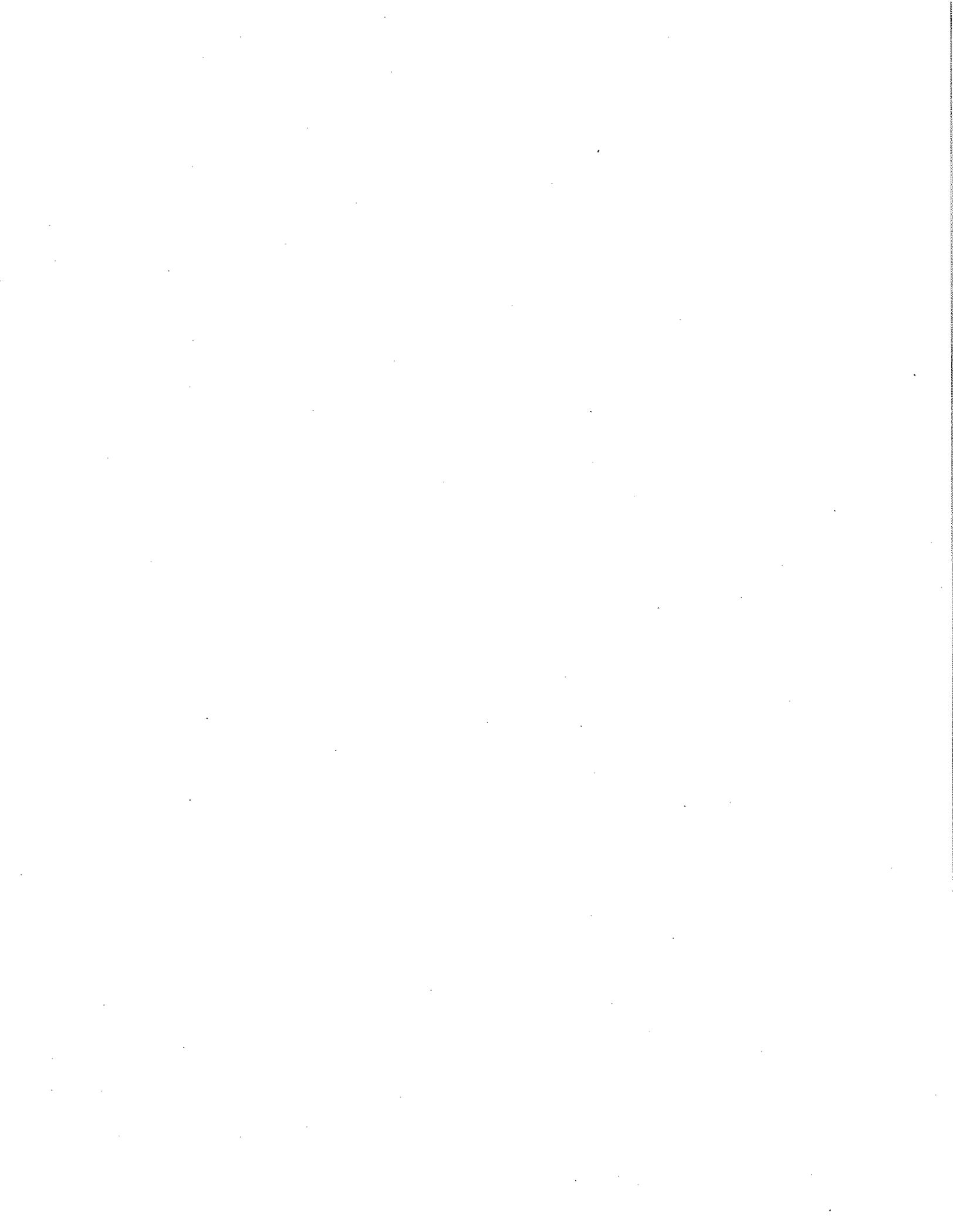


**EPA REGION 6 RESPONSE TO CCNS SUBMISSION**

**EXHIBIT C**

**Comment Letter from Communities for Clean Water (CCW) to Bruce Yurdin, Surface Water Quality Bureau, New Mexico Environment Department, dated August 13, 2013.**



04

**Communities For Clean Water**

August 13, 2013

Mr. Bruce Yurdin  
Manager, Point Source Regulation Section  
Surface Water Quality Bureau  
New Mexico Environment Department  
P. O. Box 5469  
1190 St. Francis Drive  
Santa Fe, NM 87502-5469  
bruce.yurdin@state.nm.us

Re: Clean Water Act Section 401 Certification - Draft Permit for Los Alamos  
National Laboratory Permit No. NM0028355

Dear Mr. Yurdin:

Thank you for the opportunity to submit comments on the 401 certification for the draft National Pollutant Discharge Elimination System (NPDES) permit for Los Alamos National Laboratory (LANL). Communities for Clean Water (CCW), begun in 2004, is a grassroots collaborative that formed to address water contamination from LANL. CCW is comprised of four core organizations – Amigos Bravos, Concerned Citizens for Nuclear Safety, Honor Our Pueblo Existence, and the New Mexico Acequia Association and is supported by a broad network of other community groups and individuals. CCW is committed to stop groundwater and surface water pollution migrating from LANL facilities into New Mexico's water resources. CCW believes that this NPDES discharge permit provides the public with a unique opportunity to work with the Environmental Protection Agency (EPA) and the State of New Mexico to develop the best possible protection for surface water on and downstream from the LANL facility. By preventing additional pollution from being released, and by requiring clean up of historic releases, the public's right to clean water will be protected. Advocating for a protective and comprehensive NPDES permit provides our organizations with an opportunity to serve New Mexico's citizens by protecting the state's future drinking water resources.

As required by Section 401 of the Clean Water Act, the New Mexico Environment Department (NMED), Surface Water Quality Bureau, is required to certify that the permit will reasonably ensure that the permitted activities will be conducted in a manner that will comply with the applicable New Mexico water quality standards, including the antidegradation policy and the statewide water quality management plan.

The NPDES permit allows for more than 1 million gallons of effluent to be discharged from industrial facilities, such as cooling towers, sanitary facilities, the Radioactive Liquid Waste Treatment Facility, and the High Explosive Waste Water Treatment Plant, into the canyons that flow to the Rio Grande everyday. In order to ensure that the permitted activities will be conducted in a manner that will comply with the applicable New Mexico water quality standards, the NMED must condition their certification on the following key provisions:

**I. Method 1668 for PCB analysis must be required for monitoring and compliance purposes.**

The draft permit allows for the use of a polychlorinated biphenyl (PCB) analytical method that has a 0.2 ug/L minimum quantification level for compliance purposes. The New Mexico water quality standard for PCBs that is protective of human health is 0.00064 ug/L. Using an analytical method with a detection level 312 times less sensitive than the standard and corresponding effluent limit is meaningless and not protective of water quality standards.

The previous permit required the use of method 1668 for analyzing PCBs, which has a detection limit below all applicable water quality standards. By now requiring an analytical method with a detection limit well above applicable water quality standards in the draft permit, EPA is effectively setting effluent limits that are less stringent than those in the previous permit and thus allowing for a backsliding of permit conditions and water quality protections. And as you know, backsliding is illegal under the Clean Water Act, Section 402(o).

In the previous permit EPA required the use of method 1668 for monitoring and compliance purposes based on a precertification letter from the NMED. A similar letter was sent to EPA during the current permit renewal process on December 20, 2012, in which NMED wrote that the "employment of Method 1668 is necessary and appropriate as a condition of this permit so as to assure the permit is protective of the State's Water Quality Standards." To ensure compliance with New Mexico water quality standards NMED must require as a certification condition that the congener method (method 1668) be used for both compliance and monitoring purposes.

**II. The final permit must do more to protect the multiple impaired receiving waters.** Many of the streams on LANL property are listed as not meeting water quality standards for multiple parameters and are listed on the official New Mexico's 303d impaired waters list.

Of particular note and concern are Mortandad Canyon and Canada del Buey where industrial point sources (such as those permitted in the draft permit) are identified in the New Mexico 305b/303d Report as probable sources of impairment. Mortandad Canyon is impaired for Aluminum, Copper, and Gross Alpha. Canada del Buey is impaired for Aluminum, Copper, Gross Alpha, and PCBs. Effluent limits should be required for these constituents at the outfalls into these canyons (Outfalls13S, 051, 03A022, and 03A181).

To ensure that water quality is protected, NMED should require effluent limits for all impaired parameters in the receiving waters at each of the permitted outfalls as a condition of certification. At the very least, monitoring and reporting requirements for these parameters should be required in the permit.

**III. The final permit must do more to protect intermittent streams at LANL by applying the chronic life criteria to intermittent streams when calculating effluent limits.**

The process that assigned the limited aquatic life use which only applies acute aquatic life standards and not chronic aquatic life standards was flawed as is outlined in Amigos Bravos' Statement of Basis for the 2009 Triennial Review of New Mexico's water quality standards (*see* pages 17-21 of attachment A). This process resulted in the intermittent streams on LANL property being given weaker protections than any other intermittent waterbody in New Mexico despite the fact that there is a United States Geologic Survey (USGS) report that specifically called for chronic aquatic life protections for these intermittent streams. While "aquatic life" with the associated acute and chronic aquatic life criteria may not be a *designated* use for intermittent waters at LANL, there is evidence (*see* pages 17-21 of attachment A), that "aquatic life" NOT "limited aquatic life" is an *existing* use in intermittent waters at LANL. The draft NPDES permit, by not applying chronic criteria to intermittent waters at LANL is not protective of existing uses. Now is the time to correct this matter. We respectfully request that the NMED certification applies the chronic life criteria to intermittent streams when calculating effluent limits. In addition we request that NMED address this problem and amend the water quality standards to include the chronic aquatic life criteria to intermittent waters at LANL during the upcoming triennial review of water quality standards.

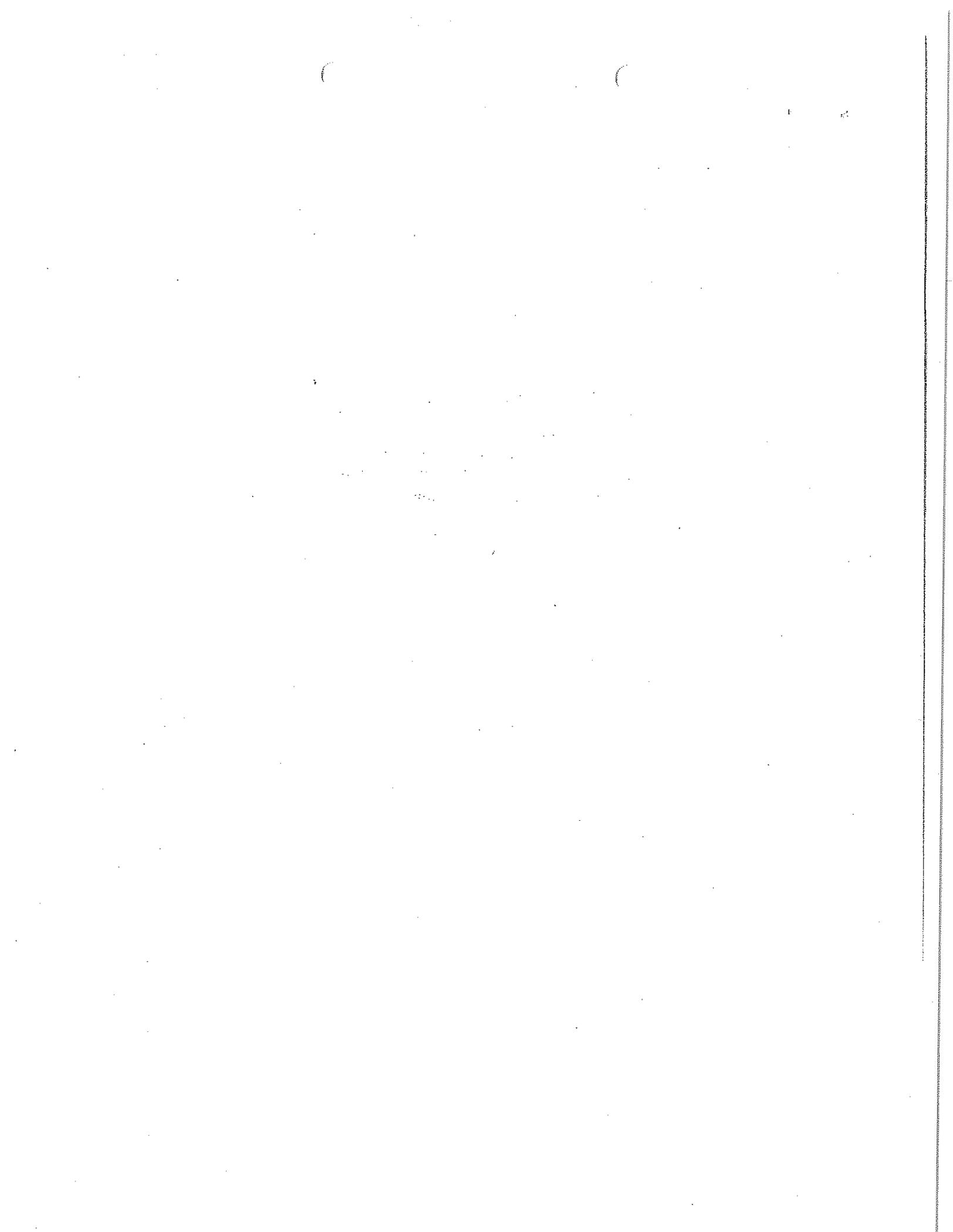
Thank you for your careful consideration of our comments.

Sincerely,

Rachel Conn  
Amigos Bravos  
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Joni Arends  
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**STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION**

\_\_\_\_\_  
IN THE MATTER OF THE TRIENNIAL REVIEW )  
OF STANDARDS FOR INTERSTATE AND )  
INTRASTATE SURFACE WATERS, 20.6.4 NMAC )  
\_\_\_\_\_ )

WQCC No.08-13 (R)

**STATEMENT OF REASONS AND CLOSING LEGAL ARGUMENT**

**I. INTRODUCTION**

Amigos Bravos hereby submits its statement of reasons and closing legal argument for the 2009 Triennial Review of *State of New Mexico Standards for Interstate and Intrastate Surface Waters* (20.6.4 NMAC). Amigos Bravos wishes to note at the outset that it has very much appreciated the professional manner in which these proceedings were conducted and the New Mexico Environment Department's ("NMED" or "the Department") efforts in ensuring that there were numerous opportunities for public involvement in the initial stages of this process. Amigos Bravos believes that it is imperative that the public be involved in the Triennial Review to ensure that the waters of the state are protected for the uses for which people enjoy them.

The Triennial Review stems out of the State's obligations pursuant to the Clean Water Act ("CWA") to "protect the public health or welfare, enhance the quality of water," and wherever possible, to ensure that water quality allows for the "protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1313(c)(2)(A); 33 U.S.C. § 1251(a)(2). Similarly, the New Mexico Water Quality Act ("WQA") directs the Commission to adopt standards that "shall *at a minimum* protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act." NM Stat. 74-6-4(D) (emphasis added). These goals, in particular the emphasis on standards that *enhance* the quality of water, represent what is a fundamental truth in New Mexico—that water is the lifeblood of our communities, ecosystems, economy, and way of life. We call upon the Commission to keep these goals in mind as it reviews the materials and promulgates new water quality standards.

**II. AMIGOS BRAVOS' PROPOSALS**

As a preliminary matter, please note that Amigos Bravos has withdrawn several of its proposals in previous filings. To facilitate the Commission's review of its proposals, Amigos Bravos has attached a Consolidated Proposal. *See* Exhibit A. Each proposal is included and discussed

below. In addition, Amigos Bravos' reasoning for withdrawing certain of its proposals is also included.

*Proposed materials to be deleted are indicated by ~~bold strikethrough~~ (red in color copies) and proposed new language is indicated by bold underlining (blue in color copies). NMED's proposed changes are included here as non-bolded (and non-colored) underlined and strikethrough text.*

## A. CONSOLIDATED PROPOSALS

### 1. CLIMATE CHANGE

Amigos Bravos has withdrawn its proposals to incorporate the issue of climate change into the water quality standards. Although Amigos Bravos continues to believe that the Commission and NMED should address the issue of climate change directly in the water quality standards, Amigos Bravos—indeed, NMED indicated in their testimony that NMED already applies one of the key components of our proposal in that they account for climate change as a manmade pollutant load and not as natural background, Direct Testimony of Pamela Homer at 7—Amigos Bravos agrees that further discussion of how to incorporate the issue is warranted. Therefore, to continue this discussion, Amigos Bravos takes this opportunity to address the issue and the reasoning for its withdrawal.

Amigos Bravos' main goal in proposing that climate change be included in the water quality standards was to ensure that climate change is discussed in association with the protection of water quality. Indeed, the thoughtful discussion between Amigos Bravos' experts and the Commission was a step towards accomplishing that goal. See Transcript at 590-621. As noted in our testimony, climate change will likely result in changed precipitation patterns, a potential decrease in water supply, and at the very least will add another pressure to already over-allocated water resources in the state. Direct Testimony of Erik Schlenker-Goodrich at 2-7; Rebuttal Testimony of Erik Schlenker-Goodrich at 1-4. Given the impacts of climate change, Amigos Bravos feels that climate change should be discussed when discussing the many other reasons a stream may become impaired so that we can start to confront the problem head on. As Ms. Conn put it at the hearing: "Just because the problem is so big doesn't excuse us from addressing [climate change] in our standards and calling . . . what it is." Transcript at 611.

As a result of the serious impacts to our water ways posed by a changing climate, Amigos Bravos remains concerned that climate change be flagged as an issue in the standards. Amigos Bravos wishes to thank the Commission for the robust discussion on this issue at the hearing. However, because it seems that further discussion is warranted to determine how to best incorporate considerations of climate change into the standards, Amigos Bravos has decided to withdraw its proposal. Nevertheless, Amigos Bravos hopes that the Commission and NMED will continue to think about this issue—as will Amigos Bravos—and perhaps in future proceedings this issue can be addressed more fully.

Amigos Bravos made the following proposals relating to climate change, which it has now withdrawn:

20.6.4.7H(2) – Human-Made Causes / Global Warming and Climate Change

20.6.4.7.H(2) “Human-Made Causes” means those causal agents that would affect water quality and are not caused by natural causes but are due to human activities including, but not limited to, point and nonpoint discharges, and global warming and climate change.

20.6.4.7.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, including climate change.

20.6.4.11.B – Critical Low Flow

B. Critical Low Flow: The numeric [standards] criteria set under Subsection F of 20.6.4.13 NMAC, [20.6.4.101] 20.6.4.97 through 20.6.4.899 NMAC and 20.6.4.900 NMAC may not be attainable when streamflow is less than the critical low flow due to natural causes, but narrative criteria in 20.6.4.13 NMAC will continue to apply. All applicable criteria will apply if low flow conditions are not due to natural causes, including climate change due to human-made causes. The critical low flow of a stream at a particular site shall be:

**2. DEFINITION OF PERENNIAL- 20.6.4.7.P**

*Amigos Bravos’ proposal:*

~~UU.]~~(2) “Perennial” when used to describe a surface water of the state means the water body currently or historically typically contains or contained water [continuously] throughout the year [in all years] except during drought conditions [; its upper surface, generally, is lower than the water table of the region adjoining the stream].

Amigos Bravos supports NMED’s changes to the definition of perennial. However, Amigos Bravos has proposed additions to the definition, which it feels are more in keeping with the CWA’s goal not only to “maintain,” but also to “restore” our waters. Although this proposal is related to Amigos Bravos’ climate change proposals, it applies more broadly in that it seeks to ensure that protections for a historically perennial stream are not weakened over time as a result of anthropogenic impacts generally. See Rebuttal Testimony of Erik Schlenker-Goodrich at 4.

NMED has pushed back on Amigos Bravos’ proposal by arguing that the language requiring the Department to consider the historical condition of a water would be “impossible to implement in most cases” because the Department does not have stream gauge data to determine the historical condition of every water way. Testimony of Pamela Homer at 9. Although the state may not have stream gauge data, the state has had water quality standards, which classify waters as perennial, since at least 1993 (which was the oldest version of 20.6.4 NMAC that Amigos

Bravos had available for review). Thus, a review of these standards would enable NMED to determine whether a water has been perennial historically. Therefore, Amigos Bravos' proposal does not add too onerous of a burden on the Department.

Moreover, Amigos Bravos' proposal merely reiterates and provides a mechanism to meet the obligation already imposed by the CWA to "restore and maintain" our waters. 33 U.S.C. § 1251(a). "This objective incorporated a broad, systemic view of the goal of maintaining and *improving* water quality: as the House Report on the legislation put it, 'the word 'integrity' ... refers to a condition in which the natural structure and function of ecosystems is [are] maintained.'" *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (emphasis added). There is simply no way to ensure that water quality, and more importantly the "natural structure and function of ecosystems," be maintained, let alone improved, if there is no baseline for historical conditions. As such, Amigos Bravos' proposal is critical to ensure that water quality standards are in keeping with the goals and mandates of the CWA, and that waters are adequately protected.

### 3. MIXING ZONES- 20.6.4.11 (D) and (E)

#### *Amigos Bravos' Proposal:*

Section D and E should be completely replaced by:

**20.6.4.10 D. Water Quality in Surface Water at Point of Discharge: To ensure the protection of all attainable, designated or existing uses of the States surface waters, no discharge shall cause or contribute to the violation of any water quality criteria. All water quality standards shall be met at the point of discharge.**

#### *Amigos Bravos' Alternative Proposal:*

20.6.4.11.D – A limited mixing zone, contiguous to a point source wastewater discharge, may be allowed in circumstances as detailed in 20.6.4.11E and may be prohibited where infeasible or inappropriate, in any stream receiving such a discharge. Mixing zones serve as regions of initial dilution that allow the application of a dilution factor in calculations of effluent limitations. Effluent limitations shall be developed that will protect the most sensitive existing, designated or attainable use of the receiving water.

20.6.4.11.E – Wastewater mixing zones, in which the numeric criteria set under ~~subsection F of 20.6.4.13 NMAC~~, 20.6.4.97 through 20.6.4.899 NMAC, or 20.6.4.900 may be exceeded, shall be subject to the following limitations:

20.6.4.E.(2) The acute **and chronic** numeric criteria, as set out in ~~Paragraph (1) of Subsection I, Subsection J, and Subsection K of 20.6.4.900 NMAC~~, shall be

attained at the point of discharge for any discharge to the surface water of the state with a designated aquatic life use.

**20.6.4.11.E(6) Discharges to any surface water with a designated use of public or domestic water supply shall not cause or contribute to an exceedance of the applicable standards set forth under Sections 20.6.4.900.A. and 20.6.4.900.B. NMAC.**

**20.6.4.11.E(7) Mixing zones shall not impair the overall ecological and biological integrity of the water body.**

**20.6.4.11.E(8) Mixing zones may be authorized only if water quality standards cannot reasonably be complied with at the point of discharge.**

Amigos Bravos has made two proposals in regard to mixing zones: first, that mixing zones be eliminated completely in New Mexico's water quality standards; second, recognizing that the Commission may not decide to do away with mixing zones altogether, Amigos Bravos has also proposed alternative criteria which ensure that New Mexico's mixing zone criteria are at least in line with Environmental Protection Agency ("EPA") regulations. Each of these proposals will be addressed in turn.

**a. Amigos Bravos' First Proposal: Eliminating Mixing Zones and Requiring Compliance at the Point of Discharge**

Amigos Bravos first proposal requires water quality standards to be met at the point of discharge, thus eliminating the need for mixing zones. The Department argues that because EPA regulations allow for mixing zones, mixing zones are therefore appropriate. There are two flaws with this logic. First, merely because EPA regulations allow for mixing zones does not necessarily mean that mixing zones are legal and consistent with the CWA. Second, assuming for purposes of argument that mixing zones are consistent with the CWA, EPA allowance for mixing zones does not mean that the Commission should adopt a mixing zone provision or that it is appropriate to do so in an arid state such as New Mexico.

First, despite EPA regulation, mixing zones are illegal and inconsistent with the goals and requirements of the CWA.<sup>1</sup> See Testimony of Erik Schlenker-Goodrich at 9. The CWA states in no uncertain terms that "it is the national goal that the discharge of pollutants into navigable

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<sup>1</sup> NMED argues that because EPA regulation allows for mixing zones that Amigos Bravos should take the issue up with EPA, not the Department. Transcript at 223-24. Amigos Bravos does not dispute that its argument regarding the legality of mixing zones extends to EPA as well. However, Amigos Bravos notes that the Commission also has the authority to consider the legality of mixing zones and if it finds them to be inconsistent with the CWA to eliminate them from New Mexico's water quality standards despite EPA regulation. See Environmental Protection Agency, *Water Quality Standards Handbook*, Ch. 5 (2007) available at: [www.epa.gov/waterscience/standards/handbook/](http://www.epa.gov/waterscience/standards/handbook/) ("Whether to establish a mixing zone policy is a matter of State discretion . . .").

waters be *eliminated* by 1985.” 33 U.S.C. § 1251(a)(1). Furthermore, the CWA calls for waters to provide for fishing and swimming by 1983. 33 U.S.C. § 1251(a)(1). As discussed in greater detail in our testimony, these goals simply cannot be met while allowing for mixing zones. *See* Testimony of Erik Schlenker-Goodrich at 8-11; Rebuttal Testimony of Erik Schlenker-Goodrich at 4-6. Mixing zones—which expressly allow for the “dilution is the solution” approach—explicitly prohibited by the CWA—effectively condone violations of water quality standards in certain areas. Such allowance for water quality standards violations is in direct contravention of the goals of the CWA, which requires that water bodies be both maintained and restored, not used as mixing zones to dilute pollution. 33 U.S.C. § 1251(a). In addition, mixing zones are inconsistent with CWA and New Mexico antidegradation policies, which require that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected in *all* surface waters of the state.” N.M.A.C. § 20.6.4.8(A)(1) (emphasis added); 33 U.S.C. §§ 1251(a), 1313(d)(4)(B). In sum, mixing zones are nothing more than a violation of the CWA—the objective of which is to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters—” and therefore should be prohibited by the Commission. Amigos Bravos’ proposal, which, as the Department noted, “would enhance the protection for aquatic life” thus provides exactly what the CWA requires. Amigos Bravos therefore respectfully requests that Commission consider its adoption.

**b. Amigos Bravos’ Second Proposal: Refining the Use of Mixing Zones**

Should the Commission decide not to prohibit mixing zones entirely, Amigos Bravos requests that the Commission consider its second proposal, which ensures that New Mexico’s mixing zone policy is consistent with EPA regulations.

At present, New Mexico’s mixing zone policy does not comport with EPA regulations which allow mixing zones only where the mixing zones (1) do not impair the integrity of the water body as a whole; (2) prevent the death of organisms passing through the mixing zone; and (3) do not cause significant health risks. Environmental Protection Agency, Water Quality Handbook, § 5.1 (2007) (available at: <http://www.epa.gov/waterscience/standards/handbook/>). The water quality standards now do not meet these limitations on mixing zones. *See* Testimony of Erik Schlenker-Goodrich at 9-10; Rebuttal Testimony of Erik Schlenker-Goodrich at 5.

Amigos Bravos’ proposal seeks to incorporate these limitations into the standards, to the extent that they can be given the size of rivers in New Mexico. First, Amigos Bravos’ proposal limits mixing zones to perennial waters; thus, mixing zones are prohibited in intermittent or ephemeral streams. This limitation ensures that a mixing zone does not impair the overall integrity of the water body; indeed, at times of the year when these waters have no water running in them, a mixing zone would not even be possible.

To satisfy all three criteria—that the water body is not impaired as a whole, that the mixing zone is not lethal to organisms passing through, and to prevent significant health risks, Amigos Bravos proposes that toxic pollutants be prohibited in toxic amounts. The current language at 20.6.4.11.E allows for exceedances of standards for toxic pollutants listed under 20.6.4.13.F.

Amigos Bravos' proposed language under 20.6.4.11.E eliminates mixing zones for these toxic pollutants.

To ensure that the mixing zones will not cause significant health risks, Amigos Bravos proposes that mixing zones be eliminated where the water is to be used for Domestic Water Supply and Public Water Supply uses.

Finally, in keeping with EPA regulations, Amigos Bravos' proposal includes language that makes it explicit that mixing zones are not to impair the overall ecological and biological integrity of the water body and that they should be allowed only where it is infeasible to meet water quality standards at the point of discharge. This proposal makes it clear that mixing zones should be used only where necessary; in short, our waters should not be used as mixing zones merely because it is more convenient to the discharger. Presently, as noted in NMED's testimony, mixing zones are considered in permits as a matter of course—the discharger faces no burden to show that it cannot comply with water quality standards at the end of the pipe. *See* Transcript at 218. By providing language in the standards which alerts regulators and dischargers alike that mixing zones are to be used sparingly, the mixing zone provision will be at least more in line with the CWA's objectives to restore and maintain *all* waters and to prohibit the discharge of pollutants into navigable waters. *See* 33 U.S.C. §1251(a).

#### 4. COMPLIANCE WITH HUMAN HEALTH CRITERIA- 20.6.4.12.D

##### *Amigos Bravos' Proposal:*

20.6.4.12.D. Compliance with [~~water quality criteria for the protection of human health~~] the human health-organism only criteria shall be determined from the analytical results of **three** representative grab samples. **If any one of the samples shows an exceedance, then the human health-organism only criteria is deemed to have been exceeded, as defined in the water quality management plan.** Human health-organism only criteria shall not be exceeded.

##### *Amigos Bravos' Alternative Proposal:*

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

The language in 20.6.4.12 (D) very clearly states that the “human health criteria shall not be exceeded.” This language would indicate that if only one of the three grab samples shows an exceedance then there is noncompliance, or alternatively, that only one grab sample needs to be taken. Referring back to 20.6.4.12.A, where the compliance with acute water quality criteria is detailed, one can find the same strong language: “acute criteria shall not be exceeded,” accompanied by the directive that “acute water quality criteria shall be determined from the

analytical results of a single grab sample.” Amigos Bravos proposal simply aligns these two sections of standards.

The Department asserts that Amigos Bravos’ arguments on this point pertain to assessment practices and therefore are not germane to this section because it concerns enforcement practices. Testimony of Pamela Homer at 36. While this distinction held true for our proposal for section 20.6.4.12—and we have subsequently withdrawn the 20.6.4.12 proposal because of this issue—it is not the case for this section, 20.6.4.12.D. Amigos Bravos’ proposed changes do not pertain to assessment practices and do not propose language that is different in nature than that which already exists for other subsections in this section. Amigos Bravos’ intent is to implement the stated intent, already found in 20.6.4.12, that “human health-organism only criteria shall not be exceeded.” The two proposals detailed above accomplish this result.

Furthermore, Amigos Bravos’ understanding is that during typical Department sampling only one grab sample is collected. However, to determine compliance with the human health criteria the Water Quality Management Plan requires:

A minimum of three individual grab samples, separated in time by no less than 15 minutes each, shall be taken during the same sampling event from the same location. For the purpose of determining noncompliance, the analytical results of 2 or more of these samples must be greater than the applicable human health criteria. Results of all grab samples shall be recorded and reported.

*Water Quality Management Plan – Work Element 10.* The Water Quality Management Plan is a planning document that should be written to implement the standards not vice versa. Thus, when changes to the standards are made, the appropriate changes to the Management Plan should follow. Therefore the methods detailed in the Management Plan should not influence the setting of appropriate standards. Amigos Bravos’ statement that the Department typically takes only one grab sample, thus making a determination of compliance under the current regulation and Management Plan impossible, has not been rebutted or denied by the Department. Therefore, at the very least, if the three-sample protocol is maintained, Amigos Bravos proposes to explicitly state in the standards that three grab samples are required to be collected.

## 5. COMPLIANCE SCHEDULES- 20.6.4.12.I

*Amigos Bravos’ proposal:*

Section 20.6.4.12.I should be eliminated in its entirety:

~~**I- Compliance Schedules: It shall be the policy of the commission to allow 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 allocations. Compliance schedules may be**~~

~~include 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). [20.6.4.12 NMAC - Rp 20 NMAC 6.1.1104, 10-12-00; A, 10-11-02; Rn, 20.6.4.11 NMAC, 05-23-05; A, 05-23-05; A, XX-XX-XX]~~

*Amigos Bravos' Alternative Proposal:*

20.6.4.12.[J] L 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 when appropriate. Such schedule of compliance will be for the sole 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 allocations. In these instances, 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 but no longer than 3 years after new standards have been adopted or within one year of the date of permit renewal or modification, whichever is greater. Compliance schedules shall also specify enforceable milestone dates so as to measure progress towards final project completion (e.g., design completion, construction start, construction completion, date of compliance). [20.6.4.12 NMAC - Rp 20 NMAC 6.1.1104, 10-12-00; A, 10-11-02; Rn, 20.6.4.11 NMAC, 05-23-05; A, 05-23-05; A, XX-XX-XX]

Amigos Bravos has made two alternative proposals with regard to compliance schedules. First, Amigos Bravos proposes that compliance schedules be eliminated from the standards entirely, due to the fact that the plain language of the CWA prohibits their use. Recognizing that the Commission may retain a provision for compliance schedules, Amigos Bravos' second proposal seeks to limit the use of compliance schedules to instances where they are needed, as opposed to becoming a tool for, as the Department put it, a discharger to "drag its feet." See Testimony of Pamela Homer at 37.

First, as explained in detail in Amigos Bravos' proposal and testimony, compliance schedules are illegal under the CWA. See Amigos Bravos' Proposal at 9-11; Testimony of Erik Schlenker-Goodrich at 12-15; Rebuttal Testimony of Erik Schlenker-Goodrich at 7. As noted by several circuit courts of appeal, the CWA establishes a hard and fast deadline for compliance with water quality standards, and that deadline has passed. See *State Water Control Board v. Train*, 559 F.2d 921, 924 (4th Cir. 1977) ("Section 301(b)(1)'s effluent limitations are, on their face, unconditional."); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3rd Cir. 1976) *cert. denied sub nom. Bethlehem Steel Corp. v. Quarles*, 430 U.S. 975 (1977) ("Although we are sympathetic to the plight of Bethlehem and similarly situated dischargers, examination of the terms of the

statute, the legislative history of [CWA] and the case law has convinced us that July 1, 1977 was intended by Congress to be a rigid guidepost.”). This point is reinforced by Congress’s adoption of CWA section 301(i), which specifically allowed for a limited extension of the July 1, 1977 deadline for publicly owned treatment works. CWA § 301(i)(1)-(2), 33 U.S.C. § 1311(i)(1)-(2); *see also United States v. Homestake Mining Co.*, 595 F.2d 421, 427-28 (8th Cir. 1979). Had Congress wanted to extend the date for compliance for other categories of dischargers, it could have done so for them in a similar fashion. CWA regulations also mandate compliance by CWA deadlines: “Any schedules of compliance under this section shall require compliance as soon as possible, but *not later than the applicable statutory deadline* under the CWA.” 40 C.F.R. § 122.47; *see also* 40 C.F.R. § 124.55(f) (“Nothing in this section shall affect EPA’s obligation to comply with § 122.47. *See* CWA section 301(b)(1)(C).”). As the CWA does not allow for compliance schedules, their use should be prohibited unless and until Congress revisits the issue and comes up with a considered allowance for them.

As compliance schedules have continued to be used, Amigos Bravos’ second proposal at least seeks to confine the use of compliance schedules rather than allowing them as a matter of course. Specifically, Amigos Bravos first proposes that “on a case-by-case basis” be substituted with language stating that compliance schedules should be used only “when appropriate—“ the language used in the EPA regulations. Although a minor change, and indeed NMED noted that it does not see much difference between the two clauses, *see* Transcript at 231-32, given that it is EPA which writes NPDES permits in New Mexico, the change will ensure that a discussion of whether a compliance schedule should be added to a permit will be considered according to EPA standards of “appropriateness.” *See* Amigos Bravos Proposal at 11-12. As EPA has thought through several factors to determine whether a compliance schedule is appropriate, such a change will add consistency to the inclusion of compliance schedules in NPDES permits—something the standards do not presently provide.

Amigos Bravos second change, which is slightly modified from the original proposal, would add a deadline to the use of compliance schedules in permits so that a discharger would be required to come into compliance within three years after a new standard has been adopted, or alternatively, a year after the date of permit expiration— whichever would allow the discharger more time to comply.<sup>2</sup> Thus, a discharger would have at least three years from a change in standards, to implement the necessary changes. A discharger who was still operating under a permit when the standards were changed would have even more time to comply as the discharger would be on notice of the change when the standards were adopted, and thus would be able to begin planning and implementing changes to its facility to ensure compliance with the standards, but would have an additional year after permit expiration to complete those changes.

Although NMED questioned the use of a hard and fast deadline in the compliance schedule provision as inflexible, it is exactly such a burden that Amigos Bravos wishes to impose. The CWA is a technology-forcing statute, which seeks to ensure that water quality is improved as soon as possible. *See* 33 U.S.C. §§1251(a); 1311(b). The perpetual “dragging of feet” that

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<sup>2</sup> EPA only allows the use of compliance schedules for standards that have been “issued or revised less than three years before recommencement of discharge.” 40 C.F.R. § 122.47(a)(1). Amigos Bravos’ proposal would add a deadline for compliance with such a revised standard.

NMED noted, will continue endlessly unless there are hard and fast deadlines. Furthermore, should the Commission be concerned about such a deadline, it could certainly include an exception to the rule. However, as it stands now, the exception could become the rule; compliance schedules can be granted as a matter of course. Although Amigos Bravos has faith that NMED at present would not allow EPA to act in such a cavalier fashion, the standards ensure that, even if personalities change, water quality is protected as much as possible. In short, it is up to the Commission to send a message to EPA—the entity actually writing the NPDES permits in New Mexico—as to what the compliance schedules in these permits should look like.

Amigos Bravos wishes to make one additional note on the subject of this proposal. During cross-examination of its witnesses, Amigos Bravos was continually asked whether it met with a host of other stakeholders to discuss its proposal. As an initial matter, Amigos Bravos considers the Triennial Review itself to be the time and place to bring up such changes, when all stakeholders are provided with notice of proposed changes, and, presumably, interested stakeholders are in the room and have multiple opportunities to comment on proposed changes in meetings and in writing. Amigos Bravos first mentioned its concerns regarding compliance schedules in a November 30, 2007 comment letter to NMED—over two years before the Triennial Hearing. Furthermore, Amigos Bravos notes that other parties were not questioned about the impact of their proposals to other stakeholders. For example, industry-oriented groups seeking to alter water quality protections – often by weakening them – were not questioned as to whether they reached out to stakeholders such as Amigos Bravos whose members depend on clean water for their health, for spiritual ceremonies, and their very livelihood, including for agriculture, and tourism such as rafting and fishing guides.

#### 6. FLOW- 20.6.4.13.N

*Amigos Bravos' proposal:*

**N. Flow: If waters of the state are not attaining designated uses due to lack of adequate flow they shall be considered impaired and appropriate planning documents and steps shall be taken.**

Amigos Bravos' proposal seeks merely to recognize the problem so that the issue of flow—which can prevent the attainment of all manner of water quality standards—does not become the elephant in the room. Testimony of Rachel Conn at 2; Rebuttal Testimony of Rachel Conn at 1-3. The Department's has recognized that "the lack of flow is a significant cause for impairment in New Mexico's waters," and that the 303(d)/305(d) Integrated Report identifies water bodies that do not support aquatic life uses due to low-flow conditions. See Testimony of Pamela Homer at 42. Indeed, the Department even acknowledges, that while unenforceable, a planning document "could potentially identify strategies for augmenting the flow, e.g., acquisition of water rights, voluntary agreements with water right holders, negotiations with federal water managers." *Id.* Nevertheless, the Department inexplicably opposes Amigos Bravos' modest proposal. Amigos Bravos urges the Commission to consider adopting this proposal which would ensure that water quality and water quantity are not artificially separated.

## 7. USE ATTAINABILITY ANALYSIS- 20.6.4.15

### *Amigos Bravos' proposal:*

Note - in response to NMED's surrebuttal, Amigos Bravos has amended their proposal by withdrawing language previously proposed in 20.6.4.15(A)(2) and making changes to NMED's amended language in section (C). Amigos Bravos originally included some of these comments to NMED's Proposal for section 20.6.4.11.H. However, NMED has switched some of this language around and thus these comments are now applicable to this section.

### 20.6.4.15 USE ATTAINABILITY ANALYSIS:

A. A use attainability analysis is a scientific study ~~[that shall be]~~ conducted ~~[only]~~ 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), 131.20(a), and 131.20(c) shall be applicable.

~~(1) [Any person who proposes to classify, or reclassify to a designated use with less stringent criteria, a surface water of the state with designated uses that do not include the a use[s] specified in Section 101(a)(2) of the federal Clean Water Act from a surface water of the state must conduct]~~ 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 is an existing use~~ unless a use requiring the same or more stringent criteria is designated.

~~3) A use attainability analysis or an equivalent study approved by the department and the regional administrator must be conducted to remove any non-existing designated use from any classified waters of the state.]~~

(3) Any water body segment with water quality standards that do not include the uses specified in section 101(a)(2) of the federal Clean Water Act shall be reexamined every three years to determine if any new information has become available.

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, but not limited to, the methods described in the following documents . . . .

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 interests 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, and the department shall periodically petition the commission to list ephemeral waters under Subsection 6 of 20.6.4.97 NMAC and to incorporate changes to classified segments as appropriate.

Amigos Bravos has brought up several concerns with the Department's Use Attainability Analysis ("UAA") proposal. After hearing more about this proposal during the hearing, Amigos Bravos' has two remaining concerns: first, the Department's proposal allows for waters to be downgraded before the Commission has an opportunity to review them; second, the proposal is confusing because it puts all waters that do not meet CWA 101(a)(2) uses under 20.6.4.97, thus implying that all ephemeral waters cannot meet fishable/swimmable uses. Each of these concerns is addressed in turn.

First, the Department's proposal represents an expansion of the Department's powers that is not authorized by the Water Quality Act. Specifically, the Department's proposal provides the Department, rather than the Commission, with the authority to change water quality standards; the Department's proposal grants the Department the power to effectively downgrade a water to the "ephemeral" category in 20.6.4.9—thereby eliminating the fishable/swimmable presumption mandated by the CWA—before the Commission has had a chance to approve the change. See Department Proposal at § 20.6.4.15(C). The power to change water quality standards, however, is reserved to the Commission by the WQA. N.M.S.A. § 74-6-4(D); Direct Testimony of Erik Schlenker-Goodrich at 15-16; see also N.M.S.A. § 74-6-9 (outlining powers of constituent agencies—notably absent is any inclusion of the power to change water quality standards; rather, NMED is granted the power to, "on the same basis as any other person, *recommend and propose* regulations and standards for promulgation by the commission" (emphasis added)).

Adding to Amigos Bravos' concern about this proposal is the fact that the proposal contains nothing to ensure that the Commission will have the opportunity to formally approve the changes in any sort of timely fashion. The proposal states merely that "the Department shall periodically petition the Commission" to review such changes. Consistent with the fact that the proposal does not include any parameters on what "periodically" means, NMED likewise could not say how soon after downgrading a water NMED would petition the Commission to formalize that change. See Transcript at 246-47. Although NMED asserted that it would petition the Commission at least every triennial review, the proposal does not actually mandate that it do so. Furthermore, NMED comes before this Commission for the triennial at the most once every four to five years. As a consequence, NMED's proposal gives NMED the power to treat waters as downgraded for years before the Commission is able to approve such an action. Furthermore, because NMED will not be protecting the water with the more protective standards, by the time the Commission reviews the change, the water may already be to the point where the higher uses

are no longer supported. In addition, the Department's proposal does not follow the public participation requirements set out in the WQA which require a public hearing prior to the change of water quality standards. *See* Direct Testimony of Erik Schlenker-Goodrich at 16. The Department's proposal is therefore inconsistent with the WQA in that it seeks to transfer powers to the Department that are specifically reserved to the Commission.

Second, Amigos Bravos is troubled by the Department's proposal because it uses the category entitled "ephemeral waters," section 20.6.4.97, as a "bin" for waters that a UAA determines do not meet CWA 101(a)(2) uses. *See* Testimony of Pamela Homer at 54; Rebuttal Testimony of Pamela Homer at 21. By labeling this category "ephemeral," the Department's proposal implies that all ephemeral waters necessarily cannot support fishable/swimmable uses. However, as demonstrated by the Amigos Bravos' expert, Jon Klingel, ephemeral waters can and do support aquatic life and primary contact uses. *See* Testimony of Jon Klingel, Rebuttal Testimony of Jon Klingel at 2-4. Although, as NMED notes, the proposal only puts waters into the section 97 "bin" after a UAA has been completed, the implication is that once a water is determined to be ephemeral—a determination which can be based on as yet undetermined hydrology protocol—it is likely to be assumed that it will fall into the "ephemeral" category. *See* Surrebuttal Testimony of Pamela Homer at 7. The allowance in NMED's proposal for ephemeral waters that *do* support fishable/swimmable uses to be placed in the "intermittent" category only further complicates the proposal; it is difficult both for a member of the public who is studying the standards for the first time, and indeed for this attorney who has pored over them, to understand why an ephemeral water would be included in a category labeled "intermittent." Amigos Bravos remains concerned that because of this labeling, once a water is determined to be ephemeral, it will be much too easy to place it in the ephemeral "bin," where it is assumed that the fishable/swimmable uses cannot be met. In short, not only is NMED's proposal confusing, it also inserts a dangerous implication that ephemeral waters cannot meet CWA 101(a)(2) uses.

## 8. PRIMARY CONTACT- 20.6.4.100-899

### *Amigos Bravos' proposal:*

20.6.4.115 RIO GRANDE BASIN - The perennial reaches of Rio Vallecitos and its tributaries, and perennial reaches of Rio del Oso and perennial reaches of El Rito creek above the town of El Rito.

A. Designated Uses: domestic water supply, irrigation, high quality coldwater aquatic life, livestock watering, wildlife habitat and ~~[secondary]~~ primary contact; public water supply on the Rio Vallecitos and El Rito creek.

B. Criteria:

~~[ (1) In any single sample: specific conductance 300  $\mu$ mhos/cm or less, pH within the range of 6.6 to 8.8 and temperature 20°C (68°F) or less.]~~ The use-specific numeric criteria set forth in 20.6.4.900 NMAC are applicable to the designated uses ~~[listed above in Subsection A of this section],~~ except that the following segment specific criterion criteria applies apply: specific conductance 300  $\mu$ S/cm or less; the monthly geometric mean of E.coli 126 cfu/100mL or less; single sample of 235 cfu/100mL or less

[ ~~(2) The monthly geometric mean of E. coli 126 cfu/100 mL or less; single sample 235 cfu/100 mL or less (See Subsection B of 20.6.4.14NMAC.)~~ ]

Amigos Bravos supports the Department's proposal to assign waters that are protected by primary contact criteria the primary contact use. The policy of having secondary contact listed as a designated use and then have site-specific primary contact standards should be stopped. Waters that have primary contact as an existing use should also have it as a listed designated use. The former policy causes undue confusion to the public, and we would assume to the regulators and policy makers as well. This practice makes it especially difficult to review the 303(d) list because there is no indication what is meant when a segment says that secondary contact is "fully supported." There is no way for the public to know if the primary contact criterion is being supported.

While Amigos Bravos supports the Department's proposal generally, as noted in testimony, care must be taken to ensure that segments which have criteria that are more protective than that associated with the primary contact designated use continue to receive the benefit of the more protective criteria. See Testimony of Rachel Conn at 3.

Amigos Bravos is glad to see NMED has remedied this situation for segment 20.6.4.115 and now Amigos Bravos' and NMED's proposal are identical. Amigos Bravos did not do a comparison between the old standards and new standards for every segment and we are concerned that this situation may have occurred elsewhere. We therefore encourage the Commission to ensure that additional segment specific criteria have not been lost in the shuffle; because criteria can be downgraded only if a UAA is performed, the more protective criteria must be maintained for such segments.

## **9. STANDARDS FOR TRANSURANIC ALPHA-EMITTING ELEMENTS- 20.6.4.105, 106, and 114**

### **a. Jurisdiction of the Commission to Adopt Informational Standards for Radionuclides**

Although Los Alamos National Security ("LANS") withdrew its opposition to informational water quality standards for radionuclides, *see* Transcript at 377, Commissioner Hutchinson raised a question during the hearing about the Commission's jurisdiction to adopt such informational standards, *see* Transcript at 634-35, and we therefore wish to address that question at the outset.

The New Mexico Water Quality Act ("WQA") grants the Commission the authority to adopt water quality standards, including informational standards such as those proposed by NMED and Amigos Bravos. N.M.S.A. § 74-6-4(D). Specifically, the WQA provides that the Commission shall adopt standards which shall include "narrative standards and as appropriate, the designated uses of the waters and the water quality criteria necessary to protect such uses." Importantly, the Commission is charged with adopting standards that "shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act."

In this instance, NMED has proposed that the designated use of “public water supply” be added to the segment below Los Alamos. In conjunction with that designated use, the Commission must adopt water quality criteria to protect that use. Although informational, the criteria for radionuclides proposed by NMED and Amigos Bravos seek to do just that—provide the public and water providers, such as Buckman Direct Diversion Board, the information necessary to ensure that the water flowing to homes and businesses in Santa Fe is safe for human use and consumption. Furthermore, the information will enable Los Alamos National Labs (“LANL”) to take corrective action if necessary to avoid radionuclides reaching the Rio Grande. Although the standards do not operate as typical standards in that they do not regulate behavior, they are nevertheless perfectly consistent with the WQA and the Commission’s duty to “protect the public health or welfare, [and] enhance the quality of water.” N.M.S.A. § 74-6-4(D). As such, the Commission has authority to adopt the radionuclide standards proposed by NMED and Amigos Bravos.

**b. Amigos Bravos’ Radionuclide Proposal**

*Amigos Bravos’ Proposal:*

20.6.4.105, 20.6.4.106, 20.6.4.114 RIO GRANDE BASIN:

B. Criteria:

(1) The use-specific numeric criteria set forth in 20.6.4.900 NMAC are applicable to the designated uses,.....the following criteria are applicable to the public water supply use:

<u>Radionuclide</u>	<u>pCi/L</u>
<u>Americium-241</u>	<u>0.19</u>
<u>Cesium-137</u>	<u>0.64</u>
<u>Plutonium239/240</u>	<u>0.15</u>
<u>Strontium-90</u>	<u>0.35</u>
<u>Tritium</u>	<u>400</u>
<u>Long-lived Alpha TRU (Note 1)</u>	<u>0.15</u>

Note 1: The category long-lived alpha-emitting TRU (transuranic radionuclides) includes the combined total of plutonium-238, plutonium-239/240, plutonium-242, americium-241, americium-243, curium-244, and neptunium-237.

Amigos Bravos supports the inclusion of standards for radionuclides, but Amigos Bravos’ proposal would have the standards set an order of magnitude greater ( $10^{-6}$ ) than that proposed by NMED, in keeping with the standards set in Colorado for waters coming out of Rocky Flats. See

Testimony of Arjun Makhijani.<sup>3</sup> As put simply by Amigos Bravos' witness, Dr. Makhijani, why should the "people of New Mexico who are going to use this Rio Grande water should be less protected than the people of Colorado?" Transcript at 535. There simply is no good answer to that question. Indeed, no where in its testimony did the Department dispute that setting the standards at  $10^{-6}$  would be appropriate. Rather, NMED notes merely that it chose the  $10^{-5}$  risk level because it is the same level of risk used in other environmental programs. Testimony of Pamela Homer at 71. While this is certainly a justification for using the  $10^{-5}$  risk level, it is not a very compelling one, particularly in light of Colorado standards which adopt the  $10^{-6}$  risk level. As Dr. Makhijani noted, "there's every reason to review the risk standard and not continue to use an old risk standard just because it has always been used, because the current situation is that these waters are not going to be used in the way they've always been used, but they're going to be used by a substantial fraction of the New Mexico population, including, in this city, for drinking water, for bathing, for cooking." Transcript at 529-30.

Amigos Bravos also proposes including the radionuclide standards for segments 20.6.4.105, 20.6.4.106. These segments are also downstream of Los Alamos, and indeed include the points of diversion for water to be taken for public use. As such, Amigos Bravos reiterates its proposal that these segments include the radionuclide criteria.

#### 10. LOS ALAMOS INTERMITTENT AND EPHEMERAL WATERS- 20.6.4.128

##### *Amigos Bravos' proposal:*

20.6.4.128 RIO GRANDE BASIN - Ephemeral and intermittent portions of watercourses within lands managed by U.S. department of energy (DOE) within LANL, including but not limited to: Mortandad canyon, Cañada del Buey, Ancho canyon, Chaquehui canyon, Indio canyon, Fence canyon, Potrillo canyon and portions of Cañon de Valle, Los Alamos canyon, Sandia canyon, Pajarito canyon and Water canyon not specifically identified in 20.6.4.126 NMAC. (Surface waters within lands scheduled for transfer from DOE to tribal, state or local authorities are specifically excluded.)

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

Amigos Bravos proposes a change to eliminating the "limited aquatic life" use for this segment because it is not supported by the record. NMED opposes this change, asserting that this change was discussed during the 2004 Triennial Review. *cite*. However, that justification is not accurate; although standards for this section were adopted during the 2004 Triennial Review, there is no justification in either the 2004 transcripts of the hearing or the final 2004 Commission Statement of Reasons for the triennial review as to why the limited aquatic life was

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<sup>3</sup> Please note that Amigos Bravos has attached as Exhibit B, the data regarding neptunium referenced in Dr. Makhijani's testimony at the hearing. *See* Transcript at 538.

appropriate and adopted for these streams. Furthermore, the EPA specifically directed NMED to perform a UAA for this section, but that UAA was done *after* the 2004 Triennial Review.

In fact, if the record reveals anything, it demonstrates support for Amigos Bravos' proposal, not the contrary. The Department's 2004 witness Mr. John Montgomery stated that the Department believed that: "It is appropriate to apply the chronic life criteria to these waters. The Bureau's Aquatic Biology and Physical Habitat Team has reviewed the US Fish and Wildlife Service information and concludes that there is substantial scientific evidence to support the application of chronic criteria in these waters." 2004 Transcript at 67, lines 2-23.

The Commission, in its final Statement of Reasons for the 2004 Triennial Review, gives the following reason for adopting the uses for segment 20.6.4.128:

243. The Commission adopts another new segment proposed by NMED and [University of California "UC"], for the same reasons as set out above in paragraphs 235-236 [segment 20.6.4.126]. The proposed uses are appropriate, as discussed above.

Commission Statement of Reasons at ¶ 243. Yet, when one goes to paragraphs 235-236 one finds the justification for applying the coldwater aquatic life use, not the limited aquatic life use:

235. Both UC and NMED proposed to segment and adopt segment-specific standards for waters within or near LANL. The segments, set out now as segments 126, 127 and 128, are identical, but different designated uses and criteria were urged in this segment.
236. The Commission adopts this new segment to classify waters based upon an intensive study by the USFWS. The study supports the designated uses of *coldwater aquatic life*, wildlife habitat, secondary contact, and livestock watering. The aquatic life, wildlife habitat and recreation uses are required by CWA Section 101(a)(2) unless a UAA supports not designating them. *For this segment, coldwater is the appropriate subcategory of aquatic life use because it is supported by the USFWS report and is consistent with the aquatic life use in adjacent Section 20.6.4.121, which includes tributaries of the Rio Grande in Bandelier National Monument (where high quality coldwater is the designated use).* For this segment, secondary contact is the appropriate subcategory of recreation because full-body contact in these small streams is unlikely and infrequent, and if it does occur the proposed criteria offer a proper level of protection. Finally, the uses of wildlife habitat and livestock watering are appropriate. The WQCC has historically presumed these uses for all unclassified surface waters. There is no question about wildlife using these streams. There also is evidence that livestock watering is an existing use. Laboratory publications acknowledge the presence of livestock on or adjacent to this segment, including horseback riding, cattle grazing and free-range chickens and dairy goats. The designation of livestock watering is based on both the existing use of these waters by livestock, as well as for the protection of downstream livestock watering uses.

*Id.* at ¶¶ 235-36 (emphasis added). In addition, the Commission specifically rejects UC's proposal to designate just limited aquatic life to segment 20.6.4.126 for the following reasons:

237. *The Commission rejects UC's proposal to designate just limited aquatic life because USFWS demonstrated that shellfish typically found in coldwater aquatic communities is present in these streams.* The coldwater subcategory is intended for "the protection and propagation of fish, shellfish and wildlife." Accordingly, the presence of shellfish indicative of a coldwater aquatic community establishes an existing use, even in the absence of fish. In addition, the USFWS documented existing macroinvertebrate communities in all of these streams (except Water Canyon). These macroinvertebrate communities (except Sandia Canyon) compare favorably (only slightly impaired or full support - impacts observed) to Upper Los Alamos Canyon, a coldwater fishery at the time of the study. The USFWS also determined that eight species in Los Alamos and Pajarito Canyons (identified by NMED) were classified by the Idaho Department of Environmental Quality (DEQ) as preferring coldwater. Moreover, the Laboratory's invertebrate data included several species that prefer coldwater in Los Alamos, Pajarito, Sandia and Chaquehui Canyons. Finally, to the extent that the absence of fish is relevant to the subcategory designation, the term "existing use" has a broader meaning than "existing on this date". The absence of fish in 2003 is not the benchmark for designation of an aquatic life use.

*Id.* at ¶ 237 (emphasis added). While this statement of basis refers to segment 20.6.4.126, the "streams" that are referred above where shellfish are found include intermittent streams on LANL property. See Testimony of Rachel Conn at 5. Mr. Lusk, a biologist from the USFWS and one of the authors of the 2002 USFWS study of the streams in LANL County (this study is referenced in and attached to Ms. Conn's direct testimony at page 5) testified at the 2004 Triennial Review summarizing this study and supporting the application of the coldwater aquatic life use to intermittent and ephemeral streams on LANL property and to intermittent and ephemeral waters in general. Mr. Lusk stated "The adoption and maintenance of chronic aquatic life criteria for intermittent and ephemeral waters, as proposed by the New Mexico Environment Department on the first day of this hearing, will assist in fish and wildlife protection." 2004 Triennial Transcript at 813. Later in his testimony, Mr. Lusk summarizes the USFWS study of the 4 intermittent streams in Los Alamos County (3 of which are on LANL property and are currently found in segment 20.6.4.128): "Therefore, based on the adequate water temperature, suitable trout habitat, the presence of shellfish and other forms of aquatic life, we found an existing, quote, coldwater aquatic life use, unquote, in these four streams. "We recommend that the Commission designate these streams for the coldwater aquatic life use." *Id.* at 827.

In addition during the 2004 Triennial Review the WQCC assigned aquatic life, not limited aquatic life, to segment 20.6.4.98, the segment for unclassified intermittent waters. The statement of reasons for this designation is as follows:

192. The Commission believes it is appropriate to apply chronic criteria to intermittent waters because of the potential long-term exposure of aquatic life to pollutants.

Commission Statement of Reasons at ¶ 192. Yet the intermittent waters on LANL property were given weaker protections than any other intermittent waters in the state even though the USFWS provided a detailed study that demonstrated that the waters supported trout habitat, that shellfish were present, and specifically recommended that coldwater aquatic life was the appropriate use designation for these intermittent streams.

The EPA, upon reviewing the 2004 Triennial Review documents, was also concerned about this designation and requested that more information be provided to justify the designation of limited aquatic life to segment 20.6.4.128. The Department, in an unexplained turn-around from its previous position that ephemeral and intermittent waters in the state and at LANL should receive chronic aquatic life protections, drafted a use attainability analysis (UAA) to justify the designation of limited aquatic life to LANL intermittent and ephemeral waters after the 2004 Triennial Review. Yet the Department did not conduct any on-the-ground studies, or even reference any different studies besides the original USFWS report that they used in their 2004 triennial review testimony to come to the opposite conclusion and recommendation to protect these waters with both acute and chronic criteria. Amigos Bravos does not understand how the same information was used to come to such drastically different conclusions.

The UAA relied primarily on the USFWS document, Lusk and MacRae, 2002. This document specifically recommends an upgrading of water quality standards to coldwater aquatic life, yet the UAA uses it as a justification to downgrade the use from aquatic life to limited aquatic life. Of the 12 drainages in this segment (20.6.4.128) only 3 were examined by the USFWS and are mentioned in the USFWS report. The UAA does not present any additional data besides the USFWS report and therefore only presents data on 3 of the 12 drainages (the study looks at 4 intermittent streams in Los Alamos County, but one of those streams is located upstream from LANL and is not included in 20.6.4.128). As mentioned above, the data on these 3 intermittent streams that USFWS presented led the USFWS on page 90 of their Report to conclude that: "Since all these intermittent streams contained aquatic life, a coldwater fishery was considered an existing use and should be considered for State designation".

Mr. Montgomery, on page 164 of the 2004 transcript, goes on to say "[a]s we have previously discussed, LANL's contention that coldwater aquatic life cannot be assigned without fish has no basis because the presence or absence of a specific life form is not determinative." Yet the UAA states that "[s]upport of a fishable use in these types of waters would require a source population of fish that could enter and occupy these waters during wet periods." The USEPA and the USFWS agree with Mr. Montgomery that aquatic life is more than the presence or absence of fish as stated on page 89 of the 2002 USFWS report: "An existing aquatic life community composed entirely of invertebrates and plants, such as may be found in a pristine alpine tributary stream, should still be protected whether or not such a stream supports a fishery (USEPA 1995b). Therefore, a fishery is more than just a fish in the water; it is the biological, chemical, and physical characteristics of a water body, including the invertebrate community and all the other aquatic life forms that provide food as well as other ecosystem functions and services." Finally, the Commission itself contends that the absence of fish should not be used as the determining factor in applying aquatic life uses as demonstrated by the quote included above from the 2004 Triennial Statement of Basis: "to the extent that the absence of fish is relevant to

the subcategory designation, the term "existing use" has a broader meaning than "existing on this date". The absence of fish in 2003 is not the benchmark for designation of an aquatic life use." Yet the main reason presented in the UAA for not applying the aquatic life use is the lack of the presence of fish.

The existing use by shellfish is not even mentioned in the UAA yet the protection of shellfish is a 101(a)(2) and CWA Regulations specifically say that States must provide water quality for the protection and propagation of fish, shellfish, and wildlife. 40 C.F.R. § 131.3(f). In fact this same USFWS report cites current occurrence of shellfish (ridged-beak peaclams) in Frijoles, Pajarito, Water and Los Alamos Canyons (citing Cross 1996b).

The public was not informed of this after-the-fact drafted UAA and was not given an opportunity to review or comment on the document. In fact, Amigos Bravos was not even aware that this UAA existed until the Department referenced it in their rebuttal testimony during this current triennial process. Ms. Homer confirmed during the hearing that the UAA was not put out for public. Transcript at 257, lines 23-25. Yet, according to EPA regulations and guidance, states MUST provide public comment on UAAs (40 CFR 131.10(e) and Water Quality Handbook 2.7.5 Step 5).

In conclusion, due to the lack of credible evidence on record for justifying a downgrading of aquatic life and due to an invalid UAA because of the lack of public review and comment, at the very least the aquatic life use, which would apply both chronic and acute criteria, should be adopted for this section. In addition, the *coldwater* aquatic life use, as recommended by the USFWS in their 2004 testimony (presented as exhibit 2 of Amigos Bravos testimony) and in their 2002 Report (presented as exhibit 3 of Amigos Bravos' testimony) should be considered by the Commission for this segment.

#### 11. LIMITED AQUATIC LIFE USE- 20.6.4.900(H)(7)

*Amigos Bravos' proposal:*

~~[(6)(7) Limited Aquatic Life: [Criteria shall be developed on a segment-specific basis.] The acute aquatic life criteria of Subsections I and J of this section [shall] apply to this subcategory. Chronic aquatic life criteria do not apply unless adopted on a segment-specific basis. Human health organism only criteria apply only for persistent pollutants unless adopted on a segment-specific basis.~~

Amigos Bravos believes that the designated use of "limited aquatic life," set forth at 20.6.4.900(H)(7), is ambiguous and confusing. Instead, Amigos Bravos proposes that we return to the pre-2005 policy of setting segment specific uses in the rare case where the other aquatic life uses are not attainable. For instance, in the case of Sulphur Creek, Section 20.6.4.124 it would be simple to say under paragraph B(3) that, except for subsections I and J of 20.6.4.900, the chronic aquatic life criteria do not apply. The limited aquatic life use adds one more layer of confusion to the standards requiring members of the public to flip back and forth between the

segment and the back of the standards. In addition, the limited aquatic life use could be abused to lower water quality standards. It is more appropriate to make segment specific changes in cases where the natural conditions have resulted in an impairment associated with either the chronic or acute aquatic life criteria. This method would allow for more fine tuned standards. For example, in some cases it may be that none of the chronic life criteria are attainable, and therefore all the criteria could be listed as not applying, but, in some other cases, it may be that only a couple of the chronic life criteria do not apply and in those cases these constituents could be listed individually. Returning to the pre-2005 policy also ensures that water quality standards are applied equitably and that standards are modified only when natural conditions necessitate such changes. Getting rid of the limited aquatic life use would not require a large overhaul to the standards as presently only three segments have the limited aquatic life designated use.

EPA's disapproval of the use of the limited aquatic life use for ephemeral waters is consistent with this point. EPA noted that "this limited use does not 'serve the purposes of the [CWA], as defined in CWA sections 101(a)(2) and 303(c)." See Discussion Draft, § 20.6.4.97 NMAC, Basis for Change. NMED has addressed this concern in part by its proposed procedures for UAAs, but as discussed above in section II(A)(7), NMED's proposal creates a troubling implication that ephemeral waters can only support a limited aquatic life use. Organisms in ephemeral waters are often especially sensitive to changes, and thus ensuring that chronic life criteria are applied can be crucial to the survival of those species. See Direct Testimony of Jon Klingel at 4; Rebuttal Testimony of Jon Klingel at 4. As such, a separate limited aquatic life designation is inappropriate. At most, the criteria specified in the limited aquatic life designation should be applied on a segment-specific basis.

## 12. DETECTION LIMITS- 20.6.4.900 (J)

### *Amigos Bravos' Proposal:*

20.6.4.900(J)(2) Table of Numeric Criteria: The following table sets forth the numeric criteria ~~[adopted by the commission to protect]~~ applicable to existing, designated and attainable uses. Additional criteria that are not compatible with this table are found in Subsections A through I, K and L of this section. **Detection limits for these criteria may not be as sensitive as the standard. Detection limits can be found in the New Mexico Environment Department's Surface Water Quality Bureau's Quality Assurance Project Plan, which is updated annually and available on the Bureau's website or by request.**

Amigos Bravos originally proposed adding a column to 20.6.4.900 that would list the detection limit of the method of analysis for each constituent. This would at least allow for the public to know if we have the capability to determine if the standard is being met. NMED, in their August 28<sup>th</sup> NOI, asserts that the standards are not the appropriate place to include detection limits because they need to be updated quickly in response to the availability of new methods. Amigos Bravos agrees with NMED that the Surface Water Quality Bureau's Quality Assurance Project Plan is the appropriate place to provide this information and therefore we amend our proposal for detection limits by withdrawing our proposal to have a separate column added to 20.6.4.900 (J).

Instead we propose to add the language above so the public knows that detection limits may not be protective enough to determine if uses are being met and knows where to look if they want to find out a specific detection limit.

Amigos Bravos is concerned about water quality analysis methods that have detection limits that are orders of magnitude above the water quality standard. For example, the most common PCB analysis method has a detection level of 1 ug/L when the water quality standard for human health is .00064 ug/L. When a sample is taken and analyzed using methods that are not sensitive enough to determine if a water quality standard is being met, and then, when there is a non-detect, used to make the determination that the designated uses are being fully supported, it is misleading to the public.

### 13. DOMESTIC WATER SUPPLY CRITERIA- 20.6.4.900(J)

Amigos Bravos opposes the Department's proposal to change, and in most cases weaken, the criteria for the domestic water supply use. If the Department's proposal for this section is adopted, Amigos Bravos proposes in addition a new designated use of "Water and Organism Consumption" that would apply to all waters that have both a domestic water supply and aquatic life use designation. This designated use would have a new column in the table at 20.6.4.900.J. and the criteria would be the current (prior to the Department's proposed changes) numeric criteria listed under the domestic water supply use. A scenario where there is both the domestic water supply and water and organism consumption use, and they are appropriately applied, would best protect public health.

Amigos Bravos opposes the Department's proposed weakening the domestic water supply criteria because the proposed changes disregard the potential health effects to people who both drink the water and eat fish from the same water source. While the words "Domestic Water Supply" are retained in the Department's proposal, almost all of the criteria are weakened, completely changing the protections provided under by the designated use in the past. Amigos Bravos asserts that it is disingenuous to claim that a use is not being removed just because you call what is essentially new less protective use by the same name. The EPA recommended criteria for consumption of water plus organism (these were the standards that the WQCC currently applies to the domestic water supply use) should continue to apply to the domestic water supply use. These criteria can be found in the November 2002 EPA Human Health Criteria Calculation Matrix. To Amigos Bravos' knowledge, every water that has a domestic water supply use also has an aquatic life use and thus it is likely that some people both fish and drink from these waters. In fact, it is much more likely that both uses are conducted on the same waters than not. Many of the waters where people fish are also waters where people hike and camp and consume water. To protect these existing uses the more sensitive criteria for consumption of water and organism should apply.

It is true, as the Department pointed out in their August 28<sup>th</sup> Technical Testimony, that when removing a non 101(a)(2) use, such as the Domestic Water Supply use, a Use Attainability Analysis (UAA) is not required. However, the Department is required to first show that the use is non attainable and even then, if non attainment is shown, a 131.10(g) factor must be met prior to

removing the use.

States may remove a designated use which is not an existing use, as defined in §131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible because:

- (1) Naturally occurring pollutant concentrations prevent the attainment of the use; or
- (2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or
- (3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
- (4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or
- (5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or
- (6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.

40 C.F.R. § 131.10(g). The EPA Water Quality Standards Handbook outlines the process for removing a designated use in section 2.7. Figure 2-1 of the handbook depicts a flowchart of steps that must be taken to remove a use. It clearly shows that when removing any use, even a non 101(a)(2) use, first non- attainment must be shown and then a section 131.10(g) factor must be met. The Department has not met either of these hurdles.

## **B. GENERAL COMMENTS**

### **1. BIOCRITERIA- 20.6.4.13.M**

Amigos Bravos supports the Department's proposed narrative biocriteria in order to protect biological integrity. While establishing narrative biocriteria is a very good start, Amigos Bravos believes that strong biocriteria, both narrative *and* numeric, are essential for protecting the health of New Mexico's rivers and other waterbodies. We urge the Commission to direct the Department to prioritize developing *both* types of biocriteria.

**2. CONTACT STANDARDS FOR INTERMITTENT AND PERENNIAL WATERS- 20.6.4.97 and 98**

Amigos Bravos supports the Department's proposal to apply primary contact to perennial and intermittent waters. This proposal correctly implements CWA requirements to provide "fishable/swimmable" water quality protections.

**3. COOLWATER CRITERIA- 20.6.4.900(H)(4)**

Amigos Bravos is concerned about the Department's addition of "coolwater" criteria. Although, Amigos Bravos understands that the Department is trying to insert criteria for species that legitimately need the conditions outlined in the coolwater criteria, the addition of such criteria without additional benchmarks for its use presents an opportunity for abuse. Already, the water quality standards allow for five categories of temperature criteria: high quality coldwater, coldwater, marginal coldwater, warmwater, and marginal warmwater. Although in fact the coolwater use proposed by the Department proposes the same temperature, dissolved oxygen and pH criteria as the marginal coldwater use, so there appears to be no difference in the new use from marginal coldwater use unless different criteria in 20.6.4.900.J are going to be proposed at a future date. Given Amigos Bravos existing concerns about the already existing categories, the addition of yet another is troublesome, as it invites the Department to classify a water body into whatever category it presently fits- and with six potential categories, it is certain to fit into one- rather than classifying for the appropriate designated use, i.e. its historical or appropriate use, and then working toward achieving that condition. In particular, as climate change causes New Mexico's waters to become more limited, and thus more susceptible to temperature change, Amigos Bravos is concerned that the addition of another category will justify categorizing what are appropriately coldwater streams as coolwater.

Amigos Bravos recommends that if a coolwater use is included, that such a use be allowed only on a segment-specific basis, or that requirements are included so that the designation can be used only where historical data support such a use. Additionally, Amigos Bravos recommends that marginal coldwater be eliminated if a coolwater use is added.

**4. HARDNESS TABLE FOR ACUTE AND CHRONIC CRITERIA FOR METALS- 20.6.4.900(I)**

Amigos Bravos supports the Department's proposal for 20.6.4.900.I . The proposed table in 20.6.4.900.I will greatly help the public to interpret hardness dependent water quality data.

**5. PUBLIC WATER SUPPLY USE- 20.6.4.900(J)**

Amigos Bravos urges the commission to adopt use-specific criteria for the public water supply use. Many contaminants listed in 20.6.4.900.J are not removed with conventional treatment

practices and thus criteria to protect for this use, taking into account the effectiveness of standard treatment technology, should be adopted.

## **6. PERCHLORATE STANDARD NEEDED- 20.6.4.900(J)**

To protect public health and safety, New Mexico should adopt a Perchlorate standard of 1 ug/L for domestic water supply. Criteria for irrigation, wildlife habitat and livestock watering should be developed as well. New Mexico has increasing problems with perchlorate contamination as is evidenced by the numerous perchlorate hits in both ground and surface water in the past ten years. In the spring of 1999, perchlorate was identified at HAFB when USGS collected a surface water sample from the Lost River for the National Park Service and found perchlorate at 16,000 ug/L. In 1995 perchlorate was found in shallow alluvial groundwater in Los Alamos at 180 ug/L. At Fort Wingate, perchlorate was found in one groundwater monitoring well at 2,860 ug/L. Although there is currently no federal drinking water standard for perchlorate, the EPA has considered a reference dose of 1ug/L for perchlorate in drinking water. New evidence shows that many Americans are now consuming large quantities of perchlorate in the vegetables that they eat. It is reasonable to assume that the level of perchlorate that is safe in drinking water will have to be lowered as the amount of perchlorate we ingest from others sources increases. Vegetables irrigated with perchlorate contaminated water concentrates the contaminant by many factors. For example lettuce concentrates perchlorate by an average factor of 65 at levels found in water of 10 to 130 ppb.

## **7. PHARMACEUTICALS AND PERSONAL CARE PRODUCTS**

Amigos Bravos supports the development of new water quality standards for Pharmaceuticals and Personal Care Products (PPCPs). *See* Direct Testimony of Michael Jensen at 2-7. EPA's lack of action to protect public health from PPCPs by not setting national standards means that the Department and the Commission must take responsibility to protect New Mexico water quality and public health by developing and proposing PPCPs standards. Amigos Bravos urges the Commission to adopt water quality standards for key PPCPs, such as sulfamethoxazole, loxacin, caffeine, DEET, TDCPP, and tris (2-chlorethyl) phosphate, all of which have been detected in New Mexico's waters. We recommend that the Department test the river at the parts per trillion level for chemicals including but not limited to: chemotherapy drugs, hormones, antidepressants, anti-epileptics, antibiotics, pain relievers, blood pressure diuretics, and plasticizers. Alternatively, a list of chemicals for which to test could be derived from demographics of most commonly used PPCPs in NM. We recommend the prioritization of hormones & plasticizers (such as bisphenol-A) which can be endocrine disruptors at very low doses. A resource to calculate health based screening levels for detected contaminants that do not have US EPA maximum contaminant levels could be the USGS' collaborative project with the US EPA New Jersey Department of Environmental Protection and Oregon Health and Science University. Conducting screening level testing will help NMED identify pollutants of concern and assist in developing water quality standards in the future.

## 8. NUTRIENTS

NMED should develop water quality based nutrient standards to protect New Mexico's waters. Under the current system wastewater treatment plants are only required to treat to secondary treatment technology limits. This practice needs to be stopped, especially in some of our smaller streams where there is little to no dilution. EPA has recently proposed nutrient standards for Florida. Amigos Bravos requests that the Commission direct NMED to follow this process and propose nutrient standards for New Mexico by 2012.

## III. CONCLUSION

Amigos Bravos wishes again to thank NMED and the Commission for their efforts to solicit public participation in this process and to protect water quality in New Mexico. It is incumbent upon you to ensure that the objectives of the CWA are met and that the citizens of New Mexico enjoy clean water now and for generations to come.

Respectfully submitted this 4<sup>th</sup> day of March 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on or by March 8, 2010, I will serve an electronic copy of Amigos Bravos' Statement of Reasons and Closing Legal Argument on behalf of Amigos Bravos via email to:

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