of whether wetlands could be protected by the Act was answered "yes" by a unanimous Supreme Court in 1985 [*Riverside Bayview*] and streams have been understood to be covered even when they dry up since the early days of the Act. [*See, e.g., U.S. v. Phelps Dodge Corp.*, 391 F. Supp 1181 (D. Ariz. 1975); *U.S. v. Zanger*, 767 F.Supp 1030 (N.D. Cal. 1991); *U.S. v. Sheyemme Tooling & Mfg. Co., Inc.*, 952 F.Supp. 1414 (D.N.D. 1996)]
The proposal does not change the permitting exemption for stock ponds, does not require permits for normal farming activities like moving cattle, and does not regulate puddles	Stock ponds - The proposed rule makes the exemption for stock ponds meaningless because it would regulate the low spots where farmers typically build ponds. The rule would *only* allow farm ponds built by diking "upland." This is a farm pond that only a Washington bureaucrat would build. Normal farming activities - This is false. Under the rule, Section 402 permits would be necessary for common farming activities like applying fertilizer or pesticide—or moving cattle—if materials (fertilizer, pesticide or manure) would fall into low spots or ditches. Section 404 permits would be required for earth-moving activity, such as plowing, planting or fencing, except as part of "established" farming ongoing at the same site since 1977. Puddles - The rule would not categorically regulate all puddles—but it would regulate low spots that puddle often enough to meet the broad definition of "wetlands" if those low spots are in a "floodplain" or a "riparian area" or if they, combined with other low spots in the region, have a "significant nexus" to any other "water of the U.S." Clear as mud, right? Here is what the proposal says about "puddles:" (79 Fed. Reg. 22218)	Stock ponds – the Farm Bureau's claims are wrong. First, discharges of dredged or fill material into protected waters associated with "construction or maintenance of farm or stock ponds" will typically be exempt under the law. [Clean Water Act §404(f)(1)(C)] Second, discharges into the stock ponds themselves will not be covered, as the rule *for the first time* adds to the regulation a provision saying that "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing" are not protected waters. [Proposed 40 CFR 230.3(t)(5)(ii)] This section of the proposal does not use the term "upland," but even if it did, it doesn't mean a hillside, as the Farm Bureau implies. Again, consider the scientific terminology from the connectivity report: "Uplands—(1) Higher elevation lands surrounding streams and their floodplains. (2) Within the wetland literature, specifically refers to any area that is not a water body and does not meet the Cowardin et al. (1979) three-attribute wetland definition." Normal farming activities – the Farm Bureau is wrong again. The proposal does not change in any way the way that application of pesticides or other agricultural chemicals are regulated (or not) under the Clean Water Act. These activities, when they involve spraying

		waters don't matter, it should take advantage of the fact that the agencies have sought relevant scientific evidence in a number of ways.
The EPA and the Army Corps are NOT going to have greater power over water on farms and ranches.	The only way the agencies can believe this is if they believe they already have power over almost every low spot where water flows or stands after rain. We disagree—and so does the Supreme Court.	The law does already apply -- though there is significant uncertainty about its application to any given location because of policies adopted under the prior administration -- at least to those waters that, in the aggregate, significantly affect downstream waters' physical, chemical, or biological integrity. The proposal would provide far more clarity about where those conditions are satisfied.
• The Clean Water Act and its regulations have multiple exclusions and exemptions from jurisdiction and permit requirements. The rule does not change or limit any of them.	Congress wrote many exemptions to prevent federal permit requirements for farming. But Congress used language that assumed farming happens on land, not in "waters of the U.S." By defining land to be "waters of the U.S.," the rule would result in federal permit requirements for countless farming activities.	Congress plainly knew that agricultural pollution would be discharged into covered waters due to activity on land, and that's why it sought to exclude some activities from permitting. (It should be noted that this choice was not without consequences -- many water bodies are unable to meet state-established standards for water quality because of agricultural pollution.) The final sentence of the Farm Bureau's statement here is just a repetition of its fallacious and doctrinaire suggestion that wetlands and certain kinds of streams are "land."
The proposed rule will NOT bring all ditches on farms under federal jurisdiction. • Some ditches have been regulated under the Clean Water Act since the 1970s.	Oh, really? Point to a ditch that was regulated as a water of the U.S. in the 1970s. **The CWA DOES NOT regulate ditches as waters of the United States.** The Corps informally (not in regulation) said that *some ditches could be regulated as waters under the 404 program on a case-by-case basis*. **The rule goes much further by broadly defining almost all ditches as waters of the U.S. under all CWA programs.** Technically, even mowing the grass in a ditch would require a federal permit under the rule.	Can do. Here are three: • Arlington Canal, "an earthen irrigation ditch which flows roughly parallel to the Gila River" [U.S. EPA, Office of General Counsel, *In re Buckeye, Ariz.*, 1977 WL 28254 (Nov. 11, 1977)] • Non-navigable, artificial mosquito canals connected to Papy's Bayou in Florida [*U.S. v. Holland*, 373 F. Supp. 665 (D. Fla. 1974)] • A Louisiana canal adjacent to (and from which water was periodically pumped into) protected wetlands [*U.S. v. St. Bernard Parish*, 589 F. Supp. 617 (E.D. La. 1984) (Note: case involved discharges during 1970s and 1980s)] The longstanding regulations also clearly encompass these features, since they include "tributaries" as well as "[a]ll other waters … the use, degradation or destruction of which could affect interstate or foreign commerce…." [Existing regulations at 40 C.F.R. §§230.3(s)(3) & (5)] No, mowing a ditch wouldn't require a permit; maintenance of drainage and

	will not qualify and will be regulated. Very few ditches will qualify for this exclusion—most ditches will be jurisdictional. (79 Fed. Reg. 22203-4) Here is just one part of EPA's justification for defining "tributary" to include "ditches" and "canals:" "Ditches and canals, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. It is the agencies' position that ditches that meet the definition of tributary (which does not include ditches excluded under paragraphs (b)(3) and (b)(4)) provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule." (79 Fed. Reg. 22206)	might have and show that cutting certain features out of the Clean Water Act will be harmless.
• Ditches that are IN are generally those that are essentially human altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.	False. Ditches that are IN are all ditches that flow to any stream or river (through any number of other ditches), except those that contain no "wetland" areas along their entire length, and that drain only "upland" (no stormwater from wetlands or ponds or other waters ever flows to the ditch). The vast majority of ditches are IN. (79 Fed. Reg. 22203-4) The ditches that are "in" are far more than "human altered streams." A ditch that happens to sometimes receive rainwater overflows from nearby wetlands is not a human altered stream. A ditch that displays wetland characteristics due to the presence of water is not a human altered stream. A ditch excavated in a low area that naturally channels rainwater is also not a human altered stream. "Ditches may have been created for a number of purposes, such as irrigation, water management or treatment, and roadside drains. In order to be excluded, however, the ditch must be excavated wholly in uplands, drain only uplands, and have less than perennial flow." (79 Fed. Reg. 22203-4)	Not "all ditches" that meet the Farm Bureau's description will be covered. Rather, the rules use scientific indicia of flow or permanence to potentially include waterways in the law's coverage. To be a tributary, a flowing waterway needs to have an ordinary high water mark and a bed and bank. [Proposed 40 C.F.R. §230.3(u)(5)] Likewise, a ditch that has water from time to time is not going to magically turn into a wetland; to be a wetland, the rule would define "wetlands" to mean "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." [Proposed 40 C.F.R. §230.3(u)(6)]
• Ditches that are OUT are those that are dug in dry lands and don't flow all the time, or don't flow into a jurisdictional water.	Again, false. Ditches that are OUT are those that are "upland" (not wetland or water) along their entire length, and that drain only "upland" (no water ever flows to the ditch from wetlands or ponds or other waters). These are mythical	They're not "mythical," at least according to the Farm Bureau's anti-clean water coalition partner, the National Association of Home Builders. In litigation challenging an Army Corps general permit authorizing discharges into

• Water-filled areas on crop fields are not jurisdictional.	field" and a "seasonal pond" or "wetland" or "ephemeral stream"—any of which can be regulated? The rule says that even small and temporary waters can be regulated. Isolated waters are categorically regulated if they are in floodplains or nearby ditches. (79 Fed. Reg. 22209)	indications of flow and permanence. With respect to ponds, it is reasonable to expect that the agencies will similarly require some indication that the water body is a defined feature on the landscape; for instance, the Corps' regulations already specify that the limits of jurisdiction of all non-tidal waters is the ordinary high water mark (or the extent of any adjacent wetland). [Existing 33 C.F.R. § 328.4(c)] But, if the Farm Bureau believes that this approach is not right for some reason or another, it should by all means make its views known during the currently-open comment period.
• The proposal specifically excludes erosional features from being "waters of the U.S."	The proposal also says it can be hard to tell the difference between an erosional feature and an "ephemeral stream," which is regulated. (79 Fed. Reg. 22219) That leaves it for enforcement inspectors and lawyers to decide later!	Or, the final rule could – with the Farm Bureau's and others' constructive input – define these terms further. Indeed, the agencies specifically asked for public comment on this very subject: "The agencies request comment on how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional." [79 Fed. Reg. at 22,219]
EPA is NOT taking control of ponds in the middle of the farm. • The proposed rule does not change jurisdiction over farm ponds. • The rule does not affect the existing exemption Congress created for construction and maintenance of farm or stock ponds. • The proposed rule would for the first time specifically exclude stock watering ponds from jurisdiction.	We've already seen EPA enforcement claiming farm ponds were built illegally because they were built in low spots where water naturally channeled. (EPA couldn't wait until the proposed rule becomes final to go ahead with these enforcement actions.) • Maybe that's because EPA has already started illegally enforcing jurisdiction over farm ponds built in low spots. • False. The rule makes the farm pond exemption meaningless, because the exemption does not apply to impoundments of "navigable waters." By regulating low spots as "navigable waters," the rule would prevent building a farm pond on a low spot without a Section 404 permit. 33 CFR Section 323.4(a)(3) • Like the farm pond exemption, this exclusion would only apply if the watering pond is built "by diking dry land." It also has to be used "exclusively for" stock watering. What if it is also used for other purposes? Can a row crop farmer	Where? It is hard to address claims about which the Farm Bureau won't provide any specifics. However, the conservative media and certain members of Congress have claimed that an EPA enforcement action with respect to a Wyoming landowner that dammed a perennial stream to create a stock pond is an example of agency overreach. If that is the case that the Farm Bureau refuses to identify, then it is not at all about discharges into the pond, but rather the filling 40 feet of a stream called Six Mile Creek with "sand, gravel, clay, and concrete blocks" to create a dam, and doing so without getting any kind of Clean Water Act permit for the discharge. Note again here the Farm Bureau's rhetorical trick of referring to wetlands as "low spots," rather than long-understood hydrological features. The Farm Bureau leaves out key pieces of the proposal in its last objection – the pond need not only be for stock watering but "exclusively for such purposes as stock watering, irrigation, settling basins,

		require permits if not undertaken in compliance with the NRCS standards – they might still be considered "normal farming." Nevertheless, if the interpretive rule stays in effect, we agree with the Farm Bureau that this particular point could be clarified.
• These 56 practices clarify and add to all of the practices that are being implemented in the field today and currently considered normal farming and exempt from permitting. The interpretive rule adds to what is exempt.	That is not clear from the interpretive rule.	As noted above, it's not only clear, it stresses this point specifically.
• The "normal farming" exemption is broader than these 56 practices. So if farmers implement other practices, or don't use NRCS funds, they would continue to be exempt in the same way they are now.	The "normal" farming exemption does include more than these 56 practices, but according to longstanding Corps and EPA interpretations, it only exempts farming that has been ongoing at the same site since 1977. That's true for these 56 practices and other practices. That is why regulating land as if it were "waters" under the proposed rule will result in federal permit requirements for many commonplace and essential farming practices. Nothing in the interpretive rule says that the requirement to meet NRCS standards is limited to farmers using NRCS funds.	Again, there is no basis for the claim that the "normal farming" exemption extends only to those operations where farming has been ongoing since 1977.
• This rule is self-implementing, which means that a farmer is not required to seek approval from or consult with any agency (including USDA, EPA, and the Corps) to implement a conservation practice and be exempt from permitting.	Farmers have never had to seek pre-approval from any federal agencies to conduct exempt farming practices. The difference is that now farmers are more likely to be sued by the government or citizens groups claiming they did not fully comply with NRCS standards or that their practices are not all listed in the statute and in the interpretive rule.	As indicated earlier, NRDC understands the agencies' intent in issuing the interpretive rule to provide clarity that these activities undertaken in accordance with NRCS standards are exempt (unless they have impacts such that they are required to be permitted under the Act), nothing more, nothing less. However, the suite of practices the agencies exempted is so broad and in many cases seems far removed from "normal farming," and it was done without taking public comment, unlike the separate clean water rule. Consequently, NRDC actually agrees with the Farm Bureau – albeit for entirely different reasons – that the interpretive rule should be withdrawn.
NPDES permits will NOT be required for the application of fertilizer to fields or surrounding ditches or seasonal streams.	False. If there are jurisdictional "wetlands" (low spots) or ephemerals (drainage areas) within farm fields or ditches beside or within farm fields, and if even miniscule amounts of pesticide or fertilizer fall into those features (intentionally or not), this would be an	The Farm Bureau is exaggerating again. For one, runoff from treated fields due to rainfall or irrigation return flow is not required to be permitted. [Clean Water Act §502(14)] In addition, wetlands in farm fields, if they qualify as "prior converted cropland," are not covered

		application.
Federal agencies are NOT asserting regulatory authority over land use.	False. When federal agencies have the power to grant, deny or VETO a federally enforceable permit to plow, plant, build a fence, apply fertilizer or spray pesticide or disease control products on crops, that IS regulatory authority over land use. If a landowner cannot build a house on, build a fence over or plow through a jurisdictional wetland or ephemeral drain that runs across his or her land, then that is regulating land use. If a farmer cannot redirect a ditch to improve drainage on his soybean farm, then that is regulating land use. In addition, note the following quote from Secretary Darcy during a hearing on June 11 before the House Transportation & Infrastructure Water Resources and Environment Subcommittee – "*Once implemented, this rule will enable the Army Corps of Engineers to more effectively and efficiently protect our nation's aquatic resources while enabling appropriate development proposals to move forward.*" Congress did not give either EPA or the Army Corps the authority to determine "appropriate" land uses.	There are too many unfounded claims in this statement to rebut them all. Suffice it to say that the Farm Bureau ignores the numerous statutory exemptions available to agricultural dischargers, to say nothing of the exemptions that EPA and the Corps have created for water bodies on agricultural land. Also, the implication that permits might be denied or vetoed as a regular matter is simply belied by the facts. The Corps, for instance, denies fewer than 3% of requests for permits across the country. Finally, the point EPA is making and that the Farm Bureau would apparently rather ignore is that the Clean Water Act's permit programs apply when there is a discharge of pollutants into protected waters. Of course the law allows for the regulation of activities on land that pollute water; a sewage treatment plant must have a permit under the law that requires it to meet certain standards.
• The CWA only regulates the pollution and destruction of waters.	Actually, it is "navigable waters" or waters so closely connected to navigable waters that they have a significant effect on those navigable waters. Whether you like it or not, the Supreme Court has said this does not mean all waters (even "waters" that are usually dry).	The Farm Bureau can't seem to keep its story straight about what the law protects. In 2005, it said the Act only includes "waters that are 'navigable'—that 'were or had been navigable in fact or which could reasonably be so made.'" [Brief for American Farm Bureau Fed., *Rapanos v. U.S.*, No. 04-1034 (U.S., Dec. 2005)] In 2009, it joined a letter that was broader and said: "The undersigned organizations fully support the protection of navigable waters of the United States. We also fully understand that, to achieve that goal, we need to protect rivers and streams that flow to navigable waters." [Letter from Waters Advocacy Coalition to Senators Boxer & Inhofe (June 12, 2009)] The statement to the left appears to go further still, acknowledging that the law can protect those waters that significantly affect downstream waters. In light of this concession, the Farm Bureau should be embracing, not attacking, the proposed rule, which is based on a peer-reviewed scientific assessment of more than 1,000

Amigos Bravos • Food and Water Watch • Gila Conservation Coalition
Gila Resources Information Project • New Mexico Environmental Law Center
New Mexico Interfaith Power and Light • San Juan Citizens Alliance
Western Environmental Law Center • WildEarth Guardians

November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460
E-mail: OW-Docket@epa.gov

Re: EPA-HQ-OW-2011-0880, Proposed Clean Water Act Waters of the US Rule

To Whom It May Concern:

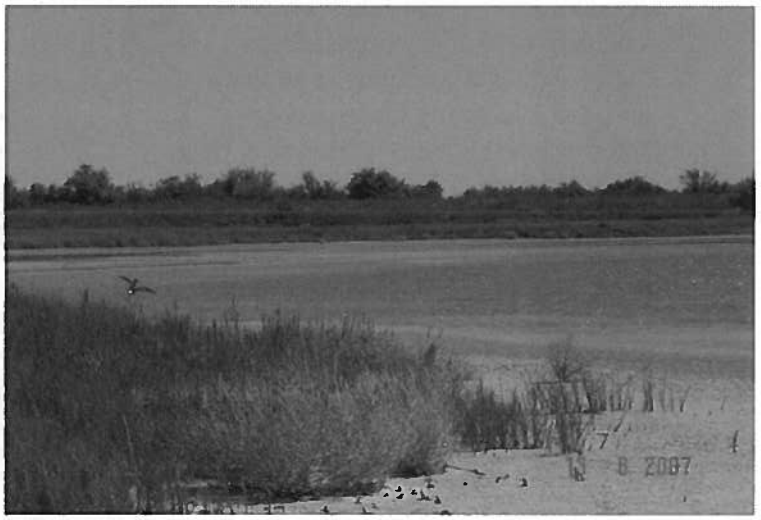
Amigos Bravos, Food and Water Watch, Gila Conservation Coalition, Gila Resources Information Project, New Mexico Environmental Law Center, New Mexico Interfaith Power and Light, Western Environmental Law Center and WildEarth Guardians represent thousands of New Mexicans who care about healthy rivers and water supplies. We write to thank you for taking steps to protect New Mexico's waters by clarifying the scope of the Clean Water Act through the proposed EPA and U.S. Army Corps of Engineers Definition of the Waters of United States Proposed Rule (Rule). We urge you to finalize this Rule and to take additional steps to restore clean water protections to New Mexico's scarce and precious waters.

In New Mexico, where up to 94% of our waters are intermittent and ephemeral,[1] we strongly support the clarification that Clean Water Act protections apply to streams that flow only seasonally. (See Figure 1 below for map of intermittent and ephemeral waters in New Mexico.) Since the US Supreme Court decisions in the Rapanos and Carabell cases there has been a loss of historic protections for many of our small streams which provide clean water for drinking, irrigation and wildlife in New Mexico. These Supreme Court decisions have made it confusing and burdensome for the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers to protect small streams and wetlands under the Clean Water Act. As a result, enforcement actions against polluters have declined, and it has become clear that some polluters are using the decisions as a justification to avoid permitting and reporting requirements for discharging pollutants into our waters. The Rule would clarify that some of the waters that have lost protections in the confusion after the Supreme Court decisions, namely ephemeral and intermittent tributaries, are once again protected under the Clean Water Act.

[1] See 2010-2012 State of New Mexico Clean Water Act 303d/305b Integrated Report, page 4. Available at: http://www.nmenv.state.nm.us/swqb/303d-305b/2010-2012/

127 vertebrate species include: 9 taxa classified as State and/or federal threatened, endangered or candidate; 8 taxa classified as State and/or federal sensitive or species of concern 24 taxa classified as State "Species of Greatest Conservation Need"; 25 game species; 1 taxa endemic to NM; and 10 species listed as of cultural importance to Pueblo Tribes (Exhibits 2 and 3). Even some fish use ephemeral waters. For example, Pecos Pupfish and White Sands Pupfish (both State Threatened, State "Species of Greatest Conservation Need", and federal Species of Concern) are exploiters which will move into ephemeral waters when available. The New Mexico Department of Game and Fish (NMDGF) actively manages 17 isolated wetlands and five intermittent streams (Mimbres River, Running Water Draw, Tularosa Creek, Three Rivers,Tajique Creek) to provide fishing opportunities for resident and non-resident anglers. [2]

Ephemeral waters are essential for all three species of spadefoot toads in New Mexico. Spadefoots stay burrowed in the soil (several years has been documented) until conditions are suitable for breeding. Emergence from burrows is triggered by thunderstorms and breeding occurs quickly (as short as one night) in ephemeral waters. Eggs hatch in as little as 15 hours, and tadpoles metamorphose and leave the ephemeral waters in as little as 13 days. Ephemeral waters also appear to be important to Box Turtles, Garter Snakes, and tiger salamanders. Many of crustaceans and insects also occur in ephemeral and intermittent streams.



Protecting ephemeral and intermittent waters in New Mexico is essential for protecting public health. EPA estimates that 280,000 people in New Mexico receive drinking water from sources that rely at least in part on ephemeral, intermittent or headwater streams (Exhibit 4). [3] These impacts are not hypothetical as there have been numerous instances of ephemeral waters being found not jurisdictional in New Mexico.[4]

Bitter Lake Playa Lake, NMED File Photo

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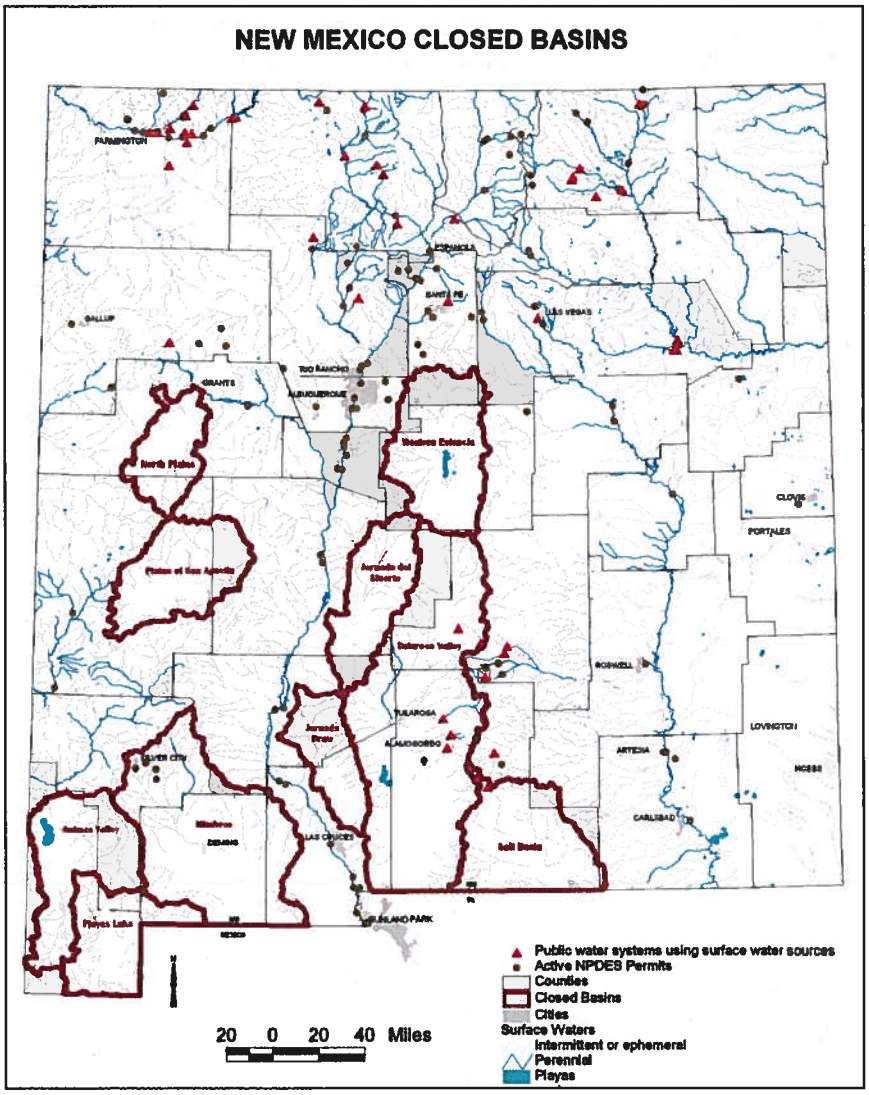
[2] Letter from Larry Bell, Director of the New Mexico Department of Game and Fish to EPA (NMDGF comment letter on the 2003 ANPRM), April 15, 2003, at 5.

[3] Note that this analysis was conducted in 2006 prior to the surface water diversions for the cities of Albuquerque and Santa Fe going online, so this number is most likely substantially greater now.

[4] See SPA-2007-636-ABQ, SPA-2007-00677-ABQ, SPA-2007-442-ABQ, SPA-2007-3540-ABQ, SPA-2008-54-AQB (research was conducted only for 2007 and 2008 and is not comprehensive)

water. Some residents drink directly from the river.[8] The Mimbres River, another closed basin waterbody, starts in the Aldo Leopold Wilderness area providing fishing and recreational opportunities for many locals and visitors alike. The Mimbres then leaves the wilderness area and flows through the Mimbres Valley providing essential water for irrigation (hay, alfafa and apples) and livestock.

Figure 2: Map of New Mexico Closed Basins



Closed basins are essential to New Mexico's economy and are essential to interstate commerce. The Department of Game and Fish has stated that they believe a significant

[8] Letter from Governor Bill Richardson to the EPA (New Mexico comment letter on the 2003 ANPRM), April 7, 2003, at 6.

Written Testimony of
Ron Curry
Secretary of the New Mexico Environment Department

Before the

United States House of Representatives
Transportation and Infrastructure Committee
Regarding the Clean Water Restoration Act (HR 2421)
July 17, 2007

Washington, DC

EXHIBIT I (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

As the man charged by Governor Richardson with protecting New Mexico's limited water supply from pollution, I can tell you that basing the decision on what water deserves to be clean on whether you can float a boat on it is an extremely limited view. Quite simply, it's lunacy. There are times during summer months when you can't even float a boat down the mighty Rio Grande, New Mexico's main surface water resource.

To put it another way, many of you today have glasses of water before you. As an analogy, imagine that those glasses collectively made up the waters of the United States. Before the 2001 SWANCC decision, the water in those glasses was protected by the Clean Water Act. However, today, because of the SWANCC and Rapanos decisions, as much as half of those glasses may no longer be protected.

I want you to have good, clean water in those glasses but if those Supreme Court decisions stand, I just can't say for sure.

The Clean Water Restoration Act solves this problem by replacing the term "navigable waters of the United States" with "waters of the United States." That fix simply restores protections that were in place for three decades when the quality of America's rivers, lakes, wetlands and streams improved dramatically. The Act also restores Congress' original intent when it passed the Clean Water Act in 1972. That intent was to protect our nation's water resources for future generations.

Local Impact

Nowhere have the limitations created by these two recent Supreme Court decisions been felt more acutely than in the desert Southwest. We simply have no water to waste. The water we do have — and its quality — is of utmost importance to the continued health of our citizens and the future economic development of our region. By excluding isolated, intrastate, non-navigable waters from protections previously guaranteed under the Clean Water Act, those decisions could remove federal protections from more than 90 percent of our state's waterbodies because they flow only intermittently. Additionally, waters within closed basins that cover up to one fifth of New Mexico would also be left vulnerable to pollution. That includes 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas and isolated wetlands. Threatened basins include the Tularosa, Mimbres, San Augustine, Estancia and Salt in central, south central and southwestern New Mexico.

Those misguided court rulings also threaten New Mexico's precious, limited groundwater resources — the source of 90 percent of our clean drinking water. Surface water bodies are often directly linked to groundwater resources. Unregulated, damaging surface dumping will therefore ultimately lead to pollution in the aquifer. We cannot allow this to happen. The water beneath just one of those basins — the Salt Basin — has been estimated by the U.S. Geological Survey to contain as much as 57 million acre feet of water, including 15 million acre feet that is potable. That could prove to be a vital and needed future water supply for the rapidly growing City of Las Cruces in southern New

Thank you for inviting me here today to testify on this important issue. I look forward to your questions.

EXHIBIT I (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

EXHIBIT J (ATTACHED TO REBUTTAL TESTIMONY OF RACHEL CONN)

State of New Mexico

Office of the Governor

Bill Richardson
Governor

July 12, 2007

The Honorable John D. Dingell
United States House of Representatives
Washington, DC 20515

The Honorable James L. Oberstar
United States House of Representatives
Washington, DC 20515

Dear Representatives Dingell and Oberstar:

The citizens of New Mexico recognize that our State's waters are essential to our culture, our health and well-being, and to our economic future. Therefore, I offer my support for the Clean Water Authority Restoration Act of 2007 and join you in protecting our Nation's waters in accordance with the original intent of the federal Clean Water Act.

In the southwest, water is in particularly limited supply, which underscores the need for well-defined robust federal protection under the Clean Water Act. In New Mexico alone, the aftermath of Supreme Court decisions *SWANCC (2001)* and *Carabel* and *Rapanos (2006)* have left 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas and isolated wetlands with limited federal protection. In addition, closed basins which comprise 20 percent of New Mexico's land area are considered to now fall outside of the jurisdiction of the Clean Water Act. Loss of federal protection leaves these and a significant portion of the Nation's critical waters exposed to destruction and pollution. In addition, the recent Supreme Court rulings have led to confusion regarding the scope of federal protection under Clean Water Act programs, which in turn has caused uncertainty and the potential for environmental degradation.

The goal of the Clean Water Act is clear and necessary: to restore and protect the chemical, physical, and biological integrity of the waters of the United States. This is a goal that can be achieved only through cooperative efforts that include all states, comprehensive protection at the federal level to support state's efforts, and by careful and vigilant attention to our aquatic ecosystems. To remove protection afforded by the Clean Water Act from critical portions of our Nation's aquatic systems and to protect only selected reaches of our waters will result in real costs for our citizens – costs to the economy, the environment and to our quality of life.

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)

REBUTTAL STATEMENT OF DR. DEKE GUNDERSEN
SUBMITTED ON BEHALF OF AMIGOS BRAVOS

Estimated Time for Rebuttal Testimony: 30 minutes

I. QUALIFICATIONS

My qualifications were set forth in my direct pre-filed written testimony, provided December 12, 2014.

II. CMI'S RESPONSE TO THE PROPOSED CHANGE OF THE ALUMINUM CRITERIA TO PRE-2009 TRIENNIAL REVIEW LEVELS—TESTIMONY BY DR. ROBERT W. GENSEMER

Dr. Gensemer states on page 3, line 23 that "*several*" acute and chronic aluminum studies were published post 1988 (date of the development of the original aluminum criteria). He goes on to state that "*these studies also demonstrated that the toxicity of aluminum to aquatic life is hardness-dependent.*"

First of all, it is not hardness that is protective against aluminum toxicity at some pH levels to aquatic species but, rather, calcium. When looking at GEI's summary of acute aluminum ("Al") data that were deemed acceptable for standards derivation and added to the updated Al acute and chronic database, only three studies were added to the acute database that specifically looked at the effects of hardness on aluminum toxicity. None of the new studies added to the chronic database specifically looked at the effects of hardness on aluminum toxicity.

(GMAV 5,698 ug/liter. The GMAV from this species is used to calculate the final acute value ("FAV"). However there are significant problems with this study. First the exposure water hardness listed in this study (245 mg/L as $CaCO_3$) does not correspond to the listed calcium and magnesium concentrations (160 and 90 mg/L respectively). Based on these values the hardness should be 769 mg/L as $CaCO_3$, which is over 3-fold higher than the listed hardness. In addition, the aluminum that was added to exposure water was $Al(NH_4SO_4)2 \bullet 12H_20$ (aluminum ammonium sulfate). There is concern that the aluminum ammonium sulfate would contribute ammonia to the exposure solutions (2 ammonia/ammonium ions for every one aluminum ion). The level of aluminum in exposure chambers was not measured in this study as well. Therefore this study should not be used, particularly when this species represents the 4th most sensitive species based on acute toxicity.

Data from a study looking at the toxicity of a variety of metals (including aluminum) on *D. magna* were used to calculate the pooled-hardness slope, final acute value, and final acute-chronic ratio (Biesinger and Christensen 1972). However there are at least four problems with this study that warrants omission from the database. First, the exposure water (Lake Superior water had other metal contaminants in addition to the added aluminum (range; Cr = 2-20 ppb, Al 1-26 ppb, Zn 1-2.7 ppb, Cu 0.3-3.2 ppb, Sr 12-27ppb, barium 8-22 ppb, Fe 2-83 ppb, Mn 0.2-11.5 ppb) and the aluminum concentration was not measured in exposure water. Second, the number of test concentrations was not listed, and the pH of the exposure water (before addition of metals had a large range (7.4 – 8.2), and was not reported for the acute test chambers. Third, the authors reported that in the chronic chambers with added aluminum the pH changed from 6.5 – 7.5, which suggests that the pH likely changed in the acute exposures as well but this was not measured or reported (pH has a very significant effect on aluminum speciation/toxicity). This certainly warrants the omission of this data for the derivation of both acute and chronic criteria and in fact is likely why the EPA omitted this study from the original aluminum criteria chronic database (Ambient Water Quality Criteria for Aluminum 1988). Finally, the study by Kimball (1978 manuscript), was used to calculate the slope value from *D. magna* data, and provided the acceptable hardness range for the species. This study does not seem to be validated in any way (master's thesis, dissertation

and temperature had the largest influence on aluminum toxicity with calcium, sodium and fluoride having only having a minor influence.

Lydersen et al. (2002) found that in brown trout exposed to aluminum in natural waters that mortality increased with increasing temperature and that temperature had a more significant affect on aluminum toxicity versus total organic carbon. Poleo et al. (1991) and Poleo and Muniz (1993) saw a similar relationship between aluminum toxicity and temperature for Atlantic salmon. The observed increase in toxicity was explained by enhanced aluminum polymerization with increased temperature and an increase in fish metabolism (higher O_2 demand) and decrease in surface water dissolved oxygen levels. This could be particularly significant for salmonid species (species that are sensitive to water temperature and dissolved oxygen levels) that inhabit surface waters where temperature and dissolved oxygen levels can be limiting late in summer (i.e. some New Mexico waters). Again, this shows that there are other water quality parameters (dissolved organic carbon, temperature, and pH) that play significant role (perhaps more so than hardness) in influencing aluminum toxicity to aquatic species and these must be considered along with calcium if you want to protect all species in all situations.

On page 7, line 14, Dr. Gensemer states that "*these hardness-based criteria are fully protective of aquatic life in New Mexico (within the intended pH range of 6.5 - 9.0).*" Once again, however, only by looking at multiple water quality parameters can we be certain that the criteria will be full protective. In addition, since studies were not used that include recreational important species (i.e. rainbow trout) we cannot be certain that criteria will be fully protective. An example of the significance of using a recreationally important species in the derivation of hardness-based equations is as follows: Using LC50s that were calculated by Gundersen et al. (1994) at different hardness values for a recreationally important species (rainbow trout) in flow-through toxicity tests at weakly alkaline pH (8.06 – 8.56), we calculated a slope of 0.1822, which is lower than the slope calculated for the New Mexico criteria (1.3695), suggesting that LC50s (based on total aluminum) are less dependent on hardness at weakly alkaline pH when looking at a recreational important species (rainbow trout).

Notably, Section IV, (Final Acute Value), part P. of the: USEPA Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic