



Gila Resources Information Project
Promoting Healthy Communities by Protecting Our Environment Since 1998

October 17, 2016

Michelle Hunter, Bureau Chief
Ground Water Quality Bureau
New Mexico Environment Department
P.O. Box 26110
Santa Fe, NM 87502

Via Electronic Mail: NMENV.GWQBrulerev@state.nm.us.

RE: Comments On The New Mexico Environment Department's September 19, 2016
Proposed Revisions To 20.6.2 NMAC

Dear Ms. Hunter,

Amigos Bravos and Gila Resources Information Project (GRIP) collectively submit the following comments on the New Mexico Environment Department's (NMED) proposed changes to New Mexico's ground and surface water protection regulations found at 20.6.2 NMAC.

Amigos Bravos is a statewide water conservation organization guided by social justice principles. Our mission is to protect and restore the waters of New Mexico. Amigos Bravos works locally, statewide, and nationally to ensure that the waters of New Mexico are protected by the best policy and regulations possible. New Mexico's ground and surface water protection regulations found at 20.6.2 NMAC are a critical component of our work to protect clean water and the communities that depend upon clean water in New Mexico.

The Gila Resources Information Project (GRIP) recognizes that human and environmental systems are inseparable and interdependent. GRIP works to protect and nurture human communities by safeguarding the natural resources that sustain us all and to safeguard natural resources by facilitating informed public participation in resource use decisions. Sound state water protection regulations are essential for realizing this work.

I. Section 20.6.2.7.D(4)- Discharge Permit Amendments

Amigos Bravos and GRIP oppose the proposal to allow polluters to apply for and the department to grant “discharge permit amendments”. While we are cognizant of the fact that in practice NMED has actually granted discharge permit amendments for decades, we do not believe that codifying a questionable practice is the best course of action. Discharge permit amendments circumvent the public process as changes to permits are made without the opportunity for public comment, a public hearing and appeal. Amigos Bravos and GRIP oppose the addition of this definition and we urge NMED to remove the proposed definition from their proposal.

Amigos Bravos and GRIP provide the following comments on the proposed “Discharge Permit Amendment” language for consideration in the event that NMED continues to move forward with requesting the addition of this definition:

Amigos Bravos and GRIP support the change from NMED’s June 16th draft that consists of changing “significant change” to “change”. This language change removes a considerable amount of uncertainty from determining what is and what is not a permit modification. In addition, this change ensures better protection of groundwater in that a change of the location of the discharge will result in a requirement for a discharge permit modification and the associated required public processes that are required with a permit modification.

Unfortunately, NMED also made several other changes from the June 16th draft. Amigos Bravos and GRIP question the basis for the ten percent figure that is included in the September 19th draft at 20.6.2.7.D(4)(b) and (c) and used a method for determining how much of increased flow and pollutant concentrations would be allowed under a permit amendment. What is the rationale for this ten percent number? Why did NMED not choose five percent? Or one percent?

Ten percent of added pollution and/or flow could be very significant to down gradient communities, especially so in regards to communities down gradient from a facility that discharges in large volumes. The public should be notified and have the ability to comment and oppose these potentially substantial increases in discharges. In addition, the draft regulations do not stipulate how many times a permit could be amended in one permit term. Under the proposed language there could be five or more permit amendments in the five-year permit term, resulting in an increase of fifty percent or more of flow and/or pollutant concentrations in a permit term, all without any sort of public oversight or process. Amigos Bravos and GRIP recommend that NMED reduce the ten percent cutoff to one percent and limit permit amendments to one per permit term.

Amigos Bravos and GRIP are extremely concerned with NMED’s proposed change found in 20.6.2.7.D(4)(d). This change represents a considerable change for the worse from the language that NMED originally proposed in the June 16th draft. Namely the September 19th draft includes the following language: “A discharge permit amendment means a minor change to the requirements of a discharge permit that does not result in... introduction of a new water contaminant at concentrations that exceed the numerical standards of 20.6.2.3103 NMAC.” Amigos Bravos and GRIP strongly oppose this change as it is in direct violation of the Water Quality Act (“Act”). This

new language would allow the introduction of a new contaminant at any level up to the 3103 standards. In essence this proposed language is the equivalent of granting a new discharge permit without any form of public process. As per the Act, *all* discharges must be below the 3103 standards. Under this proposed definition, the only thing that would actually constitute a permit modification would be proposal to discharge a new contaminant above standards. In addition, this proposed language goes way above the proposal for permit amendments for discharges of contaminants that are already included in the permit, which are currently limited to an increase of 10 percent. NMED should revert back to the June 16th language that prohibited permit amendments from applying to new contaminants.

AB And GRIP Proposed Language:

(4) “**discharge permit amendment**” means a minor change to the requirements of a discharge permit that does not result in:

- (a) a change in the location of a discharge that would affect groundwater not impacted by the existing discharge location,
- (b) an increase in daily discharge volume of greater than ~~ten one~~ percent, **or 50,000 gallons per day whichever is lesser**, of the original daily discharge volume approved in an existing discharge permit, for an individual discharge location,
- (c) an increase in the concentration of water contaminants discharged greater than ~~ten one~~ percent of the original effluent limit approved in an existing discharge permit for an individual discharge location, or
- (d) introduction of a new water contaminant at concentrations, ~~that exceed the numerical standards of 20.6.2.3103 NMAC;~~
- (e) **more than one discharge permit amendment per permit term.**

II. 20.6.2.7.T(2) Toxic Pollutants

Amigos Bravos and GRIP support NMED’s proposal to add several contaminants, including various pesticides, to the list of toxic pollutants.

III. 20.6.2.1201.B. Injection to Wells Geothermal Exploration or Production

Amigos Bravos and GRIP question the environmental basis of this change. While we are aware that there were some changes to state law that facilitate this change, we question the environmental protectiveness of switching oversight to another state agency. The Groundwater Bureau of the New Mexico Environment Department is the agency that is best able to determine whether groundwater is being protected. Moreover we are not aware of any state regulations that govern how these discharges will be regulated. Amigos Bravos and GRIP urge NMED to engage in any subsequent regulatory proceeding to ensure that these regulations mirror 20.6.2.7 to ensure consistency in groundwater protection in the state.

IV. 20.6.2.1210 – Variance Provisions

A) The Current 5-Year Variance Limit Should Be Retained

Amigos Bravos and GRIP oppose NMED’s proposal to remove the current 5-year variance limit currently found at 20.6.2.1210.C NMAC. NMED’s proposed changes do not put any limit on variance length whatsoever, creating a situation where a variance

could be adopted indefinitely. While the proposed changes direct NMED to review the variance “at five year intervals” (proposed 20.6.2.1210.E) there is no avenue for the public to fully participate in this review or participate in a hearing. In addition, because it is simply a review and not a renewal process the public does not have the opportunity to appeal a final agency action.

Amigos Bravos and GRIP thank NMED for addressing our concern that the June 16th draft language related to reviewing variances “at least every five years in conjunction with the discharge permit renewal” was open-ended and due to the fact that many permits are administratively continued, this period could have extended well past the 5-year permit limit. The September 19th language that requires a review of variances “at five year intervals” is an improvement.

While the proposed language allows “on appeal from a decision by the department to renew or modify a facility’s discharge permit” to allow any party to “present argument and evidence to the commission to reconsider the granting of an existing variance for the same facility” (proposed 20.6.2.1210.E), this provision is a substantial decrease in the participation avenues currently afforded to the public. For example, currently a variance has to be renewed every 5-years and the public has an opportunity to oppose a variance and participate in a hearing specific to the variance. The language proposed by NMED limits this opportunity to hearings associated with a discharge permit, which can come at intervals substantially longer than 5-years. At a minimum the draft language should include provisions for the public to request a hearing if the 5-year variance report indicates variance conditions are not being met or if variance conditions are not sufficient for adequately protecting water quality.

As a state with limited precious water resources, we should be looking for avenues to limit and constrain mechanisms to allow pollution into New Mexico’s water, not remove protections such as concrete time limits on variances. In summary Amigos Bravos and GRIP oppose removing the 5-year variance time limit and urge NMED to rethink this proposed change.

While Amigos Bravos and GRIP contend that the 5-year time limit is most appropriate to safeguard New Mexico’s water resources, at the very minimum the regulations should specify that all variances must include an end date. The current proposed language by NMED does not include a provision requiring that all variances must be time-limited. Amigos Bravos and GRIP urge NMED to include a provision that requires that all variances include a term limit, expressed as period of time from Commission approval of the variance.

AB and GRIP Proposed Language:

C. The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. **If the petition is granted in whole or in part the commission will specify the length of time the variance is valid.**

D. For variances granted for a period in excess of five years, the petitioner shall provide to the department for review a summary document at five year intervals to demonstrate that the conditions of the variance are being met. If ~~the department determines that~~ such conditions are not being met, ~~the Secretary any~~ **party** may request a hearing before the commission to revoke, modify or otherwise reconsider the variance.

~~**For variances that apply across multiple permit terms, public notice of the continuance of variance conditions shall be posted in conjunction with public notice requirements associated with the permit renewal. On appeal from a decision by the department to renew or modify a facility's discharge permit, any party may present argument and evidence to the commission to reconsider the granting of an existing variance for the same facility.**~~

B) Variance Regulations For CWA Permits Must Comply With New Federal Water Quality Standard Regulations Found at 40 CFR 131.14

On August 21, 2015 EPA finalized new variance regulations at 40 CFR 131.14. Amigos Bravos and GRIP urge NMED to carefully review the new regulations and ensure that language at 20.6.2.1201 complies with the new federal regulatory language. For example the following language should be added either to section 20.6.2.1210.D or added as new section 20.6.2.1210.E to comply with new a federal requirement that in situations where variances that are longer than 5 years for a mandatory 5-year review of the variance, including a public participation component, and subsequent submission of the results of the review to EPA within 30 days. Moreover if this review is not done and/or not submitted to EPA, as per federal regulation, the variance is no longer valid (40 CFR 131.14(1)(v) and (vi)).

AB and GRIP Proposed language:

For variances associated with federal Clean Water Act permits, the department will review the variance at least every five years to determine whether the conditions of the variance are being met and if the variance represents the highest attainable condition. The department will submit the results of this reevaluation to EPA within 30 days of completion. If the department does not reevaluate the variance or does not submit the results to EPA within 30 days, the underlying standard becomes the applicable standard for the permittee(s) or water body specified in the variance without further action from the EPA or the department.

This proposed language is taken almost verbatim from the new federal water quality regulations found at 40 CFR 131.14(1)(v).

In addition to the language proposed above, NMED should incorporate language in 20.6.2.1210 NMAC to ensure compliance with federal requirements to:

- Prohibit the granting of a variance if the underlying standard can be met by implementing technology-based effluent limits (40 CFR 131.14 (a)(4).
- For a variance to a use specified in section 101(a)(2) of the Act of sub-category of such a use, a variance can only be granted if CFR 131.10(g) factors are met or it is for restoration activities (40 CFR 131.14.(b)(2)(i)(a).
- Variances must be time-limited (40 CFR 131.14(b)(1)(iv).

- Ensure that variance represents the highest attainable condition of the water body affected (40 CFR 131.14 (b)(1)(ii).
- Require identification and documentation of cost-effective and reasonable BMPs for nonpoint source controls related to the pollutant or water quality parameter or water body segment specified in the variance that could be implemented to make progress towards attaining the underlying standard. Public notice and comment for this documentation must be provided (40 CFR 131.14.b.(2)(iii)(A).

V. 20.6.2.3103 – Standards for Ground Water of 10,000 mg/l TDS Concentration or less

Amigos Bravos and GRIP support NMED’s proposal to adopt the Environmental Protection Agency’s (EPA) Maximum Contaminant Levels (MCLs) for many constituents. We support the adoption of these MCLs where the result is an increase in protections (i.e. lower standard). Amigos Bravos and GRIP do not support the proposed changes when the result is a weakening of standards as such is the case for: barium, chromium, flouride, toluene, total xylenes, 1,1,1-trichoroethane, and vinyl chloride. States rightly have the authority to adopt standards that are more protective than EPA recommendations, and many states have, including New Mexico. For example, New Mexico has standards for PCBs in surface waters that are more protective by many orders of magnitude than the EPA recommended criteria. This authority is necessary to protect the unique characteristics of the state. In the case of the 3103 standards, presumably the NMED and the Water Quality Control Commission (WQCC) had good reason to adopt the more protective criteria for barium, chromium, flouride, toluene, total xylenes, 1,1,1-trichoroethane, and vinyl chloride in the first place. NMED has not provided any justification as to why these reasons are no longer valid or why it is appropriate to weaken these standards.

XI. 20.6.2.3105 Exemptions from Discharge Permit Requirements

Amigos Bravos and GRIP support NMED’s proposed change to prohibit an exemption from the discharge permit requirements for discharges that require treatment or blending to ensure that toxic pollutants are not present or that nitrogen levels are at 10mg/L or less.

XII. 20.6.2.3114 Fees

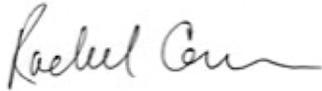
Amigos Bravos and GRIP support NMED’s proposal at 20.6.2.3114.G to increase permit fees for many dischargers and to adopt a method to annually evaluate, and change if necessary, the permit fee structure. The current fees for state discharge permit applications are outrageously low, and do not begin to cover the cost to New Mexico tax payers of issuing, monitoring, and enforcing state discharge permits. The proposed fee increases are long overdue and Amigos Bravos and GRIP support NMED in taking steps to decrease the portion that New Mexico citizens subsidize the issuance of permits to discharge pollution into New Mexico’s water resources.

XIII. 20.6.2.4103 Alternative Abatement Standards

Amigos Bravos and GRIP oppose NMED's proposal to allow the NMED Secretary to grant alternate abatement standards in excess of 200 percent of the abatement standard for a water contaminant that is not a human health-based standard (proposed 20.6.2.4103.F(1)(c)). This places substantial authority in the hands of the Secretary that is more appropriately held by the Commission. There is no limit on the amount of pollution that could be sanctioned by the Secretary under this proposal. The Secretary could allow alternate abatement standards in excess of thousands of percent of the underlying abatement standard resulting in widespread affects on surrounding resources, communities and wildlife. This weighty of a decision is more appropriately made by the Water Quality Control Commission, which is made up of 14 qualified individuals from different areas of expertise. In addition, by taking this authority away from the Commission and giving it to the Secretary, the public is once again left out of the process because a public hearing on a Secretary-issued alternate abatement standard would not be required. Moreover, Amigos Bravos and GRIP oppose the current regulations that allow the secretary to grant alternative abatement standards that are up to 200 percent of the original abatement standard. This is conflict with the Water Quality Act which grants the Commission the sole authority to adopt standards.

We look forward to further discussion about the concerns that we have raised in our comments. Please do not hesitate to contact Rachel Conn at 575-758-3874 or rconn@amigosbravos.org if further clarification or discussion on the above comments is merited or needed.

Sincerely,



Rachel Conn
Projects Director
Amigos Bravos
P.O. Box 238
Taos, NM 87571
575-758-3874
rconn@amigosbravos.org



Allyson Siwik
Gila Resources Information Project
grip@gilaresources.info
575-538-8078

