

STATE OF NEW MEXICO

WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE PETITION FOR)
A PERMIT REVIEW OF DISCHARGE)
PERMIT RENEWAL, DP 1342) WQCC NO.22-42
CITY OF GALLUP,)
PETITIONER)
V.)
NEW MEXICO ENVIRONMENT)
DEPARTMENT,)
RESPONDENT)

CITY OF GALLUP'S PETITION FOR PERMIT REVIEW, NOTICE OF APPEAL OF PERMIT RENEWAL DP 1342, AND MOTION FOR STAY AND REMAND

September 12, 2022

Respectfully submitted,

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ATTACHMENTS

- Attachment A – Discharge Permit Renewal and Invoice
- Attachment B – Verification of Marc DePauli

COMES NOW the City of Gallup, (the “City”, or “Gallup”), by and through its attorneys, Stelzner, Winter, Warburton, Flores & Dawes, P.A., pursuant to NMSA 1978, § 74-6-5 (O), 20.6.2.3112 NMAC and 20.1.3.16 NMAC, hereby submits its Petition for Review, Notice of Appeal and Motion for Remand of New Mexico Environment Department’s (“NMED”) August 11, 2022 issuance of Permit Number DP-1342 to the City.

I. BACKGROUND AND PROCEDURAL HISTORY

1. Discharge Permit 1342 (“DP-1342”) was originally issued by the Ground Water Quality Bureau (“GWQB”) of the NMED to the City on November 15, 1996 in order to impose requirements and conditions to control the discharge of approximately 1.25 million gallons per day (MGD) of treated wastewater from the Gallup Wastewater Treatment Facility (“WWTF”). DP-1342 at p. 4. DP-1342 also authorizes temporary discharges for dust control, construction purposes, fire suppression and other uses. *Id.*

2. NMED’s purpose in issuing DP-1342 is to protect groundwater and those segments of surface water gaining from groundwater inflow for present and potential future use as domestic and agricultural water supply and other uses, and to protect public health. DP-1342 at 2.

3. DP-1342 was subsequently renewed on April 1, 2001, and November 20, 2011. DP-1342 Discharge Permit Summary at 2.

4. The most recent renewal was requested by Gallup on June 17, 2016. *Id.* Public notice of the City’s application and a revised draft discharge permit was not published until May 4, 2022. The current iteration of DP-1342 was issued on August 11, 2022. *Id.* A copy of the Discharge Permit Renewal and Invoice is included as *Attachment A*.

5. The City provided NMED written comments on the proposed permit and met with NMED at various times between the May 4, 2022 draft and the August 11, 2022 permit issuance to discuss certain conditions in the draft permit.

Objection No. 1 – Conditions 16, 17 and 44 -The requirement to plug, abandon, and replace monitoring wells 4, 5, and 6.

6. During the comment period, the City objected to DP-1342 conditions 16, 17, and 44 regarding the requirement to replace, and plug and abandon Monitoring Wells 4, 5 and 6. The City noted fluctuating groundwater levels, evidence of the presence of confined aquifer layers, and prior NMED approvals of those Monitoring Wells as justification for deviation from certain NMED monitoring wells guidance. *Attachment A*, Issuance of DP-1342 at attached August 11 Correspondence from GWQB Chief Justin Ball, *see also Attachment B*, Verification of Marc DePauli at ¶¶ 9-21.

7. In the August 11 correspondence, the GWQB noted that it was not persuaded by the City’s objections, and it would require strict adherence to the NMED monitoring wells Construction and Abandonment Guidelines. Confusingly, the GWQB relied on the same 2012 study conducted by the City’s engineer, DePauli Engineering, as justification to determine that Monitoring Wells 4, 5, and 6 were improperly constructed; however this was the very same DePauli study that the NMED used in 2012 to recognize the City’s compliance with DP-1342. *Attachment B*, Verification of Marc DePauli at ¶ 16. At that time, the City, through its contracted engineers, worked closely with NMED GWQB staff to ensure that Monitoring Wells 5 and 6 would meet their expectations of having groundwater present in the wells for required sampling and testing, and in consideration of the confined aquifer conditions. *Id.* at ¶ 11.

8. The City relied on the 2012 approval by NMED and worked closely with NMED in instituting the conditions of the 2012 conditions of DP-1342. However, without justification,

and based on the same information available to it in 2012, the NMED reversed course and changed its mind to not only require additional monitoring wells, but also the retirement of perfectly viable wells previously sanctioned by 2012 NMED staff. This goalpost moving creates undue regulatory burdens and uncertainty for permittees. While no variance to NMED was formally requested, the NMED was aware of and approved all deviations from its standards due to site specific limitations. *Attachment B* at ¶ 16.

9. The implications of this decision have far reaching affects beyond DP-1342. For example, the NMED has comingled the conditions of the City's DP-418, and similar reliance on past approved permits by NMED is now called into question. While the City acknowledges changed circumstances may affect prior approvals, it does not expect different outcomes when the GWQB reviews the exact same information and arrives at different outcomes. A regulatory body is not free to change its position without good cause and prior notice to the affected parties, if the regulatory change is to be imposed retroactively. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 1993-NMSC-032 at ¶ 12, 115 N.M. 678. "If action by the agency leads to reasonable reliance on a certain interpretation of the rules, retroactive application of a change in policy is arbitrary and capricious." *Id.* at ¶18.

10. The strict adherence to the prescriptive requirements of the NMED Monitoring Wells Construction and Abandonment Guidelines will require the City undue expense of time and resources to replace monitoring wells that are performing properly and as designed to their location specific geology. The record in this case does not reflect the alternative solutions proposed by the City that could satisfy concerns of the GWQB, which would also simultaneously avoid needless additional expenditure of public resources. *Id.* at ¶¶ 29-30.

Objection No. 2 – Condition 27 - The requirement of quarterly testing for arsenic.

11. The City also objected to DP-1342 condition 27 regarding the requirement to test for arsenic. The City stated that arsenic is not present in the WWTP’s effluent, and it is more likely that there exists a “local acute source” of arsenic. *Attachment A*, August 11 Correspondence from GWQB Chief Justin Ball, *see also Attachment B*, Verification of Marc DePauli at ¶¶ 22-23.

12. Given the City’s comment, the GWQB recognized that the presence of arsenic may be an existing groundwater condition and authorized the City to request to remove the quarterly dissolved arsenic sampling requirement only after four consecutive quarterly sampling events demonstrate no dissolved arsenic above 0.01 mg/L. *Attachment A*, August 11 Correspondence from GWQB Chief Justin Ball.

13. However, the requirement to test for arsenic quarterly will be costly and burdensome. *Attachment B*, Verification of Marc DePauli at ¶¶ 22-23. The first step with regard to this condition should involve resampling for contamination after diversion of a specific amount of water from the well in order to determine the source. *Id.*

Objection No. 3 – Supply Chain constraints will make compliance with the conditions of DP-1342 impossible.

14. Permit condition 17 requires the City to install new monitoring wells within 180 days of August 11, 2022. This requirement does not take into consideration the disruption of the current post-Covid supply chain. The layered soil at this location consists of swelling clay, sandstone, and coal stratigraphy and requires a specialized well driller with the capacity to use the air rotary drilling method, rather than the traditional auger drilling method. Additionally, the City will need to advertise and seek competitive bidding in order to comply with the New Mexico Procurement Code. After a competitive bid and award, any selected contractor will then need to

also acquire needed steel casing, PVC pipe and cement. Under the current material supply and labor shortages and inflationary conditions, there is no way to predict the time frame for completing a well. The City would need at least 365 days to complete the well given these uncontrollable conditions.

II. NOTICE OF APPEAL

15. Pursuant to NMSA 1978, § 74-6-5(O), a petition for appeal must: (1) be made in writing within thirty (30) days from the date notice is given of the constituent agency's action; (2) include a statement of issues to be raised and the relief sought; and (3) be provided to all other persons submitting evidence, data, views, or arguments in the proceeding before the constituent agency.

16. The action of the NMED GWQB, the constituent agency, was made on August 11, 2022. Pursuant to 20.1.3.12 NMAC, this filing is made within thirty (30) days of that date.

17. The City is not aware of any other party who participated in this proceeding beyond the NMED GWQB. Pursuant to § 74-6-5(N), no other party was noticed by NMED in its August 11, 2022 correspondence.

III. PETITION FOR PERMIT REVIEW

18. A permit review shall be initiated by the filing of a permit review petition. 20.1.3.16 NMAC. A permit review petition shall:

- a. be filed with the commission within 30 days from the date notice is received of the permitting action;
- b. identify the petitioner, and state that the petitioner has standing under NMSA 1978 Section 74-6-5(O) or 20.6.2.3112 NMAC to file the petition;
- c. identify the permitting action to be reviewed;
- d. specify the portions of the permitting action to which petitioner objects;
- e. include a statement of the issues to be raised and the relief sought;
- f. have a copy of the permitting action attached;
- g. be signed under oath or affirmation and attest to the truth of the information contained therein; and

- h. be filed with the commission and a copy served on the department, the applicant or permittee, if the petitioner is not the applicant or permittee, and on any person who submitted evidence, data, views or arguments in the proceeding before the constituent agency.

19. In addition to the information stated above with the required information of appeal, the City includes *Attachment A*, Issuance of DP-1342, and *Attachment B*, Verification of Marc DePauli.

IV. STATEMENT OF ISSUES

20. The City wishes to have the following issues addressed on appeal to the Water Quality Commission.

- a. Was the decision to require the replacement, plugging and abandonment of Monitoring Wells 4, 5, and 6 arbitrary and capricious when the GWQB based its determination on the exact same information that it had previously approved in 2012?
- b. Did the GWQB adequately review and consider alternatives to the prescriptive standards of the NMED guidance with respect to the monitoring well replacements and arsenic testing requirements when less burdensome, performance based, standards would adequately meet the goals of the GWQB?
- c. Did the GWQB have enough support to base its conclusions on when it came to dramatically different conclusions based on the same information in 2012, and should additional evidence be taken to supplement the current record?
- d. Are the timelines ordered by the GWQB reasonable when viewed in the context of current material and labor shortages?

V. MOTION FOR REMAND

21. Pursuant to 20.1.3.16(A)(3) NMAC, a party may request the Commission to remand the matter to the department. “A request for remand must be filed simultaneously with the permit review petition. If a party shows to the satisfaction of the commission that there was no reasonable opportunity to submit comment or evidence on an issue being challenged, the commission shall order that additional comment or evidence be taken by the department. Based on the additional evidence, the department may revise the decision and shall promptly file with the commission the additional evidence received and the action taken.” *Id.*

22. In reviewing an administrative order on its merits, the courts will review (1) whether the agency acted fraudulently, arbitrarily, or capriciously; (2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence; (3) whether the action of the agency was outside the scope of authority of the agency; or (4) whether the action of the agency was otherwise not in accordance with law.” Rule 1-075(R). An agency’s action is arbitrary and capricious if it is “unreasonable or without a rational basis, when viewed in light of the whole record.” *Earthworks’ Oil & Gas Accountability Project v. N.M. Oil Conservation Comm’n*, 2016-NMCA-055 at ¶ 10, 374 P.3d 710 (internal citations omitted). See also *Elephant Butte Irrigation Dist. v. N.M. Water Quality Control Comm’n*, Slip. Op. A-1-CA-38474, at ¶ 8 citing NMSA 1978, § 74-6-7(B).

23. “A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” *Colonias Dev. Council v. Rhino Env’t Servs.*, 2005-NMSC-024, ¶ 13, 138 N.M. 133, 117 P.3d 939 (internal quotation marks and citation omitted). Additionally, “[a]n agency’s action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.”

Albuquerque Cab Co. v. N.M. Pub. Regul. Comm'n, 2017-NMSC-028, ¶ 8, 404 P.3d 1 (internal quotation marks and citation omitted). An agency decision is not in accordance with the law “if the agency unreasonably or unlawfully misinterprets or misapplies the law.” *Princeton Place v. N.M. Hum. Servs. Dep’t*, 2018-NMCA-036, ¶ 27, 419 P.3d 194 (internal quotation marks and citation omitted), rev’d on other grounds, 2022-NMSC-005, ¶ 3.”

24. The current iteration of DP-1342 does not justify why less burdensome and costly alternatives were rejected by the GWQB. Indeed, the record available does not include any mention of possible alternatives that would be acceptable to the GWQB, particularly in the event the newly required monitoring wells encounter the same issues that required similar modifications as those approved by the NMED in 2012.

25. The only justification provided by the GWQB for the rejection of the City’s objections, relies on the 2012 reports provided by the City of Gallup. *Attachment A* at August 11 Correspondence. But, that justification is based on the same information that was provided in 2012 that led to the GWQB’s acceptance of Monitoring Wells 4, 5, and 6 as constructed. The GWQB has provided no rational connection between its apparent concurrence in 2012 and its reversal in 2022 based on the same information.

26. Because the justification of the GWQB based on the same information is not provided and the apparent lack of consideration of viable alternatives, the current iteration of DP-1342 was arbitrary and capricious. Even if the City of Gallup does not prevail on its challenge, the record must still be supplemented to show that the GWQB considered some information to justify its deviation from its 2012 past practices.

27. The record should also be supplemented in this case to document the site-specific variations and approvals to properly document necessary modifications for conditions that exist on site.

28. The matter should be remanded to the department so a more complete record may be presented to the Commission on the issues being challenged.

VI. MOTION FOR STAY

29. Pursuant to 20.1.6.401 NMAC, the City requests a stay of DP-1342 Conditions 16, 17, 27 and 44.

30. In determining whether a stay should be granted, the Commission, upon a two-thirds vote shall consider: (1) the likelihood that the movant will prevail on the merits of the appeal; (2) whether the moving party will suffer irreparable harm if a stay is not granted; (3) whether substantial harm will result to other interested persons; and (4) whether harm will ensue to the public interest.

31. As stated above, the City is likely to prevail in this matter because the GWQB has already issued DP-1342 pursuant to information already provided. Additional information and deliberation will only provide more information regarding the site-specific determinations that were made and confirmed in 2012.

32. No other party will suffer injury or harm if a stay is granted. This permit has been in effect since 1996, and the latest renewal application took the GWQB six (6) years to review. Any urgency regarding this renewal was obviated by the GWQB's own review process. There are no other interested parties.

33. The City will face substantial injury in the form of lost resources and public funds. The City is statutorily obliged to maximize the purchasing value of public funds, and irresponsibly and wastefully expending those funds would violate that obligation. NMSA 1978, §13-1-29

(1984). Further, the City could face additional penalties for violations of the Water Quality Act¹ (“WQA”) for failing to meet conditions it cannot realistically comply with.

34. It is generally accepted that the process of drilling poses inherent risks to subsurface formations and risks communication between different strata. Drilling into subsurface strata should be limited to that which is absolutely needed or required.

35. The City contacted counsel for the NMED GWQB for its position on this filing, and the NMED GWQB stated that it opposed the relief requested.

VII. CONCLUSION

WHEREFORE, for the forgoing reasons, the City of Gallup respectfully requests that the Water Quality Control Commission:

- a) Review this appeal pursuant to NMSA 1978, §§ 74-6-5 (N), (O), (P) and 20.6.2.3112 NMAC;
- b) Initiate and conduct a permit review, and remand this matter to the department and take additional evidence;
- c) Remand DP-1342 with instructions for the GWQB to amend the permit pursuant to the City’s comments; and
- d) Stay the contested provisions of DP-1342 pursuant to 20.1.6.401 NMAC.

¹ NMSA 1978, §§ 74-6-1 thru 17.

