

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

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Constituent Agencies

Environment Department
Office of State Engineer
Game and Fish Department
Oil Conservation Division
Department of Agriculture
State Parks Division
Soil and Water Conservation Commission
Bureau of Geology and Mineral Resources
Municipal/County Representative
Members-at Large

New Mexico Water Quality Control Commission Meeting

April 10-11, 2007

9:00 a.m.

New Mexico State Capitol Building

Room 317

490 Old Santa Fe Trail

Santa Fe, New Mexico 87501

MEMBERS PRESENT:

Cindy Padilla	NMED/Deputy Secretary, Acting Chair
Greg Lewis	Office of the State Engineer
Mark Fesmire	Oil Conservation Division
Cheryl Bada	State Parks Division
Julie Maitland	Department of Agriculture
Mike Sloane	Department of Game & Fish
Howard Hutchinson	Soil and Water Conservation Commission
Peggy Johnson	Bureau of Geology and Mineral Resources
Maxine Goad	Member-at-Large
Edward Vigil	Member-at-Large
Fred Lujan	Member-at-Large

MEMBERS ABSENT:

Steve Glass City of Albuquerque – Municipal/County Representative

OTHERS PRESENT:

Jolene McCaleb, San Juan Water Com.	Tom Pitts, San Juan Water Com.
Bryan Bird, Forest Guardians	Glenn Saums, NMED/SWQB

Dal Moellenberg, Gallagher & Kennedy
Erin Trujillo
William Schudlich
Eric Jantz
Rachel Conn, Amigos Bravos
Deborah Sarabia, NMED/SWQB
Alberto Baros
Steve Mattenboch
Kelly Collins
Stuart Butzier, Modrall Law Firm
David Hogge, NMED/SWQB
Pam Homer, NMED/SWQB
Neal Schaeffer, Glorieta Estates
Bill Zeeclyk
Timothy Eastep, Chino Mine
David Rhodes, Chino Mine
Sally Worthington, NMED

Jeanne Houdley, U.S. Forest Service
Mike Bowen
Gregg Miller, U.S. Forest Service
Sarah Piltch, NMELC
Tim Michael, NMED/SWQB
Kevin Myers, NMED/SWQB
Roy Jemison
Felicia Orth, NMED
Jane DeRose Bamman, NMED/SWQB
David Sonnenberg, City of Farmington
Elizabeth Shields, NMDA
Erik Schlenker-Goodrich, WELC
Jon Klingel
Sam Hitt
Rick Moore, Tyrone Mine
Janet Greenwald, CARD
Zachary Shandler, AG's Office

Acting Chair Cindy Padilla, called the meeting of the WQCC to order at 9:05 a.m. Ms. Padilla announced that as a result of the passage of House Bill 998, the Commission would have two new members, the New Mexico State Secretary of Health as well as an additional member-at-large.

Item 1. Roll Call:

The Commission administrator took roll and noted a quorum was present.

Item 2. Approval of Agenda

Action: Mr. Hutchinson moved to approve the agenda. Mr. Lewis seconded. The motion passed unanimously.

Item 3. Approval of the January 9, 2007 meeting minutes.

Ms. Goad noted a typographical error in the list of meeting attendees.

Action: Ms. Maitland moved to approve the January 9, 2007 meeting minutes as amended. Mr. Hutchinson seconded. The motion passed unanimously.

Item 4. Request for change of hearing venue re: WQCC 06-09 (R), Amendments To 20.6.4.9 NMAC, Designation of Waters within the Pecos River Headwaters as ONRW. Bryan Bird, Forest Guardians.

Mr. Bird stated that Forest Guardians felt that the public would be better served if the hearing in this case could be changed to Pecos because 87% of the area impacted by the change falls into the Pecos River Sub-Watershed not the Gallinas River Sub-Watershed. He mentioned that the petition requesting designation as ONRW involved only 13% of the Gallinas River Sub-Watershed. Additionally, he pointed

out that of the actual river miles being nominated only 17% are in the Gallinas River Sub-Watershed and 83% are in the Pecos River Sub-Watershed.

There was Commission discussion regarding the availability of an appropriate hearing venue in Pecos. It was noted that the Pecos Municipal Building as well as public school facilities could be made available. The Commission also discussed the number of people that would be affected by holding the hearing in Pecos instead of Las Vegas. There was discussion regarding what facilities are available for housing the members of the public who would wish to attend the hearing. It was noted that should the Commission defer a decision in the venue change until its May meeting, the ONRW hearing would have to be moved to August to accommodate publication requirements.

Action: Ms. Maitland moved to approve the petition for change of venue from Las Vegas, New Mexico to Pecos, New Mexico on July 10, 2007. Mr. Sloane seconded. The motion passed.

Item 5. Request for hearing in petition for variance from certain regulations adopted by the WQCC establishing the approval criteria for a proposed discharge plan within a portion of Chino's Santa Rita open pit, WQCC 07-02 (V). Timothy Eastep, Chino Mines, Petitioner.

Mr. Eastep introduced several individuals from Phelps Dodge (PD) including Dal Moellenberg of Gallagher & Kennedy, the law firm representing PD. Mr. Moellenberg explained Chino Mines Company's need for a discharge permit relating to the Lee Hill Leach Facility which is proposed to be located inside of a portion of the open pit at Chino Mines. Mr. Moellenberg acknowledged PD's appreciation of the Department's rapid response in filing its Recommendation to Approve the Variance with Conditions. Additionally, he noted the ongoing issues relating to discharge permits involving Chino as well as other PD facilities. He stated that there is an urgent need for approval of the Chino Mines' permit to allow expansion of its current leaching capacity in order to continue mining operations. He also noted that since the Department has filed its recommendation, it is Chino's understanding that the matter is ready for the Commission to set a hearing on the variance petition. He also mentioned that Chino is aware of the public notice time requirements regarding the setting of a hearing before the Commission but that the company is asking for a setting as soon as possible taking those requirements into consideration.

In conjunction with Ms. Fox of NMED's Office of General Counsel, there was Commission discussion relating to the public notice time requirements and possible dates for the hearing setting.

Eric Jantz, of the New Mexico Environmental Law Center, representing Gila Resources Information Project (GRIP) stated that GRIP has very serious concerns with the petition for variance and the speed with which a setting for hearing is being pursued. He noted that since the petition had just been received on April 9, he could not reasonably develop those concerns at this point.

There was discussion relating to the petitioner's delay in coming to the Commission until the situation was one of such urgency. Mr. Eastep noted that the process had been ongoing for several years but that the hydrologic data to support the current petition had only recently become available.

Discussion continued relating to GRIP having been involved in and kept abreast of these permitting issues for a number of years. Additionally, PD indicated a willingness to work with GRIP in any manner that would be helpful.

After discussion regarding NMED's response to the Chino petition as well as several peripheral matters relating to pending discharge permits, the Chair noted that the issue before the Commission at this juncture is the setting of a hearing date as requested by Chino's petition.

There was discussion and agreement among the parties that they would work together in good faith and maintain an open dialogue prior to any hearing setting with respect to all permit issues relating to this case.

There was a general discussion regarding an appropriate hearing date that would take into consideration all of the time sensitive factors, as well as numerous other issues that have been presented relating to this matter.

Action: Ms. Maitland moved that a hearing in WQCC 07-02 (V) be set for hearing by the Commission.

There was Commission discussion regarding a May hearing date and further discussion regarding the designation of Ms. Padilla as Hearing Officer.

The Chair restated the motion for clarification purposes stating that the hearing be set in May at a date, separate from the Commission's regularly scheduled May 8, 2007 meeting, that the Commission Chair, Ms. Padilla, be designated as the Hearing Officer and that she determine and set the hearing date in WQCC 07-02 (V). Mr. Hutchinson seconded. The motion passed.

Item 6. Set date for review – Petition for Review of Secretary's Decision in GWB-06-44 (P) issuing a Groundwater Discharge Permit for the LES facility in Eunice, New Mexico. Tannis Fox, NMED/OGC; Jeff Wechsler, LES and Janet Greenwald, CARD.

Ms. Greenwald stated that she and her husband were present on behalf of CARD. She indicated to the Commission that she had printed material she wished to distribute. Mr. Shandler stated that this agenda item was for the sole purpose of setting the requested hearing and distribution would be considered a presentation of evidence. Ms. Fox also noted that the issue before the Commission was the setting of the hearing requested by CARD. She went on to state that this would be a hearing under the new legislation which allows for record review and not an evidentiary review by the Commission.

There followed a lengthy discussion relating to the fact that the Commission does not have any procedures for entertaining petitions for review of a permit under new legislation. Ms. Fox noted that it would be appropriate for the parties to propose and agree upon a briefing schedule in this case. She mentioned that LES had filed a proposed briefing schedule as had NMED. She went on to say that the parties would simply follow the requirements set out in the briefing schedule and the Commission would then schedule a date for hearing arguments. Ms. Greenwald stated that she had not received copies of any the documents referenced by Ms. Fox. Jeff Wechsler on behalf of LES noted that its proposed briefing schedule had been sent to Ms. Greenwald electronically.

Following a series of questions and discussions, NMED's Hearing Officer, Felicia Orth, explained that though there had been legislative changes in the procedures, the regulations had not yet followed those changes. The process now provides that instead of a second hearing being held with respect to an appeal from an earlier hearing, now the Commission will review the evidentiary record and based upon that record review the Commission will uphold, reverse or modify the prior decision. She further noted that the Commission will be deliberating based upon its review of the entire record. Any scheduling orders will simply set out dates for submission of briefs to the Commission by the parties.

It was established that any Commission action would have to be conducted under the new legislation dictates.

Ms. Fox suggested that the Commission appoint a Hearing Officer and that the parties work out a scheduling sequence that is acceptable to everyone and present the scheduling order to the Hearing Officer. She added that if an acceptable agreement could not be reached by the parties, then the Hearing Officer will make the scheduling decisions.

Action: Mr. Fesmire moved that the Commission appoint a Hearing Officer to schedule the hearing and the briefing schedules that are to be followed by the parties from this date forward. Mr. Lewis seconded.

The Chair reiterated and clarified the motion to ensure that the Petitioner understood all of the implications related to performance requirements imposed upon the parties. She indicated that parties needed to understand that there would not be any opportunity to introduce new evidence and that the Commission would only review the existing record. She further explained that the parties would, as proposed by Ms. Fox earlier, establish a briefing schedule sequence and present it to the Hearing Officer. In the event the parties could not agree the Hearing Officer would establish the briefing schedule sequence.

Ms. Greenwald stated that it was CARD's intention to present documentation to the Commission that was in fact already a part of the record. Ms. Fox noted that it was not appropriate for CARD to make any substantive presentation at today's meeting. Additionally, she mentioned that CARD had petitioned the Commission, as indicated on the meeting agenda, requesting only review of the Secretary's decision and that NMED had not had the opportunity to review or prepare a response to documentation that CARD wished to distribute to the Commission today. Ms. Fox further noted that under the LES proposed order, which allows for oral argument, and following briefing, there could be opportunity for oral presentations by CARD.

There was additional discussion relating to whether the Commission was allowed to receive information not contained in the record. Mr. Shandler stated that the Commission must base its decision only on the record unless it is established that there was no reasonable opportunity to submit evidence or comment on the issue being challenged, then the Commission could order such evidence or comment admitted for its consideration.

There was lengthy discussion regarding the Commission's flexibility with respect to consideration of additional evidence and comment.

Mr. Hutchinson pointed out that the Commission had two options with respect to this case, it could set a hearing on the record or remand the matter back to the Department for additional hearing. He requested an opinion from Mr. Shandler regarding whether the statute suffices with respect to governing the Commission's action in the absence of rules. Mr. Shandler noted that the statute is self-executing.

Discussion ensued regarding the Petitioner's need to meet the basic threshold issue relating to its contention that there was no reasonable opportunity to submit evidence or comment on the issue being challenged as well as an appropriate timing sequence to be adhered to by the parties in order to move this matter forward.

Mr. Fesmire noted that, in his view, it was necessary for the Commission to first deal with a hearing relating to the Petitioner's allegations regarding its contentions relating to its expert witness's testimony and following a decision on that issue, a hearing could be scheduled based upon the Commission's review of the record.

The Chair asked Mr. Fesmire to restate his motion.

Action: Mr. Fesmire again moved that the Commission appoint a Hearing Officer to schedule the hearing and briefing schedules that are to be followed by the parties from this date forward. Mr. Lewis seconded.

Ms. Johnson proposed a friendly amendment to Mr. Fesmire's motion naming Ms. Padilla as Hearing Officer in this case. Mr. Fesmire accepted the friendly amendment.

There was discussion regarding the need for a hearing on the threshold issue by Petitioner that it was not afforded a reasonable opportunity to submit evidence or comment. There was additional discussion noting that there were two separate issues extant, the threshold issue and the hearing setting.

Action: Mr. Fesmire moved to withdraw his motion and the friendly amendment thereto with the concurrence of Mr. Lewis who had seconded the original and the restated motion.

Mr. Sloane noted that he needed clarification of the Petitioner's issue in this matter and asked Ms. Greenwald if CARD's problem was that its expert was not allowed to testify or that the expert's testimony was not given weight. Ms. Greenwald stated that it was CARD's position that both of those items were issues.

There was ongoing discussion regarding the criteria issues relating to the submission of additional evidence and testimony as well as the ramifications of extending the 90 day time period within which WQCC is required to set a hearing following the filing of a petition.

Mr. Shandler summarized the issues before the Commission as presented by the Petitioner. He pointed out that there were two separate matters being discussed, (1) the evidence question and (2) the record review of the permit. He suggested that in order to proceed expeditiously, a Hearing Officer should be

appointed to conduct a telephonic meeting with all parties in order to clarify specific issues and perhaps set up future schedules; set aside the May hearing date for deliberations on the issue relating to evidence and lastly, set a date for the actual review by Commission. Additionally, he pointed out possible alternatives with respect to scheduling.

Mr. Fesmire moved that the Commission Chair be appointed as Hearing Officer; if CARD makes a motion pursuant to NMSA 74-6-5 R, that the hearing be scheduled on the Commission's May 8, 2007 meeting agenda and that the review of the Secretary's Decision be scheduled as soon thereafter as is possible at the discretion of the Chair. Mr. Sloane seconded.

Mr. Shandler asked if CARD would be willing to waive the ninety days, if necessary, past the June timetable. Ms. Greenwald replied in the affirmative.

The motion passed unanimously.

Item 7. Hearing in re: Proposed Amendments to 20.6.4.7 and 20.6.4.8 NMAC, WQCC 06-11 (R), changing the Standards for Interstate and Intrastate Surface Waters. Tannis Fox, NMED/OGC; Steve Hattenbach, Esq., USFS; Jolene McCaleb, Esq., San Juan Water Commission; Eric Schlenker-Goodrich, Esq., Amigos Bravos. Felicia Orth, Hearing Officer.

The Chair of the Board then announced that the hearing would commence and that Ms. Orth would preside as Hearing Officer for this agenda item. Kathy Townsend Court Reporters transcribed the hearing. All Notices of Intent to Present Technical Testimony were timely filed and are available for review, as well as public comment correspondence and the hearing transcript, in the office of the Environmental Improvement Board and Water Quality Control Commission Administrator, New Mexico Environment Department, 1190 St. Francis Drive, Runnels Bldg. Rm. N-2150, Santa Fe, New Mexico 87505.

The hearing commenced April 10th at 12:45 p.m.

The Chair reconvened the meeting April 11th at 2:25 p.m.

Item 8. Other Business

Mr. Shandler announced that there would be a pre-hearing conference April 12, 2007, in the Tyrone matter. He noted that Commission members were welcome to attend but that there could not be a quorum present at that conference.

Item 9. Next Meeting: May 8, 2007, Santa Fe, New Mexico

Item 10. Adjournment:

Ms. Maitland moved for adjournment. Ms. Bada seconded. The motion passed unanimously. The meeting adjourned at 2:35 p.m.

Cesar Padilla
Chair of the Water Quality Control Commission