STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF:

THE PETITION TO AMEND
THE STANDARDS FOR INTERSTATE
AND INTRASTATE SURFACE WATERS,
20.6.4 NMAC, **WQCC No. 21-16**

Triad National Security, LLC and
United States Department of Energy,

Petitioners

TRIAD NATIONAL SECURITY, LLC AND U.S. DEPARTMENT OF ENERGY
PETITION FOR RULEMAKING TO AMEND 20.6.4 NMAC

Triad National Security, LLC, ("Triad") and the United States Department of Energy, National Nuclear Security Administration ("DOE") (collectively "Triad/DOE"), pursuant to NMSA 1978, § 74-6-6.B (1993) and 20.1.6.200 NMAC, hereby submit their Petition for Rulemaking to amend the Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC.

In support of this Petition, Triad/DOE state:

BACKGROUND

A. Adoption of Water Quality Standards

1. Pursuant to the Water Quality Act ("Act"), NMSA 1978, §§ 74-6-1 to 74-6-17, the New Mexico Water Quality Control Commission ("WQCC" or "Commission") is required to adopt water quality standards for surface and ground waters of the State of New Mexico based on "credible scientific data and other evidence," including the designated uses of the waters and "the water quality criteria necessary to protect such uses." NMSA 1978, § 74-6-4(C) (2003).

2. The Commission has adopted water quality standards for surface waters in New Mexico. *See* 20.6.4 NMAC. Those standards include criteria for perennial, intermittent, and

ephemeral waters with the Los Alamos National Laboratory ("LANL"), as well as standards of state-wide application that apply to waters within LANL.

3. The Act, § 74-6-6.B, and WQCC regulations, 20.1.6.200 NMAC, authorize a non-agency party to petition the Commission to adopt, amend, or repeal water quality standards. Triad/DOE is submitting this Petition for Rulemaking pursuant to the § 74.6.6.B and 20.1.6.200 NMAC.

B. Triennial Review of Surface Water Quality Standards

4. The federal Clean Water Act ("federal Act") requires a state to hold a public review of water quality standards at least once every three years. 33 U.S.C. § 1313(c).

5. Consistent with the federal Act, the Commission holds a review of its standards every three years. 20.6.4.10 NMAC. When "justified by sufficient data and information," the Commission will modify the water quality criteria "to protect the attainable uses." *Id.*

6. The 2020 Triennial Review was initiated on August 19, 2020 by the New Mexico Environment Department's ("NMED") filing of its *Petition to Amend the Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC) and Request for Hearing*. NMED's Proposed Amendments to the New Mexico Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC, and the Statement of Reasons for the proposed changes were Attachments 2 and 3, respectively, to NMED's Petition. In its Petition, NMED requested that the WQCC "expressly limit the scope of this rulemaking to the amendments proposed by the Department in this Petition, and any logical outgrowths thereof."

7. On October 13, 2020, the WQCC considered and granted the NMED's Petition.

8. On October 19, 2020, the WQCC ordered that the NMED petition be scheduled for public hearing beginning July 13, 2021.

9. On November 2, 2020, NMED published its *Notice of Public Comment Period and Informational Meetings Regarding the New Mexico Environment Department's Proposed Amendments to Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC) – Triennial Review* (November 2, 2020). NMED provided an internet link to the full text of the proposed amendments (the Public Comment Draft).

10. On November, 25, 2020, NMED issued an *Extension of Public Comment Period Regarding the New Mexico Environment Department's Proposed Amendments to Standards for Interstate and Intrastate Surface Waters (20.6.4 NMAC) – Triennial Review* (November 25, 2020).

11. On January 6, 2021, Triad submitted its *Comments on the Public Comment Draft of NMED's Proposed Amendments to Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC* to NMED and the WQCC as part of the Triennial Review.

12. On January 29, 2021, NMED published notice of the public hearing on its petition, to begin on July 13, 2021. The Notice stated that "[p]ursuant to 20.1.6.202 NMAC and the Procedural Order issued by the hearing officer on November 9, 2020, those wishing to present technical testimony must file a written notice of intent to present technical testimony with the WQCC Administrator on or before 5:00 p.m. Mountain Daylight Time on April 12, 2021, 92 days prior to the hearing."

13. Pursuant to the WQCC's hearing procedures, 20.1.6.202.A(5) NMAC, the notice of intent to present technical testimony "may include the text of any recommended modifications to the proposed regulatory change."

14. Until today, NMED had not issued proposed modifications to the proposed regulatory change resulting from comments submitted in response to the November 2, 2020

public notice. Triad/DOE has not evaluated NMED's modification to the Public Comment Draft. If appropriate, Triad/DOE will revise its proposed changes prior to the WQCC's consideration of this petition.

PETITION FOR HEARING

15. Triad/DOE are unsure whether a number of their recommended changes to NMED's draft amendments will be incorporated in an NMED revised draft or would be considered "logical outgrowths" of NMED's amendments.

16. As a result, Triad/DOE is submitting this petition for rulemaking on the proposed changes attached to this Petition. This petition is a protective filing to assure the Triad/DOE proposed changes are considered by the WQCC.

17. If NMED incorporates Triad/DOE's proposed changes in a revised draft or the WQCC agrees that the changes are a "logical outgrowth" of NMED's proposed amendments, as Triad/DOE believes them to be, then Triad/DOE will withdraw all or a portion of this petition.

18. Triad/DOE estimates that a hearing on its proposed amendments will likely take 2 days to complete. Triad/DOE request that a hearing on its proposed amendments be held in conjunction with the Triennial Review hearing in July 2021 or as shortly thereafter as possible.

CONCLUSION

Based on the foregoing, Triad/DOE requests that the Commission schedule a public hearing at the earliest possible date, preferably in July 2021, on its petition to amend 20.6.4 NMAC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2021, a true and correct copy of the foregoing ***Petition for Rulemaking to Amend 20.6.4 NMAC*** was served via electronic mail to the following:

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PROPOSED AMENDMENTS

Proposed changes to the current 20.6.4. NMAC are shown with additions underlined and deletions indicated by strikethrough.

20.6.4.7 DEFINITIONS: Terms defined in the New Mexico Water Quality Act, but not defined in this part will have the meaning given in the Water Quality Act.

A. Terms beginning with numerals or the letter "A," and abbreviations for units.

(1) 4T3 temperature" means the temperature not to be exceeded for four or more consecutive hours in a 24-hour period on more than three consecutive days.

(2) 6T3 temperature" means the temperature not to be exceeded for six or more consecutive hours in a 24-hour period on more than three consecutive days.

(3) Abbreviations used to indicate units are defined as follows:

(a) cfu/100 mL" means colony-forming units per 100 milliliters; the results for *E. coli* may be reported as either colony forming units (CFU) or the most probable number (MPN), depending on the analytical method used;

(b) cfs" means cubic feet per second;

(c) µg/L" means micrograms per liter, equivalent to parts per billion when the specific gravity of the solution equals 1.0;

(d) µS/cm" means microsiemens per centimeter; one µS/cm is equal to one µmho/cm;

(e) mg/kg" means milligrams per kilogram, equivalent to parts per million;

(f) mg/L" means milligrams per liter, equivalent to parts per million when the specific gravity of the solution equals 1.0;

(g) MPN/100 mL" means most probable number per 100 milliliters; the results for *E. coli* may be reported as either CFU or MPN, depending on the analytical method used;

(h) NTU" means nephelometric turbidity unit;

(i) pCi/L" means picocuries per liter;

(j) pH" means the measure of the acidity or alkalinity and is expressed in standard units (su).

(4) Acute toxicity" means toxicity involving a stimulus severe enough to induce a response in 96 hours of exposure or less. Acute toxicity is not always measured in terms of lethality, but may include other toxic effects that occur within a short time period.

(5) Adjusted gross alpha" means the total radioactivity due to alpha particle emission as inferred from measurements on a dry sample, including radium-226, but excluding radon-222 and uranium. Also excluded are source, special nuclear and by-product material as defined by the Atomic Energy Act of 1954.

(6) Aquatic life" means any plant or animal life that uses surface water as primary habitat for at least a portion of its life cycle, but does not include avian or mammalian species.

(7) Attainable" means achievable by the imposition of effluent limits required under sections 301(b) and 306 of the Clean Water Act and implementation of cost-effective and reasonable best management practices for nonpoint source control.

B. Terms beginning with the letter "B".

(1) Best management practices" or "BMPs":

(a) for national pollutant discharge elimination system (NPDES) permitting purposes means schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce the pollution of "waters of the United States;" BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal or drainage from raw material storage; or

(b) for nonpoint source pollution control purposes means methods, measures or practices selected by an agency to meet its nonpoint source control needs; BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures; BMPS can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters; BMPs for nonpoint source pollution control purposes shall not be mandatory except as required by state or federal law.

(2) Bioaccumulation" refers to the uptake and retention of a substance by an organism from its surrounding medium and food.

(3) Bioaccumulation factor" is the ratio of a substance's concentration in tissue versus its concentration in ambient water, in situations where the organism and the food chain are exposed.

(4) Biomonitoring" means the use of living organisms to test the suitability of effluents for discharge into receiving waters or to test the quality of surface waters of the state.

C. Terms beginning with the letter "C".

(1) CAS number" means an assigned number by chemical abstract service (CAS) to identify a substance. CAS numbers index information published in chemical abstracts by the American chemical society.

(2) Chronic toxicity" means toxicity involving a stimulus that lingers or continues for a relatively long period relative to the life span of an organism. Chronic effects include, but are not limited to, lethality, growth impairment, behavioral modifications, disease and reduced reproduction.

(3) Classified water of the state" means a surface water of the state, or reach of a surface water of the state, for which the commission has adopted a segment description and has designated a use or uses and applicable water quality criteria in 20.6.4.101 through 20.6.4.899 NMAC.

(4) Closed basin" is a basin where topography prevents the surface outflow of water and water escapes by evapotranspiration or percolation.

(5) Coldwater" in reference to an aquatic life use means a surface water of the state where the water temperature and other characteristics are suitable for the support or propagation or both of coldwater aquatic life.

(6) Coolwater" in reference to an aquatic life use means the water temperature and other characteristics are suitable for the support or propagation of aquatic life whose physiological tolerances are intermediate between and may overlap those of warm and coldwater aquatic life.

(7) Commission" means the New Mexico water quality control commission.

(8) Criteria" are elements of state water quality standards, expressed as constituent concentrations, levels or narrative statements, representing a quality of water that supports a use. When criteria are met, water quality will protect the designated use.

D. Terms beginning with the letter "D".

(1) DDT and derivatives" means 4,4'-DDT (CAS number 50293), 4,4'-DDE (CAS number 72559) and 4,4'-DDD (CAS number 72548).

(2) Department" means the New Mexico environment department.

(3) Designated use" means a use specified in 20.6.4.97 through 20.6.4.899 NMAC for a surface water of the state whether or not it is being attained.

(4) Dissolved" refers to the fraction of a constituent of a water sample that passes through a 0.45-micrometer pore-size filter. The "dissolved" fraction is also termed "filterable residue."

(5) Domestic water supply" means a surface water of the state that could be used for drinking or culinary purposes after disinfection.

E. Terms beginning with the letter "E".

(1) E. coli" means the bacteria Escherichia coli.

(2) Ephemeral" when used to describe a surface water of the state means the water body contains water briefly only in direct response to precipitation; its bed is always above the water table of the adjacent region.

(3) Existing use" means a use actually attained in a surface water of the state on or after November 28, 1975, whether or not it is a designated use.

F. Terms beginning with the letter "F".

(1) Fish culture" means production of coldwater or warmwater fishes in a hatchery or rearing station.

(2) Fish early life stages" means the egg and larval stages of development of fish ending when the fish has its full complement of fin rays and loses larval characteristics.

G. Terms beginning with the letter "G". [RESERVED]

H. Terms beginning with the letter "H".

(1) High quality coldwater" in reference to an aquatic life use means a perennial surface water of the state in a minimally disturbed condition with considerable aesthetic value and superior coldwater aquatic life habitat. A surface water of the state to be so categorized must have water quality, stream bed characteristics and other attributes of habitat sufficient to protect and maintain a propagating coldwater aquatic life population.

(2) Human health-organism only" means the health of humans who ingest fish or other aquatic organisms from waters that contain pollutants.

I. Terms beginning with the letter "I".

(1) Industrial water supply" means the use or storage of water by a facility for process operations unless the water is supplied by a public water system. Industrial water supply does not include irrigation or other agricultural uses.

(2) Intermittent" when used to describe a surface water of the state means the water body contains water for extended periods only at certain times of the year, such as when it receives seasonal flow from springs or melting snow.

(3) Interstate waters" means all surface waters of the state that cross or form a part of the border between states.

(4) Intrastate waters" means all surface waters of the state that are not interstate waters.

(5) Irrigation" means application of water to land areas to supply the water needs of beneficial plants.

(6) Irrigation storage" means storage of water to supply the needs of beneficial plants.

J. Terms beginning with the letter "J". [RESERVED]

K. Terms beginning with the letter "K". [RESERVED]

L. Terms beginning with the letter "L".

(1) LC-50" means the concentration of a substance that is lethal to fifty percent of the test organisms within a defined time period. The length of the time period, which may vary from 24 hours to one week or more, depends on the test method selected to yield the information desired.

(2) Limited aquatic life" as a designated use, means the surface water is capable of supporting only a limited community of aquatic life. This subcategory includes surface waters that support aquatic species selectively adapted to take advantage of naturally occurring rapid environmental changes, perennial, ephemeral or intermittent water, high turbidity, fluctuating temperature, low dissolved oxygen content or unique chemical characteristics.

(3) Livestock watering" means the use of a surface water of the state as a supply of water for consumption by livestock.

M. Terms beginning with the letter "M".

(1) Marginal coldwater" in reference to an aquatic life use means that natural intermittent or low flows, or other natural habitat conditions severely limit maintenance of a coldwater aquatic life population or historical data indicate that the temperature in the surface water of the state may exceed 25°C (77°F).

(2) Marginal warmwater" in reference to an aquatic life use means natural intermittent or low flow or other natural habitat conditions severely limit the ability of the surface water of the state to sustain a natural aquatic life population on a continuous annual basis; or historical data indicate that natural water temperature routinely exceeds 32.2°C (90°F).

(3) Maximum temperature" means the instantaneous temperature not to be exceeded at any time.

(4) Minimum quantification level" means the minimum quantification level for a constituent determined by official published documents of the United States environmental protection agency.

N. Terms beginning with the letter "N".

(1) Natural background" means that portion of a pollutant load in a surface water resulting only from non-anthropogenic sources. Natural background does not include impacts resulting from historic or existing human activities.

(2) Natural causes" means those causal agents that would affect water quality and the effect is not caused by human activity but is due to naturally occurring conditions.

(3) Nonpoint source" means any source of pollutants not regulated as a point source that degrades the quality or adversely affects the biological, chemical or physical integrity of surface waters of the state.

O. Terms beginning with the letter "O".

(1) Organoleptic" means the capability to produce a detectable sensory stimulus such as odor or taste.

(2) Oversight agency" means a state or federal agency, such as the United States department of agriculture forest service, that is responsible for land use or water quality management decisions affecting nonpoint source discharges where an outstanding national resource water is located.

P. Terms beginning with the letter "P".

(1) Playa" means a shallow closed basin lake typically found in the high plains and deserts.

(2) Perennial" when used to describe a surface water of the state means the water body typically contains water throughout the year and rarely experiences dry periods.

(3) Point source" means any discernible, confined and discrete conveyance from which pollutants are or may be discharged into a surface water of the state, but does not include return flows from irrigated agriculture.

(4) Practicable" means that which may be done, practiced or accomplished; that which is performable, feasible, possible.

(5) Primary contact" means any recreational or other water use in which there is prolonged and intimate human contact with the water, such as swimming and water skiing, involving considerable risk of ingesting water in quantities sufficient to pose a significant health hazard. Primary contact also means any use of surface waters of the state for cultural, religious or ceremonial purposes in which there is intimate human contact with the water, including but not limited to ingestion or immersion, that could pose a significant health hazard.

(6) Public water supply" means the use or storage of water to supply a public water system as defined by New Mexico's Drinking Water Regulations, 20.7.10 NMAC. Water provided by a public water system may need to undergo treatment to achieve drinking water quality.

Q. Terms beginning with the letter "Q". [RESERVED]

R. Terms beginning with the letter "R". [RESERVED]

S. Terms beginning with the letter "S".

(1) Secondary contact" means any recreational or other water use in which human contact with the water may occur and in which the probability of ingesting appreciable quantities of water is minimal, such as fishing, wading, commercial and recreational boating and any limited seasonal contact.

(2) Segment" means a classified water of the state described in 20.6.4.101 through 20.6.4.899 NMAC. The water within a segment should have the same uses, similar hydrologic characteristics or flow regimes, and natural physical, chemical and biological characteristics and exhibit similar reactions to external stresses, such as the discharge of pollutants.

(3) Specific conductance" is a measure of the ability of a water solution to conduct an electrical current.

(4) State" means the state of New Mexico.

(5) Surface water(s) of the state" means all surface waters situated wholly or partly within or bordering upon the state, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, reservoirs or natural ponds. Surface waters of the state also means all tributaries of such waters, including adjacent wetlands, any manmade bodies of water that were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state, and any "waters of the United States" as defined under the Clean Water Act that are not included in the

preceding description. Surface waters of the state does not include private waters that do not combine with other surface or subsurface water or any water under tribal regulatory jurisdiction pursuant to Section 518 of the Clean Water Act. Waste treatment systems, including treatment ponds or lagoons designed and actively used to meet requirements of the Clean Water Act (other than cooling ponds as defined in 40 CFR Part 423.11(m) that also meet the criteria of this definition), are not surface waters of the state, unless they were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state.

T. Terms beginning with the letter "T".

(1) TDS" means total dissolved solids, also termed "total filterable residue."

(2) Toxic pollutant" means those pollutants or combination of pollutants ~~including disease causing agents, that after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will cause death, shortened life spans, disease, adverse behavioral changes, reproductive or physiological impairments or physical deformation in such organisms or their offspring~~ listed by the EPA Administrator under section 307(a) of the federal Clean Water Act, 33 U.S.C. § 1313(a) or in the list below**.**

(3) Tributary" means a perennial, intermittent or ephemeral waterbody that flows into a larger waterbody, and includes a tributary of a tributary.

(4) Turbidity" is an expression of the optical property in water that causes incident light to be scattered or absorbed rather than transmitted in straight lines.

U. Terms beginning with the letter "U",

(1) "Use Attainability Analysis" means a structured scientific assessment of the factors affecting the attainment of the use, which include physical, chemical, biological, and economic factors as described in 40 CFR 131.10(g).

V. Terms beginning with the letter "V". [RESERVED]

W. Terms beginning with the letter "W".

(1) Warmwater" with reference to an aquatic life use means that water temperature and other characteristics are suitable for the support or propagation or both of warmwater aquatic life.

(2) Water contaminant" means any substance that could alter if discharged or spilled the physical, chemical, biological or radiological qualities of water. "Water contaminant" does not mean source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, but may include all other radioactive materials, including but not limited to radium and accelerator-produced isotopes.

(3) Water pollutant" means a water contaminant in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property.

(4) Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions in New Mexico. Wetlands that are constructed outside of a surface water of the state for the purpose of providing wastewater treatment and that do not impound a surface water of the state are not included in this definition.

(5) Wildlife habitat" means a surface water of the state used by plants and animals not considered as pathogens, vectors for pathogens or intermediate hosts for pathogens for humans or domesticated livestock and plants.

X. Terms beginning with the letters "X" through "Z". [RESERVED]

20.6.4.12 COMPLIANCE WITH WATER QUALITY STANDARDS: The following provisions apply to determining compliance for enforcement purposes; they do not apply for purposes of determining attainment of uses. The department has developed assessment protocols for the purpose of determining attainment of uses that are available for review from the department's surface water quality bureau.

A. Compliance with acute water quality criteria shall be determined from the analytical results of a single grab sample. Acute criteria shall not be exceeded.

B. Compliance with chronic water quality criteria shall be determined from the arithmetic mean of the analytical results of samples collected using applicable protocols. Chronic criteria shall not be exceeded more than once every three years.

C. Compliance with water quality standards for total ammonia shall be determined by performing the biomonitoring procedures set out in Subsections D and E of 20.6.4.14 NMAC, or by attainment of applicable ammonia criteria set out in Subsections K, L and M of 20.6.4.900 NMAC.

D. Compliance with the human health-organism only criteria shall be determined from the analytical results of representative grab samples, as defined in the water quality management plan. Human health-organism only criteria shall not be exceeded.

E. The commission may establish a numeric water quality criterion at a concentration that is below the minimum quantification level of test procedures approved under 40 CFR Part 136. In such cases, the water quality standard is enforceable at the minimum quantification level. Compliance shall be determined according to sufficiently sensitive test procedures (i.e., methods) approved under 40 CFR Part 136 for the analysis of pollutants or pollutant parameters.

F. For compliance with hardness-dependent numeric criteria, dissolved hardness (as mg $CaCO_3$/L) shall be determined from a sample taken at the same time that the sample for the contaminant is taken.

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 permit renewal or modification and shall be written to require compliance at the earliest practicable time. Compliance schedules shall also specify milestone dates so as to measure progress towards final project completion (e.g., design completion, construction start, construction completion, date of compliance).

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

20.6.4.14 SAMPLING AND ANALYSIS:

A. 40 CFR Part 136 approved methods shall be used to determine compliance with these standards and in Section 401 certifications under the federal Clean Water Act. In all other cases, sampling and analytical techniques shall conform with methods described in the following references unless otherwise specified by the commission pursuant to a petition to amend these standards:

(1) *Guidelines Establishing Test Procedures For The Analysis Of Pollutants Under The Clean Water Act*," 40 CFR Part 136 or any test procedure approved or accepted by EPA using procedures provided in 40 CFR Parts 136.3(d), 136.4, and 136.5;

(2) *Standard Methods For The Examination Of Water And Wastewater*, latest edition, American public health association;

(3) *Methods For Chemical Analysis Of Water And Waste*, and other methods published by EPA office of research and development or office of water;

(4) *Techniques Of Water Resource Investigations Of The U.S. Geological Survey*;

(5) *Annual Book Of ASTM Standards*: volumes 11.01 and 11.02, water (I) and (II), latest edition, ASTM international;

(6) *Federal Register*, latest methods published for monitoring pursuant to Resource Conservation and Recovery Act regulations;

(7) *National Handbook Of Recommended Methods For Water-Data Acquisition*, latest edition, prepared cooperatively by agencies of the United States government under the sponsorship of the U.S. geological survey; or

(8) *Federal Register*, latest methods published for monitoring pursuant to the Safe Drinking Water Act regulations.

B. Bacteriological Surveys: The monthly geometric mean shall be used in assessing attainment of criteria when a minimum of five samples is collected in a 30-day period.

C. Sampling Procedures:

(1) Streams: Stream monitoring stations below discharges shall be located a sufficient distance downstream to ensure adequate vertical and lateral mixing.

(2) Lakes: Sampling stations in lakes shall be located at least 250 feet from a discharge.

(3) Lakes: Except for the restriction specified in Paragraph (2) of this subsection, lake sampling stations shall be located at any site where the attainment of a water quality criterion is to be assessed. Water quality measurements taken at intervals in the entire water column at a sampling station shall be averaged for the epilimnion, or in the absence of an epilimnion, for the upper one-third of the water column of the lake to determine attainment of criteria, except that attainment of criteria for toxic pollutants shall be assessed during periods of complete vertical mixing, e.g., during spring or fall turnover, or by taking depth-integrated composite samples of the water column.

D. Acute toxicity of effluent to aquatic life shall be determined using the procedures specified in U.S. environmental protection agency "*Methods For Measuring The Acute Toxicity Of Effluents And Receiving Waters To Freshwater And Marine Organisms*" (5th Ed., 2002, EPA 821-R-02-012), or latest edition thereof if adopted by EPA at 40 CFR Part 136, which is incorporated herein by reference. Acute toxicities of substances shall be determined using at least two species tested in whole effluent and a series of effluent dilutions. Acute toxicity due to

discharges shall not occur within the wastewater mixing zone in any surface water of the state with an existing or designated aquatic life use.

E. Chronic toxicity of effluent or ambient surface waters of the state to aquatic life shall be determined using the procedures specified in U.S. environmental protection agency "*Short-Term Methods For Estimating The Chronic Toxicity Of Effluents And Receiving Waters To Freshwater Organisms*" (4th Ed., 2002, EPA 821-R-02-013), or latest edition thereof if adopted by EPA at 40 CFR Part 136, which is incorporated herein by reference. Chronic toxicities of substances shall be determined using at least two species tested in ambient surface water or whole effluent and a series of effluent dilutions. Chronic toxicity due to discharges shall not occur at the critical low flow, or any flow greater than the critical low flow, in any surface water of the state with an existing or designated aquatic life use more than once every three years.

20.6.4.15 USE ATTAINABILITY ANALYSIS:

A. ~~A use attainability analysis is a scientific study conducted for the purpose of assessing the factors affecting the attainment of a use. Whenever a use attainability analysis is conducted, it shall be subject to the requirements and limitations set forth in 40 CFR Part 131, Water Quality Standards; specifically, Subsections 131.3(g), 131.10(g), 131.10(h) and 131.10(j) shall be applicable.~~ A use attainability analysis must be conducted when designating uses that do not include uses specified in Section 101(a)(2) of the federal Clean Water Act or when designating sub-categories of these uses requires less stringent criteria than previously applicable. When removing designated uses that are not Section 101(a)(2) uses, a use attainability analysis is not required**.**

(1) The commission may remove a designated use specified in Section 101(a)(2) of the federal Clean Water Act or adopt subcategories of a Section 101(a)(2) use requiring less stringent criteria only if a use attainability analysis demonstrates that attaining the use is not feasible because of a factor listed in 40 CFR 131.10(g). Section 101(a)(2) uses, which refer to the protection and propagation of fish, shellfish and wildlife and recreation in and on the water, are also specified in Subsection B of 20.6.4.6 NMAC.

(2) A designated use cannot be removed if it is an existing use unless a use requiring more stringent criteria is designated.

B. A use attainability analysis shall assess the physical, chemical, biological, economic or other factors affecting the attainment of a use. The analysis shall rely on scientifically defensible methods such as the methods described in the following documents:

(1) *Technical Support Manual: Waterbody Surveys And Assessments For Conducting Use Attainability Analyses*, volume I (November 1983) and volume III (November 1984) or latest editions, United States environmental protection agency, office of water, regulations and standards, Washington, D.C., for the evaluation of aquatic life or wildlife uses;

(2) the department's *Hydrology Protocol*, latest edition, approved by the commission, for identifying ephemeral and intermittent waters; or

(3) *Interim Economic Guidance For Water Quality Standards - Workbook*, March 1995, United States environmental protection agency, office of water, Washington, D.C. for evaluating economic impacts.

C. If a use attainability analysis based on the department's *Hydrology Protocol* (latest edition), approved by the commission, demonstrates to the satisfaction of the department that Section 101(a)(2) uses are not feasible in an ephemeral water body, the

department shall post the use attainability analysis on its water quality standards website and notify its interested parties list of a 30-day public comment period. After reviewing any comments received, the department may proceed by submitting the use attainability analysis and response to comments to region 6 EPA for technical approval. If technical approval is granted, the water shall be subject to 20.6.4.97 NMAC. The use attainability analysis, the technical approval, and the applicability of 20.6.4.97 NMAC to the water shall be posted on the department's water quality standards website. The department shall periodically petition the commission to list ephemeral waters under Subsection C of 20.6.4.97 NMAC and to incorporate changes to classified segments as appropriate.

D. Use attainability analysis conducted by an entity other than the department. Any person may submit notice to the department stating the intent to conduct a use attainability analysis. The proponent shall develop a work plan to conduct the use attainability analysis and shall submit the work plan to the department and region 6 EPA for review and comment. The work plan shall identify the scope of data currently available and the scope of data to be gathered, the factors affecting use attainment that will be analyzed and provisions for public notice and consultation with appropriate state and federal agencies. The department will review and approve work plans, or provide written basis for non-approval, within thirty days of submittal or, in the case of a previously non-approved work plan, re-submittal by a proponent. Upon approval of the work plan by the department, the proponent shall conduct the use attainability analysis in accordance with the approved work plan. The cost of such analysis shall be the responsibility of the proponent. Upon completion of the use attainability analysis, the proponent shall submit the data, findings and conclusions to the department. The department or the proponent may petition the commission to modify the designated use if the conclusions of the analysis support such action.

20.6.4.126 RIO GRANDE BASIN: Perennial watercourses within lands managed by the U.S. Department of Energy (DOE) within Los Alamos National Laboratory (LANL), including but not limited to: ~~portions of~~ Cañon de Valle from ~~Los Alamos National Laboratory (~~LANL~~)~~ stream gage E256 upstream to Burning Ground spring, Sandia canyon from Sigma canyon upstream to LANL NPDES Outfall 001, Pajarito canyon from 0.5 miles below Arroyo de La Delfe upstream to Homestead Spring, Arroyo de la Delfe from Pajarito canyon to Kieling Spring, ~~into~~ Starmer's gulch and Starmer's spring and Water canyon from Area-A canyon upstream to State Route 501.

A. Designated uses: coldwater aquatic life, livestock watering, wildlife habitat and secondary contact.

B. Criteria: the use-specific numeric criteria set forth in 20.6.4.900 NMAC are applicable to the designated uses.

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 or 20.6.4.140 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 aquatic life and secondary contact.

B. Criteria: the use-specific criteria in 20.6.4.900 NMAC are applicable to the designated uses, except that the following segment-specific criteria apply: the acute total ammonia criteria set forth in Subsection K of 20.6.4.900 NMAC (salmonids absent).

20.6.4.140 RIO GRANDE BASIN: Intermittent portions of Effluent canyon from Mortandad canyon confluence upstream its headwaters, S-Site canyon from alluvial groundwater well MSC 16-06293 upstream to Martin Spring, and Two-Mile canyon from LANL stream gage E244 upstream to its confluence with upper Two Mile canyon. (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, marginal warmwater aquatic life, secondary contact.

B. Criteria: the use-specific numeric criteria set forth in 20.6.4.900 NMAC are applicable to the designated uses.

PROPOSED AMENDMENTS TO STANDARDS AND STATEMENT OF BASIS

Proposed changes to the current 20.6.4 NMAC are shown with additions underlined and deletions indicated by strikethrough. The basis for each proposal is indicated below the proposal. Please note that this proposal *does not* contain comparisons with New Mexico Environment Department's ("NMED") August 19, 2020 Proposed Amendments to the New Mexico Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC, which was noticed on November 2, 2020 (Public Comment Draft).

1. 20.6.4.7.L(2) Modify Definition of "Limited Aquatic Life"

Amend the definition of "limited aquatic life" as follows:

> "Limited aquatic life" as a designated use, means the surface water is capable of supporting only a limited community of aquatic life. This subcategory includes surface waters that support aquatic species selectively adapted to take advantage of naturally occurring rapid environmental changes, <u>perennial</u>, ephemeral or intermittent water, high turbidity, fluctuating temperature, low dissolved oxygen content or unique chemical characteristics.

Statement of Basis:

The WQCC should retain and clarify the descriptions of hydrologic regimes or state low-flow conditions as an additional characteristic associated with aquatic life uses, including the Limited Aquatic Life use at 20.6.4.7.L(2) NMAC. The proposed definition of Limited Aquatic Life in the Department's Public Comment Draft no longer includes a hydrologic regime; instead, it describes aquatic species as "selectively adapted to take advantage of naturally occurring rapid environmental changes, high turbidity, fluctuating temperature, low dissolved oxygen content or unique chemical characteristics." These physicochemical parameters are relevant, but the presence and persistence of water is equally or more important in determining the presence or type of aquatic species that may inhabit a water body.

To remain inclusive of the definition's meaning, the terms "ephemeral" and "intermittent" should be retained and the term "perennial" added to the definition. This will better clarify that limited aquatic life designated use can apply to surface waters of differing hydrology depending on site-specific characteristics, which is part of the stated basis for NMED's proposed change for its proposal in the Public Comment Draft. (SOR¶ 3(ii)). Under the definition as modified by our proposal, the specific hydrology provides clarity that aquatic species may be selectively adapted to take advantage of naturally occurring rapid environmental changes.

NMED's proposed changes to some aquatic life use (ALU) definitions in the Public Comment Draft would remove or modify context that otherwise helps distinguish the seven classes already defined under the Standards. Hydrologic regimes should be included in all ALU definitions.

The specific hydrology associated with each aquatic life use provides clarity that aquatic species may be selectively adapted to take advantage of naturally occurring rapid environmental changes. NMED's proposal to remove "intermittent and ephemeral" in the Public Comment Draft intends

to make it clear that any hydrological regime might be part of the limited aquatic life use (ALU), but adding "perennial" in lieu of removing "intermittent and ephemeral" will better clarify that limited aquatic life designated use can apply to surface waters of differing hydrology, depending on site-specific characteristics.

2. 20.6.4.7.T(2) Modify Definition of "Toxic Pollutant"

Amend the definition of "toxic pollutant" as follows:

> Toxic pollutant" means those pollutants or combination of pollutants, ~~including disease causing agents, that after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will cause death, shortened life spans, disease, adverse behavioral changes, reproductive or physiological impairments or physical deformation in such organisms or their offspring~~ listed by the EPA Administrator under section 307(a) of the federal Clean Water Act, 33 U.S.C. § 1313(a) or in the list below.

Statement of Basis:

The definition of "Toxic pollutant" should be revised to be consistent with 40 CFR 131.3(d), which defines "[t]oxic pollutants" as "those pollutants listed by the Administrator under section 307(a) of the Act." 40 CFR 401.15 provides "the list of toxic pollutants designated pursuant to section 307(a)(1) of the Act[.]" Defining "toxic pollutant" in this manner achieves uniformity between federal and state regulations, which offers regulators and regulated industry a clearly-established definition of a toxic pollutant.

3. 20.6.4.7.U Modify Definition of Use Attainability Analysis and Move to 20.6.4.7

Revise the definition of UAA in 20.6.4.15.A NMAC and move it to the definitions section under 20.6.4.7.U NMAC, as follows:

> Use Attainability Analysis" means ~~A use attainability analysis is a scientific study conducted for the purpose of assessing the factors affecting the attainment of a use. Whenever a use attainability analysis is conducted, it shall be subject to the requirements and limitations set forth in 40 CFR Part 131, Water Quality Standards; specifically, Subsections 131.3(g), 131.10(g), 131.10(h) and 131.10(j) shall be applicable~~ a structured scientific assessment of the factors affecting the attainment of the use, which include physical, chemical, biological, and economic factors as described in 40 CFR 131.10(g).

Statement of Basis:

The definition should be amended to conform to the federal definition, 40 CFR 131.3(g) and be moved to 20.6.4.7.U for consistency with the regulatory scheme of 20.6.4 NMAC.

4. 20.6.4.12.E Inclusion of Additional Language to Compliance with Water Quality Standards

Revise 20.6.4.12.E NMAC as follows:

> The commission may establish a numeric water quality criterion at a concentration that is below the minimum quantification level of test procedures approved under 40 CFR Part 136. In such cases, the water quality standard is enforceable at the minimum quantification level. Compliance shall be determined according to sufficiently sensitive test procedures (i.e., methods) approved under 40 CFR Part 136 for the analysis of pollutants or pollutant parameters.

Statement of Basis:

40 CFR § 122.44(i)(1) requires that to assure compliance with effluent limitations, NPDES permits include requirements to monitor "[a]ccording to sufficiently sensitive test procedures (i.e., methods) approved under 40 CFR part 136 for the analysis of pollutants or pollutant parameters." A method is "sufficiently sensitive" when "[t]he method minimum level (ML) is at or below the level of the effluent limit established in the permit for the measured pollutant or pollutant parameter" or "[t]he method has the lowest ML of the analytical methods approved under 40 CFR part 136 or required under 40 CFR chapter I, subchapter N or O for the measured pollutant or pollutant parameter."

5. 20.6.4.14.A Require the use of 40 CFR Part 136 approved methods for compliance determinations

Revise 20.6.4.14.A NMAC to require the use of Part 136 approved methods for compliance determinations and 401 certifications, as follows:

> A. 40 CFR Part 136 approved methods shall be used to determine compliance with these standards and in Section 401 certifications under the federal Clean Water Act. In all other cases, sampling and analytical techniques shall conform with the methods described in the following references unless otherwise specified by the commission pursuant to a petition to amend these standards.

Statement of Basis:

Sections 304 and 401 of the federal CWA and EPA regulations, 40 CFR § 136.1(a)(3), require the use of EPA Part 136 approved methods in CWA Section 401 certifications and to determine compliance with permit requirements. 20.6.4.14 NMAC needs to be revised to assure conformance with the CWA and 40 CFR § 136.1.

6. 20.6.4.15.A Revise Subsection A of Use Attainability Analysis

Revise 20.6.4.15.A NMAC as follows:

> ~~A use attainability analysis is a scientific study conducted for the purpose of assessing the factors affecting the attainment of a use. Whenever a use attainability analysis is~~

~~conducted, it shall be subject to the requirements and limitations set forth in 40 CFR Part 131, Water Quality Standards; specifically, Subsections 131.3(g), 131.10(g), 131.10(h) and 131.10(j) shall be applicable.~~ A use attainability analysis must be conducted when designating uses that do not include uses specified in Section 101(a)(2) of the federal Clean Water Act or when designating sub-categories of these uses requires less stringent criteria than previously applicable. When removing designated uses that are not Section 101(a)(2) uses, a use attainability analysis is not required.

Statement of Basis:

The proposed revised language clarifies the purpose of UAAs. It also clearly specifies instances when a UAA must be conducted or when it is not required.

7. 20.6.4.15.D Revise Subsection D of Use Attainability Analysis

Revise 20.6.4.15(D) NMAC as follows:

D. Use attainability analysis conducted by an entity other than the department. Any person may submit notice to the department stating the intent to conduct a use attainability analysis. The proponent shall develop a work plan to conduct the use attainability analysis and shall submit the work plan to the department and region 6 EPA for review and comment. The work plan shall identify the scope of data currently available and the scope of data to be gathered, the factors affecting use attainment that will be analyzed and provisions for public notice and consultation with appropriate state and federal agencies. The department will review and approve work plans, or provide written basis for non-approval, within thirty days of submittal or, in the case of a previously non-approved work plan, re-submittal by a proponent. Upon approval of the work plan by the department, the proponent shall conduct the use attainability analysis in accordance with the approved work plan. The cost of such analysis shall be the responsibility of the proponent. Upon completion of the use attainability analysis, the proponent shall submit the data, findings and conclusions to the department. The department or the proponent may petition the commission to modify the designated use if the conclusions of the analysis support such action.

Statement of Basis:

Third party UAAs should be afforded regulatory certainty by specifying that NMED and EPA review and approval of required work plans will happen in a timely manner. Additionally, NMED and/or EPA should provide any basis for non-approval of the Work Plan in written form so the proponent may revise their Work Plan accordingly if appropriate. These revisions to the UAA provide for additional clarity and regulatory certainty.

8. 20.6.4.126 and 128 Move Certain Section 128 (intermittent and ephemeral) Waters to Section 126 (perennial waters)

In 20.6.4.128 NMAC, move certain Section 128 (intermittent and ephemeral) waters to

Section 126 (perennial) based on Hydrology Protocol[1] (HP) work conducted pursuant to the 2015 Joint Stipulated Agreement.

> 20.6.4.126 RIO GRANDE BASIN: Perennial watercourses within lands managed by the U.S. Department of Energy (DOE) within Los Alamos National Laboratory (LANL), including but not limited to: ~~portions of~~ Cañon de Valle from ~~Los Alamos National Laboratory (~~LANL~~)~~ stream gage E256 upstream to Burning Ground spring, Sandia canyon from Sigma canyon upstream to LANL NPDES Outfall 001, Pajarito canyon from 0.5 miles below Arroyo de La Delfe upstream to Homestead Spring, Arroyo de la Delfe from Pajarito canyon upstream to Kieling Spring, ~~into~~ Starmers gulch and Starmers spring ~~and~~ Water canyon from Area-A canyon upstream to State Route 501.

Statement of Basis:

The proposal is based, in part, on hydrology protocol work completed by NMED and LANL in fulfillment of the 2015 Stipulated Agreement between NMED, the U.S. DOE, Triad (previously LANS), and Amigos Bravos. Physical changes since NMED's 2007 use attainability analysis for Section 126 and 128 waters (2007 UAA) have caused hydrological changes such that some waters that were previously ephemeral/intermittent are now more properly characterized as perennial. The 2007 UAA established the existing uses of limited aquatic life and secondary contact for these waters. No new data suggests that the non-primary contact recreational use has changed. However, some new data suggests that the current aquatic life use (ALU) designation of limited aquatic life may no longer be appropriate. Available data is incomplete and may not support the coldwater ALU use, as there are some indications that this use is not being attained based on dissolved oxygen, temperature, or other factors. While the available data suggests the designated uses provided under Section 126 may not be either existing or attainable, LANL proposes moving these waters from current 20.6.4.128 NMAC to Section 126 as a matter of consistency with the principle that the decision on which specific stream segments should be moved from Section 128 to either Section 126 or new 20.6.4.140 NMAC must be made based upon sound science and defensible data. Moving these waters from 20.6.4.128 NMAC to Section 126 results in increased protections for these waters, and in such cases NMED's position is that a UAA is not required. Upon further study, LANL may propose modifications to the designated uses for these specific segments at a future time.

LANL proposes that any waters moved from current Section 128 to 20.6.4.126 include a description of each reach boundary from origin to terminus. The reaches should be precisely described so that clear geographic boundaries corresponding to designated uses are demarcated. Moving waters from Section 128 to Section 126 should be based upon careful review and evaluation of all available data including, in particular, data developed since the last Triennial Review.

[1] The *Hydrology Protocol* (or HP) is provided for in the WQMP-CPP (Section II and Appx C), and provides a methodology for distinguishing among ephemeral, intermittent, and perennial streams and rivers in New Mexico. It also generates documentation of the uses supported by those waters as a result of the flow regime.

9. 20.6.4.128 Revise Section 128

In 20.6.4.128 NMAC, add "not specifically identified in 20.6.4.126 or 20.6.4.140" and deleting the specific segment references in Section 128:

> 20.6.4.128 RIO GRANDE BASIN: Ephemeral and intermittent watercourses within lands managed by the 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 or 20.6.4.140 NMAC. (Surface waters within lands scheduled for transfer from DOE to tribal, state or local authorities are specifically excluded.)

Statement of Basis:

Section 128 waters should remain as ephemeral/intermittent because the Commission has already determined that the uses specified in Section 128 are appropriate for these waters and EPA has approved this technical determination. The proposed modifications will best support the addition of new Section 140 waters proposed by NMED in the Triennial Review and would provide increased protections for certain waters currently in Section 128 that have experienced some physical changes such that they may now be better characterized as perennial. Once the available data and information is considered, NMED will need to follow the proper process to designate a more appropriate use for these waters. We recommend any decisions on which specific stream segments should move from Section 128 to Section 126 and new Section 140 must be made based upon sound science and defensible data including, in particular, data developed since the last Triennial Review. The reaches should be precisely described so that clear geographic boundaries corresponding to designated uses are demarcated.

10. 20.6.4.140 Adopt New Section 140.

> Adopt a new Section 140 for certain intermittent waters within LANL.
>
> RIO GRANDE BASIN: Intermittent portions of Effluent canyon from Mortandad canyon confluence upstream its headwaters, S-Site canyon from alluvial groundwater well MSC 16-06293 upstream to Martin Spring, and Two-Mile canyon from LANL stream gage E244 upstream to its confluence with upper Two Mile canyon. (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, marginal warmwater aquatic life, secondary contact.
> B. Criteria: the use-specific numeric criteria set forth in 20.6.4.900 NMAC are applicable to the designated uses.

Statement of Basis:

Extensive study and technical work suggests that some intermittent waters presently classified under 20.6.4.128 NMAC have current uses that are different from their previously determined existing use, based off application of the hydrology protocol and other technical work conducted by NMED and LANL. This work, in part, has been in fulfillment of the 2015 Stipulated Agreement between NMED, DOE, Triad (previously LANS), and Amigos Bravos. The technical data supports that the marginal warmwater aquatic life use is more appropriate for these certain segments than the limited aquatic life use provided under 20.6.4.128 NMAC. There is no additional data that indicates that the other associated existing uses under 20.6.4.128 NMAC, in particular the non-primary contact recreational use, have changed for these waters. Therefore, it would be appropriate to move these certain segments from 20.6.4.128 NMAC to a new classified segment at 20.6.4.140 NMAC to make clear that a different ALU applies to these certain segments. Moving these waters from 20.6.4.128 NMAC to new Section 140 results in increased protections for these waters, and in such cases NMED's position is that a UAA is not required.

Certificate of Service

I hereby certify that on March 15, 2021 a copy of the foregoing **Triad Petition** was emailed to the persons listed below. A copy will be mailed first class upon request.

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