



**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, New Mexico 87502
(505) 827-2425**

CONSTITUENT AGENCIES:

Environment Department
State Engineer & Interstate Stream Commission
Game and Fish Department
Oil Conservation Division
Department of Agriculture
State Parks Division
Soil and Water Conservation Commission
Bureau of Mines and Mineral Resources
Members-at-Large

Minutes of the
New Mexico Water Quality
Control Commission Meeting
May 8, 2001

The New Mexico Water Quality Control Commission (WQCC) meeting was held on May 8, 2001, at 9:00 a.m. at the State Capitol Building, Room 317, corner of Paseo de Peralta and Old Santa Fe Trail, Santa Fe, New Mexico.

Members present:

Peter Maggiore	Chair, New Mexico Environment Department
John Whipple	State Engineer & Interstate Stream Commission
David Johnson	State Parks Division
Julie Maitland	Department of Agriculture
Howard Hutchinson	Soil and Water Conservation Commission
Lynn Brandvold	Bureau of Mines and Mineral Resources
Bill Olson	Oil Conservation Division
Dr. Conrad Keyes	Member-at-Large
Irene Lee	Member-at-Large

Members Absent:

Jack Kelly	Department of Game and Fish
Paul Gutierrez	Member-at-Large

Others present:

Daniel Rubin	WQCC Counsel
Maria Voyles	WQCC Administrator
Sue E. Umshler	private citizen
Erik Galloway	Water/Waste Water Management
Steven Pierce	NMED/SWQB
Scott Brown	NMGFD
Dan Howe	private citizen
Robert Mundy	private citizen
Marcy Leavitt	NMED/GWQB

Jennifer Parker	NMED/GWQB
Haywood Martin	NMED/CPB
Jeff Lowry	NMSHTD
Felicia Orth	NMED
Kelly Bitner	LANL
Dr. Jim Davis	NMED/SWQB
Alvin Garcia	Counsel for Game and Fish
Tannis Fox	NMED counsel
Wilkinson	NMGFD

Chairman Maggiore called the meeting to order at 9:05 a.m.

Item 1: Roll call.

Maria Voyles, WQCC Administrator took roll call.

Chairman Maggiore stated that Commissioner Kelly has retired and that Commissioner Gutierrez may have received an appointment from the President to a Federal Agency. Chairman Maggiore suggested that they get plaques for Commissioners Kelly and Gutierrez and invite them to the next meeting.

Item 2: Approval of the agenda.

Mr. Hutchinson moved to approve the agenda. Dr. Keyes seconded the motion. The motion passed unanimously.

Item 3: Approval of the minutes of the April 10, 2001, meeting.

Due to technical difficulties the minutes were not ready for approval at this time. Mr. Johnson moved to table the minutes until the next meeting. Mr. Hutchinson seconded the motion. The motion passed unanimously. Ms. Voyles will e-mail or fax draft copies to the Commissioners.

Item 4: Presentation hearing officer's report in the matter of the Department of Game and Fish for the approval of the use of a piscicide

Chairman Maggiore requested Counsel to explain how a recent ruling from the Ninth Circuit Court may touch the matter that is being discussed today.

Mr. Rubin stated that, in the ruling on the case, *Headwaters, Inc. vs. Talent Irrigation District*, herbicides and other pollutants that require registration under FIFRA are subject to the requirements of the Clean Water Act. Any discharge of these substances into navigable waters of the U.S. must be covered by an NPDES permit. If the Ninth Circuit ruling were upheld here (in the Tenth Circuit) the Game and Fish Department would need to obtain a NPDES permit prior to the use of a piscicide. This ruling has no bearing on today's actions.

Dr. Davis stated that the issue of delegation would not come into play. The EPA retains review powers even for states that have delegation of the NPDES process, so the same regulatory and statutory requirements would apply regardless of the status of delegation. Approximately a year and a half ago, NMED and NMGFD approached the Commission and petitioned for the change in

standards to allow for the application of piscicides. At that time the SWQB contacted EPA Region 6 and discussed this issue. Region 6 stated that permits would not be required, while EPA headquarters filed an amicus brief stating that a permit would be required.

Mr. Rubin stated that he is unsure if a Writ of Cert has been filed.

Mr. Garcia, attorney for NMGFD, stated that there are time constraints with this project, as it is an interstate project. It is important that the July date be retained since there are brook trout in the stream. Brook trout spawn in August and the treatment must be made prior to that time.

Ms. Orth, hearing officer, presented her report and it was entered as an exhibit. Ms. Orth stated that this appears to be an update to the petition that was granted last year but not acted upon by NMGFD for unknown reasons. Ms. Orth stated that at the hearing both parties stipulated to leaving the record open in order to get, from EPA, an interpretation of treated waters. The post hearing submittals were as follows: letter from Department of Agriculture, submitted in early April, an amended slide submitted by Dr. Howe, hard copy of the slide sent by Mr. Wilkinson, proposed finding of fact and conclusions of law from all parties. Ms. Orth also stated that the EPA is the agency that determines the label instructions and which effectively become federal law, and that the Commission should not second guess the EPA's health risk assessment or the label instructions.

Mr. Hutchinson has some concern about unintended consequences -- fish becoming affected and not dying.

Dr. Davis stated that if a federal NPDES permit were to be issued, it would require State certification under Section 401 of the federal act. Dr. Davis also stated that all NPDES permits are treated equally.

Mr. Rubin stated that Section 401 of the federal Clean Water Act specifies that no permit shall be certified by the state unless there is an assurance that all applicable water quality standards will not be violated.

Mr. Hutchinson had a question on the timeline of things. Does this approval process come first and then application for a NPDES permit or does the permit application come first and then they come before this Commission for approval of discharge or a waiver of the standard?

Mr. Rubin stated that because 20.6.4.12.F NMAC is a standard, before EPA could assume that all standards have been met they would have to see that this section was met.

Chairman Maggiore allowed for comment from interested parties and reminded them that the record is closed.

Mr. Alvin Garcia, attorney for NMGFD, stated that they have followed the petition process in good faith and that the NMGFD would like to move forward on the project.

Mr. Wilkinson, NMGFD, stated that the historic distribution for Gila and Rio Grande cutthroat trout has been greatly reduced. He also stated that the Gila trout is on the endangered species list and that the Rio Grande cutthroat trout has been petitioned for listing.

Dr. Dan Howe and Mr. Robert Mundy appeared and reiterated what was said at the hearing and had a few additional comments.

Dr. Howe questioned some of the items in the Statement of Reasons:

Item #12, page 3, challenged the non-toxic levels of elemental components found naturally in the environment.

Item #13, page 3, stated that bacterial cultures of streptomycetes is basically an antibiotic.

Item #14, page 3, stated that antimycin A operates at a cellular level and is basically a mutagenic substance.

Item #15, page 3, listed creek as Gila, should be Costilla, would like to make sure it applied to Costilla Creek.

Item #16, Page 3, would like to ensure that when using a bioassay (livecar) is it the Fintrol or could it be potassium permanganate that killed the fish should any die in the livecar.

Mr. Garcia, NMGFD attorney, objected. He stated that it appears to be additional testimony with no citations to the record.

Mr. Rubin denied the objection.

Dr. Howe asked that the Statement of Reasons be considered inappropriate and incomplete and that the petition be denied until it is complete. Mr. Mundy challenged the parts per billion listed in the Statement of Reasons as incorrect and that it should be 5-10 ppb and not 10-12 ppb

Ms. Branvold moved to go into executive session. Ms. Maitland seconded the motion. A roll call vote was conducted and all members present agreed to go into executive session. Members present and voting:

Peter Maggiore	yes
John Whipple	yes
David Johnson	yes
Julie Maitland	yes
Howard Hutchinson	yes
Lynn Brandvold	yes
Bill Olson	yes
Conrad Keyes	yes
Irene Lee	yes

Return from executive session.

Bill Olson moved to return to open session and stated that the items discussed in executive session fall within the purview of the hearing officer's report. Dr. Keyes seconded the motion.

A roll call vote was conducted and all members present agreed to return to open session.
Member present and voting:

Peter Maggiore	yes
John Whipple	yes
David Johnson	yes
Julie Maitland	yes
Howard Hutchinson	yes
Lynn Brandvold	yes
Bill Olson	yes
Conrad Keyes	yes
Irene Lee	yes

Chairman Maggiore requested that the hearing officer review the changes the Commission has made to the Statements of Reasons and Order Approving Petition.

Ms. Orth read the requested changes made to the Statement of Reasons and Order into the record.

Ms. Orth advised the Commission of all the changes and stated that a final order would be prepared today.

Mr. Johnson moved for approval of the order as amended and for the Chairman to sign the order. Mr. Olson seconded the motion. Chairman Maggiore called for a roll call vote. Ms. Voyles called roll.

Peter Maggiore	yes
John Whipple	yes
David Johnson	yes
Julie Maitland	yes
Howard Hutchinson	yes
Lynn Brandvold	yes
Bill Olson	yes
Conrad Keyes	yes
Irene Lee	yes

Item 5: Designation of Doña Ana County as an Areawide Treatment Management Agency.

Mr. Martin presented a request that Doña Ana County be designated as an Areawide Treatment Management Agency. Mr. Martin provided a handout that was read into the record. There was no public comment regarding this during the public comment period. The county needs designation as a Management Agency as they are receiving funding from the federal government to construct sewers for communities in the unincorporated area of the county. Mr. Johnson

moved to designate Doña Ana County as an Areawide Treatment Management Agency. Dr. Keyes seconded the motion. The motion passed unanimously.

Mr. Martin will prepare a draft order for the Chair's signature.

Item #6. Request for hearing in the matter of Stacy Warden: Warden Enterprises, Inc. And Ted Gee.

Ms. Tannis Fox appeared on behalf of the NMED. Mr. Olson moved to set this for the July 10, 2001, meeting and for Mr. Rubin to be the hearing officer. Dr. Keyes seconded the motion. . The motion passed unanimously.

Item #7. Other business.

Mr. Johnson moved to have letters of recognition prepared for the members that have retired. Ms. Maitland seconded the motion. Chairman Maggiore will prepare letters of recognition.

Ms. Brandvold spoke regarding a letter from the San Juan Water Commission. She reminded the Commission that items should be provided 10 days prior to the meeting and placed on the agenda if the Commission is to work on them.

Marcy Leavitt stated that the item regarding Zia Dairy was not dealt with at the last meeting because Zia Dairy had changed the formal appeal to an informal appeal.

Dr. Davis stated that the SWQB would be withdrawing a portion of their petition to amend the water quality standards. This hearing is set for the June meeting. Dr. Davis will provide an order to the hearing officer for signature.

Kelly Bitner, from LANL, stated that they have started a Wildlife Habitat Subcategory Working Group. The first meeting was May 7, 2001. The entire WQCC mailing list (except for Commissioners) was notified.

Chairman Maggiore stated that the Commission should not get involved with this work group, as this might constitute ex parte communication.

Mr. Pierce spoke regarding the section 308 priority pollutant data. The SWQB has not received any additional data nor does it appear that it will from EPA. The SWQB may decide to go forward based on the data they do have.

Item #8. Next meeting.

The next meeting will be on June 12, 2001. Ms. Maitland moved to adjourn at approximately 12:15 pm. Mr. Olson seconded the motion. The motion passed unanimously.

Peter Maggioro

Chairperson