

**STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION**

**IN THE MATTER OF:  
Petition for Rulemaking  
For Procedures Governing State  
Certification of Federal Permits  
Under the Clean Water Act**



WQCC 10-10 (R)

New Mexico Environment Department,  
Petitioner.

**ORDER AND STATEMENT OF REASONS**

THIS MATTER came before the New Mexico Water Quality Control Commission (“Commission”) upon a petition (“petition”) filed by the New Mexico Environment Department (“Department”) proposing procedural rules to be added to the New Mexico Administrative Code at Sections 20.6.2.2001-2003 for State certification of federal permits under section 401 of the federal Clean Water Act, 33 U.S.C. section 1341, for hearing on January 11, 2011, and again on April 5, 2011 for continued hearing and deliberations.

A public hearing was held in Santa Fe, New Mexico on January 11, 2011, and on April 5, 2011 for continued hearing and deliberations. The hearing was conducted in accordance with the New Mexico Water Quality Act and the Commission’s water quality regulations and rulemaking guidelines, before a hearing officer, with many Commissioners present during the hearing.

On April 5, 2011, the Commission deliberated and voted to adopt the proposed revised rules that were presented at the hearing on April 5, 2011, set forth below in Exhibit A hereto, for the reasons that follow.

## II. STATEMENT OF REASONS

1. The New Mexico Water Quality Act, Section 74-6-5 (B) and the federal Clean Water Act, 33 U.S.C. section 1341 (a) (1) require the adoption of procedural rules for State certification of federal permits.
2. The New Mexico Water Quality Act, Section 74-6-5 (B) provides that this Commission shall adopt procedural rules for State certification of federal permits.
3. Until now, there were no particular rules governing the Department's administration of the State certification process until the process reached the level of appeal to the Commission, at which point the Commission's adjudicatory procedure regulations apply.
4. Petitioner initially filed a rulemaking petition for these rules on September 28, 2010 which was docketed as WQCC 10-10.
5. The Department later filed a notice of intent to present testimony on December 17, 2010.
6. Montgomery and Andrews filed a notice of intent to present technical testimony and Amigos Bravos filed a notice of appearance.
7. The Commission's hearing notice requirements for rule-making are found at NMSA 1978, Section 74-6-6(C) and state: "At least thirty days prior to the hearing date, notice of the hearing shall be published in the New Mexico register and a newspaper of general circulation in the area affected and mailed to all persons who have made a written request to the commission for advance notice of hearings and who have provided the commission with a mailing address."
8. On June 25, 2010 the Department released a Public Discussion draft, which included instructions for submission of comments within a 31-day Public Comment period ending

July 26, 2010. NMED issued a news release regarding the Public Discussion draft on June 29, 2010.

9. The Department received eight letters commenting on the public discussion draft.

(a) Letter from John Stomp III, PE, Chief Operating Officer, Albuquerque Bernalillo County Water Utility Authority, dated July 26, 2010, which was admitted into evidence as Exhibit 2 at the hearing of this matter

(b) Letter from Rachel Conn, Policy Analyst, Amigos Bravos, dated July 2, 2010, which was admitted into evidence as Exhibit 3 at the hearing of this matter.

(c) Letter from Lisa M. Santana, PhD, Acting Division Chief, Environmental Management Division, International Boundary and Water Commission, dated July 14, 2010, which was admitted into evidence as Exhibit 4 at the hearing of this matter.

(d) Letter from Louis W. Rose, Montgomery & Andrews, PA, dated July 27, 2010, which was admitted into evidence as Exhibit 5 at the hearing of this matter.

(e) Letter from L. Randy Kirkpatrick, Executive Director, San Juan Water Commission, dated July 25, 2010, which was admitted into evidence as Exhibit 6 at the hearing of this matter.

(f) Letter from Allan E. Steinle, Chief, Regulatory Division, United States Department of the Army, Albuquerque District, Corps of

Engineers, dated June 4, 2010, which was admitted into evidence as Exhibit 7 at the hearing of this matter.

(g) Comments of the United States Department of Energy, National Nuclear Security Administration and Los Alamos National Security LLC, which were admitted into evidence as Exhibit 8 at the hearing of this matter.

(h) Electronic message from Brent Larson, Acting Chief, Permits and Technical Assistance Section, NPDES Permits and TMDLS Branch, United States Environmental Protection Agency Region 6, dated June 9, 2010, which was admitted into evidence as Exhibit 9 at the hearing of this matter.

10. On October 12, 2010, the WQCC reviewed the Petition for Rulemaking at its regularly scheduled meeting and authorized a Public Hearing on this matter to be held at its regularly scheduled meeting on January 11, 2011.

11. The Commission received a letter from EPA supporting the regulations, dated January 4, 2010 (probably should be January 4, 2011), which is part of the record of this proceeding.

12. The Commission received a letter from the Army Corps of Engineers supporting the regulations, dated January 5, 2010 (probably sent January 4, 2011), which is part of the record of this proceeding.

13. On January 11, 2011, the Department presented evidence of compliance with the Commission's regulations and guidelines requiring public notice and filed affidavits of publication, which were admitted into evidence as Exhibit 12 at the hearing of this matter.

14. At the hearing, the Department presented proposed procedural rules for certification of federal permits, which were admitted into evidence as Exhibit 1 at the hearing of this matter.
15. At the hearing, the Department presented its written Response to Comments regarding its September 28, 2010 Draft Procedures for Certification of Federal Permits, which was admitted into evidence as Exhibit 10 at the hearing of this matter.
16. At the hearing, the Department presented a letter from Charles de Saillan, New Mexico Environment Department to Secretary Fred Mondragon, Economic Development Department, dated October 26, 2010, which was admitted into evidence as Exhibit 11 at the hearing of this matter.
17. The Department presented witness Rich Powell, an environmental scientists and specialist, who is the industrial team leader in the Point Source Regulation Section of the Department's Surface Water Quality Bureau. Mr. Powell testified regarding the regulatory framework for the proposed regulations and described the current method of certification of federal permits in New Mexico. After a draft permit is reviewed, the Department can certify the permit without conditions, certify the permit with conditions or deny certification. If the Department does not act on the certification within the time prescribed by the Federal permitting agency, its authority to do so is waived. For many years, the Department has followed specific internal procedures for certifications, but these procedures were never codified into regulations.
18. The draft rules address certification of NPDES permits issued by USEPA in draft NMAC 20.6.2201.

19. The draft rules address discharge of dredged or fill material permits issued by the US Army Corp of Engineers in draft NMAC 20.6.2202.
20. The draft rules address certification of other federal permits and licenses in draft NMAC 20.6.2203.
21. Each of the three sets of regulations provide for
  - a) Department review of a draft permit, then Department certification with or without conditions or denial.
  - b) Waiver of the Department's authority to act on the certification application if it does not act within the time prescribed by the federal permitting agency for such action.
  - c) Conditions imposed on certifications must be based on appropriate applicable requirements of state and federal law and regulations and must assure that the permit will protect state water quality standards.
  - d) Notice must be provided that the Department is reviewing a draft permit for certification or denial and notice may be provided jointly with the permitting or licensing agency or separately.
  - e) Notices must be posted on the Surface Water Quality Bureau web site.
  - f) The public and permittees will have a minimum of 30 days to submit public comments on the draft permit to the Department and the Department must consider such comments when preparing the certification.
  - g) All pertinent public comments must be considered.

- h) Permit certifications must be in writing and must include specific information regarding the process and actions taken including a statement of justification for conditions imposed.
- i) Final certification will generally be issued within 45 days from the date a request to grant, deny or waive certification is received by the Department.
- j) The final permit certification, conditional certification or denial must be sent to the Federal permitting agency, the applicant and those members of the public who submitted comments to the Department.
- k) Appeals from Department certification or denial are available by filing a petition for review with the Secretary within 30 days of the Department action. The regulations define a reasonable process for review at the level of the Secretary.
- l) Appeals from the decision of the Secretary are available by petition for administrative record review by this Commission pursuant to NMSA 1978, Section 74-6-5(O).

23. At the hearing of this matter, Louis W. Rose, attorney from Montgomery and Andrews testified about the objections to the proposed regulations raised in his letter that included objection to the short time for certification (33 days); objection to the lack of a rule requiring that the Department explain any conditions on certifications; objection that cross-examination is not allowed at the level of appeal before the secretary.

24. At the hearing of this matter, Beverly Idsinga, Executive Director of Dairy Producers of New Mexico testified about her organization's objections to the proposed

regulations. She proposed that public notice requirements for general permits be the same as the requirements for individual permits; objected to the presentation rules in Section 20.6.2.2001; and objected to the proposed limitation on testimony on appeals in Section 20.6.2.2001.H.

25. Caren Cowan testified that she supported the comments of Mr. Rose and Ms. Idsinga, and about her due process concerns with regard to the ability to appeal additional conditions on permits and the ability to cross-examine witnesses.

26. Rachel Conn, Projects Director for Amigos Bravos, Friends of the Wild Rivers testified that her organization supports strengthening the certification language to include provisions for monitoring and enforcement and to enhance public participation; objected to the proposal that certifications be issued 33 days after receipt of a request for certification when there is a 30-day comment period.

27. At the continued hearing of this matter on April 5, 2011, the Department presented a revised proposed set of regulations and the Department explained that based on the public comments received and negotiation among interested parties, it had added a clarification that conditional certifications must include the justification for the condition, language allowing for submission of rebuttal materials and testimony at the level of review by the Secretary and a clarification that the hearing officer for the Secretary may question those presenting oral testimony at that level of review; and it had expanded the deadline for final certification to 45 days.

28. At the continued hearing of this matter on April 5, 2011, Montgomery and Andrews and Amigos Bravos withdrew their objections.

29. The Commission duly considered all evidence, written or testimonial that had been presented and finds that

- (a) There was substantial evidence that the regulations will ensure that interested parties will have notice of and a better understanding of how the process works and what options they may exercise to participate in the process.
- (b) There was substantial evidence that the Department has complied with regulatory requirements to provide an opportunity to participate in the development of the regulations. The regulations were properly promulgated by the Department through the formal public participation process codified in 20.6.2 NMAC – Ground and Surface Water Protection Regulations
- (c) There was substantial evidence that the Department has complied with due process requirements in each of the three proposed sections.

### **III. ORDER**

The revised proposed regulations were approved and adopted for any or all of the reasons stated above on April 5, 2011. The proposed regulations, and any appropriate corrections of typographical errors, reconciliation of inconsistencies, formatting or other changes necessary to file this rule with the New Mexico State Records Center, are hereby adopted, to be effective in accordance with applicable State Records Center procedures.

  
On behalf of the Commission