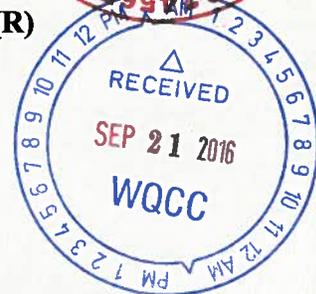


STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION



\_\_\_\_\_)  
IN THE MATTER OF PROPOSED )  
RULEMAKING RULES FOR THE )  
COMMISSION, 20.1.6 NMAC )  
\_\_\_\_\_)  
\_\_\_\_\_)

No. 16-03 (R)



**NEW MEXICO MINING ASSOCIATION'S NOTICE  
OF INTENT TO PRESENT TECHNICAL TESTIMONY AND EXHIBITS**

The New Mexico Mining Association ("NMMA") files this, its Notice of Intent to Present Technical Testimony ("NOI") pursuant to the Water Quality Act ("WQA") and the Water Quality Control Commission's ("the Commission") Guidelines for Water Quality Control Commission Regulation Hearings.

1. Entity for whom the witness will testify: NMMA

2. Technical Witnesses:

**Michael Bowen**

The qualifications of the witness are attached in Exhibit B.

**Anthony J. Trujillo, Esq.**

The qualifications of the witness are attached in Exhibit C.

3. Testimony:

Messrs. Bowen and Trujillo propose to testify as a panel regarding the reasons for the NMMA's recommended changes to proposed regulation 20.1.6 NMAC. Given the subject matter of the proposed rules, which specify procedures for Commission rulemakings, the offered testimony is not scientific, engineering, economic or other specialized testimony. Instead, the testimony will be based upon the witnesses' experience with legal procedures, rulemaking

hearings, and other administrative hearings and procedures. Although the testimony may not qualify as technical testimony, to avoid any question whether it can be presented and to provide advance notice for purposes of the hearing, NMMA is presenting its recommendations and testimony as a Notice of Intent to Present Technical Testimony.

The reasons for NMMA's recommendations, to which the witnesses will testify, are summarized as follows, with reference to the numbered paragraphs of NMMA Exhibit "A":

(1) NMMA recommends adding language to proposed section 20.1.6.7(P) NMAC to identify written pleadings as part of the record proper. NMMA believes this is necessary for a complete record and that inclusion of pleadings in the record proper is customary.

(2) NMMA proposes additions to the language of section 20.1.6.100(C)(2) NMAC to describe the procedures available to the Commission, hearing officer and parties to implement the criteria for disqualification of a hearing officer contained in the proposed rule. NMMA's proposed language gives a hearing officer the ability to recuse himself or herself, or if there is a question regarding whether the hearing officer should recuse himself or herself, clarifies that the hearing officer may obtain advice from the Commission's legal counsel or a ruling by the Commission. The proposed language also allows other parties to file a motion for disqualification.

(3) NMMA recommends that proposed regulation 20.1.6.103 NMAC be clarified to define when a rulemaking proceeding is initiated and concluded for purposes of the provision on ex parte communications. NMMA recommends that a proceeding be considered to be initiated, and ex parte communications prohibited, after the Commission decides to initiate a proceeding by determining to hold a public hearing. The proceeding is considered to be concluded when the

Commission issues a decision. The witnesses will discuss the importance of clarifying the period for which ex parte communications are prohibited.

(4) NMMA recommends that section 20.1.6.104 NMAC be modified to provide the Commission administrator discretion to waive the requirement to provide 15 copies of pre-filed documents. NMMA understands that the Commission's administrator sometimes transmits electronic versions of documents to Commission members, and that some Commission members prefer electronic, rather than paper, documents. This is of particular importance in the case of complex hearings with large numbers of lengthy exhibits.

(5) NMMA proposes to add a requirement to section 20.1.200 NMAC so that a petitioner must describe public or stakeholder proceedings used by the petitioner to obtain comments and information used to develop the rule as proposed by the petitioner and to identify to the Commission whether, based on those procedures, substantial opposition is anticipated. Such procedures are not mandatory for petitioners, but have been strongly encouraged by the Commission in previous hearings. The Commission would use this information to designate a proposed rule or rule changes as simple or complex for purposes of the procedures to be used to identify technical information, as discussed further below.

(6) NMMA recommends that the last sentence of subsection D of section 20.1.6.200 NMAC be struck. The language is advisory, and is made largely unnecessary if the Commission adopts NMMA's changes to proposed sections 20.1.6.200 NMAC and 20.1.6.206 NMAC.

(7) Section 20.1.6.202 NMAC as proposed by the petitioner would adopt the "notice of technical testimony" requirement similar to that in the 's current rulemaking hearing guidelines. As discussed elsewhere, NMMA proposes that this process be used when the Commission designates a hearing as "simple," typically because little or no opposition is

expected or the proposed changes are relatively simple and not likely to involve considerable technical testimony. The proposed changes to section 20.1.6.202 NMAC, subsection A would retain the existing “notice of intent” procedure but use that procedure for “simple” hearings.

(8) NMMA recommends a different approach than the “notice of intent” process for hearings that the Commission designates as “complex.” Complex hearings typically would be those where considerable technical testimony will be presented and/or where substantial opposition is expected.

NMMA’s intent in recommending these revised procedures is to reduce the trial-like rulemaking hearings that have taken place in the past, which consume considerable resources of agencies, the Commission and parties and often have produced contentious debates during a hearing regarding matters such as the scope of cross-examination.

The procedures proposed by NMMA are somewhat similar to those used in complex cases such as triennial review of surface water quality standards, which have been governed by scheduling and procedural orders issued by hearing officers. However, NMMA recommends some additional requirements that are intended to sharpen the focus of petitioners and other parties, to help the Commission better prepare in advance of a hearing, and to reduce the time needed for live witness testimony. The procedures also are intended to preserve rights of cross-examination provided under the WQA, but to limit cross-examination and to require parties, as well as the Commission, to identify in advance of a live hearing the intent to question or cross-examine witnesses and, for parties, the topics of cross-examination.

For a public hearing designated as “complex,” the petitioner would be required to file and serve at least 60 days before the hearing (subject to modification by the hearing officer) the text of the proposed rule, including any changes from that filed with the petition. That is intended to

give the parties notice of the exact rule language they need to address in their testimonies. The petitioner also must provide a summary of the reasons for the proposed rule or rule changes. This will give the Commission a better summary of the grounds for the rule or rule changes separate from the technical testimony (although the reasons should be based upon testimony) and will allow the Commission, if it chooses, to use those reasons in its statement of reasons. In addition to helping the Commission prepare for hearing, this is intended to allow the Commission to use those reasons, if it so chooses, as part of a statement of reasons, thereby facilitating deliberations. For complex hearings, advance filing of written testimony and exhibits would be mandatory.

Parties who wish to oppose, or propose changes to a proposed rule, would have corresponding obligations to submit revised rule text, a summary of reasons, and testimony and exhibits at least 30 days before a hearing. Parties who support the proposed rule, but who wish to offer additional technical testimony, can do so at the same time. Any final responsive testimony is due in writing at least 10 days before the hearing.

In order to help the Commission, parties and witnesses prepare in advance for the live hearing, NMMA's proposed changes include a requirement for the hearing officer, the Commission and the parties to identify to all parties at least five days in advance of a hearing witnesses whom the hearing officer or Commission wish to call for questioning. The primary purpose of the public hearing, in NMMA's view, should be for the Commission to obtain all of the information it needs to make a decision, and this requirement is intended to sharpen the focus on witnesses that the Commission wishes to question, while giving some notice to the parties and witnesses that the Commission is satisfied with the written testimony and exhibits and does not need to conduct live questioning. With regard to the parties, there is an additional requirement to

identify the topics of cross-examination and a limit to 30 minutes of cross-examination of each witness by a party. Of course, the hearing officer will retain the ability to grant additional time, and perhaps allow additional questioning of witnesses beyond the witnesses and topics identified by the Commission and the parties, if there is a reason to do so. Although some of these requirements and limitations are somewhat novel, in the experience of NMMA, these procedures will help all participants focus on the hearing in advance and limit the time needed for live hearings.

(9) NMMA recommends a clarification to proposed section 20.1.6.303(A) NMAC to clarify that this provision applies to exhibits offered during a hearing and not pre-filed. NMMA's intent is that pre-filed exhibits may be allowed to be filed electronically, instead of a mandatory requirement for 15 paper copies. NMMA notes that for complex hearings, exhibits should be pre-filed, although it is possible that a party could offer additional exhibits during a hearing if allowed by the hearing officer. For example, discussion during a hearing can elicit new information that might cause a party or witness to identify an additional exhibit.

(10) NMMA suggests a clarification to proposed 20.1.6.304 NMAC to add revised proposed rule language to the list of things that a hearing officer can allow in post-hearing submittals. Information coming to light during a hearing, or possibly post-hearing, including potential agreements by parties during or after a hearing, can result in recommendations for changes to the rule language considered during a hearing. Without this clarification, it is possible that the rule could be read as precluding the proposal of new rule language.

4. Recommended Amendments: Recommended changes to proposed 20.1.6 NMAC are attached here as Exhibit A.

5. Exhibits: NMMA's exhibits are designated as follows and attached hereto:

**Exhibit Designation**

**Description**

Exhibit A

Proposed Changes to Proposed 20.1.6 NMAC

Exhibit B

Qualifications of Michael Bowen

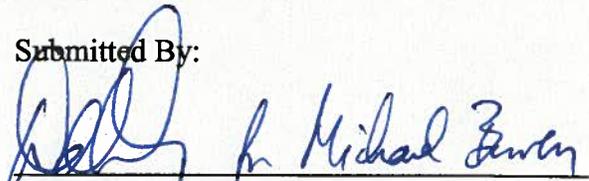
Exhibit C

Qualifications of Anthony (T.J.) J. Trujillo

6. Reservation of Rights: NMMA reserves the right to call additional witnesses or introduce additional exhibits in response to the testimony and witnesses presented at hearing.

RESPECTFULLY SUBMITTED this 21 day of September, 2016.

Submitted By:



New Mexico Mining Association  
1470 S St Francis Drive  
Santa Fe, New Mexico 87505  
(505) 820-6662

**CERTIFICATE OF SERVICE:**

I hereby certify that a copy of this Notice of Intent to Present Technical Testimony was sent by electronic mail, U.S. mail, and/or hand-delivery to the following parties this September 21, 2016:

Matthias Sayer, Hearing Officer  
c/o Pam Castañeda, Administrator  
Water Quality Control Commission  
P.O. Box 5469  
Santa Fe, New Mexico 87502  
[Pam.Castaneda@state.nm.us](mailto:Pam.Castaneda@state.nm.us)

Andrew P. Knight  
Office of General Counsel  
New Mexico Environment Department  
121 Tijeras Avenue NE, Suite 1000  
Albuquerque, New Mexico 87102  
[Andrew.Knight@state.nm.us](mailto:Andrew.Knight@state.nm.us)



NMMA EXHIBIT "A"

NEW MEXICO MINING ASSOCIATION'S RECOMMENDED  
CHANGES TO PROPOSED 20.1.6 NMAC

(References to Exhibit 2 to Petition filed by NMED on 7/25/16; deletions from text of Exhibit 2 shown by strikeout and additions shown by underline)

1. In proposed section 20.1.6.7, subsection P NMAC (the definition of "record proper") add a new paragraph to read as follows, and renumber to conform:

"(X) all written pleadings, including motions and responsive pleadings, and orders;"

2. In proposed section 20.1.6.100, subsection C, paragraph (2), at the end of the paragraph add the following:

"A person being considered for or designated as hearing officer shall either decline designation or recuse themselves if they would be disqualified under this paragraph or may disclose to the commission or the commission's legal counsel any information indicating a potential for disqualification under this paragraph, including any new information arising during the proceeding, and request advice from the commission's legal counsel or a ruling from the commission. Any party may move for disqualification of a hearing officer based on the criteria in this paragraph."

3. In proposed section 20.1.6.103, change the text to read as follows:

"At no time after the initiation and before the conclusion of a proceeding the commission's determination to hold a public hearing on a petition and before the issuance of the commission's written decision under this part, shall the department, or any other party, interested participant or their representatives discuss ex parte the merits of the proceeding with any commission member or the hearing officer."

4. In proposed section 20.1.6.104, subsection B, paragraph (1), change the text to read as follows:



NMMA EXHIBIT "A"

"(1) provide the commission administrator with the original and 15 copies of the document along with 15 copies, provided that the commission administrator may waive the requirement to provide 15 copies if an electronic copy of the original is provided in a format acceptable for distribution to the commission members."

5. In proposed section 20.1.6.200, add a new subsection C to read as follows, and renumber the succeeding subsections:

"C. The petition shall describe any public notices, meetings, or other procedures utilized by the petitioner to give public notice and obtain public comments on the proposed rule or rule changes, shall describe how such public comments and input were addressed in the rule or rule changes as proposed in the petition, and shall identify to the commission whether the petition anticipates substantial opposition to the proposed rule. On the basis of this information and any responses to the petition, the commission shall determine whether to designate the rulemaking hearing as "simple" or "complex" as provided in section 20.1.6.202 NMAC."

6. In proposed section 20.1.6.200, subsection D, strike the last sentence.

7. In proposed section 20.1.6.202, subsection A, revise the text to read as follows:

"A. For a hearing designated by the Commission as a simple hearing, any person, including the petitioner, who intends to present technical testimony at the hearing shall, no later than 20 days prior to the hearing, file a notice of intent to present technical testimony. The notice shall:"

8. In proposed section 20.1.6.202, add a new subsection B, reading as follows, and renumber succeeding subsections:

NMMA EXHIBIT "A"

"B. For a public hearing designated by the commission as a complex hearing, the following procedures shall be followed, except as may be modified by the hearing officer:

(1) No less than sixty (60) days before the hearing, the petitioner shall file and serve on all parties who have entered an appearance (i) the text of the proposed rule, specifically identifying any changes to language from that submitted with the Petition, (ii) a concise summary of the reasons for the proposed rule or rule changes in the form of numbered paragraphs, (iii) all written technical testimony and exhibits offered in support of the proposed rule or rule amendments and reasons.

(2) No less than thirty (30) days before the hearing, any party who opposes the petition or seeks a change to the proposed rule language shall file and serve on all parties who have appeared (i) the text of any recommended changes to the proposed rule, (ii) a concise summary of the reasons for opposition to the petition and/or reasons for any proposed changes to the rule language in the form of numbered paragraphs, and (iii) all written and technical testimony and exhibits offered in opposition to the petition or to support any recommended change to the proposed rule language and the reasons. Any party other than the petitioner who supports the petition and wishes to offer technical testimony and exhibits in support of the proposed rule or rule amendments shall file such at this time.

(3) No less than ten (10) days before the hearing, the petitioner or any other party may file (i) written technical testimony and exhibits responding to the written technical testimony and exhibits filed in accordance with paragraph (2) of this subsection, (ii) the text of any additional recommended changes to the rule and (iii) a concise summary of the reasons for the changes in the form of numbered paragraphs.

NMMA EXHIBIT "A"

(4) Each written testimony shall be signed by the witness and notarized under oath and shall state the qualifications of that witness, including a description of their educational and work background.

(5) Within two days of any filing under paragraphs (1), (2) or (3), the department or other constituent agency, as applicable, shall post the complete filing on its website.

(6) Any party filing written technical testimony shall be deemed to have offered to make the witness available at the hearing for questioning by the commission and cross-examination. No later than five days before the hearing, the hearing officer, after consultation with the commission, shall notify the parties in writing of each witness whom the hearing officer or commission will call for questioning. No later than five business days before the hearing, each party shall file and serve a list of witnesses that they wish to cross-examine and shall identify the topics on which they wish to cross-examine each of the identified witnesses. Failure to identify a witness for questioning or cross-examination shall constitute a waiver of such right.

(7) Cross-examination of a witness is limited to thirty (30) minutes per party or participant, except by permission of the hearing officer.

(8) Any of the timeframes specified in this section may be modified in a scheduling order issued by the hearing officer."

9. In proposed section 20.1.6.303, subsection A, change the text to read as follows:

"A. Any person offering an exhibit at hearing, other than a document filed and served before the hearing, shall provide at least an original and 15 copies for the commission, and a sufficient number of copies for every other party."

NMMA EXHIBIT "A"

10. In proposed section 20.1.6.304, change the text to read as follows:

"The hearing officer may allow the record to remain open for a reasonable period of time following the conclusion of the hearing for written submission of additional evidence, comments and arguments, revised proposed rule language, and statements of reasons."

**Mike Bowen**  
Executive Director  
NM Mining Association

Mike, who has a Bachelor of Accounting Degree from the College of Santa Fe, has been Executive Director of the NM Mining Association since February of 2000.

In addition to his duties as Executive Director, he has served on the Executive Committee of the Association of Commerce and Industry; the Executive Board of the NM Society of Association Executives; as a Member of the National Mining Associations' Committees on Government Affairs and Land; the Mining and Minerals Division's Director's Advisory Committee; as President of the NM State Police Association; the Board of Directors of the NM Sheriffs and Police Association; and the City of Santa Fe's Public Safety Committee.

On behalf of NM Mining Association, Mike has testified on behalf of the industry at various rulemaking hearings before the Water Quality Control Commission, Environmental Improvement Board, Mining Commission, Coal Surface Mining Commission, Mining Safety Board, and Interstate Stream Commission.

Prior to becoming Executive Director, Mike retired from the NM State Police, as the Assistant Commander of the Criminal Investigation Section, after a 24 year Law Enforcement Career.



**Anthony (T.J.) J. Trujillo**  
**Shareholder**  
**Gallagher & Kennedy, P.A.**

T.J. practices governmental affairs law, administrative law, environmental and natural resources litigation, and general commercial litigation. His experience includes a variety of legal matters including issues related mining, oil and gas, agriculture, water rights, water quality, energy, employment law and civil rights. T.J. serves as a lobbyist for clients on state and local issues, including activities dealing with drafting legislation, testifying before legislative committees, and developing advocacy strategies for clients on legislative and regulatory matters.

A summary of his most recent and relevant experience includes:

- Served as counsel on behalf of Freeport-McMoRan before the Water Quality Control Commission in support of the Copper Rule;
- Served as counsel on behalf of the Dairy Industry Group for a Clean Environment before the Water Quality Control Commission in support of the Dairy Rule;
- Served as counsel on behalf of Horizon Ag-Product before the New Mexico Mining Commission regarding rule changes to the New Mexico Mining Act.
- Drafted and advocated for legislation dealing with regulatory reform dealing with the Administrative Procedures Act, Uniform Administrative Hearing Act, and State Rules Act; and
- Participated in rulemakings and adjudicatory hearings before multiple state agencies, board, and commissions.

**EDUCATION**

University of Arizona  
J.D., 2000

Western New Mexico University  
M.B.A., 2000

University of Arizona  
B.S.B.A., 1995

**BAR & COURT ADMISSIONS**

- New Mexico, 2000
- U.S. District Court, District of Arizona, 2000



- U.S. Court of Appeals, Tenth Circuit, 2002

### **ASSOCIATIONS & MEMBERSHIPS**

- Association of Commerce and Industry, Former Chair of the Executive Committee, Regulatory Committee, and Environment Committee
- New Mexico Amigos, Member
- Leadership New Mexico, Class of 2006-2007, Member
- New Mexico Mining Association, Legislative Committee, Member
- New Mexico Oil & Gas Association, Legislative Committee, Member
- Dairy Producers of New Mexico, Member
- New Mexico Tax Research Institute, Member
- Permian Basin Petroleum Association, Member
- Small Business-Friendly Task Force, 2011

### **HONORS & AWARDS**

- Doc Weiler/Marvin Watts Award for Professionalism, 2015
- Exemplary Service Award, Association of Commerce and Industry, 2006

### **PUBLISHED WORKS**

- 2016 Election Cycle by the Numbers
- One-On-One Interview, May 14, 2011

### **REPRESENTATIVE CASES**

- *Gila Resources Information Project v. New Mexico Water Quality Control Com'n*, 2015-NMCA-076, 355 P.3d 36 (2015)
- *New Mexico Atty. Gen. v. New Mexico Public Regulation Com'n*, 2015-NMSC-032, 359 P.3d 133 (2015)

- *New Mexico Mining Assn. v. Water Quality Control Commission*, 2007-NMCA-084, 164 P.3d 81 (2015)
- *Manning v. Mining and Minerals Division of the Energy, Minerals and Natural Resources Department*, 2006-NMSC-027, 90 P.3d 506 (2006)
- *Salguero v. City of Clovis*, 366 F.3d 1168 (10th Cir. 2004)
- *Stein v. Legal Advertising Committee of the Disciplinary Board*, 304 F.Supp.2d 1274 (D.N.M. 2003)
- *Stein v. Legal Advertising Committee of the Disciplinary Board*, 272 F.Supp.2d 1260 (D.N.M. 2003)
- *Manning v. Mining and Minerals Division of the Energy, Minerals and Natural Resources Department*, 2004-NMCA-052, 90 P.3d 506 (N.M. Ct. Appl. 2004)
- *United States v. Malouff*, 2004 U.S. App. LEXIS 23841 (10th Cir. 2004)
- *Salguero v. City of Clovis*, 2003 U.S. Dist. LEXIS 25308 (D.N.M. 2003)
- *Stein v. Legal Advertising Committee of the Disciplinary Board*, 2003 U.S. Dist. LEXIS 24394 (D.N.M. 2003).