Public Comments on Work Element 11 –

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Public participation - pages 7 & 12-15 of the
"Proposed revision to the Statewide Water Quality Management Plans"

CES recognizes that the New Mexico Environment Department (NMED) Surface Water Quality Bureau (SWQB) complies with the regulatory obligations of the State of the New Mexico and also acts in an agency enforcement of the federal regulations in this case regarding the Clean Water Act (40CFR25.4). The Water Quality Management Plan (WQMP) Work Element 11 is in need of update and the revisions set forth by SWQB is a good first step.

CES suggests the following changes to the revision draft document provided by SWQB staff:

1. The document should have page numbers so that it can be referred.

2. On Page 7, Second Paragraph the summary of the Second Paragraph should include "The WQCC and NMED provides the general public with guidelines to outline the procedures and protocol on public meetings and hearing before the Commission. These guidelines can be obtained through the NMED SWQB and the WQCC administrative secretary. These procedures are also included on the copy of the WQCC agenda."
   CES is requesting that this language be included to comply with the Battershell v. Albuquerque ex rel. The agenda will then provide a clear explanation of the Public participation public hearing and appeals process. This will hopefully encourage an understanding of the process by which the general public can fully participate.

3. On page 12, is not clear as to the Public Participation Program (Revised: date to be determined upon Approval by WQCC). It appears that this was intended to be a part

of Work Element 11 and it was separated at some point. Also it appears that NMED SWQB intends to treat the public participation section as a separate document. CES strongly objects to the division of public participation from Work Element 11. NMED SWQB should be bound to follow a program for public information and participation as required by law, and as stated in the last paragraph on page 12 of the revision document. A policy of inclusiveness should be followed here.

4. In October of 2002, CES obtained the "Environmental Review, Public Participation Strategies and Public Meeting Protocol" (PPS). As indicated by NMED - SWQB staff this section was intended to be separate document of the public participation program and that NMED separated the document to be possibly included at a latter date after a public commenting period and pending the approval of the WQCC. CES has already submitted suggested language changes to this document to the NMED staff to further strengthen this program. See attachment A. CES supports the inclusion of this document into the WQMP.

5. Referring to the table on page 13 & 14, **Public Participation Requirements** The **"Program Elements"** should be lettered or numbered for easier referral. CES has taken the liberty to letter each program element A,B,C, and so on. I will refer to the **"Actions"** as bullet item 1,2,3, and so on.

PROGRAM ELEMENT AND ACTION CHANGES

A. **Continuing Planning Process (CPP)** Bullet 2. Should be a mandatory minimum 30-days instead of optional bureau discretion. If staff needs more time then extend the CPP time framework. CES has not seen the CPP and is not aware of it being included in the information supplied.

B. **Water Quality Management Plan (WQMP) Bullet 3** Public meetings across the state should be mandatory at this point in the discussion because the framework for the Strategy plan has not been included. Public notification and public community hearings, meetings and forums should take place before the plans go to public comment. While this suggestion stops the agency from steamrollering through the process giving adequate notice and assuring more participation from the public. **Bullet 4** – NMED press release- The Staff should make every effort to direct the press releases to the media for coverage as to what the plans, impacts and benefits are to the public. These public relations efforts for example in major newspaper's would bring a better awareness of the NMED work.

C. **WQMP Administrative updates-** Suggestions that were made in item 2 of this document is implemented here in Work Element 11.

D. **Anti-gradation Implementation -**CES has not seen the CPP revision version as stated in Bullet Item 1. This version should have been included in the document requested from NMED Staff. In bullet Item 2. Press release how the public relation efforts integrate with the CPP is unknown at this time.

E. **Water Quality Standards- Bullet 1 –** Informal public stakeholder meetings should be held before the public commenting period. Again this should be spell out in the CPP and the separated public participation document to be later included as a mandatory best practices. Bullet Item 4 Is a best management practices and every effort should be made to comply with this item. Bullet 5. Again needs to be address as previously stated.

F. **Water Quality Surveys** - All the "Actions" Items in this section are marked as optional this should be a part of the CPP and included in the PPS to be approved by the WQCC.

G. TMDL Documents – All optional "Actions" items in this section should be made a mandatory requirement by the state plan.

H. List of Impaired Waterbodies- Bullet item 2 the work element should reflect that the notification and information be mailed to stakeholders list as mandatory.

I. Request for proposals- again follows the protocol as previously discussed in this document.

In the section below the table on page 14 titled, "Strategy" - This section needed to be clearer. In questioning staff, it was indicated that this section was the separate PPS plan in a summary form. It is not clear what the WQCC or NMED will do with this section of the plan in Work Element 11 because it was not spelled out in the revision document. CES supports the PPS plan as previously indicated in the comments to be included in Work Element 11. Because the Public Participation Strategy plan is a larger document and CES has already prepared suggested language for this document. CES will submit the suggested language for the strategy plan and hold as an option for the possible upcoming commenting periods to include addenda to our comments on the strategy plan.

To further comment on the availability of the CPP, CES went to the disk version 12/17/02 as provided by NMED, while the CPP was highlighted there was no access to the information. We also tried the NMED web site and could not find the CPP at this location either.

As a request to the Water Quality Control Commission, CES suggests to direct staff to make the necessary changes and provide the revised document to the interested parties for final comment at the following WQCC meeting.

As submitted on February 13, 2003
By Elaine Cimino – Director – CES

Attachment A - Suggested language PPS
Attachment B – What Work's

Suggested language and suggestions for the WQMP
"The Environmental Review, Public Participation Strategies, and Public Meeting Protocol,"

1. **"The Environmental Review, Public Participation Strategies, and Public Meeting Protocol," document should be incorporated into the WQMP.**

2. Meeting Procedures and Protocol should be included on every published agenda and posted on the Website and sent to all interested parties before the meeting occurs and within an appropriate time frame. (State ex rel. Battershell v. Albuquerque). **See the attached example of "EXAMPLE OF WHAT WORKS". As an example of inclusion on to agendas**

3. The proposed language on Page 22 under the Public Meeting Protocol is problematic. The plan looks to "Streamline the process", this current catch phrase sends up the red flags, and is interpreted as reading, without substantive environmental review. "Streamlining" is another word for "Steamrolling". It is important that the meeting protocol is clear, concise and well defined and it is not circumvented in order to meet the applicant/staff needs to leave out an opposing voice. *Streamlining equals Steamrolling over the due process rights of the public.*

Suggestion: Exclude this "Streamlining" practice

4. On Page 22, … whenever practical and appropriate assistance will be provided for hearing-impaired individuals and translators will be provide for limited speaking communities… This language should be more direct. Strike the underlined language above. Under Public Notification Section there is no provision for second language (Spanish), this should spelled out here as an item, even though it is mentioned earlier in the document.

5. On page 23 #1. Legal Public Notice. It is not clear whether the Bureau is noticing a public meeting or public hearing and the procedures for each of these, again, need to be spelled out. There are two different processes, with different procedures for each process this should be outlined and included on the meeting agenda roster.

6. 14-day notice period is not an appropriate time frame for the public to see the notice, receive an information packet and then make a presentation of the issues at hand before the proposed meeting. This pattern and practice is already being implemented and an example of steamrolling.

Suggested Language:
The time allowance for public notice shall be 30 days between the Public meeting and the first public hearing or pre hearing presentation.

7. Both the WQCC and NMED have had problems with their mailing and email lists. An example of this is that CES has not been notified of specific meetings when the agency knows there will be opposition on a case. I personally have not had equal access to meetings. I have filed the complaints with the appropriate agency. Our suggestion is to give the lists to someone like the EOC person or department secretary so when an employee leaves, the contact list does not leave too.

Suggested language:
Any interested parties wishing to receive information may contact the EOC person or department Secretary (supply Name, address, phone number and email address.

8. On Page 25 #3 of the Draft in the first paragraph regarding the running of PSA's, there are no consistent outlets as to where the radio spots will run. Albeit, specific radio band AM/ FM, specific stations need to outlined in the different regional areas with the list on where to find the information on the dial, posted on the website and updated as needed.

Suggested Language: Radio PSA's can be heard on the following stations: (then list)…

9. Item #4. Posting of Fliers. Question: Which public buildings in Santa Fe, Albuquerque, Grants, Hobbs, Las Cruces and Farmington and on what community boards will fliers be posted? These areas should be to outlined in the plan so that a consistent pattern of information is established.

Suggested Language: Fliers will be found…

10. Meeting Information Packets should be free to the general public upon request. It is now cost prohibited receiving every issue that comes out for review, especially for small grassroots organizations. *Also, be aware that sole reliance on the Internet does not serve under-privileged and under served communities, peoples who do not have access or even the most up-to-date Internet capability, as the state does, in order to download and print materials. This is an assumption on the part of the Bureau to transfer their burden of supplying hard copy on to the general public and that the Internet serves as the end all.* The public's burden is that it must try to find, pay for and process the information in a timely manner and if expertise in technical areas is needed the deadline is too tight.

Suggested language:
- **Plans generated and changes made by NMED shall be free of charge to interested parties.**

- **The time allowance for public notice shall be 30 days between the Public meeting and the first public hearing or pre hearing presentation.**

11. RE: Public Meetings: There needs to be a way that outside interests are heard during the public participation - public meeting process. The protocol has been that the Agency involved makes a presentation, lectures and has a question and answer period. This has become known in neighborhood associations as "the dog and pony show ". During this process there is no room for opposing presentations and Q and A. During a public meeting, setting a time that would assure opposing presentations so that people in the effected regional areas could have the opportunity to hear both sides of an issue before the public hearing. The meetings should be recorded; wherein the plan implies that recording is an arbitrary decision on the part of staff.

Suggested Language: Staff will set aside time for interested parties to make presentations in public meetings on the plans or applications being consider before the agency. Both staff and interested party presentation comments will be included in the application or plan and submitted to the commission for review.

12. RE: Public Hearings: When other parties want to make suggestions or oppose a case in a public hearing and it comes before the WQCC, they are usually directed to speak with staff then maybe the suggestions will be incorporated into the rules and regulations. This direction simply does not work. [As in the case of the Aquifer Storage and Recovery Act - Rules and Regulation Hearing, where major loopholes were left open allowing no oversight on a potential catastrophic set of circumstances in any application that comes forward if they were to occur.]

Suggestion: That the WQCC revisit the Aquifer Recharge and Recovery Act Loophole by including this on it next agenda.

When an opposing party is directed to meet with staff some staff members become very defensive for a variety of reasons, call it personal pride, ownership in the document, and arbitrarily has ignored the request for inclusion of language, *without giving any reason or reply to the request.* Because this has been the repeated behavior within NMED agency, CES believes that it is appropriate when other parties wishing to make a presentation, be able to make their presentation in front of the Commission ***before approval*** and ***before the final public hearing***. Then suggestions from the Commission can be brought forward and staff can be directed to include or deny said information. But that hearing officer **include reasons in the Findings and Conclusions for rejecting proposals, requests or language inclusions.** See page 27 last three lines.

Suggested Language:
Appellant and other parties will be able to make their presentations in front of the Commission *before approval* and *before the final public hearing* slated as a pre-hearing or first public hearing. The Commission will direct staff to include or deny said information presented and/or direct staff and/or said parties to submit information, suggestions of language inclusion in writing.

The Bureau staff will provide reasons and reply to requests for language inclusion or denial and will provide this information to the Commission for inclusion in the hearing officer's findings and conclusions.

13. Also, "What constitutes further investigation?" as stated in the last paragraph on page 27. All public comments should be incorporated into the documents for the final hearing approval so that the commission can see for themselves whether their directives were followed and what information was allowed. Also, the agenda roster for every meeting should include the procedures and protocol for the meeting that have been spelled out in this document.

Suggested language: Public comments from public meetings and hearings will be incorporated into the Commission packages and application/plans to other types of documents at the time of the meetings and hearings.

Attachment B to the WQMP Work Element 11

Example of What Works

CES is requesting that the WQCC request that NMED use this idea as the framework for the agenda roster, while following state guidelines.

In New Mexico, the Battershell case already provides the basic ground rules for fair hearings at the local level that simply are not being followed in Santa Fe. In addition, some cities, like Las Cruces, already require some of the elements that CES is trying to get Santa Fe to adopt. In fact, in Las Cruces, every agenda provides a clear explanation of the public participation and appeals processes. Every agenda that is issued by the City of Las Cruces contains the following information:

"ANNOUNCEMENTS:

Attendees at City Council meetings are encouraged to pick up a copy of the City's "*Public Participation at City Council Meetings*" brochure that is available in the front lobby of City Hall. This brochure will answer the most often asked questions concerning citizen participation at these meetings.

It takes an affirmative vote of four members of the City Council to approve a Resolution or an Ordinance, regardless of the number of Councilors at the meeting. A Councilor may motion for passage or second a vote for passage of an item, yet vote "No" on the motion. A Councilor may vote in favor of an amendment to a motion, because of the contents of the amendments, and yet vote "No" on the main motion.

This meeting shall be conducted by a form of Robert's Rules of Order. Items on the consent agenda will be voted on with one motion unless a Councilor requests that a specific item be removed. To have an item removed from the consent agenda, contact your District Councilor, the Mayor, or the City Clerk prior to the beginning of the meeting.

All information from advisory boards must be submitted in writing and contained in the agenda package. This will ensure that all Council members have access to the same information. Members of Council appointed boards/commissions will not publicly discuss any actions or discussions of their board at City Council meetings.

All Speakers are to conduct themselves in an orderly, law abiding manner. Otherwise, a recess will be immediately declared until order and decorum are restored.

* * *

"PUBLIC PARTICIPATION:

COUNCIL RESPONSE:

APPEAL PROCESS:

Council members shall not privately discuss with any interested person or persons the merits of a case which is, or may be pending before the City Council.

If there have been any such discussion or discussions, they should be disclosed by the appropriate Councilor(s) or individuals at this time.

Appeals to be presented before the Las Cruces City Council **may** follow the appellate procedures mandated by the State ex rel. *Battershell v. Albuquerque.* These procedures are intended to protect the due process rights of all parties to the appeal. **However, the *Battershell* procedure will only be followed in the event that any party in the appeal wishes to use this procedure**.

Persons wishing to give testimony on any item shall wait to be recognized, then go to the lectern, give their name and address, be sworn in (if using the *Battershell* procedure), and limit their comments to three minutes. If there is a properly identified neighborhood spokesperson, attorney or real estate agent for one of the parties, the time limit shall be ten (10) minutes. You may speak more than once provided you avoid being repetitious. Proponents shall speak first, followed by opponents.

BATTERSHELL PROCEDURES

FOR APPEALS PRESENTED TO THE CITY COUNCIL

I. PRE-APPEAL HEARING REQUIREMENTS:

a. Any party to be represented by an attorney, at the appeal hearing, shall present to the City Attorney's Office, at least 5 business days prior to the hearing, a memorandum with citations of authority substantiating the party's position. This memorandum is not the same as the appeal summary submitted 15 days after the public hearing by the Board of Adjustment or the Planning and Zoning Commission.

b. All parties in the appeal that desire to have a specific City staff person present at the appeal, need to present to the City Planning Department, at least 5 business days prior to the appeal hearing, a letter requesting that the specific staff person be present at the appeal hearing. This allows ample opportunity to notify the staff person in order to assure attendance.

II. AT THE BEGINNING OF THE *BATTERSHELL* APPEAL HEARING, the Council will:

a. Identify all parties to the appeal, including all witnesses, that wish to give testimony.

b. All persons who give testimony, including City staff, will be sworn-in by the clerk or person authorized to administer oaths.

c. All persons giving testimony will be subject to cross-examination by other parties within the appeal, including City staff.

d. All items presented in the appeal, whether in *Battershell* or not, will be limited to the relevant matter being appealed and the City Council may place a reasonable limit on the number of persons to be heard and their amount of testimony.

PROCEDURES FOR PRESENTATION OF ALL APPEALS

The following procedures will be used whether an appellant chooses to utilize the *Battershell* procedure or not.

I. ORDER OF ALL PRESENTATIONS:

a. City Staff Presentation

b. Appellant Presentation

c. Other parties presentation

II. APPLICABLE STEPS FOR ALL PRESENTATIONS:

a. Opening statement about the case by the party.

b. City Council may question the presenter/party.

c. Cross-examination by other parties, which must be done in the form of questions to be answered by the presenter(s).

d. City Council may question the presenter/witness.

e. Continue to other witnesses for the party until complete.

f. Once all parties are through with giving testimony, closing statements can be made by each party, in same order as above (I).

III. CITY COUNCIL ACTION:

a. A City Council member makes a motion, followed by a second.

b. There may be discussion of the motion.

c. The Council is prepared to vote. In the vote, the City Council may reverse, modify, affirm, or change any decision or determination of the Official, Board, or Commission from which the case was appealed.

d. The City Clerk takes roll call of the City Council; the decision is announced."

This procedure provides a fair and even-playing field. Both the City of Santa Fe and Santa Fe County have a seriously flawed public hearing process. Although the abuses are worse at the county level, in the last year, the city seems to be following in the county's footsteps.

While some state agencies adhere to statutory public hearing requirements and the mandates of the Battershell case, there are still some state agencies that do not. Most notable is the Water Quality Control Commission who recently refused to allow cross examination or presentation of direct testimony by members of the public.

SUGGESTED ACTION

That the City and County of Santa Fe adopt similar procedures to those used by the City of Las Cruces.

That a handbook on the Public Participation and Appeal Processes be available for members of the public.

ADDITIONAL INFORMATION SUGGESTED FOR INCLUSION IN A PUBLIC HANDBOOK

(also contained in Las Cruces handout)

Public Participation at City Council Meetings

When does the Council meet?

The City Council gathers for Council meetings to adopt official action items at 1 p.m. the first and third Mondays of the month. *Special meetings*, which also are announced at least 24 hours in advance to the public, may be called at any time by the Mayor or four or more Councilors. *Work sessions* are held so that the Mayor and Council may study problems or examine issues. These are usually held on the second and fourth Mondays of each month. No official action is taken at these meetings. All meetings take place in City Hall, 200 N. Church St., unless otherwise noted in an announcement.

What is the meeting procedure?

The usual order of business at regular meetings is as follows:

- Opening Ceremonies
- Approval of Council Minutes
- Unfinished Business
- Ordinances
- Resolutions
- Public Participation
- Appeals
- Council Discussion
- Proposed Ordinances

Where can I get the City Council meeting agenda?

Agendas are posted by Fridays at City Hall, 200 N. Church St., and on the municipal web site at www.las-cruces.org. Meetings also are announced in the *Las Cruces Sun-News*.

Who makes the meeting agenda?

Agendas for regular meetings are set by the Mayor in a meeting with the City Manager and staff. Agenda meetings are open to the public and are held on the Monday preceding the next regular meeting. Agendas for work sessions are set by the City Council.

What items are in an agenda?

The Council considers in formal action the passage of resolutions and ordinances. Ordinances are laws of the City while resolutions are policy statements. Ordinances are the highest form of legal action the council can make. Examples of ordinances are pet licensing and restrictions on smoking in public places. Ordinances, which become part of the Municipal Code, are published at least two weeks prior to adoption. Resolutions are primarily contracts, agreements with other government agencies, and purchasing contracts.

How do I keep track of Council action taken on an item?

Pick up an agenda before the meeting. Usually these are made available on the Fridays before Monday night meetings. Asterisks beside items indicate that those matters are on a "consent agenda," meaning that they may be passed in a single motion.

Can I speak at a regular City Council meeting?

Yes. Address any agenda item of interest after the Council has discussed it. It's your turn to make comments when the Mayor asks for public comment. If you want to discuss an item on the consent agenda, it will need to be removed from that agenda before the meeting. Residents may ask the Mayor, City Councilors, City Manager or the City Clerk to have any item removed from the consent agenda before the meeting. Council meetings that invite the public to observe but not participate are work sessions and agenda meetings.

What if I want to talk about something not on the agenda?

The public participation portion of the meeting is held at the end of the meeting. Citizens may bring up any topic at this time. The chair of the meeting, usually the Mayor, must recognize you. Direct all questions to the chair.

Can I speak as long as I wish?

Persons wishing to speak for longer than three minutes should fill out a "Public Participation Form" available at the entrance to the City Council Chambers. You will be limited to one topic.

How do I know if an item was approved or denied?

Motions are passed or denied by a majority of the Council. By the Wednesday following a regular Monday meeting, a City Council action summary is posted on the city's web site at www.las-cruces.org. The City Clerk's Office also provides the information at City Hall. "